UNITED STATES REPORTS

VOLUME 169

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1897

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
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.
JOSEPH McKENNA, Associate Justice.[1]

JOHN WILLIAM GRIGGS, Attorney General.[2]
JOHN KELVEY RICHARDS, Solicitor General.[3]
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. McKenna was appointed Associate Justice in the place of Mr. Justice Field, resigned. His commission is dated January 21, 1898. On the 26th of January, 1898, he took the oath of office in open court, and at once took his seat upon the bench.

[2] Mr. Griggs's commission is dated January 25, 1898. He was appointed in the place of Mr. McKenna, appointed Associate Justice. On the 21st of February, 1898, he was presented to the court, and his commission was ordered to be recorded.

[3] Mr. Conrad having resigned, Mr. Richards was commissioned July 1, 1897, and qualified on the 9th of the same July.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

STUART *v.* HAYDEN.

GRUETTER *v.* STUART.

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

Nos. 151, 160. Argued December 9, 10, 1897. — Decided January 10, 1898.

One who holds shares of national bank stock — the bank being at the time insolvent — cannot escape the individual liability imposed by the statute by transferring his stock with intent to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, that it is insolvent or about to fail.

A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferor and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee.

The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent; and the shareholder cannot, by transferring his stock, compel creditors to surrender this security as to him, and force the receiver and creditors to look to the person to whom his stock has been transferred.

If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the

transfer is made is immaterial, as a transfer under such circumstances does not impair the security given to creditors; but if the bank be insolvent, the receiver may, without suing the transferee and litigating the question of his liability, look to every shareholder who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of his stock in order to escape the individual liability to which the statute subjected him.

Whether, the bank being in fact insolvent, the transferrer is liable to be treated as a shareholder in respect of its existing contracts, debts and engagements, if he believed in good faith, at the time of the transfer, that the bank was solvent — not decided; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.

Where the Circuit Court and the Circuit Court of Appeals agree as to what facts are established by the evidence, this court will not take a different view, unless it clearly appears that the facts are otherwise.

THE case is stated in the opinion.

Mr. C. C. Flansburg for Stuart.

Mr. G. M. Lambertson for Hayden. *Mr. Amasa Cobb*, *Mr. A. E. Harvey* and *Mr. F. M. Hall* were on his brief.

Mr. John H. Ames for Gruetter.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 6th day of February, 1893, the Comptroller of the Currency appointed a receiver of the Capital National Bank of Lincoln, Nebraska, which had a nominal capital of three hundred thousand dollars. The bank had shortly before suspended business, and upon due examination had been found to be insolvent.

Subsequently, June 10, 1893, that officer — having first determined that in order to pay the debts of the bank it was necessary to enforce the individual liability of shareholders as prescribed in sections 5151 and 5234 of the Revised Statutes — made an assessment for three hundred thousand dollars, to be paid by shareholders equally and ratably on or before July 10, 1893. Of this assessment and requisition Stuart had proper notice.

In execution of this order the receiver brought the present action against Stuart.

Stuart became the owner of one hundred shares of the stock of the Capital National Bank in 1884, and of fifty additional shares in 1886. Substantially from the time of becoming a shareholder he was one of the directors of the bank, and a member of its finance committee, and acted in both capacities until about December 16, 1892. On the last named day, Gruetter & Joers, dealers in furniture at Lincoln, sold to Stuart certain real property in that city for $67,500, upon which there was at the time a mortgage for $30,000 bearing interest at the rate of six per cent per annum. The terms of the contract were that Stuart should assume the mortgage debt, deliver to Gruetter & Joers his stock in the Capital National Bank as of the value of $18,000, meet the taxes on the property, which then amounted to $250, and pay the balance of the price in cash; Gruetter & Joers to take a lease of the real estate for ten years, at $6000 per year. At the time of this agreement, Stuart paid $1000 to bind the bargain. On the 22d day of December, 1892, Gruetter & Joers made their deed to Stuart for the real estate; and Stuart delivered to them his certificates of shares of stock, having signed the blank forms of powers of attorney endorsed thereon, and paid the balance of the agreed price in cash, the taxes on the property and the interest that had accrued on the mortgage.

On the 3d day of January, 1893, the certificates of stock, with the blank powers of attorney endorsed thereon, were returned to the bank, and new certificates were issued to Gruetter & Joers.

The bank closed its doors within less than three weeks after the stock was transferred on its books to Gruetter & Joers, its total assets being about $900,000, and total liabilities $1,463,013.17. Its bills receivable on hand were $519,600, of which $58,596.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless. Its bills receivable not on hand amounted to $141,000, of which only $10,000 were worth anything.

The original bill was against Stuart alone. But a demurrer for want of parties having been sustained, an amended bill was filed against Stuart, Gruetter and Joers.

The amended bill alleged in substance that, at the time of the transaction between Stuart and Gruetter & Joers, the former was fully advised of the failing condition and insolvency of the bank, and transferred his stock to them in anticipation of its early failure and the necessary enforcement of the liability of shareholders for the benefit of creditors, and with the intent to evade such liability and to defraud the creditors of the bank. The relief sought was a decree setting aside the transfers of stock, and adjudging that Stuart was liable as a shareholder of the bank under the assessment made by the Comptroller of the Currency. It was further alleged by the receiver that Gruetter & Joers were, at the time of the transfer to them of Stuart's stock, pecuniarily irresponsible persons, from whom the amount of such assessment upon each share of the stock so owned and held by Stuart could not be made by legal process or otherwise.

Stuart in his answer insisted that the sale to Gruetter & Joers was an ordinary business transaction, and denied that he had, at the time of his purchase from Gruetter & Joers, any knowledge whatever of the condition of the bank, or that he knew that the bank was then insolvent, or that he expected it to fail; that, on the contrary, he believed it to be perfectly solvent, and sold and transferred his stock without any thought of the enforcement of his liability as a shareholder, and without any intention to evade such liability or to defraud the bank's creditors.

Gruetter & Joers answered, and averred that Stuart made the transfer of stock to them with full knowledge of the failing condition and insolvency of the bank, in anticipation of its approaching suspension and with the intent to defraud the bank, its depositors and creditors, of the security afforded by law to such depositors and creditors, and render it impossible to enforce his liability as a shareholder; also, that Stuart, with the knowledge and intent stated, represented and warranted to them that the bank was in a safe and solvent

condition, and that its stock was reasonably worth $125 per share, or $18,000 in all. They also filed a cross-bill against the receiver and Stuart, in which the relief sought was a decree declaring the transfer of the stock standing in the name of Stuart to be fraudulent and void as against them, as well as against the receiver and the creditors of the bank, and adjudging that Stuart make full restitution to them of the amount at which such stock was received on the contract for the purchase of the real property sold and conveyed to him.

The decree in the Circuit Court recited — though not in the form of a finding of facts — that on and prior to January 3, 1893, Stuart was the owner of and had standing in his name upon the books of the bank the shares of stock above mentioned; that on or about December 16, 1892, and for more than eight years prior to that date, he was a member of the Board of Directors and of the finance committee of the bank; that on both of the above dates he had knowledge of its then existing insolvency; that at the time of the transfer of the stock he represented to Gruetter & Joers that the bank was in a solvent and prosperous condition, and that such representation was made for the purpose of inducing them to purchase the stock, and of evading and escaping his liability as a shareholder for an assessment thereon. It was then ordered, adjudged and decreed that the sale, assignment and transfer of the one hundred and fifty shares of stock of the Capital National Bank was wholly void as against the receiver and Gruetter & Joers; that the sale, assignment and transfer be set aside, cancelled and held for naught; that the stock be reinstated upon the books of the bank in the name of Stuart, who was declared to be the holder and owner thereof; that Stuart, within twenty days from the date of the decree, pay to the receiver the full amount of the assessment against the stock, and that the receiver recover from him the sum of fifteen thousand dollars, together with interest at the rate of seven per cent per annum, from the 10th day of July, 1893, being in the aggregate the sum of sixteen thousand eight hundred seventy-five and $\frac{42}{100}$ dollars; that Stuart,

within twenty days from the date of the decree, make full restitution and payment to Gruetter & Joers of the amount of the purchase price of the stock, to wit, the sum of eighteen thousand dollars, together with interest thereon at the rate of seven per cent per annum, from the third day of January, 1893, being in the aggregate the sum of twenty thousand nine hundred and five dollars; that Gruetter & Joers be relieved from all liability to the receiver for and on account of any assessment on the stock, and in case Stuart neglected to pay each of the aforesaid sums of money, together with the costs of the suit, to be taxed by the clerk, that execution should issue therefor.

Upon appeal to the Circuit Court of Appeals the decree was reversed, without costs to either party, and the cause was remanded with instructions to enter a decree declaring the transfer of stock from Stuart to Gruetter & Joers to be fraudulent and voidable as to the receiver of the bank; that the receiver recover of Stuart the assessment made upon him, with costs; and that Gruetter & Joers were not entitled to relief against Stuart in this suit, and their cross-bill should be dismissed with costs to Stuart. 36 U. S. App. 462. In the opinion of that court it is stated that the evidence justified the conclusion reached by the Circuit Court as to the facts.

From the decree of the Circuit Court of Appeals the present appeals have been prosecuted.

The shares of the capital stock of a national bank are transferable on its books in such manner as may be prescribed by the by-laws or articles of the association, and every one becoming a shareholder by such transfer succeeds, in proportion to his shares, to all the rights and liabilities of the prior holder. Rev. Stat. § 5139.

It is also provided by statute that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat. § 5151.

The principal inquiry in this case is whether Stuart transferred his stock to Gruetter & Joers in order to escape the liability imposed by statute upon shareholders of national banking associations. His contention is that if the transfer was absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made is of no consequence.

This construction of the statute seems to find some support in the general language used in a few cases. But it will be found upon examination that those cases were dealt with upon the basis that the facts therein showed not only an intent upon the part of the shareholder to escape liability by transferring his stock, but that the transfer was either colorable or to a person who was financially irresponsible at the time of such transfer. There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition.

In *National Bank* v. *Case*, 99 U. S. 628, 631, 632, this court, speaking by Mr. Justice Strong, said that while a shareholder of the stock of a corporation has, generally, a right to transfer his shares, and thereby disconnect himself from the corporation, and from responsibility on account of it, there were limits to that right; that it is not every transfer that releases a stockholder from his responsibility as such; and that "a transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable." And in *Pauly* v. *State Loan and Trust Company*, 165 U. S. 606, 619, where the previous cases in this court were reviewed, it was held to have been established that "if the real owner of the shares [of a national banking association] transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking

associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed."

The safety of a national banking association, so far as its creditors are concerned, depends largely upon the security given by the statutory provision entitling creditors to look to the individual liability of shareholders, including the liability of the estates and funds in the hands of executors, guardians and trustees holding shares of national bank stock. § 5152. One who holds such shares — the bank being at the time insolvent — cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, *Richmond* v. *Irons*, 121 U. S. 27, 58, that it is insolvent or about to fail. A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent, and the shareholder cannot, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and creditors to look to the person to whom his stock has been transferred. This court has said that "the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders." *Richmond* v. *Irons*, 121 U. S. 27, 55, 56. If the bank be sol-

vent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is, of course, immaterial. But if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them. Whether — the bank being in fact insolvent — the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts and engagements if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.

The intent with which an act was done may be proved by the declarations of the party concerned, or by facts and circumstances from which the existence of the intent may be reasonably inferred.

Stuart, both in his answer and as a witness in his own behalf, denies that the sale of his stock was with the view of escaping his liability as a shareholder. He states, also, that it was an ordinary business transaction, and so far from knowing at the time that the bank was insolvent, he believed it to be solvent and able to meet its liabilities of every kind.

But the contention of the receiver was sustained by the proof in the cause. It was in evidence that Stuart, for some time previous to the sale of his stock, had been dissatisfied with the conduct of Mosher, the president of the bank. In addition to the latter's duties as president he was in enterprises that required much attention, and which must have interfered with the proper supervision of the affairs of the bank. He was connected with a manufacturing company, an insurance company and a gas company; was interested in a company engaged in the making of staves in Arkansas; was in the skating rink business, and also in the baseball business. In addition, he had a penitentiary con-

tract, and was a legislative lobbyist. All this was well known to Stuart when he sold his stock to Gruetter & Joers. Before that transaction, he had received an "intimation" that the next general dividend would be passed. He also had information that a large amount of the bank's money was "locked up" in real estate, and invested in worthless securities. And he was in a position to ascertain, with at least reasonable certainty, the condition of the bank at or before the sale of his stock to Gruetter & Joers. As a director he signed each of the reports made to the Comptroller of the Currency of the condition of the bank at the close of business on September 25, 1891, December 2, 1891, March 1, 1892, May 17, 1892, and September 30, 1892. He did not sign the report of December 9, 1892. In addition, his membership of the finance committee of the bank gave him peculiar facilities to ascertain how the bank's money was being used by its president. And that he had information that made him somewhat uneasy about the condition of the bank, and its management by Mosher, is shown by his own testimony as well as by his declarations to witnesses, whose intelligence and truthfulness are not impeached by anything in the record, except the denial by Stuart that he said just what those witnesses testified that he did say. Nor is this negatived by the circumstance that Stuart and his wife had each $1250 on deposit in the bank at the time its doors were closed. That may be accounted for by the fact, admitted by him, that he did not expect the bank to fail so soon.

When the bank failed, Mrs. King, the wife of Dr. S. H. King, had $26,105.80 on deposit there. The first intimation she received of the failure was a statement in a morning paper that the bank had closed its doors. She hurried to the residence of Stuart to ascertain what was the matter with the bank. Her account of the interview with him was as follows: "I told him the Doctor had sent me there for him to tell me about the bank, what the condition had been, and if there was anything wrong, and he sat down, and in his good, quiet way told me he did not like the way the bank had been doing for a long time. He said he did not like their going into the

Western Manufacturing Company business, and he said he had a talk with Mr. Mosher about it, and he said he did not like the Arkansas business, and I asked him what that was, and he said it was a stave business, and he said he did not know of any loss of money in it, but he did not like it, and he said from that they went into the skating rink business, and he said then he felt mad, and he said this is not banking, and I told them so, and then he said, when they went into the baseball business, I said it must be stopped; that we must stop that and do a banking business, and not run after these outside affairs, and, as near as I can give it, he said they were mad, but he told them if they did not stop that kind of business he would get out. Q. Who do you mean by them? A. Mosher and Outcalt [the cashier]; and he said one of them swore very badly and used bad language, and he said particularly Mosher, and at this time I said that the Doctor has gone to see Mosher about it, and he said if he has not gone you tell him to go to Outcalt, because he can get the truth out of Outcalt better than Mosher. And I said, Professor, [Stuart] what is the condition of the bank? Why is it closed? He says I have known for quite a while they had some bad debts, such as very poor paper there, amounting to about $136,000, and he says, I did not like the way they were doing. They could not do outside business and that too, and I did not like it. And, of course, anybody who knows Professor Stuart knows that would not be the way of his doing business, and he said he was in hopes they would tide it over, and he said they had some very poor paper, and he spoke of some land in a different county, and at that Mrs. Stuart came in, and he says, you know I have sold out — which I had not known — and he said, well, he had traded his stock for the Gruetter building a short time before. At this juncture Mrs. Stuart came into the room, and she says, 'It don't let you out from being responsible, does it? How long has it been?' Oh, no, he says, and then he spoke about the board of directors."

Being asked to state any further conversation she had with Stuart the same morning in reference to the bank and its condition, the witness proceeded: "He went on and told me

about it, he said he had not liked the management of the bank, and felt anxious about it, and I asked him how long, and he said a long time; and he went on and repeated again what he said before about going off into side business and said he did not like their not being able to declare a dividend, and I asked him this question. I asked him why the bank was not closed in the condition it was, and asked him if he did not know that the bank's capital was impaired, and he said that it was; still he did not know he said about having the bank closed. And I asked if the bank had been closed we could have gotten something out of the bank, and he said he was in hopes they could tide it over, and Mrs. Stuart says, Professor, you did not expect this so soon."

Henry Gerner, a witness for the plaintiff, and a stockholder in the bank, stated that he had a conversation with Stuart before the failure of the bank as to the sale of his stock to Gruetter & Joers. Being asked to state that conversation, he said:

"Well, one afternoon I met the Professor, which was an almost daily occurrence, if I did not see him in the bank I met him on the street, and we passed the compliments of the day and some remarks, and one day in one of our conversations and talks he told me that he was contemplating making a real estate deal. I said 'yes,' 'yes' he says he had a proposition made him to purchase the Gruetter block down here, and it was a trade, and he said if he made the trade at all, it would be trading his bank stock and some money and assuming their liabilities, their obligations, a mortgage on the building for $30,000. I told him I thought it was rather an exorbitant price for the property; that I did not consider the building worth any such money, to which he responded that they were going to make a very good lease; they would take it for ten years — a ten years' lease on the premises at a rental of $6000 a year. I told him I did not think it was possible for those men in the business to pay any such rent, it was too risky. Well, the Professor replied, we have to take some risk. Well, I said, I should rather, if I was in your place, hold my stock and my interest in the bank. I think it is better or

safer. He said he did not like the way they were doing business, he did not like the style, and a large share of the bank's capital was tied up in real estate and there was no prospect of dividends, and he preferred to do his own business and manage his own affairs. That is all there was to that conversation. Q. Did you have any subsequent conversation with him about the matter? A. Well, yes. I guess it was after he made the trade, either he told me about it or I took occasion to remark, I see you made that trade, Professor. Yes, he says, I did; he says, as I told you before I don't like Mosher and Outcalt's ways of doing business, and I shall prefer to manage my own affairs hereafter. Q. Did he, in any conversation you had with him, say anything about the amount of the capital stock of the bank that was tied up in real estate? A. Yes, some 130 or 140 thousand dollars, about 140,000 he said was tied up. Q. Do you remember about the time when the last dividend of the bank was returned? A. It was a dividend of four per cent declared in July, 1892; that is the last dividend I was credited with. Q. Did you have any talk with the respondent, A. P. S. Stuart, as to whether a dividend would be returned the first of January, 1893, or for the close of the year 1892? A. Well, only this, the Professor told me that in all probability there would be no dividend declared in January, owing to the fact that a large amount of the bank's capital was tied up in real estate, and until the amount was reduced and property converted into cash the bank could not pay any dividend."

His cross-examination was as follows: "Q. You say, Mr. Gerner, that he said he did not like the way that Mosher and Outcalt did the business. Did he give you in detail the management of that business he objected to, or was that the sum total of his remarks, that he did not like the way they did business? A. He says, oh, yes, he made comments on Mosher's being in so many things and having so many irons in the fire and paying too much attention to outside matters. As to Outcalt, I do not know whether the Professor made any comments on his conduct or not. Q. And the reason he gave you at that time for getting out was because he wanted

to manage his own business, and he did not like the way they managed the business? A. He did not like the way they conducted the business."

Without referring to other facts and circumstances disclosed by the record, it is sufficient to say that the Circuit Court was justified by the evidence in finding that Stuart, with knowledge of the insolvency of the bank, or at all events with such knowledge of facts as reasonably justified the belief that insolvency existed or was impending, sold and transferred his stock with the intent to escape the individual liability which the statute imposed upon shareholders of national banks for their contracts, debts and engagements. And the bank having been, in fact, insolvent at the time of the transfer of his stock — which fact is not disputed — he remained, notwithstanding such transfer, and as between the receiver and himself, a shareholder, subject to the individual liability imposed by section 5151. We will add, that as the Circuit Court and the Circuit Court of Appeals agreed as to what were the ultimate facts established by the evidence, this court should accept their view as to the facts unless it clearly appeared that they erred as to the effect of the evidence. *Morewood* v. *Enequist*, 23 How. 491; *The Ship Marcellus*, 1 Black, 414, 417; *Dravo* v. *Fabel*, 132 U. S. 487, 490; *Compania de Navigacion* v. *Brauer*, 168 U. S. 104, 123.

In reference to the appeal by Gruetter & Joers but little need be said. The Circuit Court of Appeals correctly held that the cross-bill of Gruetter & Joers attempted to bring into this suit a new and independent controversy, in which the receiver of the bank had no interest, and which could be determined upon facts not material to the issue between the original plaintiff and Stuart. The Circuit Court of Appeals also held the cross suit to be objectionable upon additional and, we think, entirely sufficient grounds. Judge Sanborn, speaking for that court, said: "The supposed cross-bill utterly fails to state a case for rescission, because it does not show that Gruetter & Joers ever returned to Stuart the nineteen thousand five hundred dollars in cash which they received from this trade, or that they ever released Stuart

from his agreement to pay the mortgage of thirty thousand dollars upon the property they conveyed. They could not rescind this trade and recover back that which they gave in exchange, or any part of it, while they retained at least forty-nine thousand five hundred dollars in value that they had received from it. The proof, if it were possible, is more fatal to them than the pleading. The record discloses the fact that they made their election and chose to affirmatively ratify this transaction more than a year before they filed this bill for its rescission. It shows that on January 23, 1893, they brought an action at law against Stuart in one of the courts in the State of Nebraska to recover of him damages to the amount of eighteen thousand dollars for his fraudulent misrepresentation of the value of this stock at the time of the trade. This was in effect an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid and its title was vested in Stuart, and on no other theory. That suit is still pending. It was a distinct and affirmative ratification of the transfer of this stock and the conveyance of the real estate, after full knowledge of all the facts, and it barred Gruetter & Joers of all right to rescind the trade thereafter. The result is that all that portion of the decree which grants to Gruetter & Joers any relief against the appellant Stuart was wrong."

The decree of the Court of Appeals is affirmed, but without prejudice to the prosecution of any claim that Gruetter & Joers may have against Stuart arising out of the transactions between them.

UNITED STATES *v.* PASSAVANT.

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

No. 129. Argued December 1, 1897. — Decided January 3, 1898.

In proceedings brought before the board of general appraisers by protests under § 14 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, to review decisions of a collector of customs upon entries, the board has jurisdiction to inquire into and impeach the dutiable valuation reported to the collector by the appraiser upon which the collector assessed the rate of duty to which the merchandise was subject.

The "German duty," which is a tax imposed by the German Government on merchandise when sold by manufacturers for consumption or sale in the markets of Germany, but is remitted by that Government when the goods are purchased in bond or consigned while in bond for exportation to a foreign country, was lawfully included by the appraiser in his estimate of the dutiable value of the importation in question in this case.

This case came to this court on the following certificate from the United States Circuit Court of Appeals for the Second Circuit:

"A judgment or decree of the Circuit Court of the United States for the Southern District of New York having been made and entered on the 30th day of January, 1895, by which it was ordered, adjudged and decreed that there is no error in certain proceedings before the board of United States general appraisers in this cause, and that their decision therein be, and the same hereby is, in all things affirmed; and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for hearing and argument in this court, certain questions of law arose concerning which this court desires the instructions of the Supreme Court of the United States for the proper decision of said cause.

"The facts from which said questions arise are herewith submitted and certified as follows:

"1. Certain merchandise, consisting of cotton velvets, was imported from the empire of Germany into the port of New

York by the appellees in various steamers between May 22, 1891, and March 13, 1892, and was entered at the custom house and appraised by the appraiser.

"2. The merchandise was originally imported into Germany in the gray, and was subjected to processes of dyeing and finishing, and was put in bond in that country.

"3. The collector classified the merchandise for duty under paragraph 350 of the tariff act of October 1, 1890, at 20 per centum ad valorem and 14 cents per square yard, and assessed the said rates of duty upon the dutiable value of the merchandise decided by the appraiser and reported by him to the collector.

"4. The merchandise was of a description provided for *eo nomine* in said paragraph 350, and was properly classified for duty under that section.

"5. The invoices stated certain prices as the net invoice value of this merchandise. The invoices stated also certain additional sums, under the heading 'German duty.'

"6. This German duty is a tax which is imposed by the German Government on the merchandise when it is sold by the manufacturers thereof for consumption or sale in the markets of Germany, but when the merchandise is purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate.

"7. This German duty or tax is the amount of the duty levied by the German tariff upon the goods when consumed in Germany. It is collected when the finished product goes into consumption in Germany, but is remitted when the finished product is sold in bond for exportation.

"8. The merchandise can be purchased in bond for exportation in the principal markets of Germany at the net invoice prices and without paying the so-called German duty. The merchandise involved in this action was so purchased for exportation.

"9. In estimating and appraising the actual market value and wholesale price of such merchandise at the time of ex-

portation to the United States in the principal markets of the country from whence imported, the appraiser decided that the dutiable value of such merchandise equalled the sum of the net invoice value and the German duty added together, and reported to the collector this decision as to the dutiable value of the merchandise appraised.

"10. In estimating this dutiable value the local appraiser added as an element of dutiable value to the net invoice value these amounts specified in the invoices and entries under the name of 'German duty.' Such amounts have been included by the importers in their entries under duress, to avoid threatened penalties under the law.

"11. The importers did not call for any reappraisement of the merchandise, but within ten days after the liquidation by the collector of each entry, and the assessment by him of the rates of duty aforesaid upon the dutiable valuation so reported to him by the appraiser, filed protests under section 14 of the act of June 10, 1890, against the decisions of the collector, of which the following protest is one, to which the others are similar:

[Here followed the protest.]

"12. The board of United States general appraisers, acting upon said protests, reversed the decisions of the collector on the ground that the so-called German duty was not a lawful element of dutiable value.

"13. Thereupon the collector applied to the Circuit Court of the United States for the Southern District of New York by petition praying for review of said decision by the board, pursuant to section 15 of the act of June 10, 1890, and the said Circuit Court upon said petition ordered the board of United States general appraisers to return to the Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, and the said board of general appraisers thereafter made such return; and the Circuit Court affirmed the decision of the board as aforesaid.

"14. It is admitted that Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W.

Watson and Oscar Passavant, the importers, are the persons composing the firm of Passavant & Company.

"Upon the foregoing facts this court, for the proper decision of said cause, desires instruction upon the questions of law following:

"(1) In proceedings brought before the board of general appraisers by protests, under section fourteen (14) of the act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the board jurisdiction to inquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

"(2) If the first question is answered in the affirmative, was the 'German duty' lawfully included by the appraiser in his estimate of dutiable value?"

Mr. Solicitor General for the United States.

Mr. Edwin B. Smith for Passavant.

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

The thirteenth section of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, relates solely to the appraisement of imported merchandise, and declares that the decision of the board of general appraisers, when invoked as provided, "shall be final and conclusive as to the dutiable value of such merchandise," and directs the collector to ascertain, fix and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon.

Section 14 provides that the decision of the collector as to the "rate and amount of duties, . . . including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage, shall be final and conclusive," unless the importer protests and appeals to

the board of general appraisers. This section clearly allows and provides for an appeal by the importer from the decision of the collector, as to both rate and amount of duties, as well as dutiable costs and charges, and as to all fees and exactions.

By section 15 it is provided that "if the importer, . . . or the collector . . . shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them, may . . . apply to the Circuit Court . . . for review of the questions of law and fact involved in such decision."

In *United States* v. *Klingenberg*, 153 U. S. 93, 102, it was said by Mr. Justice Jackson, speaking for the court: "The right of review by the Circuit Court is coextensive with the right of appeal to the board, as to all matters except the dutiable value of the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive. Now, by section 14 of the act, if the decision of the collector imposes an excessive amount of duties, under an improper construction of the law, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive as it is in respect of the dutiable value of the merchandise, and not being conclusive, it is subject to review under the express provisions of section 15."

The purpose of section 13 is to afford the importer or collector the right to call for a reappraisement by a general appraiser or a board of general appraisers, to review the decision of the local appraiser or a general appraiser as to the correct amount of the dutiable value of the merchandise, and is distinct and separate from the remedy by protest.

Under section 7 the collector is to determine for himself the question of what is the invoice value of the goods, and, in doing this, he may add such charges as he considers to be dutiable, but his decision in this respect is not in the nature of an appraisement, and may be attacked by protest. And

while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute. *Oberteuffer* v. *Robertson*, 116 U. S. 499; *Badger* v. *Cusimano*, 130 U. S. 39; *Robertson* v. *Frank Brothers Company*, 132 U. S. 17; *Erhardt* v. *Schroeder*, 155 U. S. 124; *Muser* v. *Magone*, 155 U. S. 240.

These decisions were made under prior similar legislation as to the finality of the appraisement, and when an action against the collector was provided by section 3011 of the Revised Statutes as the remedy for an illegal exaction of duties. Section 3011 was repealed by the act of June 10, 1890, and in *Schoenfeld* v. *Hendricks*, 152 U. S. 691, it was held that such an action could not be maintained, as it was not authorized by statute, and would not lie at common law because the money was required to be paid into the Treasury by section 3010; so that the importers were remitted to the remedies provided in the latter act. Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, was a question of law, and properly carried to the board of general appraisers by protest and appeal.

We think that section 14 furnishes the means of redress for illegal action, and that the board of general appraisers has the same power under this section to inquire into the legality of an assessment as it has under section 13 to see whether or not the valuation is excessive or insufficient through an error of judgment.

The first question must, therefore, be answered in the affirmative.

By section 19 of the act it is provided "that whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of

exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, . . ."

By section 10 it is made the duty of the appraisers "by all reasonable ways and means in his or their power to ascertain, estimate and appraise (any invoice or affidavit thereto or statement of cost or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels or quantities, and actual market value or wholesale price of every of them, as the case may require."

Was the action of the appraiser lawful in treating the so-called German duty as an element of value in determining the actual market value or wholesale price of these cotton velvets, at the time of exportation, in the principal markets of Germany?

What was to be ascertained was the actual market value or wholesale price of the merchandise as bought and sold in usual wholesale quantities at the time of exportation, in the principal markets of the country from whence imported. This market value or price was the price in Germany and not the price after leaving that country, and the act does not contemplate two prices or two market values.

The certificate of facts states that the German duty is imposed on merchandise when "sold by the manufacturers thereof for consumption or sale in the markets of Germany;" and "is collected when the finished product goes into consumption in Germany." As the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax,

and that is the price for the merchandise when bought and sold in those markets.

Doubtless, to encourage exportation and the introduction of German goods into other markets, the German Government could remit or refund the tax, pay a bonus, or allow a drawback.

And it is found that in respect of these goods when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. It is a special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all."

But the laws of this country in the assessment of duties proceed upon the market value in the exporting country and not upon that market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy.

Muser v. *Magone*, 155 U. S. 240, is quite in point. In that case the appraisement was attacked on the ground that certain items or elements of value had been illegally added to and included in the dutiable value. The imported goods were cotton embroideries. The cloth was purchased in the gray by the importers at Manchester; sent to St. Gall, Switzerland, where the embroideries were finished; and thence exported to the United States. The importers owned the plant at St. Gall. The entered value of the goods was raised by the appraisers, and the importers protested for the reasons that commissions and non-dutiable charges had been illegally included in the market value; that the goods should have been appraised at their actual market value when in the gray, adding the cost of finishing and laundering them; and on other grounds; the protest being particularly directed to the

alleged illegality of the valuation because one of the constituent elements of the value as found was illegally included. The appraisement was held conclusive in the absence of fraud, and this court, among other things, said:

"The question was not whether through the special advantages which Muser Brothers enjoyed, the actual cost to them may have been less than what was decided to be the actual dutiable value of their goods, for the latter was determined by the general market value and wholesale price of all goods of the same description. . . .

"The issue made by the protest was that the valuation was illegal because including certain specified incidental expenses, (one or more of them,) as for designs, salary of buyer, clerk hire, rent, interest and percentage on aggregate cost. Upon the theory of an ascertainable market value at St. Gall, these were matters to be considered and in a sense included, but not in the sense of substantive items independent of market value, added thereto to make dutiable value. . . . The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transactions. How these various elements impressed the general appraiser, and what grounds influenced or controlled his mental processes, were matters in respect of which he could not be interrogated, since his decision, when approved by the collector, was final and could not be reviewed and the verdict of a jury substituted. . . . The adjudication was of true market value, and did not consist in taking market value and adding the cost and charges specified in section 2907 in order to get at dutiable value." *United States* v. *Kenworthy*, 28 U. S. App. 450.

As the question in this case was what was the general market value and wholesale price of cotton velvets, as bought and sold in the principal markets of Germany, the fact that the German duty was not in fact paid on such goods when exported is immaterial. Exoneration from its payment was a mere special advantage extended by the German Govern-

ment, as we have said, in promotion of manufactures and commerce. The appraiser found, as matter of fact, that the market value in Germany was equal to the invoice price plus the home duty, but he did not therefore include that item as a substantive item independent of the market value, and add it thereto to make dutiable value, though in ascertaining the market value in Germany he properly recognized the fact that that duty formed part of the purchase price in the markets of that country.

The second question must also be answered in the affirmative.

The answers indicated above will be so certified.

Mr. Justice Brown, with whom concurred Mr. Justice Peckham, dissenting.

I concur in the opinion of the court that the first question requires an affirmative answer, but I think that the second question should be answered in the negative. In estimating the dutiable value of goods the collector added to the net invoice value what is known as the German duty, which was never paid, and which formed no part of the "market value or wholesale price" of these goods. It does not appear what proportion of this class of goods was imported into Germany for exportation, as distinguished from those imported for consumption, but it clearly appears that there were two entirely distinct and separate prices: one of which was paid for the goods for exportation, and the other for consumption. It seems a great hardship that the defendants, Passavant & Company, should be charged with a price which they did not pay and which was no part of the value of the goods as they were purchased by them in Germany. If there be, in fact, two wholesale prices for these goods in the same markets, I know of no reason why the collector should not recognize this fact and charge the importer with that one of the wholesale prices which he actually paid, and for which others under the same circumstances could obtain the goods.

The construction given to the statute by the court is unneces-

sary, and the effect is to increase the cost of the article to the consumer by adding to the price the amount of a tax in fact not paid by the importer. For aught that appears in this record, the sales for exportation may have been ten times as great as those for domestic consumption, and we do not understand why the prices realized in the latter sales should be arbitrarily selected by the Government as the actual market value or wholesale price of the articles.

HETZEL *v.* BALTIMORE & OHIO RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 110. Argued November 9, 1897. — Decided January 3, 1898.

This was an action to recover damages for injury done to certain land in the city of Washington by reason of the illegal occupation by a railroad company of the street on which the land abutted. The land constituted original lot one in square 630, and long prior to the action it had been subdivided between the owners, and a plat thereof recorded. In the partition it was provided that the alleys marked on the plat were exclusively for the sole benefit and use of the sub-lots, should be private and under the control of all owners of property thereon, and that, except as provided, could not be closed unless by common consent. Before the action was brought the plaintiff had become the owner of the fee of all the sub-lots constituting original lot one. *Held,*

(1) If the plaintiff did not own all of original lot one, she was entitled to recover damages for any injury done to such part of it as she did own;

(2) The plaintiff, being the owner of all the sub-lots, was entitled, under the deed, to close the alleys altogether; and therefore it was error to instruct the jury that she could not have conveyed a good title to the land marked on the plat as alleys;

(3) The plaintiff was entitled to recover such damages as were equivalent to or would fairly compensate her for the injury done to her land by the defendant. Absolute certainty as to damages in such cases is impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. What the plaintiff was entitled to was reasonable compensation for the wrongs done to her.

Opinion of the Court.

THE case is stated in the opinion.

Mr. Frank W. Hackett and *Mr. Walter D. Davidge* for plaintiff in error.

Mr. George E. Hamilton for defendant in error. *Mr. M. J. Colbert* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages alleged to have been sustained in consequence of the unlawful obstruction by the defendant in error of D street in the city of Washington.

The jury having been instructed that the plaintiff could not recover anything more than nominal damages, returned a verdict for one cent; and for that amount judgment was entered in her favor, but without costs. And that judgment was affirmed in the Court of Appeals of the District.

The declaration alleged that the plaintiff was seized in fee of a certain lot of land on the corner of D and North Capitol streets in the city of Washington, "being lot numbered one, in square six hundred and thirty;" and that the defendant on the 24th day of April, 1873, and thereafter at divers other times, had wrongfully, unlawfully and injuriously obstructed that street, by placing thereon freight cars, in large numbers, and suffering the same to remain unreasonably long; by loading and unloading freight in the street; by using the street for the general purposes of a freight yard; by blocking the way with wagons and carts for the loading and unloading of freight — the result being that the plaintiff, as well as the public, was prevented from passing and repassing on D street, and more particularly from using that portion of it on which plaintiff's lot abuts to gain access to or exit from her land; and that the defendant still obstructs the street in the manner stated, whereby it has "materially and seriously diminished the value of said land and prevented the plaintiff from selling the same, though she tried so to do."

The plaintiff brought a suit in April, 1873, to recover damages for this obstruction, and obtained a judgment, which was paid. The present suit covers the period of three years from April, 1873. The declaration in the two suits was the same, except that in the present action the declaration contains the additional words "and prevented the plaintiff from selling the same, though she tried so to do."

In the present action the defendant pleaded: 1. Not guilty. 2. That the plaintiff's alleged cause of action did not accrue within three years before the institution of this suit. 3. That the plaintiff ought not to have or maintain her suit, because at a former term of the court she recovered judgment against the defendant in the sum of $843.86 in a suit at law for the same identical cause of action, which judgment was satisfied. Upon these pleas issue was joined in the usual form.

The bill of exceptions states that it was undisputed that the plaintiff owned unimproved land at the corner of D street northwest and North Capitol street in the city of Washington; that along the side of her premises, about where the sidewalk would be, the defendant maintained and used a railroad track for receiving and delivering freight; that the track stopped on D street, being a siding; that the street was occupied by freight cars on the track, and carts were backed against the cars, so that access to the plaintiff's premises on the street was destroyed.

It was conceded that the track was maintained on the street without authority of law.

At the trial below the plaintiff testified that she owned the entire lot numbered one, in square 630; was joint owner with Judge Wylie in some 28,000 feet, but became sole owner in 1872; had not used the land since January, 1870, it being impossible to get upon it; had tried to sell it, but without success, persons wishing to buy saying that the position of the railroad rendered it useless to them; that there was no access to the land from D street except on foot; that the occupancy of the street by freight cars and the loading and unloading of freight was continuous during the entire period covered by

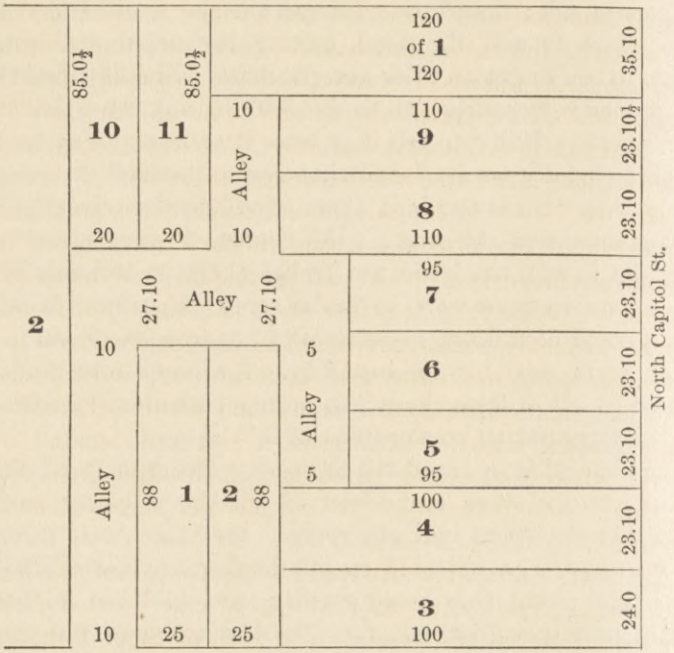
the present suit; that during this period she made every possible effort to sell the land, having instructed real estate agents to sell or get an offer for purchase. She testified that the property was directed to be sold in any way that the agents could sell it, "to sell it or lease it or in any way to get people to build upon it;" and that she authorized its sale, as one lot, but "never confined them to selling the whole." On cross-examination she said: "Of course, I gave them the whole lot to sell, but I did not forbid them to sell any part, and my instructions were to make some disposition of it, so that it could be utilized in some way; to lease it or sell it, in whole or in part, or in any way. I always told them I wanted to sell or lease the whole or any part of it, in order to get buildings put up on the front of it."

The plaintiff introduced the testimony of certain real estate agents who had been authorized to sell the property, to the effect that the street was obstructed; that they took persons there to buy, who objected to purchasing because of the D street track; that they could readily have sold the lot for a certain price per foot, but for the obstruction of the track. She also produced the evidence "of experts as to the value of the land with the D street track there and with that track removed."

It further appeared that an offer made for a part of the lot on the corner of D street was declined by the plaintiff because she did not choose to sell off a part, and two persons who had been authorized as agents to sell the property testified that they were instructed to sell lot one as an entirety, and were not permitted to sell in parcels.

The defendant put in evidence the record of conveyances disclosing the title, and tending to prove that the plaintiff and Judge Wylie had owned as tenants in common since 1855 all of original lot one except 35 feet 10 inches by a depth of 120 feet, which the latter owned in severalty; and that in December, 1871, they subdivided their holding into lots numbered from 1 to 11, with alleys, according to a plat dated January, 1872, which was put in evidence.

The plat here referred to was as follows:



D Street, Northwest.

Upon this plat were recorded the following words: "This is to certify that we have subdivided that part of lot 1 in square No. 630, owned jointly by us, into the lots as laid down in the above plat as lots 1 to 11, both inclusive, with the alleys for their accommodation, which alleys are exclusively for the sole benefit and use of said lots."

At the time of this subdivision Judge Wylie and the plaintiff executed a deed of partition which gave sub-lots 1 to 5 inclusive in severalty to the plaintiff, and sub-lots from 6 to 11 inclusive to Judge Wylie in severalty, but did not convey the fee in the alleys. In January, 1872, Wylie conveyed to Tyler, and Tyler to the plaintiff, sub-lots 6 to 11 and that portion of original lot one (35 feet 10 inches front) just mentioned as not having been held by plaintiff and Wylie in common, but did not convey the alleys as such. Those deeds read: "Lots 6, 7, 8, 9, 10, 11, being subdivisions of lot one, in square

No. six hundred and thirty, on the ground plan of said city, according to the metes and bounds, covenants and conditions set forth and described in the deed of partition, dated December 28, 1871, entered into by and between Andrew Wylie and Mary C. his wife, and the said Margaret Hetzel, and recorded, with plat of subdivision annexed thereto; . . . also all that part of said lot one in said square No. six hundred and thirty, at the northeast corner thereof, fronting on North Capitol street thirty-five feet and ten inches by a depth of one hundred twenty feet, together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of the said party of the first part of, in, to or out of the said piece or parcel of land and premises."

The partition deed above referred to contained the following among other clauses: "And the said parties Andrew Wylie and Margaret Hetzel do and each of them doth hereby mutually covenant and agree to and with each other as follows: That the said Margaret Hetzel, her heirs and assigns, shall have the right to erect any structure or building from lot number one on D street north over or across the alley entering from that street on condition that an open space of ten feet in width and twelve feet in height shall at all times be kept clear for ingress and egress for the use of the other lots in the rear bounding on the alleys and area as designated in said plan. Also that the said Andrew Wylie, his heirs and assigns, being owner or owners of lots eight, nine and eleven in said plan, and of the above-mentioned part of said lot one in said square not embraced in this partition, but owned at present by the said Wylie as his own individual property, fronting $35\frac{10}{12}$ feet on North Capitol street by 120 in depth, may at any time in their discretion close the ten-foot alley running northward from the main area in the rear of lots eight and nine. Also that the owner or owners of lots four and five shall have the like privilege to close the five-foot

alley along the rear of lot five and part of lot six so far as the main area aforesaid. Also that all these alleys and area shall be private and to be under the control of all owners of property touching thereon, and except as hereinbefore otherwise provided shall never be closed unless by common consent, and the owners thereof and of each of said lots shall at all times contribute their and each of their joint and equitable proportions of all proper and necessary charges for paving the said alleys and area and keeping the same in proper condition by means of drains, sewers or otherwise, and the same are to be for the exclusive use of said owners. And the parties hereto have annexed to this deed and made it part of the same for illustration and reference, a copy of the aforesaid plan of their subdivision. In testimony whereof," etc.

The railroad company also introduced testimony tending to prove that since 1872 the property had been assessed for taxes and that taxes were paid upon it as subdivided into lots from 1 to 11.

This is substantially all the evidence set forth in the bill of exceptions.

The plaintiff presented several requests for instruction, among which were the following:

"The jury are instructed that if they shall find that the property in question was rendered unsalable by reason of the alleged nuisance, and, further, that the plaintiff in good faith was trying to sell it, an allowable method for them to estimate the measure of damages is to ascertain what the plaintiff might have obtained for the property with the obstruction there and what she might have obtained for it with the obstruction removed, and allow her the legal rate of interest — that is, six per cent — on the difference for so long a period, not exceeding three years, as the jury shall be satisfied that she was so continuing her efforts to sell it.

"If you shall find for the plaintiff, then having ascertained a sum you think would on the 24th day of April, 1876, have compensated the plaintiff, you are allowed in your discretion to add interest, not exceeding six per centum, upon that sum from that date, provided you shall think that such sum with-

out interest is not a fair compensation for all the loss you find that the plaintiff has sustained.

"If the jury shall find that the defendant so obstructed the access to and egress from the plaintiff's land that she could not use the same as such property is generally used, then the jury are at liberty to allow such damages as they shall find have resulted from the act of the defendant, irrespective of any attempt made by the plaintiff to sell the same."

Each of these instructions was refused, and to that action of the court the plaintiff at the time duly excepted.

Thereupon, the bill of exceptions states, "the court instructed the jury that the plaintiff offered her property for sale as a whole, and undertook to sell it as lot one; that the action was for damages for her not being able to sell lot one; that the testimony showed that even if she had received an offer for lot one she could not consummate the sale, because she did not own the fee in the alleys. This being so, and the defendant's counsel conceding that the structure was illegal, the court instructed the jury that the plaintiff could not recover anything more than nominal damages, and thereupon instructed the jury to find for the plaintiff for one cent damages, which was done."

1. In the opinion of the Court of Appeals it is said that there was not a particle of evidence in the record as to the salable or rental value of the land without reference to the existence of the nuisance complained of, and that such facts were essential to be ascertained in order to furnish a basis for estimating the damages. It is clear however that there was evidence before the jury "as to the value of the land with the D street track thereon and with that track removed." It is so expressly stated in the bill of exceptions. The amounts given by the witnesses when testifying as to value were not set out in the bill of exceptions for the reason, we infer, that the real contest was as to questions of law arising upon the instructions asked by the plaintiff and the ruling of the court that the plaintiff could recover only nominal damages. The bill of exceptions was evidently prepared with reference to those questions. It must, therefore, be assumed, upon the

record, that there was evidence as to value upon which the plaintiff was entitled to go to the jury, unless she was precluded by some principle of law from recovering anything more than nominal damages.

2. The Court of Appeals, after observing that the instructions asked by the plaintiff were founded upon the assumption of injury to her in respect of all the lots contained in the subdivision of original lot one, and did not propound any proper or exact rule for estimating damages, said: "But, apart from all this, the evidence upon which the prayers were founded showed a state of case quite different from that set out in the declaration. It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover, and the one must consist with the other. The declaration here, as we have seen, proceeds as for an injury to the entire original lot, without any reference or respect to the subdivision of that lot, and that the lots made of the subdivision are separate and distinct parcels of ground, fully recognized and provided for by law; and entirely ignores the fact that the plaintiff never was in reality seized in severalty of the original lot one, as it existed before the subdivision, and as declared upon in the declaration. The proof produced by the defendant, showing how lot one was originally held, and how it had been subdivided and partitioned, and how title to all the lots was acquired by the plaintiff, and their relation to each other and the streets upon which they abut, entirely negatives and refutes the case presented in the declaration, and the right of the plaintiff to recover thereon."

Undoubtedly, the declaration claims damages for the injury done to the entire original lot numbered one in square six hundred and thirty. It appears that when this action was brought the plaintiff owned all the sub-lots which, with the alleys as marked on the plat of 1872, constituted original lot one. If the railroad company, by its illegal use of D street, had done injury to the land, or any part thereof, within the exterior boundaries of original lot one, we are unable to perceive why damages might not be recovered in this action

with respect to such part as, in fact, the plaintiff owned, although she may have claimed to own more than belonged to her. In estimating the damages, the jury could take into consideration the subdivision of original lot one, and eliminate from their calculation any sub-lot belonging to the plaintiff that was not damaged in salable or rental value by the nuisance in question. So, if the plaintiff did not own the alleys marked on the plat, that fact could be given proper weight in estimating the damages she was entitled to recover; that is, if damages were claimed in respect of more land than belonged to the plaintiff, the recovery could have been limited to the injury done to the part that she did own.

3. The jury were instructed that the testimony showed that the plaintiff offered her property for sale as a whole, and undertook to sell it as a whole. This was error, for the instruction implied that the plaintiff had not put her property on the market except as a whole; whereas the bill of exceptions shows that while there was evidence tending to prove that she wished or preferred to sell it as a whole, there was also evidence that the plaintiff authorized her land to be sold in parcels or as a whole, indeed, "in any way."

4. The jury were also erroneously instructed that the action was for damages by reason of the plaintiff not being able to sell lot one, and that, according to the testimony, "if she received an offer for lot one she could not consummate the sale because she did not own the fee in the alleys." In the first place, the action was for damages for the injury done to the value of the plaintiff's land, and the unnecessary recital in the declaration that she had tried to sell did not convert the action into one only for damages for not being able to consummate a particular sale. If the salable or rental value of the land was substantially or materially diminished by the defendant's illegal use of D street, she would be entitled to recover without proving that, on a specific occasion, she tried to sell, but failed to effect a sale. In the second place, the plaintiff's right to damages for material injury done to the land owned by her would not have been defeated even if it were true that she did not own the fee in the alleys. If the

alleys had been dedicated to public use, so as to be beyond the control of those owning the abutting lots, plaintiff would nevertheless have been entitled to recover in this action for any substantial diminution in the value of her land, or of any part thereof, arising from the nuisance in question. Apart from this, we do not perceive why she might not have passed, by deed, the fee of the ground marked on the plat as alleys. By the Revised Statutes of the District of Columbia it is provided that "the ways, alleys, or passages, laid out or expressed on any plat or subdivision, shall be and remain to the public, *or* subject to the uses declared by the person making such subdivision, at all times under the same police regulations as the alleys laid off by the Commissioners on division with the original proprietors." Rev. Stat. D. C. § 480. What were the uses, in respect of these alleys, as declared by the persons who made the subdivision of lot one? Upon the plat of the subdivision it is declared that the alleys "are exclusively for the sole benefit and use of said lots." And the deed of partition between Wylie and Hetzel expressly provides that "all these alleys and area shall be private and to be under the control of all owners of property thereon;" that except as provided they "shall never be closed unless by common consent," and that "the same are to be for the exclusive use of said owners." Now, when the plaintiff became the owner of all the sub-lots of original lot one, is it to be doubted that she could have closed the alleys altogether and have conveyed a good title to all the land constituting the original lot one? If this be so, it was error to instruct the jury that she could not have made a good title in fee to the entire original lot as one body of land, including the alleys on which the respective sub-lots abutted.

5. It results from what has been said that the trial court erred in instructing the jury that the plaintiff could recover nothing more than nominal damages. In our opinion, she was entitled to recover such damages as were equivalent to the injury done to her by the defendant's inexcusable and persistent occupation and use of a public street in violation of law and in disregard of her rights as an owner of adjacent

property. At the trial of the first case brought by the plaintiff against the railroad company on account of this nuisance, Judge Hagner instructed the jury that they might ascertain from the evidence what, in the absence of the D street track, would be the fair value of the property in its unimproved condition during the time covered by the declaration; and if they found that the property during that period remained in that condition by reason of the track maintained and used by the defendant, then they might allow such sum as was equal to six per cent interest on such value, if they believed that the loss of revenue was caused wholly by the track, or a lesser sum proportionate to the effect which the maintenance and the use of the track had in causing the lot to lie unproductive. This was substantially the proposition of law embodied in one of the instructions asked by the plaintiff.

What was the plaintiff's land reasonably worth, during the period covered by the declaration, if D street had not been occupied and used by the railroad company in the manner disclosed by the evidence? In the absence of the defendant's track was there a reasonable certainty that it could have been used or sold? If so, for what purpose could it have been profitably used, or for what sum could it have been sold? Was it reasonably certain that neither the original lot nor any sub-lot could have been used or sold while the street was obstructed by the defendant's track? These were all proper inquiries by the jury in determining what damages were equivalent to, or would fairly compensate the plaintiff for, the injury done.

Of course, in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done. In *United States Trust Company* v. *O'Brien*, 143 N. Y. 284, 287–289 — which was an action for damages for the breach of certain covenants contained in a lease — Mr. Justice Peck-

ham, speaking for the Court of Appeals of New York, when a member of that court, said: "It is clear, and so it has been held in many cases, that the rule of damages should not depend upon the form of the action. In all civil actions the law gives or endeavors to give a just indemnity for the wrong which has been done to the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of a contract, is on the question of damages an irrelevant inquiry. As was said by Rapallo, J., in *Baker* v. *Drake*, 53 N. Y. 211, 220, the inquiry is what is an adequate indemnity to the party injured, and the answer cannot be affected by the form of the action in which he seeks his remedy." Again: "In using the words 'uncertain, speculative and contingent,' for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by the defendant. The plaintiff is not bound to show to a certainty that excludes the possibility of a doubt that the loss to him resulted from the action of the defendant in violating his agreement. In many cases such proof cannot be given, and yet there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was not only in fact occasioned by the defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract. . . . The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not

come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about."

We are of opinion that the Court of Appeals erred in affirming the judgment of the Supreme Court of the District.

The judgment is reversed, and the cause is remanded, with directions for a new trial in the Supreme Court of the District and for further proceedings consistent with this opinion.

In re BOARDMAN, Applicant on behalf of Durrant.

ORIGINAL.

No number. Presented and denied, January 7, 1898.

Application for leave to file a petition for a writ of *habeas corpus* will be denied if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner.

The action of a Circuit Court in refusing an appeal from a final order dismissing a petition for *habeas corpus* and denying the writ cannot be revised by this court on *habeas corpus*.

The fact that, when an appeal from a final order of a Circuit Court, denying a writ of *habeas corpus* and dismissing the petition therefor of a person confined under state authority, has been prosecuted to this court and the order affirmed, the state court proceeds to direct sentence of death to be enforced before the issue of the mandate from this court, does not justify the interposition of this court by the writ of *habeas corpus*.

Where the statutes of a State provide that execution under a sentence of death shall not be stayed by an appeal to the highest tribunal of the State unless a certificate of probable cause be granted as provided, and such certificate has been refused, and application for supersedeas denied, this court cannot interfere on *habeas corpus* on the ground, if Federal questions were raised on such appeal, that thereby the party condemned is deprived of the privilege or immunity of suing out a writ of error from this court.

THE case is stated in the opinion.

Mr. Louis P. Boardman in person for petitioner.

No one opposing.

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

Application was made on behalf of Durrant, held in custody by the warden of the State's prison at San Quentin, California, for execution to-day, under sentence of death, for leave to file a petition for the writ of *habeas corpus*.

The petition in support of general allegations that Durrant was confined under proceedings in contravention of the Constitution and laws of the United States, set forth, *in hæc verba*, two petitions for the writ presented on Durrant's behalf to the Circuit Court of the United States for the Ninth Circuit and Northern District of California, on November 11 and December 31, 1897, respectively; and the action of that court in respect thereof.

The averments of these petitions must be considered in the light of sections 1227 and 1243 of the Penal Code of California, which read as follows:

"§ 1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or if he is at large, a warrant for apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the warden of the state prison to whom the sheriff is directed to deliver the defendant shall execute the judgment at a specified time. The warden must execute the judgment accordingly."

"§ 1243. An appeal to the Supreme Court from a judgment of conviction, stays the execution of the judgment in all capital cases, and in all other cases upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the Supreme Court,

that, in his opinion, there is probable cause for the appeal, but not otherwise."

It was alleged in the petition of November 11, that, theretofore, Durrant had been found guilty of murder in the first degree in the Superior Court of the city and county of San Francisco; that judgment had been rendered on the verdict, and he had been sentenced to death; that an appeal had been taken from that judgment to the Supreme Court of California, and the judgment affirmed. See 48 Pac. Rep. 75.

That on April 10, 1897, the Superior Court rendered a second judgment against Durrant, from which he took an appeal to the state Supreme Court, raising Federal questions thereon, and that that appeal was still pending and undetermined.

That on June 2, 1897, application had been made by Durrant to said Circuit Court of the United States for a writ of *habeas corpus*, which application was denied, and from that order an appeal was duly taken and perfected to the Supreme Court of the United States, but that no mandate showing the determination of that appeal had been filed in the Circuit Court, yet, nevertheless, judgment was entered by the Superior Court, November 10, sentencing Durrant to be executed Friday, November 12, though that court was without authentic or official information that said appeal had been considered or determined in the Supreme Court of the United States. Hence it was charged that the judgment of the Superior Court of November 10 was null and void; and also because of the pendency of the appeal from the alleged judgment of April 10, 1897.

It was further averred that the Circuit Court on the eleventh of November denied the writ and dismissed the petition; that from this order petitioner prayed an appeal, presenting a notice of appeal, assignment of errors, citation and bond for costs; and that the Circuit Court refused to allow an appeal, or to permit the papers to be filed, and neither of its judges would approve the bond, nor sign the citation.

The petition of December 31 reiterated in substance the allegations of the previous application, and insisted that by

reason thereof an appeal from the final order of the Circuit Court of November 11 was actually pending in the Supreme Court of the United States, and suspended further proceedings against Durrant, but that, nevertheless, the Superior Court on December 15, 1897, though without authority and contrary to the Constitution and laws of the United States, entered an order directing the execution of Durrant on January 7, 1898; that from this order Durrant had prosecuted an appeal to the Supreme Court of California, which was still pending and undetermined; and that the judge of the Superior Court and the justices of the Supreme Court had refused to grant a certificate of probable cause, so that the proceedings below were not stayed by said appeal.

That Federal questions had been raised before the Superior Court and that the disposition thereof was brought under review by the appeal to the Supreme Court, and that if the order of December 15 were carried into effect, petitioner would be deprived of the right to prosecute a writ of error from the Supreme Court of the United States to the final judgment of the Supreme Court of California in respect of such Federal questions; as was true also of the appeal from the judgment of April 10, 1897.

Some other matters were put forward in the petitions, but these were not insisted on at the bar, and were so evidently destitute of merit as to require no observations.

The contention here practically rested on these grounds:

First. That the judgment of the Superior Court on the tenth of November was void because the mandate of this court on the appeal from the final order of the Circuit Court of June 2 had not been sent down; and that although the Circuit Court denied an appeal from its final order refusing the writ and dismissing the petition of November 11, still the appeal should be regarded as duly perfected, and that for that reason, or because the Circuit Court could not arbitrarily defeat such appeal, petitioner was entitled through the interposition of this court by the issue of the writ applied for to be placed in the same position as if the appeal had been granted.

Second. That as the appeals from the judgments of April

10 and of December 15 involved Federal questions and were still pending in the state Supreme Court, the execution of the sentence in accordance with the state statutes would deprive petitioner of the right, privilege and immunity of suing out writs of error from this court to revise the final judgments of that court when entered on those appeals.

The rule was laid down in *Spies* v. *Illinois*, 123 U. S. 131, that when application is made to this court for the allowance of a writ of error to the highest court of a State, the writ will not be allowed if it appear from the face of the record that the decision of the Federal question which is complained of was so clearly right as not to require argument. And the same rule governs an application to us for the writ of *habeas corpus*, which must be denied, if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner to custody, for the object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice or judge, granting the writ, on hearing, "to dispose of the party as law and justice may require." Rev. Stat. § 761; *Iasigi* v. *Van De Carr*, 166 U. S. 391; *Ekiu* v. *United States*, 142 U. S. 651.

The action of the Circuit Court in refusing to grant the appeal from its final order of the 11th of November, on the petition then presented, and in declining to entertain the petition of December 31, cannot be revised on this application, and the inquiry really is whether these petitions furnish any ground for the conclusion that if the writ were granted the prisoner's detention would be found illegal.

As it appears on the face of the record that the judgment of November 10 was superseded and that petitioner is held for execution under the judgment of December 15, it manifestly follows that we could not enlarge the prisoner as unlawfully detained on the ground that if the Circuit Court had allowed an appeal from its final order of November 11, further proceedings below would have been stayed until that appeal was disposed of.

Nor could we hold that that final order was erroneous because the judgment of November 10 was entered in the

absence of our mandate on the affirmance of the final order of the Circuit Court of June 2, 1897. The judgment of this court affirming that order was rendered, as we know from our own records, November 8 (see 168 U. S. 705), and we have decided that if the state court after judgment here proceeds before our mandate issues, its action, though not to be commended, is not void. *In re Shibuya Jugiro*, 140 U. S. 291.

In this instance the state trial court did so proceed, but, in the due and orderly administration of justice, its judgment was superseded by the Supreme Court of the State, which, it is proper to note, granted the certificate of probable cause on the principal ground that the lower court could not exercise jurisdiction to fix a day for the execution of sentence against defendant, in the absence of authentic and official evidence of the disposal of the appeal to this court. *People* v. *Durrant*, 50 Pac. Rep. 1070.

In respect of the alleged abridgment of petitioner's privilege or immunity to sue out writs of error from this court to revise the final judgments of the state Supreme Court on appeals therein pending, and particularly the appeal from the judgment of the Superior Court of December 15, which, it was argued, raised Federal questions, it is sufficient to say that it was for the trial judge or the Supreme Court of California to determine whether or not the judgments complained of should be stayed or superseded, and with such determination it is not our province through this writ to interfere, nor do the statutory provisions in that behalf, in themselves, involve any infraction of the Constitution or laws of the United States. *Kohl* v. *Lehlback*, 160 U. S. 293; *Bergemann* v. *Backer*, 157 U. S. 655; *Andrews* v. *Swartz*, 156 U. S. 272.

All the averments in the papers, as well as a petition for a writ of error, which had been previously presented to some of our number and denied, as was admitted, and the suggestions urged at the bar, have been duly considered, with the result that the court is unanimously of opinion that if the writ should be awarded, it would be its duty on the return thereto to remand the petitioner. The application is, therefore,

Denied.

BUILDING AND LOAN ASSOCIATION OF DAKOTA *v.* PRICE.

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

No. 158. Submitted December 9, 1897. — Decided January 10, 1898.

The court below having dismissed the bill in this case on the ground that it had no jurisdiction, as the matter in dispute was determined not to exceed $2000 exclusive of interest and costs, this court examines the bill at length in its opinion, and holds that upon the face of the pleading the matter in dispute is sufficient to give the court below jurisdiction, and remands the case for further proceedings, without determining any of the other questions on the merits.

The case is stated in the opinion.

Mr. J. H. Hauser and *Mr. C. W. Starling* for appellant.

Mr. W. S. Simkins and *Mr. T. E. Conn* for appellees.

Mr. Justice Peckham delivered the opinion of the court.

The appellants herein commenced this action against the defendants in the Circuit Court of the United States for the Northern District of Texas, the complaint in which was filed on the 3d of October, 1895. The defendants demurred on the ground that the court had no jurisdiction of the several subjects-matter set forth in the complaint, one of the objections being that the matter in dispute did not exceed $2000 exclusive of interest and costs.

The cause was heard in the Circuit Court, the demurrer was sustained, and the bill dismissed with costs and without prejudice, for want of jurisdiction of the subject-matter in controversy. The complainant appealed to this court, which appeal was allowed and granted solely upon the question of the jurisdiction of the Circuit Court, and that question alone

has been certified. Whether the bill shows facts sufficient to invoke the consideration of a court of equity is not such a question of jurisdiction as is referred to in the Judiciary Act of March 3, 1891, c. 517, and we have therefore no concern with that question. 26 Stat. 826, § 5; *Smith* v. *McKay*, 161 U. S. 355.

The decision of the only question before us depends upon whether the allegations contained in the bill of complaint show the matter in dispute to be of sufficient value to give the Circuit Court jurisdiction.

The appellant was incorporated under the laws of the State of South Dakota, and has its principal place of business in the city of Aberdeen, in that State. The action was brought for the purpose of recovering the amount of an alleged debt, damages and costs against the defendants Price, Rothschild and Miller, and for a decree of foreclosure against the defendants H. M. Price and W. B. Luna, under a certain mortgage and vendor's lien on the premises described therein.

The bill alleges, among other things, that on the first of January, 1890, one Jacob Rothschild applied for membership in the complainant's association and subscribed for forty shares of its capital stock, which application was accepted, and on that day a certificate for forty shares of the capital stock was issued and delivered to him, and he paid the application or subscription fee due thereon, and the stock was accepted and received by him upon the terms and conditions therein set forth, and he thereupon became a member of the association and the holder and owner of forty shares of its capital stock.

The bill then proceeds as follows:

"3d. Your orator further shows that on or about the said first day of January, 1890, the said Jacob Rothschild, being then and there a stockholder in your orator and entitled under the rules, regulations and by-laws to make application for an advancement on his said stock, made his application to your orator for an advancement of two thousand dollars in anticipation of the maturity value of his said forty shares of stock, and in competition with other bidders for the funds of your

orator bid as a premium for the privilege of obtaining such advancement the sum of fifty dollars per share and offered as security for the continued payment for the monthly dues on said forty shares of stock and the interest on said advancement the real estate hereinafter described; and your orator further shows that said application and bid were made in accordance with the rules, regulations and by-laws of said association, and were duly accepted and approved by your orator's board of directors, and the advancement applied for was duly made, and the amount due thereon was duly paid to the said Jacob Rothschild; that said advancement was made by your orator on the faith and in the expectation that the said Rothschild would, according to his agreement, continue the monthly payment on his said forty shares of stock until such stock should have become fully matured and of the value of one hundred dollars per share.

"4th. Your orator further shows that on or about the first day of February, 1890, the said Jacob Rothschild and the defendant, Bertha Rothschild, for and in consideration of the advancement so made and for the purpose of securing the continued payment of the monthly dues on said stock, made, executed and delivered to your orator, and thereby promised and agreed to comply with the terms of a bond, of which the following is substantially a copy:

"'Know all men by these presents, that Jacob Rothschild and Bertha Rothschild, his wife, of the county of Dallas, and State of Texas, are held and firmly bound unto the Building and Loan Association of Dakota, of the city of Aberdeen, and State of South Dakota, in the sum of four thousand ($4000) dollars, lawful money of the United States of America, to be paid to the said association, its certain attorney, successors or assigns, at its home office in Aberdeen, South Dakota, to which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, firmly by these presents.

"'Sealed with our seals, and dated at Aberdeen, South Dakota, this first day of February, one thousand eight hundred and ninety.

"'The condition of this obligation is such that, whereas, said Jacob Rothschild has bid, in accordance with the by-laws of said association, the sum of two thousand ($2000) dollars, as and for a premium for the advancement to him by said association of two thousand dollars, by way of anticipation of the value, at their maturity, of forty shares of the capital stock of said association, now owned by said Jacob Rothschild and, whereas, said association has this day advanced to said Jacob Rothschild the sum of two thousand dollars, in consideration of said premium, and by way of said anticipation:

"'Now, therefore, if the above bounden Jacob Rothschild and Bertha Rothschild, their heirs, executors and administrators, or any of them, shall well and truly pay or cause to be paid unto the said association, its certain attorney, successors or assigns, at its home office, on or before nine years from date hereof, the just sum of four thousand dollars as aforesaid, together with interest on two thousand dollars, at the rate of six per cent per annum, from the first day of February, A.D. 1890, until paid, payable monthly in advance; or shall well and truly pay, or cause to be paid, unto said association, its certain attorney, successor or assigns, at its said home office, the sum of twenty-four and $\frac{00}{100}$ dollars on the first day of each and every month hereafter, as and for the monthly dues on said forty shares of capital stock of said association now owned by the said Jacob Rothschild, and by him hereby sold, assigned, transferred and set over to said association as security for the faithful performance of this bond, and shall also well and truly pay, or cause to be paid, all instalments of interest aforesaid, and all fines which become due on the said stock, without any fraud or further delay, until said stock becomes fully paid in and of the value of one hundred dollars per share, and shall then surrender said stock to said association; then, and in either of such cases, the above obligation to be void, otherwise of full force and virtue.

"'Provided, however, and it is hereby expressly agreed, that if, at any time, default shall be made in the payment of said interest, or the said monthly dues on said stock, for the space

of six months after the same, or any part thereof, shall have become due, or if the taxes and assessments on the property mortgaged to secure the faithful performance of this bond be not paid when due, or if the insurance policy or policies on the said mortgaged property be allowed to expire without renewal, then, and in either or any such case, the whole principal sum aforesaid shall, at the election of said association, its successors or assigns, immediately thereupon become due and payable, and the sum of four thousand dollars, less whatever sum has been paid said association, as and for the monthly dues on said forty shares of said capital stock, at the time of said default, may be enforced and recovered at once as liquidated damages, together with and in addition to, all interest and fines then due, and all costs and disbursements, including said taxes, insurance and assessments, which have been paid by said association, anything hereinbefore contained to the contrary notwithstanding.

"'JACOB ROTHSCHILD. [SEAL.]

"'BERTHA ROTHSCHILD. [SEAL.]

"'Signed, sealed and delivered in presence of —

"'W. L. HALL.

"'C. S. CRYSLER.'

"5th. Your orator would further show that, on the first day of February, 1890, the said Jacob Rothschild and the defendant Bertha Rothschild, in order to better secure your orator for the money advanced by your orator as aforesaid and in all their agreements, obligations and contracts as aforesaid, made, executed and delivered to your orator their certain mortgage or deed of trust, with power of sale, in which Charles S. Crysler was made trustee on the following described tract or lot of land, situated in the city of Dallas, county of Dallas, and State of Texas, and more particularly described as follows:

(Here follows description of property.)

"6th. Your orator would further show that it is recited in said deed of trust, among other things, that the said Jacob Rothschild is a member of the Building and Loan Association

of Dakota, and is the owner of forty shares of the capital stock thereof, the monthly payments of which amount to $24.00; and it is further recited that said deed of trust is given for the purpose of securing the aforesaid bond, the nature of which bond is fully set forth in said deed of trust.

"7th. Your orator would further show that it is stipulated in said deed of trust that if the said defendants shall well and truly pay or cause to be paid the sum of four thousand dollars, together with the interest above specified, within the time and in the manner as in said bond specified, or shall pay or cause to be paid, at the home office of said association, the instalments of interest as they become due on said stock, until said stock becomes fully paid in and of the value of one hundred dollars per share, and before any of said instalments of interest or monthly payments shall have been past due for a period of sixty (60) days, and shall then surrender said stock to said association in payment of said bond, and shall pay the taxes and assessments and shall keep and perform all and every of the conditions of said bond, then this deed shall be void and the property hereinbefore conveyed shall be released at the cost of the parties executing the said bond, but otherwise to continue in full force and effect; but if default be made in the payment of said sum or sums of money or any instalment of interest thereon or of any monthly payment of stock for the period of sixty (60) days after the same shall be due, or any part of either, or in the payment of taxes at the time or times specified for payment, or in any condition in said deed of trust contained, then or in either or any such case the whole principal sum or sums secured by this trust deed and the interest thereon accrued up to the time — such default shall, at the election of your orator, its successors or assigns, or its or their agent, become thereupon due and payable immediately upon said default. Whereupon the trustee in said trust deed is authorized and empowered to sell said premises in accordance with the stipulations contained in said instrument, and with the proceeds of said sale to pay the expenses of sale and all sums of money due by the terms of said bonds so in default, with all interest due thereon, and all taxes, if any, due to said association.

Opinion of the Court.

"8th. Your orator further shows that said forty shares of stock have not been withdrawn, nor have they matured or become of the par value of one hundred dollars per share; that subsequent to the execution, delivery and record of the aforesaid deed of trust the said Jacob Rothschild and Bertha Rothschild conveyed the aforesaid premises to the defendant Sophia Miller, who, as a part of the purchase price for said premises, assumed and agreed to pay the said bond in the sum of four thousand dollars, secured by the aforesaid deed of trust lien, retaining a vendor's lien in said deed of conveyance to secure the payment of the aforesaid sum of four thousand dollars; that subsequently the said Sophia Miller conveyed said premises in like manner to the defendant M. S. Price as her separate property, who, as a part of the purchase price therefor, assumed and agreed to pay said bond secured by said deed of trust lien, said Sophia Miller retaining a vendor's lien for the payment thereof and for the payment of other portions of the purchase money, by virtue of which she may claim some interest in the aforesaid premises; that W. B. Luna also claims some interest in the aforesaid premises, which interest, if any, is subsequent and inferior to that of your orators.

"Your orator further alleges that it is now the owner and holder of the said bond and deed of trust. Your orator further shows that the said defendants have not paid said principal sum of $4000, nor any part thereof; that the said defendants have not continually paid the monthly dues on said forty shares of stock, nor the monthly instalments of interest as provided in said bond, but that defendants have paid no part of said dues or interest except the sum of twelve hundred dollars ($1200) as and for the said monthly dues for the month of February, 1890, to and including the month of March, 1894, and the further sum of $500 as and for the interest, as in said bond provided, for the month of February, 1890, to and including the month of March, 1894.

"Your orator further shows that default has been made in the payment of the monthly dues on said forty shares of stock and the monthly instalments of interest on said ad-

vancement; that more than six months have elapsed since the first monthly instalment of interest and dues so in default became due and payable, and your orator elects to declare the whole sum named in and secured by said bond and deed of trust to be immediately due and payable.

"9th. Your orator further shows that there is now due and owing your orator from Bertha Rothschild, Sophia Miller, H. M. and M. S. Price under and by virtue of the terms of said bond the sum of four thousand dollars, ($4000,) less the sum of twelve hundred dollars, ($1200,) paid to your orator as the monthly dues on said forty shares of capital stock at the time of the aforesaid default, aggregating $2800, together with and in addition to interest on two thousand dollars, at the rate of six per cent per annum, from April 1, 1894."

The complainant then prays for a decree against defendants for the amount of the above-named debt, damages and costs, and for a decree of foreclosure of the mortgage above set forth.

We think upon the face of this pleading the matter in dispute exceeds the amount of two thousand dollars, exclusive of interest and costs. Act of August 13, 1888, 25 Stat. 433, c. 866.

The by-laws of the complainant are not made a part of the bill and they cannot be referred to for the purpose of aiding or marring the pleading itself. In truth, they are not in the record, and we are ignorant of their contents, except as some matters set forth in the bill are alleged to be in conformity with certain of their provisions. Nor can the inference be indulged, on a question of jurisdictional amount, that the whole scheme is a mere cover to conceal an usurious exaction of interest for the loan of a sum of money not exceeding in any event $2000. No such legal inference arises from the facts stated in the bill. On the contrary, it appears on the face of the bill that the company was duly incorporated by legislative act; that Rothschild, the original owner of the stock, applied for membership in the company, subscribed for forty shares thereof, and promised to pay for it in the manner stated. We cannot assume, as a matter of legal inference,

that the circumstances set forth in the bill constitute a cover for usury, and we must take those allegations as they are made and assume their truth for the purpose of our decision.

The bill shows an application to complainant for an advance of $2000 in anticipation of the maturity value of the shares of stock owned by Rothschild; that the application was granted and the advance applied for duly made and the amount paid to Rothschild, and that it was made on the faith and in the expectation that he would, according to his agreement, continue the monthly payments on his stock until it became fully matured and of the value of one hundred dollars per share. The bond given as part security for the repayment of this advance contains distinct contracts. The obligor agreed to pay in nine years from the date thereof $4000, and interest on $2000 at six per cent from February, 1890, until paid, the interest being payable monthly in advance; or, instead of this payment, he agreed to pay $24 on the first of every month at the home office of the company as monthly dues, being at the rate of sixty cents per month on each share, there being forty shares of stock, and he agreed to continue these payments until the stock became fully paid up and of the value of $100 per share, when he was to surrender it to the company, and he agreed also to pay the interest as stated above.

We cannot assume, as against the allegations contained in the bill, that the payment of these monthly dues upon the contract was pursuant to an agreement to pay interest on the loan, and that such payment was merely another name for interest. It is alleged to be separate and distinct from that, and it is set up as a material portion of the obligation of the borrower who, by subscribing for the shares and being accepted, etc., thereby became a shareholder and entitled to dividends and profits coming to the shares he held. Upon default in either of these distinct obligations, to pay interest and to also pay his monthly dues, the whole sum at the option of the association became due less whatever sum had been paid it as the monthly dues at the time the default might be enforced. The bill here shows that there had been a default

for six months, and that there was due from defendants at commencement of suit the sum of four thousand dollars, less the sum of twelve hundred dollars of monthly dues which had been paid up to and including March, 1894, leaving due the sum of $2800, together with and in addition to the interest on $2000, at the rate of six per cent per annum, from April, 1894.

The matter in dispute, therefore, is not merely $2000 money loaned, together with the interest on that sum, but the claim on the part of the complainant is for the payment of the principal sum above stated, which exceeds the sum of $2000, exclusive of interest and costs. All these facts are admitted by the demurrer.

The nature of this association is not very clearly set forth in the bill, but it is probably not materially different from those which have been incorporated to a great extent in many different States, and referred to generally in Endlich in his work on Building Associations.

A question somewhat similar to this has been decided in *Richard* v. *Southwestern Building & Loan Association*, 21 S. R. 643, (49 La. Ann.,) where it was held that a loan of this nature was not to be treated as usurious, for the reason that the payments supposed to constitute the usury were by the terms of the contract made upon the stock debt and not upon the loan. To the same effect is *Equitable Building & Loan Association* v. *Vance*, 27 S. E. Rep. 274, Supreme Court of South Carolina, May, 1897.

The stock is not, as is claimed by counsel for appellee, a mere fiction. It is issued, it is to be assumed on this appeal, in accordance with the provisions of the charter of the complainant, and the owners of it are entitled to share in the profits of the corporation, which it is supposed it will be enabled to make during its existence, and his position of shareholder is entirely separate from his position of borrower from the company.

Without determining any of these questions on the merits, we think the matter in dispute was within the jurisdiction of the Circuit Court, and we therefore reverse the judgment

dismissing the bill, and remand the case to the Circuit Court with directions to take such further proceedings as may be in conformity with this opinion.

Reversed.

WILLIAMS *v.* PAINE.

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

No. 114. Argued November 29, 30, 1897. — Decided January 10, 1897.

Under the laws of Maryland, which were in force in the District of Columbia in 1859, it was competent for a married woman, outside of the District, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the District, thereby became a valid and sufficient instrument to authorize the conveyance by attorney; and the first section of the act of March 3, 1865, c. 110, 13 Stat. 531, contains a clear legislative recognition of the right to execute such power.

Such a power of attorney, executed in one of the Northern States before the civil war by a married woman then residing there, was not revoked by the fact that when that war broke out she and her husband removed to the Southern States, where he entered the Confederate service, and where she resided to the close of the war.

When the purchase money for land sold under such a power is received by the principal, to permit her heirs after her death to repudiate the transaction, on the ground that the power of attorney had been revoked by the war, would be in conflict with every principle of equity and fair dealing.

A majority of the court think that the deed made under the power of attorney which is in controversy in this suit, and which is printed at length in the Statement of the Case, below, was in the nature of a conveyance of the legal title, though defectively executed, and that it came within the provisions of the act of March 3, 1865, and its defective execution was thereby cured.

By this disposition of the whole case upon the merits the court is not to be considered as deciding that parties situated as the plaintiffs were in this case, out of possession, can maintain an action for partition.

The appellants herein brought this suit in the Supreme Court of the District of Columbia for the purpose of obtaining

partition of certain lands in the city of Washington, known as square 53 of the ground plan of that city.

Upon the trial it appeared that the common source of title was one George W. Peter, who, in January, 1837, conveyed the premises to Henry Huntt and Benjamin Ogle Tayloe as tenants in common. Mr. Huntt died in 1838 intestate, leaving two daughters, Fannie and Mary, and a son named George Gibson Huntt, to whom his undivided interest in these lands descended. Fannie married an officer in the United States Army named Gibson, and Mary married an officer in that army named Robert Ransom, Jr. In May, 1859, Lieutenant Ransom was stationed at Carlisle Barracks in Pennsylvania, and at that time he and his wife executed and acknowledged a power of attorney to the brother of Mrs. Ransom, to convey their interest in the land, the material part of which power reads as follows:

"Know all men by these presents, whereas Lieut. Robert Ransom, Jr., of the United States Army, and Mary his wife in right of the said Mary are seized in fee-simple as tenants in common, with the sister and brother of the said Mary, to wit, Fanny Huntt and George Gibson Huntt and with B. O. Tayloe of certain lots of ground in the city of Washington in the District of Columbia, which are described as follows: [Describing among others the lots in question.] To provide for the contingency of our absence we, the said Robert Ransom, Jr., and Mary my wife, do by these presents constitute and appoint and in our place put and depute the said George Gibson Huntt, of Washington city aforesaid, to be our true and lawful attorney in fact for us, and in our name place and stead to control, manage, grant, bargain and sell, and in that event convey all our right, title and interest in and to the said lots and square of ground or any part or parts thereof, or to join in and for us and in our name to sign any proceedings in partition of the said lots and square, or to appear for us in court for that purpose; and in regard to the said real estate to do, execute and perform every act and thing necessary to be done as fully and amply as we might or could do if personally pres-

ent, and we do hereby ratify and confirm all and whatsoever our said attorney in fact may legally do in the premises.

"In witness whereof we, the said parties to these presents, have hereunto set our hands and seals this twenty-third day of May, A.D. one thousand eight hundred and fifty-nine.

"Witnesses present: R. RANSOM, Jr. [SEAL.]

"S. H. GRAHAM. M. H. RANSOM. [SEAL.]

"A. L. SPONSLER."

This paper was duly acknowledged by both Lieutenant Ransom and his wife, the latter of whom made the acknowledgment necessary to be made in the District of Columbia in order to convey real estate by a married woman.

The acknowledgment and the certificate thereof are full and complete, and taken and certified by a proper officer.

The premises in question at that time were vacant lots. Soon after the execution of this power of attorney, Lieutenant Ransom was ordered away, and, with his wife, he left the station at Carlisle Barracks and went to Fort Lyon in the western country. He was a native of one of the Southern States, and when the war broke out he resigned his commission in the army and entered the Confederate service, and at the conclusion of the war he had risen in that service to the rank of general. Mrs. Ransom's brother, George Gibson Huntt, to whom the power of attorney above mentioned was given, remained in the old army. At the conclusion of the war General Ransom returned with his wife to his native State, North Carolina, where she died in February, 1881, leaving a number of children who are complainants herein. He remained in that State until his death in January, 1892.

During the continuance of the war, the children of the deceased Mr. Huntt became anxious to sell their interest in the premises in question, as the land was still vacant and unimproved, and a source of expense in the way of the payment of taxes. It was more particularly on account of Mrs. Ransom that the sale was desired, in order to aid her as far as possible by turning her interest in the lands into money. Negotiations for the sale of the property were therefore com-

menced some time in 1864 through a real estate agent employed by Mr. Walter S. Cox, a distant relative of the parties and then a practising lawyer at the bar of the District, now one of the Justices of the Supreme Court thereof. These negotiations resulted in the sale of all their interest in the property to Mr. Tayloe, the owner of the other half interest therein, and deeds were duly given therefor by Mrs. Gibson and Mr. Huntt to Mr. Tayloe, and on the 29th of November, 1864, Mr. Huntt, assuming to act under the power of attorney already mentioned, executed, acknowledged and delivered to Mr. Benjamin O. Tayloe a paper which reads as follows:

"Know all men by these presents, that I, George Gibson Huntt, by virtue of the annexed power of attorney to me from Robert Ransom, Jr., and Mary Ransom, his wife, and for and in consideration of the sum of eight hundred and thirty-three $\frac{33}{100}$ dollars to me in hand paid by Benjamin Ogle Tayloe, of the city of Washington in the District of Columbia, the receipt of which is hereby acknowledged, have bargained and sold to said B. O. Tayloe, his heirs and assigns, all the right, title and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in and to those pieces of ground in the city of Washington aforesaid, known and described as lots Nos. one and three in square No. five, lot No. ten in square No. fourteen, lots Nos. five and nine in square No. seventeen, lots Nos. three and four in square No. twenty-eight, lot No. three in square No. thirty and the whole of square No. fifty-three, with the improvements and appurtenances; and I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benj'n O. Tayloe, in fee-simple.

"In testimony whereof I have hereunto set my hand and seal this 29th day of November, A.D. 1864.

"George Gibson Huntt. [Seal.]

(Stamp, $1. G. G. H. Jan. 4th, '65.)

"Witness: W. Kline."

This paper was acknowledged by Huntt before officers dif-

ferent from those before whom proof of the power of attorney was made. It was also and on the 14th day of January, 1865, recorded in the proper land records office in the District of Columbia, together with the power of attorney already referred to.

The purchase price of the lands was paid to Mr. Cox, who promptly paid over her share to Mrs. Gibson, and also included in such payment the share belonging to Mrs. Ransom, and Mrs. Gibson duly paid over Mrs. Ransom's share to her or expended the same for her benefit and with her approval. This was done prior to the close of the war, while Mrs. Ransom was within the lines of the Southern army with her husband, and Mrs. Gibson was in one of the Northern States.

After the death of Mr. Tayloe, which occurred in 1868, one of his daughters, Julia Tayloe, in November, 1870, succeeded, under proceedings in partition, to all the interest of her father in the premises. She married in 1865 the defendant, John W. Paine, and the other three defendants are the children of such marriage. From the time of the division of the estate of Mrs. Paine's father, Mr. Tayloe, which took place in 1870, his daughter, Mrs. Paine, claimed to be the owner of the property, and was in possession thereof, renting it through her husband and his agents, for a coal yard and for other purposes, and paying the taxes upon the same up to the time of her death in 1872, since which time her husband has been in possession, claiming the right as tenant by the courtesy, and his three children claim title in fee, subject to the life estate of their father.

Prior to the filing of this bill Mr. Paine had expended large sums of money in building twenty-two dwelling houses on the property at a cost of about $125,000, and has received the rents from such houses and paid the taxes on the property, the whole property being now estimated to be worth about $250,000. The sum at which the property was sold in 1864 was a fair price for the same and the best that could be secured after earnest efforts made to sell it.

After the death of Robert Ransom and his wife this bill was filed by their children, and the relief sought is to have

the paper executed by Mrs. Ransom's brother, George Gibson Huntt, under the power of attorney given by her husband and herself, declared null and void as a cloud upon the title of the complainants in this property, and the bill then asks that the right of the complainants to a one sixth (Mrs. Ransom's alleged) interest in the land in fee as tenants in common with the defendants may be established against all the defendants, as well the life tenant as the reversioners, and the land partitioned accordingly.

Upon these facts the Supreme Court of the District of Columbia dismissed the bill with costs, and its judgment to that effect, having been affirmed by the Court of Appeals of the District, 7 D. C. App. 116, the case is now here upon the complainants' appeal from that judgment of affirmance.

Mr. Franklin H. Mackey for appellants.

Mr. Calderon Carlisle and *Mr. William G. Johnson* for appellees.

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

The questions in this case grow out of the execution of the power of attorney by Lieutenant Ransom and his wife while at Carlisle Barracks, Pennsylvania, in 1859.

It is claimed on the part of appellants, (1) that the power of attorney given by Mrs. Ransom, a married woman, (jointly with her husband,) could not operate as a valid authority to the attorney named therein to convey her real estate, because a married woman could not convey real estate by a power of attorney; (2) that the power of attorney was revoked by the war; (3) that the paper executed by the attorney in fact pursuant to the power of attorney was not a conveyance, and did not pass the title of Mrs. Ransom to Mr. Tayloe; (4) that these difficulties were not cured by the act of Congress of March 3, 1865, c. 110, 13 Stat. 531, entitled "An act to quiet

titles in favor of parties in actual possession of lands situated in the District of Columbia," as that act only applied to instruments conveying lands and to parties who were in actual possession at the time when the act was passed, and the paper executed by the attorney was not a conveyance, and when the act was passed the premises in question were vacant; (5) that the purchase price for her interest in that land was never received by Mrs. Ransom, and her heirs are not estopped from setting up the invalidity of the alleged contract of sale or conveyance upon any equitable grounds.

The first section of the above act is set out in the margin.[1]

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[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all deeds heretofore recorded in the land records of the District of Columbia, which have been executed and acknowledged by femmes covert (their husbands having signed and sealed the same) for conveying any real estate, or interest therein, situated in said District; and all acknowledgments of deeds heretofore recorded, as aforesaid, which have been made by femmes covert (whether they have executed the deed or not) for the purpose of releasing their claims to dower in the lands described therein, situated as aforesaid, in which acknowledgments the form prescribed by law has not been followed; and all deeds heretofore recorded, as aforesaid, which have been executed and acknowledged by an attorney in fact, duly appointed for conveying real estate situated in said District; and all deeds heretofore recorded, as aforesaid, executed and acknowledged, or only acknowledged by such attorney in fact, for conveying real estate situated in said District, as to which the acknowledgment was made before officers different from those before whom proof of the power of attorney was made, and as to which the power of attorney was proved before only one justice of the peace; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged out of the District of Columbia, before a judge of a United States court, or before two aldermen of a city, or the chief magistrate of a city, or before a notary public; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged by an attorney in fact, duly appointed, or by an officer of a corporation, duly authorized, who has acknowledged the same to be his act and deed, instead of the act and deed of the grantor or of the corporation; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District to which there is not annexed a legal certificate as to the official character of the officer or officers taking the acknowledgment, shall be, and the same are hereby, declared to be of the same effect and validity to pass the fee-simple or other estate intended to be conveyed, and bar

Opinion of the Court.

Very careful and well-considered opinions have been delivered in the case, both in the Supreme Court and in the Court of Appeals of the District, in which these various questions are discussed. The Supreme Court held that the two papers (the power of attorney and the instrument executed in pursuance thereof) were so far valid as to be subject only to such objections and defects of form of execution and acknowledgment as could be cured by legislation, and these defects were cured by the act of Congress; that this statute was constitutional, and that the power of attorney was not revoked by the war, but was in full force and valid when the deed by the attorney was executed. The court also thought the defence which had been set up, that the complainants were at the commencement of the suit and thereafter out of possession and their title denied by the defendants, who were

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dower in the real estate therein mentioned in favor of parties in actual possession, claiming under and through such deeds, as if such deeds had been by such femmes covert executed and acknowledged, or acknowledged in case of a dower right, in the form heretofore prescribed by law; as if such deeds had been executed and acknowledged by the grantor in the deed; as if such power of attorney had been proved before the officer or officers taking the acknowledgment; as if such power of attorney had been proved before two justices of the peace; as if such acknowledgment had been made before any judge of a state court, or before two justices of the peace; as if such attorneys in fact or officer of a corporation had acknowledged the deed to be the deed of the grantor or of the corporation; as if such deeds had thereto annexed a certificate, in legal form, that the officer or officers taking the acknowledgment were really what they purport to be: *Provided*, That the certificate of acknowledgment by a femme covert shall show that the acknowledgment was made "apart" or "privily" from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect: *And provided, also*, That when the power of attorney shall have [been] executed by a femme covert the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged and recorded according to law.

in actual and full possession, was an answer to the bill for partition even if there had been no other defence proved. The bill was therefore dismissed.

The Court of Appeals, while discussing somewhat the defence that complainants were out of possession, did not decide the case upon that ground, but held that the power of attorney (properly acknowledged by Mrs. Ransom, as above stated) duly conferred upon the attorney in fact the legal power to convey Mrs. Ransom's interest in the land; that the war did not revoke the power; that the paper executed and delivered by the attorney in fact was not a conveyance, but only a contract for the sale and conveyance of the land; that the act of Congress did not apply to such a paper; and, lastly, that the contract of sale was within the scope of the power of attorney, and vested in the purchaser an equitable interest or estate which, upon general equitable principles, a court of equity would not divest out of the vendee in the absence of fraud, and no fraud being alleged or shown, and the purchase money having been received by Mrs. Ransom, equity would not set aside the sale. We will now state the conclusions to which we have come regarding these questions:

And, first, as to the question whether the power of attorney executed by Lieutenant Ransom and wife to George Gibson Huntt authorized and enabled the attorney to bargain and sell and convey, or contract to convey by deed of bargain and sale, the property therein mentioned. We think it did.

Under the laws of Maryland, which were in force in the District of Columbia in 1859, we think it was then competent for a married woman, outside of the District, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the District, thereby became a valid and sufficient instrument to authorize the conveyance by attorney. It is not claimed that the acknowledgment to the power of attorney in this case was insufficient in matter of form to comply with the statute in that respect.

The real contention is, assuming the acknowledgment to have been sufficient, that a married woman could not by any manner of acknowledgment appoint an attorney with authority to convey her lands. It is true that by the common law a married woman could not convey an estate of freehold owned by her unless by levying a fine or suffering a common recovery. This was altered by the statute in England of 3 & 4 Will. IV, c. 74, abolishing fines and recoveries, and providing other means for the conveyance of estates. In most, if not all, of the States of the Union, statutes have been passed providing for the manner in which a married woman can dispose of her real estate. These statutes were intended to and did set aside the technicalities of the common law, and they provided some simple and effectual method for the transfer of the interests of married women in real estate. The Chief Justice of the Court of Appeals of the District of Columbia, in delivering the opinion of that court in this case, has cited several Maryland statutes which the court holds were in force in this District in 1859, and those statutes are also held to provide for the case of the execution of a power of attorney by a married woman joined in by her husband and privily acknowledged by her, authorizing the attorney in fact to convey her real property in the District.

This separate acknowledgment is provided for in probably all the statutes of the various States relating to the subject of the conveyance by married women of any interest they may have in real estate. It has been said to be the most important and essential element in the method employed to transfer such estates.

The statutes referred to in the opinion are the statutes of Maryland of 1715, c. 47; 1752, c. 8; and 1766, c. 14; and in those statutes the ceremony of the private examination of the married woman and her voluntary acknowledgment of the deed were made substitutes for the private examination as to her voluntary consent in the levying of the fine or the suffering of a common recovery. After citing these various statutes of Maryland and commenting upon their provisions relating to conveyances of married women, the Chief Justice, in his opinion in this case, says:

"These provisions of the acts of 1715 and 1766 were in force in this District in 1859, and are still in force, and they were in no respect repealed by or in conflict with the acts of Congress of the 31st of May, 1832, (4 Stat. 520,) and of the 20th of April, 1838, (5 Stat. 226, relating to the execution and acknowledgment of deeds for land in the District of Columbia. The acts of Congress do not profess to repeal the acts of Maryland of 1715 and 1766, or to be exclusive in their operation; but they have, in some particulars, not involved here, amplified and extended the provisions of the former statutes then in force. And, construing these statutes all together, and looking to the reason and policy upon which they are founded, it would seem to be clear that in the year 1859 and down to the year 1865, it was competent to a *feme covert*, by a joint power of attorney with her husband, duly executed and acknowledged according to the forms prescribed by the statute, to execute and acknowledge a valid deed of conveyance of her real estate situate in the District of Columbia. It is well settled that a power to convey land must possess the same requisites, and observe the same solemnities in execution and acknowledgment, as are necessary in a deed directly conveying the land; and that a title to land can only be acquired and lost according to the laws of the place where the land is situated. (*Clark* v. *Graham*, 6 Wheat. 577.) In this case, the property to be conveyed was specifically mentioned and described in the power of attorney; and the power of attorney was executed and acknowledged at Carlisle, in the State of Pennsylvania, by husband and wife, under their hands and seals, and the acknowledgment and authentication of the instrument was in all respects in accordance with the provisions of the statutes in force in the District of Columbia, providing the manner and form in which the real estate of *femes coverts* could be conveyed. Indeed, we do not understand that the statutory requirement in respect to the form of acknowledgment and authentication thereof, is a matter of objection. The terms of the statutes, 'any grantor or bargainor of any lands or tenements,' being out of the province; or 'any person or persons conveying,' etc.; not residing in the prov-

ince at the time,' etc., 'may acknowledge said deed by letter of attorney, well and sufficiently proved,' etc., are sufficient to embrace *femes coverts*, authorized to sell and convey their real estate. If not, then the husband could not sell and convey by power of attorney, free of the contingent right of dower of his wife, for if the wife could not acknowledge by power of attorney a deed for the conveyance of her own real estate, she would be equally unable to acknowledge, by power of attorney, a deed for the relinquishment of dower in the lands of her husband. Such disability, we think, was never intended by the legislatures passing the statutes to which we have referred, to be fixed upon *femes coverts*, having lands with right to convey the same."

We give great weight to the views expressed by the Chief Justice in regard to these statutes of Maryland because, as is well known, he occupied for many years a seat upon the bench as Chief Justice of the Court of Appeals of that State, and is specially familiar with its laws and the construction given them by the courts of the State. In addition to such circumstance and from a perusal of the various statutes cited, our own judgment concurs with the Court of Appeals upon this question. We think a clear implication arises from the provisions of these acts that a power of attorney such as has been described, and acknowledged as already mentioned, was good in 1859 in this District. We can think of no good reason for excluding such implication. Where the person is by the statute allowed to do the principal thing directly, we think she could do it by power of attorney as described in this case. The power to convey includes in such case the power to appoint another to do the same thing. We, therefore, agree with the views expressed by some of the text writers, when power is given by statute to married women to convey their interest in real estate where their husbands join in the conveyance and where the private examination is made, that in such cases the right of the wife to dispose of it by power of attorney joined in by her husband and where she was privately examined, etc., would naturally be implied. The common law which incapacitates a married woman from making a contract

in general is so far altered by the statute as to permit her to execute a power of attorney and to therein contract to ratify his acts, instead of conveying directly, as the statute in terms provides. (See Washburn on Real Property, [4th ed.] vol. 3, p. 258.) The author there says: "It is laid down unqualifiedly, in some of the States, that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest. But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts. A similar right is also recognized by statute in New York." We do not think the aid of a statute is necessary. When the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her. The reasoning which would prevent it is, as we think, entirely too technical, fragile and refined for constant use. It is said in Story on Agency, sec. 6: "So in regard to married women, ordinarily they are incapable of appointing an agent or attorney; and even in case of a joint suit at law, an appointment of an attorney by a married woman is void; and her husband may make an attorney for both. But where a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, there, perhaps, she may, with the assent of her husband, appoint an agent or attorney to do the same." In this case we hold that, as the wife was capable of conveying her real estate in Washington in 1859, by a deed, properly executed and acknowledged by her privily, etc., and joined in by her husband, she could accomplish the same thing by authorizing another to convey for her, where the authority was joined in by her husband, and the required private examination, etc., made.

The Court of Appeals of Maryland has never, so far as we can discover, construed the statutes above cited in any manner opposed to the views expressed by the Court of Appeals of this District in this case. The cases of *Webster's Lessees* v. *Hall*, 2 Harr. & McH. 19; *Flannigan* v. *Young*, 2 Harr. & McH. 38; *Hollingsworth* v. *McDonald*, 2 Harr. & Johns. 230;

and *Lawrence* v. *Heister*, 3 Harr. & Johns. 371, in which the above-named statutes are referred to, were all cases where deeds had been executed and where the acknowledgment of either the wife or the husband was held to be defective under the provisions of those statutes. In some of the cases it was said to be necessary, in order to pass the interest of the wife in her land, that she and her husband must join in the deed as grantors, which must be properly acknowledged, etc. This statement was not made as descriptive of the only method by which a married woman could convey her land, but was made in relation to the defective manner in which the deed of conveyance was executed in the particular case, which was the case of a deed defectively acknowledged under the statute. No decision has been cited by counsel for the appellants from the courts of Maryland which is inconsistent with or opposed to the construction given to these statutes by the court below.

In *Holladay* v. *Daily*, 19 Wall. 606, 610, the plaintiff and his wife appointed an attorney with general power to convey land which belonged to the husband. The attorney in fact subsequently conveyed the lands, and the plaintiff Holladay, after such conveyance, alleging that he had never received any of the consideration money recited in the deed, sued to recover back the possession of the land. The only question was as to the sufficiency in law of the power of attorney from Holladay and wife to Hughes, the attorney in fact, and his deed thereunder to pass the title of the husband. It was held that the power was sufficient, the court saying: "Here the object, and the sole object, of the power was to enable the attorney to pass the title freed from any possible claim of the wife; and under the law of Colorado that result could be accomplished by the deed of the husband alone as fully without as with her signature." What was said by the learned justice in delivering the opinion of the court in that case in regard to the manner in which the interest of married women in real estate could be conveyed was not necessary to the decision of the case, the point decided being that, considering its form, the power of attorney signed by the husband and wife was valid to convey his interest in the real property.

Opinion of the Court.

Finally, upon this branch of the case, we also concur with the lower court in holding that the first section of the act of Congress, already mentioned, contains a clear legislative recognition of the right to make this power of attorney. In this case, we think this fact is entitled to exceptional consideration. The act was evidently drawn with care, and it fully and plainly describes the different defects of the various instruments upon which it was intended to operate. Although the section is quite long and the phraseology is somewhat involved, yet the meaning of the section is perfectly clear. Certain provisions therein fully recognize the then existing right of a married woman to appoint jointly with her husband an attorney in fact to convey lands owned by her in this District, and language is used for the purpose of curing certain named defects which might exist in the execution or acknowledgment of such a paper. Speaking of the acknowledgment, the statute in the first section proceeds in this way: "*And provided, also*, That when the power of attorney shall have been executed by a *feme covert*, the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged and recorded according to law." It had already been provided in the section "that the certificate of acknowledgment by a *feme covert* shall show that the acknowledgment was made 'apart' or 'privily' from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect."

The acknowledgment attached to the power of attorney in this case was sufficient under the provisions of this act to pass the estate and interest of Mrs. Ransom if she had been a

party executing a deed conveying her real estate in the District.

Upon a consideration of all the circumstances, we have no doubt that the power of attorney in question was properly executed and acknowledged, and that it authorized the person named therein as attorney in fact to convey Mrs. Ransom's real estate situated in this District.

(2.) The next question which arises is whether this power of attorney was revoked by the war which broke out between the two sections of the country in 1861.

Lieutenant Ransom, although one of the last officers to go out, did resign his commission in the army of the United States and went South and entered the army of the Confederacy, in which, before the close of the war, he attained high rank. His wife followed him, so that during the war they were both inside the lines of the Confederacy.

We are of opinion that the war did not revoke the power of attorney executed by Mrs. Ransom and her husband. It is not every agency that is necessarily revoked by the breaking out of a war between two countries, in which the principal and agent respectively live. Certain kinds of agencies are undoubtedly revoked by the breaking out of hostilities. Agents of an insurance company, it is said, would come within that rule. *Insurance Company* v. *Davis*, 95 U. S. 425, 429. In that case Mr. Justice Bradley, in delivering the opinion of the court, said:

"That war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment

of debts to an agent of an alien enemy, where such agent resides in the same State with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it."

The learned judge then adds that, in order to the subsistence of the agency during the war, it must have the assent of the parties.

These remarks were made in relation to the case then before the court, which was an action on a policy of life insurance issued by a New York corporation before the war upon the life of Davis, a citizen and resident of the State of Virginia. The premiums were regularly paid until the beginning of the war, the last one having been made December 28, 1860. Previous to the war the company had an agent residing in Petersburg, Virginia, where the assured also resided, and premiums on the policy had been paid him in the usual way. About a year after the war broke out the agent entered the Confederate service and remained there until the close of the war. An offer of payment of the premium due in December, 1861, was made to the agent, which he declined to receive, alleging that he had received no receipts from the company, and that the money, if he did receive it, would be confiscated by the Confederate government. He testified that he refused to receive any premiums, had no connection with the company during the war, and after it terminated did not resume his agency. Davis died in September, 1867. The plaintiff below was assignee of the policy, and claimed to recover the amount of ten thousand dollars on the ground that he was guilty of no laches and that at the close of the war the policy revived. The judge instructed the jury that if the assured was ready and offered to pay his premium to the agent in Virginia, after the breaking out of the war, there was no forfeiture of the policy, although the agent refused to receive the money, if within a reasonable time after the war he endeavored to pay his premium and the company refused to receive it. The defendant contended that the war put an end

to the agency, and that the offer to pay the premium to the former agent was of no validity, and the failure to pay rendered the policy void. This court held that the case was nearly on all fours with that of the *New York Life Insurance Company* v. *Statham*, 93 U. S. 24, but the point as to the supposed power of an agent of a company in the adhering States to receive premiums in a State in insurrection after the war broke out not having been specially adverted to in the opinion of the court in that case, it was particularly considered in the *Davis case*, as above quoted from. It was in relation to such an agency that the remarks were made. Agents of a life insurance company are undoubtedly engaged in the active business of their principal. Their duty is to receive the premiums for all policies obtained by them and to transmit such premiums to the home office. The prompt transmission of such premiums is a necessity for the successful prosecution of the business of the company. Upon their receipt the company is able to invest them in some interest-bearing security, and thus provide funds for the ultimate payment of the policy when it matures. It is easy to see that active and continuous business of such a nature could not be carried on during a war where the principal and the agent reside in the different countries engaged in such war.

In the case of *Kershaw* v. *Kelsey*, 100 Mass. 561, the general subject of contracts and business entered into and transacted between the citizens of the different States at war with each other is examined, and the question treated with great care by Mr. Justice Gray in delivering the opinion of the Supreme Judicial Court of Massachusetts, and numerous authorities are referred to and commented upon in the opinion. In the course of that opinion it was said at page 572: "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by

transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

Under the circumstances of this case, we think the attorney in fact had the right to make the conveyance he did. It was not an agency of the class such as is mentioned in *Insurance Company* v. *Davis*, *supra*, and was not necessarily revoked and avoided by the war. Where it is obviously and plainly against the interest of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out will not be presumed but must be proved, either by his subsequent ratification or in some other manner. And on the other hand, where it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then those acts are just as valid and binding upon the principal as if no war had intervened. *Insurance Company* v. *Davis*, *supra*.

It is entirely plain, as we think, that the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the

nature and character of the agency. This case shows that in 1859, at the time when the power of attorney was executed, Lieutenant Ransom and his wife were desirous of realizing their share of the value of the land in controversy. It was vacant, unimproved land in the city of Washington, and the charge for taxes was quite burdensome. The parties desired to realize the money. No sale of the property was effected from that time until the latter part of 1864, or early part of 1865. There is no evidence of any such change of circumstances as would naturally suggest a revocation of the authority to sell, but on the contrary the testimony is otherwise. It appears to have been to the interest of all parties to sell and thus to free themselves from a constant source of expense. In addition to that, the evidence is clear and sufficient that after the sale the action of the attorney in fact of Mrs. Ransom was ratified and confirmed by her by the receipt of her share of the purchase money or its expenditure for her benefit and with her assent and approval. Her sister, Mrs. Gibson, testified that Mrs. Ransom's share of the purchase money was either paid over to her or expended for her at her direction. This full and complete ratification of the act of the agent shows conclusively the assent of the principal to the continuance of the agency notwithstanding the war. Some criticism is made upon this testimony of Mrs. Gibson because, after the passage of so many years, she is unable to state definitely which course was pursued, whether the money was paid to Mrs. Ransom, or whether it was expended for her at her direction. We think the criticism is not well founded. Mrs. Gibson might well have been able to state with absolute certainty that she either paid the money to Mrs. Ransom or expended it for her at her direction, and yet after this lapse of time she might also be unable to state with like certainty which of the two courses was pursued. It is perfectly possible for a witness to be certain of the ultimate fact and yet to have forgotten the intermediate facts upon which that ultimate fact was based.

Here we have a power of attorney properly executed for the purpose of selling, among other lots, this real estate in question, and a state of circumstances which fairly shows that

it was for the benefit and interest of the principal that such real estate should be sold at the time the sale in fact occurred; we have also the principal's receipt of her share of the purchase money in 1865, with full knowledge of all the facts, and her acquiescence in and approval of the action of her attorney up to the time of her death in February, 1881. Upon these facts, we think it clear that the instrument executed by the attorney in fact was as valid and effectual as if no war had intervened. The ratification of the act of the attorney was full and complete. It recognized and assented to the continued existence of the agency. The purchase money for the land was received by the principal, and to permit her heirs after her death to repudiate the transaction on the ground that the power of attorney had been revoked would be at war with every principle of equity and fair dealing. This principle applies as strongly in the case of a married woman as in any other, and it will not permit her or, upon her death, her heirs at law to repudiate a transaction the benefits of which she received with full knowledge of the circumstances attending it, and yet claim to recover an estate which had been sold with her authority and the purchase money for which had been paid to her. *Bein* v. *Heath*, 6 How. 228, 247; *Bank* v. *Partee*, 99 U. S. 325, 329. *Bedford* v. *Burton*, 106 U. S. 338, considers generally the obligation of married women to do equity under circumstances somewhat similar in principle to the present case.

Nor does the act of Congress of July 17, 1862, c. 189, 12 Stat. 589, to suppress insurrection, etc., have any effect upon the sales, transfers or conveyance of the estate and property of persons in rebellion after September 23, 1862, except as to the United States. As against that Government, the transfers of property liable to seizure were null and void; they were not void as between private parties or against any other party than the United States. *Conrad* v. *Waples*, 96 U. S. 279, 288.

(3.) Even though the power of attorney were valid and had not been revoked by the war, it is objected that the instrument executed by the attorney in fact conveyed no title, but at best was a mere contract of sale; and,

(4.) That this objection is not cured by the act of Congress, above set forth.

These two questions may be considered together; and it makes no difference in the result whether the instrument be construed as conveying a legal title, or an equitable title only.

Some of the justices of this court concur in opinion with the Court of Appeals that, taking all the provisions of the instrument together, it did not amount to a deed of conveyance, but only to an agreement to convey made by an attorney who was authorized by his power to make a conveyance. In that aspect of the case, the instrument would convey an equitable title, which would afford a good defence to this bill; and it would be unnecessary to invoke the curative act of Congress.

But a majority of this court is of opinion that the instrument was in the nature of a conveyance of the legal title, though defectively executed, and that it came within the provisions of the act, and the defect was thereby cured.

We agree generally that although there are words of conveyance *in præsenti* in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. The whole question is one of intention to be gathered from the instrument itself. *Jackson* v. *Moncrief*, 5 Wend. 26; *Ogden* v. *Brown*, 33 Penn. St. 247; *Phillips* v. *Swank*, 120 Penn. St. 76.

Looking at the instrument executed by the attorney it will be seen that he refers to and annexes the power of attorney executed to him by Robert Ransom, Jr., and Mrs. Ransom, his wife, states the consideration received by him from Mr. Tayloe, acknowledges its receipt, and then acknowledges that he has "bargained and sold to Mr. B. O. Tayloe, his heirs and assigns, all the right, title and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in and to" the various pieces of ground, including the ground in question, and then adds, "with the improvements and appurtenances." Stopping here,

and construing the language of the instrument, there can be no question that it was executed as a conveyance of the interest of the principals in the land, and was intended as such by the attorney in fact. Although the instrument shows an intention on the part of the attorney to convey the title of his principals, yet, instead of signing their names by himself as attorney, he signs his own name, preceding the signature with the statement "In testimony whereof, I have hereunto set my hand and seal this 29th day of November, 1864." This is one of the defective executions of an instrument under a power of attorney, spoken of in the act of congress. It is alleged, however, that the following language, which appears at the end of the instrument executed by Huntt, changes the character of that instrument, and shows that it was not intended as a conveyance but as a simple contract of sale. The language referred to comes immediately after the words "with the improvements and appurtenances," and is as follows: "And I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benjamin O. Tayloe in fee simple."

We do not think this language changes the effect of the prior portion of the instrument, nor does it show that the intention of the person executing it was simply to enter into a contract of sale. He is the only one who signs it. The instrument shows that he is executing it as an attorney in fact and by virtue of the power of attorney annexed to the instrument. Although he assumes therein to bargain and sell (in legal effect to convey) to Mr. Tayloe, his heirs and assigns, all the right, title and estate of his principals, being a one undivided third part of the real estate in question, yet he also agrees in the same instrument, in addition to the conveyance by himself of the title of his principals, to also obtain from them a deed of the same premises. This portion of the instrument is a contract in the nature of a covenant for further assurance. It may well be that the grantee, Mr. Tayloe, while taking the conveyance from the attorney in fact, and paying the full consideration for the land, would also desire to obtain

a deed conveying the same title and executed by the parties in person. This desire may easily be understood even upon the assumption that the instrument executed by virtue of the power of attorney was intended to convey the title. Such a deed would remove all possible question which could, in any event, arise based upon the fact that the conveyance was executed by an attorney instead of by a principal. The agreement to obtain a conveyance from his principals is entirely consistent with the prior portion of the instrument in which the attorney assumes to convey the title by virtue of the power of attorney which he annexes. If the attorney had, instead of agreeing on behalf of his principals that they should make and execute a proper deed of conveyance of the premises, agreed that he would himself at some future time make such a deed, a different question would be presented; for in that case, taking the whole instrument together, it might be argued that there was no intention at that time to convey the title. But, where, in addition to conveying the title himself by apt words, clearly expressed, he simply agrees to also procure a proper deed from his principals at some future time, there is nothing inconsistent in that agreement with the intention to himself convey the title by virtue of the power. Nor do we regard the fact as material upon this latter point that in the acknowledgment of the instrument in question, taken by two aldermen who were *ex officio* justices of the peace, they describe the instrument as a certain contract of sale, and certify that "Mr. Huntt executed said contract and acknowledged the same to be his act and deed." What the aldermen may have regarded as the legal effect of the instrument is not of much importance, and whether they described it as a contract of sale or as a conveyance cannot alter the character of the paper itself or its legal effect.

Being of opinion that the paper was in the nature of a conveyance, we also think that the defective execution of the instrument was cured by the act of Congress. This instrument was executed by the attorney in fact, who acknowledged the same to be his act and deed instead of the act and deed of his principals, and the act of Congress provides that in such case

the deed shall have the same effect as if such attorney in fact had acknowledged the deed to be the deed of the grantors (his principals). One or two other defects existed of a like nature, that is, of a nature which might be cured by a legislative act, and which were cured by the act in question.

The statute applies where the parties intended to convey, thought they had conveyed, and yet had not complied with the requisites necessary to make the conveyance in all things effective. In such case, especially where the consideration for the instrument has been received and retained, curative statutes may be passed which give validity to the defective instruments to the same extent as was intended by the parties at the time when they were executed. *Watson* v. *Mercer*, 8 Pet. 88, 110; *Randall* v. *Kreiger*, 23 Wall. 137.

The chief objection to the act, assuming that the instrument was a conveyance, is that it does not apply in this case as plaintiffs urge, because at the time when the act was passed the parties claiming through this deed were not, as plaintiffs contend, in the actual possession of the land covered by it. The statute declares the instrument is to have effect and validity to pass the fee simple to the estate intended to be conveyed and to bar dower in the real estate therein mentioned "in favor of parties in actual possession, claiming under and through such deeds." It is said that this limitation to the parties in actual possession refers to the time when the act was passed, and if the parties claiming under the deed were not at that time in actual possession of the premises, the statute has no application to them. We think the act applies if at the time when it was passed the parties claiming under the defective instrument were in actual possession of the land, and that the act also applies if the parties claiming under such instrument were not in actual possession at the time of its passage, but subsequently came into such possession. The act cured the defects in the instrument mentioned therein, if when it passed the parties were in actual possession, claiming under such instruments; and if thereafter ousted they could still claim the benefit of the act even in an attempt to regain possession. If not in actual possession

when the act was passed, they could not have the benefit thereof in an attempt to obtain possession thereafter. But if thereafter they were in actual possession, they could defend that possession under the act, so far as their title depended upon defective instruments existing at the time when the act was passed and which were of a character covered by its terms.

We think this is a fair construction of the act, and that it ought to be liberally construed for the purpose of obtaining the benefits it was clearly intended to give in the case of a defective execution of otherwise valid instruments. This view renders it unnecessary to decide as to the validity of the objection that these defendants were not in actual possession when the act was passed. We do not decide whether they were or not. They were in actual and undisturbed possession at the commencement of this suit, and they can avail themselves of the act to protect such possession and their title under the deed in question.

(5.) The fifth objection taken we have already answered in holding that Mrs. Ransom did, in fact, receive the purchase price of her share in the land with full knowledge that it was such purchase price, and thereby ratified and confirmed the act of her attorney.

By this disposition of the whole case upon the merits we are not to be considered as deciding that parties situated as the plaintiffs were in this case, out of possession, can maintain an action for partition. We have not discussed that question, and do not decide it, because it was unnecessary on account of the views we have stated in relation to the other aspects of the case.

We are of opinion that the complainants have failed to make out a cause of action, and the judgment dismissing the bill must, therefore, be

Affirmed.

Mr. Justice White did not sit in this case and took no part in its decision.

HOLDER *v.* AULTMAN.

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

No. 109. Argued November 8, 9, 1897. — Decided January 10, 1898.

Under a statute of a State, imposing a franchise tax on foreign corporations doing business in the State without having filed articles of association under its laws, and providing that "all contracts made in this State" after a certain date, "by any corporation which has not first complied with the provisions of this act, shall be wholly void," a contract of such a corporation, signed by its local agent and by the other party within the State, and stipulating that the contract is not valid unless countersigned by its manager in the State, and approved at its home office in another State, is not "made in this State," within the meaning of the statute, even if it is to be performed within the State.

THIS was an action of assumpsit, brought September 21, 1894, in the Circuit Court of the United States for the Eastern District of Michigan, by Aultman, Miller & Co., a corporation of the State of Ohio, against William Holder, a citizen of the State of Michigan, to recover the price of agricultural machines furnished by the plaintiff to the defendant, and sold by the defendant, under a contract in writing, the material parts of which were as follows:

"This agreement, made this 20th day of February, 1894, between Aultman, Miller & Co., a corporation duly incorporated under the laws of the State of Ohio, of Akron, Ohio, of the first part, and William Holder, of Laingsburgh, county of Shiawassee, and State of Michigan, of the second part, witnesseth, That the party of the second part is hereby authorized to sell Buckeye mowers, reapers and binders and extra parts thereof in the following territory, viz., Laingsburgh and vicinity," and other specified territory in Michigan, "for and during the season of 1894, on the following terms and conditions, viz.:

"The party of the second part agrees: First. To use all reasonable diligence in canvassing and supplying said terri-

tory with said machines." Second. "To sell the said machines at the retail list prices authorized by said first party;" "to grant credit to such persons only as are of well known responsibility;" "to see that all notes taken for machines sold are drawn on blanks furnished by the said first party;" "and, in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal;" and to redeem all notes not accepted by the party of the first part. Third. To endorse, unless sufficiently secured, "all notes given by renters and parties owning no real estate." Fourth. "That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part until converted into notes or money," and such notes shall remain the property of the first party; and, "in all cases where machines are sold for cash, or part cash and notes, all such cash received shall be promptly remitted." Fifth. "To see that all machines sold are properly set up and started;" and "to keep a correct record of sales." Sixth. To receive all "goods shipped or delivered on account of said first party;" to pay the freight on them, and keep them insured; "to keep all unsold goods well housed and cared for, subject to the order of the party of the first part;" and to make no charge for handling or storage. Seventh. To furnish "repairs, free of charge, to customers," only in case of flaw or defect. Eighth. "To make prompt and accurate reports of machines on hand, as often as requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and, in case of failure to make such report or transfers, to pay said first party, for all machines remaining on hand at settlement unsold by reason of such failure, at the option of said first party." Ninth. "To sell, or assist in the sale of, no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract." Tenth. "To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time." Eleventh. To advertise this agency.

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"The party or the first part further agrees with the party of the second part: First. To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled;" "nor shall any commission whatever be due said second party until a full settlement of account is made." Second. "To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines, and making collections whenever required," certain specified commissions. Third. "To furnish the said second party a stock of extra castings and other repairs," to be sold on commission. Fourth. "To sell the said second party knives and sickles," and certain other things, at a discount of fifty per cent. Fifth. "To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

"NOTICE. — It is especially agreed that when sales have not been closed by cash or notes on or before delivery, as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlement. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for. No canvassers or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you; and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him; nor will any promise not authorized in writing by our manager at Lansing, Michigan, be recognized at settlement."

"In witness whereof, the parties hereunto have set their hands the day and date above written.

"AULTMAN, MILLER & CO.,
"By D. C. GILLETT.

"This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio.

"Wm. Holder.

"Countersigned, Lansing, Michigan, Feb. 27, 1894.

"R. H. Worth, Manager."

Across the back of the contract were written these words:

"Approved April 29, 1894. Ira M. Milloy, Secretary."

The declaration alleged that "on February 27, 1894, at the said village of Laingsburgh and at the city of Lansing, in the Eastern District of Michigan, the said plaintiff, by D. C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant, William Holder," above stated; and that "afterwards, to wit, on April 27, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, in the State of Ohio, and the same then and there became and was a binding and valid contract between the defendant and the plaintiff, according to the terms thereof, to wit, at the city of Lansing, in the Eastern District of Michigan;" that the plaintiff faithfully performed its contract, and in pursuance thereof shipped to the defendant a large number of mowers, reapers and binders, and extra parts for the same; and the defendant sold them under the contract, and became liable to pay the plaintiff the sum of $5052.56; and had never paid him that sum, or any part thereof. The declaration, besides a count on the contract, contained the common counts.

The defendant relied on the statute of Michigan of 1891, c. 182, § 1, as amended by the statute of 1893, c. 79, and copied in the margin;[1] and alleged that the contract sued on was

[1] An act to amend section one of act number one hundred and eighty-two of the public acts of eighteen hundred and ninety-one, entitled "An act to provide for the payment of a franchise fee by corporations," approved July two, eighteen hundred and ninety-one.

Section 1. The People of the State of Michigan enact, that section one of act number one hundred and eighty-two of the public acts of eighteen hundred and ninety-one, entitled "An act to provide for the pay-

made and to be performed in the State of Michigan, within the meaning of the statute; that the plaintiff, being a foreign corporation, was at the time of the execution of that contract doing business in the State of Michigan, within the meaning and application of the statute, and had not complied with its requirements; and that the contract was therefore absolutely void and without force as against the defendant.

The parties waived in writing a trial by jury, and submitted the case to the decision of the court, which found the following facts:

On April 29, 1894, the parties entered into the contract above stated; and it was executed, accepted and approved,

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ment of a franchise fee by corporations," approved July two, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

SECTION 1. The People of the State of Michigan enact, that every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the secretary of state, and every foreign corporation or association which shall hereafter be permitted to transact business in this State, which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein, shall pay to the secretary of state a franchise fee of one half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State, which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act, shall be wholly void.

This act is ordered to take immediate effect.

Approved May 13, 1893.

as set forth therein, and in the indorsement thereon. Its provisions, so far as the plaintiff is concerned, have been fulfilled; and there is a balance due to the plaintiff under it of $5052.56. The plaintiff is a corporation organized and existing under the general laws of Ohio, having its corporation office and its manufactory at Akron in that State; and does not manufacture any goods in the State of Michigan. It sells its goods in Michigan by means of local commission agents, and has a general agent at Lansing in Michigan; its commission agents are under contracts with it similar to that sued on; and all contracts are sent to the plaintiff at Akron, for approval or rejection, before taking any effect. The goods manufactured by the plaintiff at its factory in Akron, and sold by it in Michigan, are shipped from the factory upon orders received from commission agents and forwarded by the general agent from Lansing to Akron. Goods are shipped, either directly to the commission agent, or in bulk to Lansing or elsewhere in Michigan, and reshipped in smaller lots to the commission agents. The plaintiff owns a warehouse in Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. Some of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partly commission goods, and partly goods sold directly to them. Accounts with every commission agent in Michigan are kept at the plaintiff's office in Akron. The plaintiff effects settlements with its commission agents by sending copies of such accounts to its general agent, who goes over the season's work with each commission agent, collects the cash and notes taken in payment for machines sold, and forwards them to the plaintiff at Akron, subject to the plaintiff's approval or rejection of the notes. The notes are filed and kept by the plaintiff at Akron until just before maturity, when they are sent to the bank or to express agents for collection and remittance to Akron. The plaintiff has never filed a copy of its articles of association in the office of the

secretary of state or in any other office in Michigan, or paid any franchise fee to the State of Michigan, or in any way complied, or attempted to comply, with the statute above mentioned.

Upon these findings of fact the court made the following conclusions of law: 1st. The plaintiff's business, as carried on under and in pursuance of the contract, is an interstate commerce business; and the plaintiff is not subject to the aforesaid statute; and the statute, so far as it applies, or purports to apply, to foreign corporations like the plaintiff, which are doing an interstate commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate interstate commerce. 2d. The contract was made and executed in the State of Ohio, and does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States. 3d. The plaintiff is entitled to recover the sum of $5052.56. 68 Fed. Rep. 467.

Judgment was rendered for the plaintiff accordingly; and the defendant sued out a writ of error from this court, upon the ground that the case was one in which a law of a State was claimed to be in contravention of the Constitution of the United States, within the act of March 3, 1891, c. 517, § 5, 26 Stat. 828.

Mr. Clark C. Wood for plaintiff in error. *Mr. Frederick A. Maynard*, Attorney General of the State of Michigan, filed a brief on behalf of the same.

Mr. Frederick A. Baker and *Mr. John A. Bradley* for defendants in error. *Mr. Olin L. Sadler* was on their brief.

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

This action was brought in the Circuit Court of the United States for the Eastern District of Michigan, by a manufactur-

ing corporation of the State of Ohio, having its principal office and its factory at Akron in that State, against one of its commission agents, a citizen of Michigan, to recover the price of agricultural machines sold by the defendant in Michigan under a contract in writing, by which the plaintiff authorized the defendant to sell, within a certain territory in Michigan, such machines supplied to him by the plaintiff; and the defendant agreed to canvass the territory, to sell the machines at retail prices fixed by the plaintiff, to hold the unsold machines as the plaintiff's property, to keep and render accounts of sales, and to remit the proceeds to the plaintiff.

The defendant relied on a statute of Michigan of May 13, 1893, which required every foreign corporation, permitted to transact business in that State, and not having filed articles of association under its laws, to pay a franchise tax of half a mill upon each dollar of its capital stock; and further provided that "all contracts made in this State after January 1, 1894, by any corporation which has not first complied with the provisions of this act, shall be wholly void." Michigan Public Acts 1893, c. 79, p. 82.

The Circuit Court, in giving judgment for the plaintiff, held that the contract was made in the State of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate interstate commerce. 68 Fed. Rep. 467.

This was therefore a "case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States," and was rightly brought directly to this court by writ of error under the act of March 3, 1891, c. 517, § 5. 26 Stat. 828. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not

limited to the constitutional question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn Ins. Co.* v. *Austin*, 168 U. S. 685.

But this court has not found it necessary to pass upon the constitutional question, because it is of opinion that the contract is not within the statute set up by the defendant.

By the clear terms of the statute of Michigan, the invalidity of the contract does not depend upon the place where, or the time when, it is to be performed, but upon its being "made in this State after January 1, 1894." A contract made before that date is valid, although it is to be performed afterwards; and a contract made elsewhere than in Michigan is valid, although it is to be performed in this State.

A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both.

This contract is admitted to have been drawn up at Laingsburgh, in the State of Michigan, where the defendant resided. It begins by stating that it is "made this 20th day of February, 1894, between" the plaintiff and the defendant; and it ends with the clause, "In witness whereof, the parties hereunto have set their hands the day and date above written." Then follows the signature, "Aultman, Miller & Co., by D. C. Gillett," who may be assumed to have been the plaintiff's local agent at Laingsburgh. That signature is followed by a stipulation, evidently addressed by the plaintiff to the other party to the contract, in these words: "This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio." Then follows the signature of the defendant, "William Holder," who thereby necessarily assents to this stipulation, as well as to the other terms of the contract. Both parties thus agreed that the contract was not to be valid, until countersigned by the plaintiff's manager at Lansing in Michigan, and also approved at Akron in Ohio, the site of the plaintiff's principal office. It further appears, upon the contract itself, that it was afterwards, on February 27, 1894, countersigned at Lansing, by "R. H. Worth, Manager," and, by an endorsement on the contract,

that it was approved at Akron, April 29, 1894, as shown by the signature of "Ira M. Milloy, Secretary."

The plaintiff, in its declaration, alleged that on February 27, 1894, at Laingsburgh and Lansing, the plaintiff "by D. C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant." The date on which the plaintiff "entered into" the contract with the defendant is thus alleged to have been, not February 20, 1894, mentioned at the beginning of the contract as the day on which it was made, and which may have been the day on which it was signed at Laingsburgh, by Gillett in behalf of the plaintiff, and by the defendant in person; but February 27, 1894, the day on which it was countersigned at Lansing by Worth, the plaintiff's manager. The plaintiff thus assumed that the contract did not exist as a contract before it was countersigned by the plaintiff's manager at Lansing; and there is no more reason for assuming that it existed as a contract before it was approved at the plaintiff's principal office at Akron; for the stipulation above quoted required both countersigning by the manager at Lansing, and approval at Akron, to make it a valid contract. Accordingly, the declaration further alleged that "afterwards, to wit, on April 29, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, and the same then and there was and became a binding and valid contract between the defendant and the plaintiff, according to the terms thereof." The words "to wit, at the city of Lansing, in the Eastern District of Michigan," would seem to have been added by way of formal venue only, in accordance with the ancient mode of pleading in suing upon a transaction which took place abroad. As Lord Mansfield said, "no judge ever thought that, when the declaration said in Fort St. George, viz. in Cheapside, that the plaintiff meant it was in Cheapside." *Mostyn* v. *Fabrigas*, Cowper, 161, 177. See also *McKenna* v. *Fisk*, 1 How. 241, 248.

The Circuit Court found, as facts, that the parties entered into the contract on April 29, 1894, which was the date of its approval at the plaintiff's home office in Ohio; and that

it was executed, accepted and approved, as set forth therein, and in the endorsement thereon.

Whether, therefore, we look to the contract itself, to the plaintiff's declaration, or to the findings of fact by the court, it clearly appears that the contract, when, after being drawn up in writing and signed by the plaintiff's local agent, it was tendered to the defendant and assented to and signed by him in Michigan, contained a distinct stipulation that it was not valid unless, not only countersigned by the plaintiff's manager in Michigan, but also approved at the plaintiff's principal office in Ohio; and that it was on April 29, 1894, and at Akron in the State of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, for the first time, became a valid and binding contract between the parties. It cannot therefore be considered as "made," within the meaning of the statute in question, at any earlier time, or other place.

The approval at the plaintiff's home office was not a ratification by the plaintiff of an unauthorized act of one of its agents; for each of its agents, Gillett in first signing the contract, and Worth in countersigning it, appears to have acted within the strict limits of his authority. But the final approval by the plaintiff itself was an act which, according to the express stipulation of the parties, and in the contemplation of every person who affixed his signature to the paper, was a necessary step to complete the execution of the instrument by the plaintiff, and to make it a valid and binding contract between the parties.

The opinion of the Supreme Court of the State of Michigan in *Seamans* v. *Temple Co.*, cited at the bar, contains nothing inconsistent with this conclusion. It was there held that a contract of insurance, made in another State by a corporation thereof, upon an application procured through its agents in Michigan upon property in Michigan, could not be sued on in the courts of Michigan, because of provisions of earlier statutes of Michigan, making it unlawful for any foreign insurance company to transact any business of insurance in the State, and for any person to aid in any way in procuring a

policy of insurance by a foreign corporation upon property in the State. Howell's Statutes, §§ 4331, 4354, 8136. And the court said: "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this State as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this State." 105 Michigan, 400, 404.

The statute now before this court contains no such provisions as were contained in the statutes in question in that case; but it simply invalidates "contracts made in this State" by a foreign corporation which has not filed its articles of association in Michigan and paid the franchise tax imposed by this statute.

Judgment affirmed.

POWERS *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 144. Argued December 6, 7, 1897. — Decided January 10, 1898.

A judgment of the Circuit Court of the United States, against a party contending that that court has no jurisdiction because the case has not been duly removed from a state court, may be reviewed as to the question of jurisdiction by this court upon writ of error directly to that court under the act of March 3, 1891, c. 517, § 5.

An order of the Circuit Court of the United States, remanding a case to a state court, is not reviewable by this court.

An action brought in a state court, which, by reason of joinder as defendants of citizens of the same State as the plaintiff, is not a removable one under the act of Congress until after the time prescribed by statute or rule of court of the State for answering the declaration, may, upon a subsequent discontinuance in that court by the plaintiff against those defendants, making the action for the first time a removable one by reason of diverse citizenship of the parties, be removed into the Circuit Court of the United States by the defendant upon a petition filed immedi-

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ately after such discontinuance, and before taking any other steps in defence of the action.

If sufficient grounds for the removal of a case into the Circuit Court of the United States are shown upon the face of the petition for removal and of the record of the state court, the petition for removal may be amended in the Circuit Court of the United States by stating more fully and distinctly the facts which support those grounds.

The right of a party to insist that a case has been duly removed into the Circuit Court of the United States is not lost or impaired by his making defence in the state court, after that court had denied his petition for removal.

This action was brought September 7, 1893, in an inferior court of the State of Kentucky, by Powers against the Chesapeake and Ohio Railway Company, as well as against Boyer, Evans and Hickey, the conductor, engineer and fireman of a railway train of the company, to recover damages for injuries suffered by the plaintiff from the running of the train against him by the negligence of the defendants. The summons was not served on Hickey, but was served on the other defendants.

The railway company, before its answer was required by the law of Kentucky to be filed, removed the case into the Circuit Court of the United States, upon a petition alleging that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $2000; that the railway company was a citizen of the States of Virginia and West Virginia only, and the plaintiff was a citizen of the State of Kentucky; that there was in this suit a separate controversy, which could be fully determined, as between them; and that the other defendants were fraudulently and improperly joined for the sole purpose of defeating the railway company's right of removal. In the Circuit Court of the United States, a transcript of the record of the proceedings in the state court was filed; and, after a hearing, a motion by the plaintiff to remand the case to the state court was sustained by an opinion filed and entered of record, which stated that the plaintiff was a citizen of Kentucky and the railway company a citizen of Virginia, and the other defendants were admitted to be citizens of Kentucky; and held that there was no separable con-

troversy between the railway company and the plaintiff; and the case was ordered to be remanded accordingly.

The railway company then filed in the state court a transcript of the proceedings in the Circuit Court of the United States; and an answer, containing a demurrer, and denying the facts alleged in the original petition, and alleging that the other defendants were fellow servants of the plaintiff. A year after the first petition for removal, and when the case was called for trial before a jury in the state court, the plaintiff discontinued his action against the individual defendants; the court overruled the demurrer; and the railway company filed a second petition for removal, like the first, except in alleging that in bringing this suit Evans and Hickey were fraudulently and improperly joined as defendants for the purpose of defeating the railway company's right of removal; that because of their joinder the cause had been remanded to the state court; and that the action, having now been discontinued as against them, was for the first time pending against the railway company alone. The state court denied the petition for removal, and the railway company excepted to the denial; the trial proceeded in that court, resulting in a verdict and judgment for the plaintiff; and the railway company appealed to the Court of Appeals of the State.

At the next term of the Circuit Court of the United States, the railway company filed a transcript of the record of the proceedings in the state court. The plaintiff moved to remand the case to the state court, upon the grounds, that it was not removable under the acts of Congress; that the second petition for removal was not filed within the time fixed by those acts; and that the question sought to be made by the second petition for removal had been already adjudged by the Circuit Court of the United States, and its former adjudication was a bar to the second proceeding for removal. The railway company (having filed affidavits showing that Boyer and Hickey were citizens of Kentucky, and that the discontinuance of the action as against the individual defendants was made by the plaintiff's attorney without their request or knowledge and without any consideration moving

from them) was permitted by the Circuit Court of the United States to amend its second petition for removal, by substituting therein the name of Boyer for that of Evans, in correction of a clerical mistake in the petition; and by alleging that Evans was a citizen of Virginia, and Boyer and Hickey were citizens of Kentucky, and that, by reason of the fraudulent and improper joinder of them to defeat the railway company's right of removal, the plaintiff was estopped to deny that the second petition for removal was not filed within the time required by law.

The Circuit Court of the United States, being of opinion that the plaintiff had fraudulently joined Boyer and Hickey as defendants in order to defeat the removal of the case to that court, and was therefore estopped to deny that the second petition for removal was filed in time, granted the petition for removal, and denied the motion to remand. 65 Fed. Rep. 129. The plaintiff then pleaded, in abatement of the cause in the Circuit Court of the United States, and to the jurisdiction of that court, the proceedings in the state court in which the railway company took part after the denial of its second petition for a removal, and its appeal to the Court of Appeals of the State; and, for the same reasons, moved the court to defer all proceedings until the termination of the case in the courts of the State, and in this court if the case should be brought here from the courts of Kentucky; and also moved to remand the cause to the state court. The Circuit Court of the United States sustained a demurrer to the plea, and denied the motions to defer and to remand.

The case was afterwards called for trial in the Circuit Court of the United States; and, the plaintiff insisting on his objection that the court was without jurisdiction, because the case had never been properly removed into that court, and declining for that reason to recognize the jurisdiction thereof or to prosecute his action therein, the court, overruling all the plaintiff's objections, and being of opinion that the original petition of the plaintiff did not state a cause of action, adjudged that the action be dismissed, and rendered final judgment for the defendant.

A writ of error from this court was sued out by the plaintiff, upon the sole grouud that the cause was not properly removed into the Circuit Court of the United States and therefore that court was without jurisdiction. The court allowed the writ of error, and certified to this court the question, so presented, as a question of the jurisdiction of the Circuit Court, under the act of March 3, 1891, c. 517, § 5. 26 Stat. 827.

Mr. Lawrence Maxwell, Jr., for plaintiff in error. *Mr. William Goebel* and *Mr. Alfred Mack* were on his brief.

Mr. Charles B. Simrall for defendant in error.

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

In the Circuit Court of the United States, the plaintiff contended that the court had no jurisdiction to entertain the case and to render the final judgment complained of, because the case had not been duly removed into the court from the state court in which it had been commenced.

The question thus presented was not, as in *Smith* v. *McKay*, 161 U. S. 355, whether a suit, of which the Circuit Court of the United States was admitted to have jurisdiction, was cognizable on the common law or on the equity side of the court; but the question was whether the Circuit Court of the United States had any jurisdiction whatever of the case. The jurisdiction of the Circuit Court of the United States was thus in issue, and the question of its jurisdiction having been duly certified, the case was rightly brought from the Circuit Court of the United States directly to this court, under the act of March 3, 1891, c. 517, § 5, upon the question of jurisdiction only. 26 Stat. 827.

The action was brought against a railroad company and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that an action of tort, which

might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defences from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, "A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville Railroad* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340. Applying this rule, the Circuit Court of the United States, when this case was first removed into that court, ordered it to be remanded. 65 Fed. Rep. 129, 130.

It is true that the same court, in similar cases between other parties, has since decided otherwise; and, upon a review of conflicting authorities, and referring to the distinction taken under the old system of special pleading between trespass and trespass on the case, has held that a master and servant cannot be joined in an action for a tort, and therefore the controversy between each of them and the plaintiff is a separate controversy. *Warax* v. *Cincinnati &c. Railway*, 72 Fed. Rep. 637; *Hukill* v. *Mansfield & Big Sandy Railroad*, 72 Fed. Rep. 745.

But it is unnecessary now to consider which of the views of the Circuit Court upon this question is the correct one, because that court, by its order remanding this case, distinctly and finally adjudged, as between these parties and for the purposes of this case, that, at the time of the filing of the first petition for removal, the case was not removable, because,

as it then stood, some of the defendants were citizens of the same State with the plaintiff, and there was no separate controversy between the plaintiff and the railway company, a citizen of a different State from himself. That order is not reviewable by this court. *Gurnee* v. *Patrick County*, 137 U. S. 141; *In re Pennsylvania Co.*, 137 U. S. 451; *Birdseye* v. *Schaeffer*, 140 U. S. 117; *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556.

After the case had been so remanded, and when it was called for trial in the state court, the plaintiff discontinued his action against all the individual defendants, leaving it an action between citizens of different States; and the case then for the first time became one in its nature removable, and the single remaining defendant thereupon immediately filed a second petition for removal, which was denied by the state court, but was granted and an amendment thereof allowed by the Circuit Court of the United States. 65 Fed. Rep. 129.

The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester &c. Railway* v. *Swan*, 111 U. S. 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, "but modal and formal," and a failure to comply with it may be the subject of waiver or estoppel. *Ayers* v. *Watson*, 113 U. S. 594, 597–599; *Northern Pacific Railroad* v. *Austin*, 135 U. S. 315, 318; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 688–691; *Connell* v. *Smiley*, 156 U. S. 335.

Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defence whatever in its courts. *Edrington* v. *Jefferson*, 111 U. S. 770; *Baltimore & Ohio Railroad* v. *Burns*, 124 U. S. 165; *Kansas City &c. Railroad* v. *Daughtry*, 138 U. S. 298; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 686, 687.

But it by no means follows, when the case does not become

in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all.

In *Northern Pacific Railroad* v. *Austin*, 135 U. S. 315, where a plaintiff suing in an inferior court of a State had laid his damages at less than the sum necessary to authorize a removal into the Circuit Court of the United States and was permitted at the trial to increase the *ad damnum* above that sum, and judgment of the district court was affirmed by the highest court of the State, a writ of error to that court was dismissed by this court, solely because no application for removal had been made after the allowance of the amendment; and the Chief Justice, in delivering the opinion, said: "If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit, as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal, *Ayers* v. *Watson*, 113 U. S. 594, 598, it may, though obligatory to a certain extent, be waived; and as, where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him." 135 U. S. 318.

The question whether a defendant may file, in the state court in which the suit was commenced, a petition for removal, after the time mentioned in the act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

In order to warrant a removal from a court of a State into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States

must exist. It is only when that does exist, that "any party entitled to remove any suit" "may make and file a petition in such suit in such state court at the time, or at any time before the defendant is required by the laws of the State, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the District where such suit is pending," and to give bond to file a copy of the record in that court "on the first day of its then next session." Act of March 3, 1887, c. 373, as corrected by act of August 13, 1888, c. 866; 25 Stat. 435.

This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress, that "any party entitled to remove any suit," "may make and file a petition for removal" at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same State as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2000, and was afterwards discovered to be so much graver, that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*.

The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold

that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case. *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27. But if, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson* v. *Dunham*, 121 U. S. 421, 427; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 690, 691.

In the case at bar, the second petition for removal, as presented to the state court, alleged that the petitioner was a citizen of the States of Virginia and West Virginia only, that the plaintiff was a citizen of the State of Kentucky, that Evans and Hickey had been fraudulently and improperly joined as defendants for the purpose of defeating the petitioner's right of removal, that because of their joinder the case had been remanded to the state court, and that the action,

having been discontinued against them, was now for the first time pending against the petitioner alone; and by the transcript, previously filed in the state court, of the record of the proceedings in the Circuit Court of the United States upon the first petition for removal, containing the opinion and order remanding the case, it appeared to have been admitted that the individual defendants were citizens of Kentucky.

It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the Circuit Court of the United States; and this petition was rightly permitted to be amended in that court.

The petition, as amended, distinctly alleged that Evans was a citizen of Virginia, that Boyer and Hickey were both citizens of Kentucky, and that by the discontinuance against them the action was for the first time pending against the railway company alone; and thus showed a case which the railway company was entitled to remove, independently of the allegations that these persons had been fraudulently joined as defendants to defeat the right of removal, and that the plaintiff was therefore estopped to deny that the second petition for removal was filed in time.

We do not find it necessary to pass upon the points of fraudulent joinder and of estoppel, made by the railway company, and upon which the Circuit Court of the United States proceeded in retaining jurisdiction of the case, because, for the reasons before stated, we are of opinion that, upon the true construction of the act of Congress, the petition, filed as soon as the case became a removable one, and before the railway company took any new steps in defence of the action, was seasonably filed; and that it sufficiently stated grounds for removal, and was therefore rightly permitted to be amended.

It is hardly necessary to add that the railway company, by making defence in the state court after that court had declined to surrender jurisdiction of the case, did not lose or

Syllabus.

impair its right to insist that the case had been lawfully removed into the Circuit Court of the United States. The defendant, notwithstanding its objection, duly saved upon the record, to the jurisdiction of the state court, having been forced to a hearing in that court, is entitled to have the error in this respect corrected in any court having jurisdiction for the purpose. *Removal Cases*, 100 U. S. 457, 475; *Edrington* v. *Jefferson*, 111 U. S. 770, 774.

Judgment affirmed.

UNION MUTUAL LIFE INSURANCE COMPANY *v.* KIRCHOFF.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 155. Argued December 16, 17, 1897. — Decided January 10, 1898.

The defendant in error filed a bill against the plaintiff in error in a state court in Illinois to compel the performance of a contract to convey to her land in that State. The case proceeded to judgment in plaintiff's favor in the Supreme Court of the State, but was remanded with directions to take an account for the purpose of ascertaining for how much payment should be directed. A writ of error, sued out from this court to review that judgment was dismissed here on the ground that the judgment was not final. It does not appear that any right or title had been specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the Supreme Court of Illinois, prior to such judgment of that Court. It appeared on the second hearing that prior to September 10, 1884, the United States had seized the property for revenue taxes due from a firm then occupying it as a distillery, the defendant in error being in no way connected with the firm, that the property was sold, the Government bidding it in and taking a deed for it, and that the Government conveyed to the plaintiff in error. In the account stated the defendant in error was required to repay the amount so paid with interest. It also appeared that the plaintiff in error, after the case went back, moved to amend its answer by setting up that title, as a right and title acquired and claimed under the Constitution, statutes and authority of the United States, which motion was refused, and the trial court disposed of the case on other grounds. In the Appellate Court and in the Supreme Court the plaintiff in error contended that there was error in refusing its motion; but the Appellate Court held, and

Statement of the Case.

its decision was sustained by the Supreme Court, that it was bound by the first decision, and that error could not be assigned, on the second appeal, for any cause existing at the time of the prior judgment. In this court it was contended that, at the second trial it appeared that plaintiff in error claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that the decision of the case necessarily involved passing on the claim of title; that the opinion of the Supreme Court of Illinois showed that it was passed upon; and that the necessary effect of the decree and judgment of the state court was against the right and title of defendant sufficiently claimed under Federal authority. *Held*, that the point thus raised was certainly embraced by the first judgment, and that this court cannot revise the second judgment on the ground that the plaintiff in error was thereby denied any right, properly claimed, in apt time, in accordance with Rev. Stat. § 709.

Oxley Stave Company v. *Butler County*, 166 U. S. 648, cited, quoted from and approved to the point that the words "specially set up or claimed," in Rev. Stat. § 709, 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 was a bill filed by Elizabeth Kirchoff in the Circuit Court of Cook County, Illinois, against the Union Mutual Life Insurance Company, to compel a conveyance of two certain lots in accordance with an agreement between the company and herself on payment of the amount due thereunder as provided for. The Circuit Court dismissed the bill on hearing, and the cause, after an ineffectual appeal directly to the state Supreme Court, 128 Illinois, 199, was carried to the Appellate Court, which reversed the decree of the Circuit Court, and remanded the cause with directions that an account be taken, and that, when the amount due the company was ascertained, a decree be entered that on payment of such amount, with interest, the company should convey to Mrs. Kirchoff. 33 Ill. App. 607. From this judgment the Insurance Company prosecuted an appeal to the Supreme Court, and the judgment was affirmed. 133 Illinois, 368. To review this judgment a writ of error was sued out from this court, but was dismissed

on the ground that the judgment of the Supreme Court was not final. 160 U. S. 374.

The case had, in the meantime, gone back to the Circuit Court, an accounting had been had, and a decree had been entered settling the accounts between the parties, and ordering the Insurance Company to convey the property in question on payment of the amount found due. From this decree the Insurance Company appealed to the Appellate Court; the decree of the Circuit Court was affirmed, 51 Ill. App. 67; and this second judgment of the Appellate Court was affirmed by the Supreme Court. 149 Illinois, 536. To review the latter judgment the Insurance Company prosecuted this writ of error.

The facts as found by the state courts were substantially these: In May, 1871, the Union Mutual Life Insurance Company loaned $60,000 to Elizabeth Kirchoff, her husband, Julius Kirchoff, and her mother, Angela Diversey, upon their judgment note, secured by trust deed, conveying many parcels of land belonging to them in severalty, among which were the lots in question, which lots belonged to Elizabeth Kirchoff. Default having been made in the payment of interest and taxes, judgment was taken against Mrs. Diversey, and later a bill was filed by the Insurance Company in the Circuit Court of the United States to foreclose the trust deed. The bill in addition sought to cure a misdescription of the property belonging to Mrs. Diversey, who filed an answer denying the right of the company to correct the misdescription, and averring that the note and mortgage were procured from her by misrepresentation. While this bill was pending an agreement was reached by the parties, pursuant to which the company released to Mrs. Diversey its claim upon forty acres of the land belonging to her, and she executed to them a warranty deed for the remainder, while Mrs. Kirchoff and her husband executed a quitclaim deed of all the property belonging to them and included in the trust deed, it being agreed as part of the transaction that Mrs. Kirchoff might purchase from the company the two lots above named for $10,000, one thousand dollars in cash and nine thousand dollars in annual payments, for which Mrs. Kirchoff was to execute her notes, extending

over a period of nine years, bearing interest at six per cent, and secured by mortgage upon the two lots. But as there was an intervening claim on one of the lots growing out of a sheriff's deed in pursuance of a sale on a judgment against Mrs. Kirchoff, rendered subsequently to the original trust deed but prior to the deed from Kirchoff and wife to the company, it was agreed that the foreclosure proceedings should continue to be prosecuted; that as soon as the company got a deed from the master it would convey to Mrs. Kirchoff and take the mortgage from her, and the company would thus obtain and convey clear title, and the mortgage back would be a first lien.

No defence was made to the foreclosure; the case went to decree and sale; and a master's deed was issued to the Insurance Company.

During the prosecution of the foreclosure proceedings a receiver had been appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed a petition, stating that Julius Kirchoff was in possession of the premises and refused to pay rent therefor, and asking for a writ of assistance to put the receiver in possession, to which Julius Kirchoff filed an answer setting up the agreement and objecting to the issue of the writ lest his rights be prejudiced; but the writ was nevertheless issued.

It appeared on the second hearing that prior to September 10, 1884, the United States had seized the property for certain revenue taxes due from a firm then occupying it as a distillery, Mrs. Kirchoff being in no way connected with the firm; that the property was sold, the Government bidding it in and taking a deed for it; and that the Government conveyed to the Insurance Company. In the account stated Mrs. Kirchoff was required to repay the amount the Insurance Company paid the Government, with interest.

The Supreme Court of Illinois held, on the second appeal, on the authority of *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326, that the United States took no title by its deed as against Mrs. Kirchoff; and, further, that the Insurance Company could not set up any right under the deed from the

Government, because of its acquisition long prior to the submission of the case upon the first appeal. No question was raised in this court in respect of this transaction.

Mr. Parmalee Prentice for plaintiff in error. *Mr. Frank L. Wean* and *Mr. Josiah H. Drummond* were on his brief.

Mr. William S. Harbert for defendant in error. *Mr. George R. Daley* and *Mr. Ira W. Buell* were on his brief.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

When this case was before us on the prior writ of error we were obliged to dismiss the writ because the judgment sought to be reviewed was not final. *Union Mut. Life Ins. Co.* v. *Kirchoff*, 160 U. S. 374. And the question whether, had this been otherwise, the jurisdiction could have been maintained, was necessarily not considered. That inquiry, however, now meets us on the threshold, as in order to invoke our jurisdiction on the ground of the denial of a title or right claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, such title or right must be specially set up or claimed at the proper time and in the proper way.

The judgment of the Supreme Court of Illinois, when the case was first before it, 133 Illinois, 368, established the agreement between Mrs. Kirchoff and the Insurance Company as claimed by her, and determined that she was entitled to the relief she sought by reason thereof, and the cause was remanded for the purposes of an accounting merely. And although the fact that the case was sent back for further proceedings deprived the judgment of that finality deemed essential to the issue of a writ of error from this court, yet it does not follow that the prior determination on the merits can be overhauled on the ground of the existence of a Federal question which was not raised when that determination was arrived at.

As observed by the Supreme Court when the case was a second time before that tribunal, 149 Illinois, 536, 542: "Nothing is better settled than that where a cause has been reviewed by this court, and remanded with directions as to the decree to be entered, a party, on a subsequent appeal, cannot assign for error any cause that accrued or existed prior to the judgment of this court. All errors not assigned will be considered as waived, and cannot afterwards be urged. *Hook* v. *Richeson*, 115 Illinois, 431; *Village of Brooklyn* v. *Orthwein*, 140 Illinois, 620, and cases cited."

The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below or in the Supreme Court of Illinois prior to the decision of the latter court on the first appeal.

The original bill after setting up the agreement to the effect, among other things, that the title was to be perfected in the company by the foreclosure proceedings, as well as by complainant's deed of release and quitclaim, prayed that the company might be compelled to specifically perform the agreement and convey the lots to her on performance on her part. To this defendant filed a demurrer, assigning as cause, that the bill did not show a contract enforceable either at law or in equity. The demurrer was overruled and defendant answered, denying the averments of the bill, pleading the statute of frauds, and asking "the same right by its answer as if it had pleaded or demurred to said bill of complaint." The bill was subsequently amended, and prayed that complainant might be allowed "to redeem said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix and convey to her the said two lots of lands hereinbefore specifically described, according to the terms thereof, as before stated;" and for an accounting.

When from the judgment of the Appellate Court reversing the Circuit Court and directing the entry of a decree in complainant's favor on payment of the amount due from

her to the company as ascertained on an accounting, the first appeal was taken to the Supreme Court, the errors there assigned nowhere in terms raised a Federal question. And, in affirming the judgment of the Appellate Court, the Supreme Court did not consider or discuss any Federal question as such in its opinion. The Supreme Court held that the agreement was fully made out, and that complainant was entitled to a conveyance of the lots; that it was not material whether the agreement was called an agreement to redeem or an agreement of repurchase, "as the form of the transaction, in a court of equity, is not to be regarded;" that the bill need not be treated as strictly a bill for specific performance, but it was enough that complainant was entitled to have her property restored to her upon discharging the burden upon it fixed in amount by the agreement.

The Supreme Court of Illinois further said: "It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here — that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was part of the arrangement under which the complainant was to obtain the two lots in controversy, that a decree of foreclosure should be entered, and that the premises should be sold under such decree. The decree was rendered and the sale made by consent, for the purpose of clearing the different tracts of land mentioned in the quitclaim deed, from certain incumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest. She is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of plaintiff were cut off or in any manner impaired by the decree."

It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that the

decision of the case necessarily involved passing on the claim of title; that the opinion of the Supreme Court of Illinois showed that it was passed upon; and that the necessary effect of the decree and judgment of the state court was against the right and title of defendant sufficiently claimed under Federal authority. But we cannot accept this conclusion.

In the recent case of *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, 654, this court, speaking by Mr. Justice Harlan, said:

"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 dis-

posed 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."

Tested by this rule it is quite apparent that defendant did not specially set up or claim a Federal right or title within the meaning of section 709, and that no right or title so claimed was denied by the Supreme Court on the first appeal.

And as the judgment of that court determined the rights of the parties and left open only the amount due on the accounting, the suggestion of the disposition of a Federal question by that judgment comes too late.

After the case went back to the Circuit Court for the entry of decree in favor of Mrs. Kirchoff and the accounting, defendant moved for leave to amend its answer by inserting the following:

"And the said defendant, further answering, says that by reason and in virtue of the said foreclosure decrees in the said

United States court, the sale thereunder, the confirmation thereof, and all the acts and doings of said court therein, the said Union Mutual Life Insurance Company acquired a title and right to the lands aforesaid; that said right and title was acquired and is claimed under the Constitution, statutes and authority of the United States; that a decree for redemption or specific performance of the contract alleged in said bill would be against the right and title of said company thus acquired and hereby claimed under the Constitution, laws and authority of the United States; that a decree for redemption or specific performance, as prayed for in said bill, or either of them, would fail to give full faith, credit and effect to the said decrees, orders and acts of the United States Circuit Court in the foreclosure proceedings aforesaid; that a decree for redemption or specific performance, as prayed for, or either of them, cannot be entered without attacking and pretending to nullify or impair the said decrees, orders and acts of the said United States Circuit Court, and that, for the foregoing reasons, this court is without jurisdiction of the subject-matter of the action set forth in the bill of complaint and is without jurisdiction to enter a decree for redemption or specific performance, as prayed for in said bill of complaint."

But the Circuit Court refused to allow the amendment.

There was no contention that any Federal question arose on the accounting itself. The case having reached the Appellate Court the second time, the Insurance Company assigned, among other errors, that the Circuit Court erred "in that it did not dismiss complainant's bill for want of jurisdiction;" "in not holding that it was without jurisdiction to enter a decree allowing redemption;" "in entering a decree which would in effect nullify the decree and doings of the Circuit Court of the United States for the Northern District of Illinois;" "in entering a decree in conflict with the decree of the United States Circuit Court;" "in refusing to the defendant leave to file the proposed amendment to its answer;" "in entering a decree against the validity of titles claimed by defendant under the authority of the United States."

It will be perceived that, so far as Federal questions were

thus attempted to be raised, they were all covered by the prior judgment.

The Appellate Court on the second appeal held itself bound by the previous decision and declined to enter on matters of defence which might have been availed of. The Supreme Court was of the same opinion, for it ruled that where a case had once been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment. Nevertheless the Supreme Court said:

"Much of the argument of counsel for appellant is devoted to an effort to show a want of jurisdiction in the Circuit Court of Cook County over the subject-matter of this litigation. Whether, upon this second appeal, that is an open question we do not deem it important to determine, being clearly of the opinion that the position of counsel is untenable. It is said the suit is brought to review and set aside a decree of the United States Circuit Court, and the bill is treated, throughout the discussion, as hostile to the foreclosure proceeding in that court, or as attempting to obtain relief properly available in that action.

"This is a misapprehension of the scope and purpose of complainant's bill. In our former opinion we said: 'After the settlement had been concluded, it turned out that certain incumbrances existed against some of the property, which were subsequent to the trust deed, but which would take priority to the quitclaim deed executed by complainant and her husband. It therefore became necessary, in order to obtain a perfect title, to go on with the foreclosure proceedings, which was done.' This statement is based upon an allegation of the bill to the effect that, it being represented to the complainant by the attorney of the company that it would be necessary to foreclose the trust deed in order to make good the title in the company to the lots before they could take a mortgage thereon for the instalments of redemption money, it was agreed between the parties that the agreement for redemption should not be executed until after the title had been perfected

in the company by foreclosure, but in the meantime complainant should execute and deliver to the company her quitclaim deed, and should interpose no defence to such foreclosure. The allegation was found, in the opinion above referred to, sustained by proofs, and is conclusive of that fact upon this appeal. The foreclosure decree in this Federal court was therefore as much the result of the agreement relied upon by complainant as was the making of the quitclaim deed by her. So far from this being an attempt to review, modify or set aside the decree of the United States Circuit Court, the right of action is predicated, in part at least, upon it.

"Whether the bill be called a bill to redeem, or given another name, can in no way affect the question of jurisdiction in the state court. The relief sought is the enforcement of a contract to reconvey the property in question, which we have already held the complainant entitled to. Her rights grow out of the alleged contract, and not by reason of anything that was done, or could have been done, in the Federal court in the foreclosure suit.

"That a court of equity has jurisdiction to enforce the contract, whether it be called a contract to redeem or to reconvey, is, we think, too clear for argument."

The Supreme Court did not decide that the case was reopened as to matters previously adjudicated, and we cannot regard these observations as amounting to such disposition, on a second appeal, of Federal questions which might have been, but were not, raised on the first appeal, as would justify us in taking jurisdiction.

It was further argued at this bar that the agreement was fraudulent and illegal as respected the foreclosure decree; and that the decree of the state court upholding an agreement thus tainted, ascribed to that decree an operation which would not have been permitted in the courts of the United States, and in that view involved a review thereof or a refusal to give it its due effect.

We do not find that the state courts were asked to pass on any such question. If it was really contended before them that the agreement was invalid on the ground that it provided

that the United States court should go to decree and sale in order to cut off intervening liens, it may be conceded that those courts held, on the facts appearing, that the agreement was not open to that objection, but it would not follow that thereby a Federal question was disposed of. And the point was certainly embraced by the first judgment.

We are of opinion that we cannot revise the present judgment on the ground that plaintiff in error was thereby denied any right properly claimed, and in apt time, in accordance with § 709 of the Revised Statutes.

Writ of error dismissed.

WETMORE *v.* RYMER.

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

No. 76. Submitted November 1, 1897. — Decided January 17, 1898.

In an action of ejectment the question whether the land in dispute is of sufficient value to give a Circuit Court jurisdiction is purely one of fact, and the statutes regulating jurisdiction leave the mode of trying such issues to the discretion of the trial judge.

Whether he elects to submit such issue to a jury, or to himself hear and determine it without the intervention of a jury, in either event the parties are not concluded by the judgment of the Circuit Court.

In this case the question was passed upon by the court below on affidavits, and the judgment dismissing the action for want of jurisdiction is reviewable here.

A suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

This was an action of ejectment, brought in the Circuit Court of the United States for the Eastern District of Tennessee, to recover a tract of land in Polk County. The declaration alleged that the land was worth more than two thousand dollars. The defendants disclaimed as to a portion of the

land, and pleaded not guilty and the statute of limitations as to the remainder.

At the trial, after the plaintiffs' evidence was closed, the defendants moved the court to dismiss the plaintiffs' suit for want of jurisdiction because it appeared that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars; but the court suspended action on this motion until the verdict of the jury should be rendered. The defendants then proceeded to introduce their evidence on the matters put in issue by the pleadings, and, after argument of counsel and the charge of the court, the jury found a verdict in favor of the plaintiffs, and assessed their damages for the detention of the premises at one dollar. Thereupon the court rendered judgment on the verdict and a writ of possession and execution accordingly.

But, immediately upon the rendition of the verdict and judgment, the court set them aside, entertained the defendants' motion to dismiss for want of jurisdiction, and gave leave to both parties to file affidavits showing the value of the land in controversy.

Upon consideration of the evidence heard on the trial and of affidavits produced on behalf of the plaintiffs, the court, being of opinion that the value of the matter in dispute was less than two thousand dollars, and that there was not a substantial controversy between the parties of sufficient value to be within the jurisdiction of the court, dismissed the suit for want of jurisdiction, and rendered judgment for costs against the plaintiffs. The plaintiffs excepted to this action of the court; a bill of exceptions was sealed; and a writ of error was allowed to this court.

Mr. Charles Seymour for plaintiffs in error.

No appearance for defendants in error.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

The first question that arises upon this record is whether

the action of the Circuit Court in dismissing the plaintiffs' action for the want of jurisdiction is reviewable by us. The court acted in pursuance of the fifth section of the act of March 3, 1875, c. 137, 18 Stat. 470, 472, which provided, "that if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal as the case may be."

By the sixth section of the act of August 13, 1888, c. 866, 25 Stat. 433, 436, amending the act of March 3, 1887, it was enacted "that the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed."

Any doubt that may have been caused by this repealing enactment, as to the power to review the judgment of a Circuit Court dismissing a suit for want of jurisdiction, was removed by the act of February 25, 1889, c. 236, 25 Stat. 693, entitled "An act to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the question of the jurisdiction of the courts below," and which provided "that in all cases where a final judgment or

decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions as apply to other writs of error or appeals. . . ."

This act of February 25, 1889, was followed by the act of March 3, 1891, c. 517, 26 Stat. 826, which provided, in its fifth section, "that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

These provisions of the several statutes plainly disclose the intent of Congress that a party whose suit has been dismissed by a Circuit Court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the Circuit Courts in such cases is subject to our revision. *Williams* v. *Nottawa*, 104 U. S. 209; *Barry* v. *Edmunds*, 116 U. S. 550; *Hartog* v. *Memory*, 116 U. S. 588; *Morris* v. *Gilmer*, 129 U. S. 315; *Deputron* v. *Young*, 134 U. S. 241; *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327.

The question raised by this writ of error is whether the Circuit Court erred in dismissing the plaintiffs' suit for the alleged reason that the value of the property in dispute did not amount to the sum of two thousand dollars, exclusive of interest and costs, and that, therefore, such suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court; and, as prescribed by the fifth section of the act of March 3, 1891,

such question of the jurisdiction of the Circuit Court alone is presented for our decision. *Shields* v. *Coleman*, 157 U. S. 168.

The question whether the land in dispute was of a value sufficient to give the Circuit Court jurisdiction was purely one of fact, and as that question was not submitted to the jury, but was passed on by the court upon affidavit, it is now suggested that, upon a writ of error, this court cannot consider the facts disclosed by the affidavits, but is restricted to any errors of law shown by the record.

Undoubtedly, the general rule is that, upon a writ of error, only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law; and ordinarily a bill of exceptions lies only upon some point arising either upon the admission or rejection of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. *Arthurs* v. *Hart*, 17 How. 6.

The difficulty arises out of the peculiar character of the legislation which we are now considering. Prior to the passage of the act of 1875 questions going to the jurisdiction of the court could only be raised by a plea in abatement in the nature of a plea to the jurisdiction. See *Farmington* v. *Pillsbury*, 114 U. S. 138, and cases there cited. If such a plea presented a question of law upon the face of the record, this court could review the decision of the court below upon such question of law. If the plea asserted matters of fact *dehors* the record, it was open for the parties to agree upon a statement of facts, or to take exceptions to the rulings of the court in admitting or rejecting evidence offered to the jury or in giving instructions, and in either event only questions of law would be presented for our decision.

But, under the act of 1875, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist. *Williams* v. *Nottawa*, 104 U. S. 209; *Barry* v. *Edmunds*, 116 U. S. 550; *Morris* v. *Gilmer*, 129 U. S. 315; *Deputron* v. *Young*, 134 U. S. 241. And our present problem is to preserve as well the power of the trial court to make such inquiries as the right of suitors, so expressly reserved to them in the statutes, to have the action of the lower court reviewed by the Supreme Court of the United States.

In equity cases, which come up on appeal, and where the evidence on which the court below acted is presented here, the action of that court can be readily reviewed. But in cases at law, like the present one, how can we review the judgment of the court below, unless that judgment is either based on the verdict of a jury or upon facts found in an agreed statement?

The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined.

When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different States, or when, as in the present case the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied.

In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. The action of the court, in the admission or rejection of evidence, or in instructing the jury, would thus be subjected to the review by this court which was intended by Congress.

Such was the course pursued in the case of *Jones* v. *League*,

18 How. 76. That was an action at law to try title to land. League, the plaintiff, averred himself to be a citizen of Maryland, the defendants being citizens of Texas. By a plea in abatement the defendants alleged that, at the time of the commencement of the suit, League was a citizen of Texas. On this plea the plaintiff took issue, and a trial of that issue was had, which resulted, under the instructions of the court, in a verdict of the jury for the plaintiff. The case was brought up, by a writ of error, to this court, where the validity of the instructions given by the trial court was considered.

A similar course was followed in the case of *Chicago & Northwestern Railway* v. *Ohle*, 117 U. S. 123. There, an action had been brought by Ohle in a state court of Iowa against the railway company, which took the case by a removal petition into the Circuit Court of the United States, on the ground that Ohle was a citizen of Iowa and the railway company a citizen of Illinois. Ohle was permitted by the Circuit Court to file a plea in abatement or to the jurisdiction, alleging that both he and the railway company were citizens of Illinois. Upon this plea issue was joined, and a trial had with a jury ; and the cause was brought to this court by a writ of error, where the instructions of the court to the jury were reviewed and the judgment affirmed.

But the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury. And it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge.

But whether the judge shall elect to submit the issues to the jury, or to himself hear and determine them, it is the manifest meaning of this legislation that, in either event, the parties are not to be concluded by the judgment of the Circuit Court. As we have already said, if the questions are submitted to the jury, there will be a ready remedy, by proper exceptions and a writ of error, to correct any errors into which the trial court may have fallen. And if the court takes to itself the determination of the disputed questions, it is imperative, in order to give effect to the intention of Con-

gress, that its action must take a form that will enable this court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court.

Thus in *Barry* v. *Edmunds*, 116 U. S. 550, where the judgment of the Circuit Court, dismissing a cause because in its opinion the matter in dispute did not amount to the jurisdictional value, was reversed, it was said:

"In making such an order therefore the Circuit Court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court.'" In *Hartog* v. *Memory*, Ib. 588, it was said: "No doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition. But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the appellate jurisdiction of this court for the review of the order of dismissal. And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff

should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence."

And this language from *Barry* v. *Edmunds* was quoted with approval in the case of *Deputron* v. *Young*, 134 U. S. 252.

This court must, therefore, consider whether the judgment of the Circuit Court, dismissing the suit for want of jurisdiction, was warranted by the facts of the case as they are disclosed in the record.

The declaration was as follows:

"The plaintiff, George Peabody Wetmore, who is a citizen of the State of Rhode Island; Matilda C. Alloway, a citizen and resident of the State of Pennsylvania; V. K. Stevenson, Hugh Stevenson, Paul E. Stevenson, Eloise Stevenson Kernochan and James L. Kernochan, her husband, and Maxwell Stevenson, by Paul E. Stevenson, his next friend, all of whom are citizens and residents of the State of New York, sue the defendants, David Rymer, Sam. Rymer, Tom Payne and W. Calvin McConnell, all of whom are citizens and residents of Polk County, Tennessee, to recover the following-described lands, situate in the county of Polk, in the southern division of the eastern district of Tennessee, to wit:

"In town. one, range three east, of the basis line, Ocoee district.

"The south half of section one, the south half of section two, the northwest quarter of section eleven, all of section twelve, the southwest quarter of section thirteen.

"In town. two, range four east, of the basis line, Ocoee district.

"All of sections one and two and three and five and eight and nine and ten and eleven and twelve and thirteen and fourteen and fifteen and seventeen and twenty and twenty-one and twenty-two and twenty-three and twenty-four and twenty-five and twenty-six and twenty-seven and twenty-eight and thirty-three and thirty-four and thirty-five, the north half and the southeast quarter of section six, the east half of section seven, the east half of section eighteen, the east half and the northwest quarter of section nineteen, the

north half and the southeast quarter of section twenty-nine, the east half of section thirty-two, the west half of the west half of section thirty-six.

"In town. one, range four east, of the basis line, Ocoee district.

"All of section thirty-one and thirty-five and thirty-six, the west half of section thirty-four.

"As shown on the general plan of the Ocoee district of the State of Tennessee, to which and the grants for said land reference is made for full description.

"Which lands are worth more than two thousand dollars and of which lands said plaintiffs were possessed, claiming in fee, before the commencement of this suit, and after said possession accrued the said defendants, on the first day of January, 1892, entered thereupon and unlawfully withhold and detain the same, together with one thousand dollars due for the detention thereof."

The plea was as follows:

"And now comes the defendant, David Rymer, and for plea to plaintiffs' declaration says that he is not in possession of and does not claim and has not entered upon or been in possession of or claimed any part of the lands in said declaration described, except the following described lands, to wit: The southwest $\frac{1}{4}$ of section 17, the north $\frac{1}{2}$ of section 20, the east $\frac{1}{2}$ and southwest $\frac{1}{4}$ of section 18, and the northeast $\frac{1}{4}$ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Tennessee; and as to all the lands except those herein described this defendant here and now disclaims any and all interest, right or title.

"And for further plea in this behalf said defendant says that as to the said southwest $\frac{1}{4}$ of section 17, the north $\frac{1}{2}$ of section 20, the east $\frac{1}{2}$ and southwest $\frac{1}{4}$ of section 18, and the northeast $\frac{1}{4}$ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Polk County, Tennessee, he is not guilty in manner and form as the plaintiffs in their said declaration have alleged; and of this put himself upon the country."

The verdict and judgment were for all the lands claimed in

the declaration, being a connected body of land of about 25,000 acres. The plea claimed right of possession to between one and two thousand acres. The evidence upon which the court passed was restricted to the value of the land claimed by the defendants. And it is urged on behalf of the plaintiffs that the value of the entire tract claimed in the declaration and recovered by the verdict should have been considered in passing upon the question of the value of the matter in dispute; that, while the disclaimer may estop the defendants, it does not deprive the plaintiffs of their right to a verdict and judgment for the entire tract claimed, upon which a writ of possession may issue; that judgment in ejectment is conclusive as to title so far as the parties are concerned.

But we do not consider it necessary to consider or decide this contention, because we are of opinion that the evidence sufficiently disclosed, for the purposes of maintaining jurisdiction, that the value of the land claimed in the plea exceeded the sum of two thousand dollars. As that evidence is brief it seems proper to state it in the very form in which it appears in the bill of exceptions.

At the trial and before the jury rendered their verdict, the plaintiffs introduced as a witness one Oscar W. Muller, who testified that he was a surveyor and had surveyed the lands for the plaintiffs. On cross-examination by defendants' attorney he testified that the market value of the land was fifty cents per acre; that it was wild or mountain land, and not worth more than that unless its prospective value was to be considered, and that the land described in the plea of the defendants was not worth $1000.

After the verdict and judgment, and upon the motion made to dismiss, the plaintiffs filed the affidavit of Charles Seymour, who testified that he was the attorney and had been for twenty-five years the agent of what are known as the Wetmore and Stevenson lands, in Polk County, Tennessee, and that he is familiar with most of the lands and has been on the lands in dispute in this cause, and that the lands set out in the plea of the defendants lie on Lost Creek and Little Lost Creek, and form a connecting way to many thousands of acres of land of

the plaintiffs, which lie in that vicinity, and that the lands described in this plea are worth more than $2000 on account of their location, and are not to be judged by the general price for mountain land in the vicinity; that these lands lie near the foot of Frog Mountain, on the northwesterly side, where the timber is more than usually heavy and unusually valuable, both for accessibility and quality.

The plaintiffs likewise filed the affidavit of J. B. Brock, in which he testified as follows:

"I have lived in Polk County over forty years; was sheriff for six years, and have herded cattle for about twenty-five years on and in vicinity of lands set out in defendants' plea, and I know the location of some twenty thousand acres lying near by, understood to be the property of Wetmore and Stevenson heirs, the plaintiffs in this suit. The lands described in the plea are worth much more than the ordinary mountain lands. I sold a quarter section of 160 acres lying a mile from the lands in the plea for $400, and the lands described in the plea are near the foot of the mountain, where the timber is better than on most of the mountains; and the way they lie, if I owned the Wetmore and Stevenson lands, I would not want to sell at all, as they are part of a large boundary that would be needed for shelter of cattle off the mountain and for roadways, and control of the ways to the herding grounds or timber work, or if mining be done would be in the way. Not long before the defendant took the lease in 1888 from Wetmore and Stevenson he offered to make me a deed for some land a mile and a half from any land in his present plea in this suit."

The plaintiffs likewise filed the affidavit of O. W. Muller, who, having testified that he has been county surveyor for Polk County for a number of years, and has surveyed the lands in dispute, and also surrounding lands, said:

"While I value the mountain land as a whole at fifty cents per acre, the land in litigation, lying on the waters of Lost Creek and Little Lost Creek at the foot of the mountain, forms part of a connected body of land of about twenty-five thousand acres, and forms a gateway and outlet to this body

for timber and stock to the Hiwassee River and railroad, without which the rest of the body would be materially reduced in value, say from ten to twenty cents per acre. To cut this off and permanently block this approach would reduce the value of the whole from two to four thousand dollars."

The defendants filed no affidavits and adduced no evidence on the question of value, but appear to have relied wholly on the statements of O. W. Muller when under cross-examination at the trial.

It is not easy to see upon what sound view of this evidence the learned judge of the Circuit Court deprived the plaintiffs of their verdict and judgment. There was no pretence that the plaintiffs had fraudulently overstated the value of the land in order to confer jurisdiction.

It does not seem to have occurred to the defendants that the land which they claimed was not worth $2000, until, at the trial, their attorney caught at the statement of one of plaintiffs' witnesses that he estimated wild mountain land at fifty cents an acre. When the court gave leave to both parties to file affidavits showing the value of the lands in controversy, the defendants were unable or unwilling to make or procure to be made a single statement under oath on the subject of the inquiry. A liberal presumption ought, therefore, to be indulged in favor of the plaintiffs' evidence in that regard. It is well known that there is no matter in respect to which the judgments of men more widely differ than in regard to the value of real estate.

We give no weight to that portion of the plaintiffs' evidence that goes to show damage to the balance of their lands by an adverse occupancy of the land claimed by the defendants. But looking only at the evidence bearing strictly on the value of the controverted lands, it seems obvious that while the market value of the wild mountain land generally was estimated by one of the witnesses at fifty cents an acre, yet it was testified by several witnesses that these particular lands possessed a special value by reason of their location at the foot of the mountain, and because the timber on them was more than usually heavy and valuable both for accessibility

and quality. Charles Seymour, who had been familiar with the lands for twenty-five years as agent for their owner, testified that the lands described in the plea were worth more than $2000 on account of their location and the quality of their timber, and were not to be adjudged by the general price for mountain land in the vicinity.

It is unnecessary to quote authorities to show that, in estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration; not only its present use but its capabilities are to be considered. Even unimproved land lying at the foot of a mountain range is obviously more valuable than similar lands less eligibly situated.

Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant a dismissal of the action for the want of jurisdiction.

The judgment of the Circuit Court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict.

RICHARDSON *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 251. Submitted December 13, 1897. — Decided January 17, 1898.

On a motion to dismiss for want of jurisdiction, this court being of opinion that the ruling of the state court on the points upon which the case turned there was obviously correct, does not feel constrained to retain the case for further argument, and accordingly affirms the judgment.

Opinion of the Court.

THIS was an action of ejectment brought in a state court of Florida, to recover tracts of land at and near Pensacola, alleged to have been granted to the person from whom the plaintiff deraigned title, by the Spanish superintendent general before the acquisition of Florida by the United States. Judgment was entered for the defendants by the trial court, which judgment was sustained by the Supreme Court of the State. The grounds upon which each of these judgments was founded are briefly stated in the opinion of the court, below. The defendant in error moved to dismiss the case for want of jurisdiction. His motion was as follows:

"Comes the appellee, the Louisville and Nashville Railroad Company, by its counsel of record, Gregory L. Smith, and moves the court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:

"It does not appear from the record that the questions relied upon by the plaintiff in error, to give jurisdiction to this court, were presented to the state courts for consideration at the proper time and in the proper manner.

"The Supreme Court of Florida based its decision upon two sufficient grounds, at least one of which does not involve, and is not claimed to involve, a Federal question.

"No Federal question sufficient to give jurisdiction to this court to review the decision of the state court is involved in the cause or was decided by the Supreme Court of Florida."

Mr. Gregory L. Smith for the motion.

Mr. W. A. Blount opposing.

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

This was an action of ejectment brought by plaintiff in error in the Circuit Court of Escambia County, Florida.

On the trial plaintiff offered in evidence an alleged Spanish grant of several tracts from Don Alexander Ramirez, intendant of the army and superintendent general of Cuba and the two Floridas, to Don Vicente Sebastian Pintado with proof of

execution; and also deraignment of paper title from Pintado's heirs to himself. No evidence was offered of actual prior occupation. The property sued for was included in one of the tracts, described as follows:

"The lands designated by the letter C are an extension or tract of the bay of Pensacola, whose superficies of water is equal to an area of 718½ arpents, superficial, occupying between the eastern point of the mouth of the creek of Casa Blanca, commonly called Bayou Chico, and the western point of the mouth of the rivulet or creek of Texar, commonly called Bayou Texar, and a line drawn in the direction of southeast of the needle, ninety-five perches of Paris, within the sea, from the aforesaid first point, and the other line of 100 of said perches in length, counted from the second point mentioned within the sea, also from the same point of southeast of the needle, which embraces the whole of the front from the one to the other mouth of the creeks of Casa Blanca and Texar, between which is the town of Pensacola, the whole conforming and according to the plan annexed, made for the greater clearness and understanding in which is represented the figure which the said land forms in the water and the limits within the bay of Pensacola, being that part of the land and beach which is found between the said two points of the mouths of the mentioned creeks, the curve which the shore of the water of the sea at the highest tide in calm weather makes, and with the depth from the surface of the water as far as ten feet English below the actual bottom, or towards the centre of the earth, in the whole, the space which the figure represented in the said plan C embraces, considering it as a solid, since it has these three dimensions of longitude, latitude and depth. . . . The whole in full property and for the purpose of constructing wharves and houses for bathing, reserving and saving not only the right of his majesty, but also that of the public, at all times whenever it becomes convenient, and it be designed to construct wharves with whatsoever funds, municipal or common, intending the exclusion only with respect to particular individuals."

Opinion of the Court.

Defendants objected to the introduction of the grant upon the following grounds, viz.:

"The grant so far as it relates to the *locus in quo* was a mere license to Pintado to use the property in a particular way and vested in him no sufficient title upon which to recover in ejectment.

"Because said grant, so far as it relates to the *locus in quo*, was not an exclusive grant of the property occupied by the defendants.

"Because said grant, so far as it relates to the *locus in quo*, was not within the delegated authority of the officer who attempted to grant the same.

"Because said grant, so far as it relates to the *locus in quo*, is not one which was validated or recognized by the treaty between the United States and Spain.

"Because it is not shown that Alexander Ramirez had the power or authority to make said grant, so far as it related to the *locus in quo*."

The trial court sustained defendants' objections and excluded the grant, and plaintiff excepted.

Thereupon a verdict was returned for defendants and judgment entered thereon, from which an appeal was taken to the Supreme Court of the State. In that court the plaintiff in error assigned but one error, to wit, "The refusal of the court to admit in evidence the grant from Alexander Ramirez to Vicente S. Pintado."

The Supreme Court of Florida affirmed the judgment, and held that the purpose of the grant "as to the water front therein described was not to grant the land and water as such within the described limits, but the right to use the same, within such limits and to the depth stated below the surface of the soil, for the purpose of constructing wharves and houses for bathing, such right of use being to the exclusion of any similar right of use in any other individuals, and subordinate to the right of the King and the public to construct wharves with municipal or common funds within such limits; also, that while the King of Spain could have made such a grant to Pintado, it would have been contrary to his laws then in

force in West Florida and a case of special exception from their effect, and that Ramirez had no authority to make the grant, and it was void and vested no title in the grantee." *Richardson* v. *Sullivan's Executors*, 20 Sou. Rep. 815. And see *Sullivan* v. *Richardson*, 33 Florida, 1, where the case is fully considered on a prior appeal.

On affirming the judgment the Supreme Court entered an order to the effect that, in holding the grant void, a claim by plaintiff of a right, title or privilege under the treaty between the United States and Spain of February 22, 1819, had been disposed of adversely to him; and a writ of error from this court was allowed.

As before stated, defendants objected to the admission of the grant in evidence on the grounds that, so far as it related to the *locus in quo*, it "was a mere license to Pintado to use the property in a particular way and vested in him no sufficient title on which to recover in ejectment;" and also that the grant "was not within the delegated authority of the officer who attempted to grant the same." Thus the construction of the grant and its validity were presented for consideration as distinct inquiries, and while the trial court assigned no reasons for its action, the Supreme Court passed on both questions, and in its first opinion elaborately discussed them.

But in sustaining the ruling of the trial court in excluding the alleged grant, the Supreme Court rested its decision on the want of authority to make such a grant as it held this to be. Therefore, the contention on behalf of plaintiff in error is that this court necessarily has jurisdiction. As, however, we entirely concur with the state court in the view that the grant was not a grant of title, but of a mere license, easement or right of use, and no evidence of prior possession was offered, we need not consider whether the grant as thus correctly construed was valid or not, for, even if valid, the ruling on this record could not have been other than it was. That ruling was so obviously correct that we do not feel constrained to retain the case for further argument. *Chanute City* v. *Trader*, 132 U. S. 210.

Judgment affirmed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* SOLAN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 73. Argued November 1, 1897. — Decided January 17, 1898.

A statute of a State, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the State under a contract for interstate transportation, contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.

THE case is stated in the opinion.

Mr. George E. Clarke for plaintiff in error. *Mr. Burton Hanson* and *Mr. George R. Peck* were on his brief.

Mr. S. M. Stockslager for defendant in error. *Mr. George C. Heard* was on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought in an inferior court of the State of Iowa against a railroad corporation incorporated under the laws of the State of Wisconsin, and authorized to transact business in the State of Iowa, and having a railroad extending from Rock Valley in Iowa to Chicago in Illinois, to recover $10,000 as damages for injuries suffered by the plaintiff between Boyden and Sheldon in Iowa, from the derailing, by the defendant's negligence, of a caboose attached to a freight train of the defendant, in which the plaintiff was travelling under a written contract by which the defendant agreed to carry him with cattle from Rock Valley to Chicago.

The defendant, in its answer, denied its negligence, and alleged contributory negligence on the part of the plaintiff; and further alleged that by a clause in the contract under which the plaintiff and the cattle were carried it was "among

other things expressly stipulated 'that the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of $500;' that in consideration of said clause in said contract the defendant entered into a contract for the transportation of said stock from Rock Valley, Iowa, to Chicago, Illinois, for a less sum than its regular, usual charges, which fact the owner and shipper of said stock and the plaintiff all well knew at the time of the making of the said contract, and at the time the plaintiff started in transit with said stock from Rock Valley, Iowa, to Chicago, Illinois; that said contract related exclusively to interstate transportation and constituted an interstate commerce transaction, and that the plaintiff and the owner and shipper of said stock, having accepted the benefits of said contract, are now estopped from questioning its validity or disavowing the same; that at common law said contract is a valid and legal contract, and that section 1308 of the Code of Iowa is void and unconstitutional, so far as said contract is concerned, as being an attempt to regulate and limit contracts relating to interstate commerce; that under and by virtue of the terms of said contract plaintiff is not entitled in any event to judgment herein to exceed the sum of $500."

The section of the Code of Iowa, referred to in the answer, is as follows: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." Iowa Code of 1873, § 1308.

At the trial, it appeared that the plaintiff and the cattle under his charge were carried under such a contract as alleged in the answer, and that he suffered injuries as alleged in the declaration; and the court, against the defendant's objections and exceptions, excluded evidence offered by the defendant that the rate on cattle carried the same distance under contracts other than this one was fifty per cent higher than was charged by this contract; and instructed the jury that, if the

defendant was negligent and the plaintiff was without fault, the jury should allow him such a sum as would compensate him for his injuries; and that the clause in the contract, limiting the plaintiff's damages to $500, was not permitted by law, and was void.

The jury returned a verdict for the plaintiff in the sum of $1000, upon which judgment was rendered. The defendant appealed to the Supreme Court of Iowa, which affirmed the judgment. 95 Iowa, 260. The defendant sued out this writ of error.

By the law of this country, as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carriers was established — the securing of the utmost care and diligence in the performance of their important duties to the public. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 117. In the leading case of *Railroad Co.* v. *Lockwood*, above cited, it was accordingly adjudged that an agreement in writing with a railroad company, by which a drover travelling with his cattle upon one of its trains, in consideration of his cattle being carried at less rates, stipulated to take all risk of injury to them and of personal injury to himself, did not exempt the company from all responsibility for injuries to him caused by the negligence of its servants. In *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, the general rule was affirmed; but a contract fairly made between a railroad company and the owner of goods, by which the latter was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as a just and reasonable mode of securing a due pro-

portion between the amount for which the company might be responsible and the compensation which it received, and of protecting itself against extravagant or fanciful valuations.

The statute of the State of Iowa, the validity of which is drawn in question in this case, affirms and extends, as applied to railroad corporations, the principle of the common law, by enacting that "no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." Iowa Code of 1873, § 1308; Iowa Stat. 1866, c. 113.

Under this statute, the courts of the State, in the case at bar, held that the stipulation, in the contract under which the plaintiff and the cattle in his charge were carried by the defendant, that the defendant should "in no event be liable to the owner or person in charge of said stock in any amount exceeding the sum of $500," was void, and could not be enforced by the courts. The plaintiff having been accordingly permitted to recover a verdict and judgment for a larger sum, the question presented by this writ of error is whether the statute, as applied to a claim, for an injury happening within the State, under a contract for interstate transportation, contravenes the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.

This question is substantially answered by previous judgments of this court.

The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State; and may be changed by its legislature, except so far as restrained by the constitution of

the State or by the Constitution or laws of the United States. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368; *Hough* v. *Railway Co.*, 100 U. S. 213, 226; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102, 109; *Smith* v. *Alabama*, 124 U. S. 465, 476–478; *Lake Shore &c. Railway* v. *Prentice*, 147 U. S. 101, 106; *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368; *Paine* v. *Central Vermont Railroad*, 118 U. S. 152, 161.

Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular sub-

ject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons, engaged in the driving or management of all railroad trains passing through the State, to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628. See also *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Hennington* v. *Georgia*, 163 U. S. 299; *Gladson* v. *Minnesota*, 166 U. S. 427.

The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa — which is the only matter presented for decision in this case — clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods.

Judgment affirmed.

RITTER *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

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

No. 142. Argued December 3, 6, 1897. — Decided January 17, 1898.

This was an action on six policies of insurance, all alike (except as to the amount of insurance), and in the following form: "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto William M. Runk, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, his executors, administrators or assigns, twenty thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of the said William M. Runk during the continuance of this policy, upon the following condition, and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The annual premium of seven hundred and eighty-two dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the tenth day of November in every year during the continuance of this contract. In witness whereof," etc. The principal defence was that the assured, when in sound mind, deliberately and intentionally took his own life, whereby the event insured against — his death — was precipitated. One of the issues was the sanity or insanity of the assured when he committed self-destruction. *Held*,

(1) If the assured understood what he was doing, and the consequences of his act or acts, to himself as well as to others — in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would, then he is to be regarded as sane;

(2) In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind but with the intention of simply effecting its destruction;

(3) Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for

the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract;

(4) A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment;

(5) If, therefore, a policy — taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns — expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. The case is not different in principle, if the policy be silent as to suicide, and the event insured, the death of the assured, is brought about by his wilful, deliberate act when in sound mind.

The case is stated in the opinion.

Mr. Richard C. Dale and *Mr. George Tucker Bispham* for plaintiff in error. *Mr. John Hampton Barnes* was on their brief.

Mr. John G. Johnson for defendant in error. *Mr. Charles P. Sherman* and *Mr. Edward Lyman Short* were on his brief.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought against the Mutual Life Insurance Company of New York on six policies of life insurance, each bearing date November 10, 1891, one for $20,000, one for $15,000, and four for $10,000 each. There was a verdict in its favor, upon which judgment was entered, and that judgment was affirmed in the Circuit Court of Appeals. 28 U. S. App. 612.

The policies were all alike except as to the amount of insurance, and were in the following form:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto William M. Runk, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, his executors, administrators or assigns, twenty thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of the said William M. Runk during the continuance of this policy, upon the following condition, and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The annual premium of seven hundred and eighty-two dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the tenth day of November in every year during the continuance of this contract. In witness whereof," etc. The "provisions, requirements and benefits" thus made part of the policy will be referred to hereafter.

The assured died October 5, 1892, all premiums falling due previous to his death having been paid. It is not disputed that he took his own life.

In the affidavit of defence filed by the insurance company, it is stated that at or about the time of the execution of the policies in suit, Runk held policies upon his life to the extent of $315,000 issued to him by other companies; that during the year 1892 he effected additional insurance to a considerable amount, the total amount at or about the time of his death being $500,000; that prior to taking the additional insurance of $200,000, he was indebted in a very large amount by reason of the improper use of moneys entrusted to him in a fiduciary and in a quasi-fiduciary capacity; that he was without resources of his own sufficient to meet the amount of that indebtedness; that he was confronted with the fear of being convicted of breach of trust, and was desirous to protect pecuniarily those whom he had injured; that he deliberately determined to commit suicide for the purpose of escaping the

necessity of meeting those whose confidence had been betrayed, and with the intention, through moneys expected to be paid on his policies of insurance, to liquidate wholly or in part the debts owing by him; that he deliberately and intentionally took his life, being at the time in sound mind and in the full possession of his mental faculties; and that his suicide was not the result of nor occasioned by mental unsoundness, but was the act of a man mentally and morally able to understand all the consequences thereof.

The affidavit of defence also contained the following statements:

"The policies of insurance sued upon contain a reference to the application therefor, which is made a part of the contract of insurance. A copy of this application is hereto attached, which, it is prayed, may be taken as a part of this affidavit. Under the advice of counsel the defendant avers that this application is a part of said contract, and that the contract of insurance was a contract made in the State of New York, and to be interpreted by, and in accordance with, the laws of that State.

"The policies of insurance sued upon were delivered to the said Runk upon the faith of an independent contract entered into by him, embodied in the said application, to the effect that if such policies should be granted, he, the said Runk, did, 'warrant and agree . . . that I will not die by my own act, whether sane or insane, during the said period of two years' — said period of two years dating from the 6th day of November, 1891.

"The said Runk did, within the period of two years, commit a breach of said contract by killing himself, as has been before stated, in the way and manner above recited. By reason of the breach of said contract, and only by reason of such breach, the policy of insurance matured, and damages occasioned by such breach are equivalent in amount to that demanded under the policies."

Each of the applications for policies signed by the assured and attached to the affidavit of defence contained the following:

"I hereby warrant and agree . . . not to engage in any specially hazardous occupation or employment during the next two years following the date of issue of the policy for which application is hereby made, and also not to engage in any military or naval service, in time of war, during the continuance of the policy, without first obtaining permission from this company; I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years."

At the trial below the defendant offered in evidence Runk's application for insurance. This was objected to on the ground that the application was not attached to the policy, and under an act of the General Assembly of Pennsylvania approved May 11, 1881, could not, for that reason, be considered as part of the contract, or be admitted in evidence. The defendant, by counsel, stated at the time that the paper was not offered for the purpose of making it as an "application" part of the contract, but to prove that an independent, collateral, contemporaneous agreement was entered into by which Runk stipulated that he would not die by his own act, whether sane or insane, during the period of two years. The objection to this evidence was sustained, Judge Butler, who presided at the trial in the Circuit Court, observing: "The representation or statement or agreement, call it by whatever name you choose, is in my estimation a part of the application for insurance, and it constitutes a condition on which the policy was applied for and obtained, as much so as any representation contained in the paper itself, and it is therefore by the statute excluded by reason of the fact that a copy was not attached to the policy. . . . The statute intended that the policy shall exhibit on its face, or the policy in connection with whatever it refers to shall exhibit to the insured the conditions on which he holds the policy. The object of this would be to limit the policy of insurance, to qualify it, to make it available only in case the party lived up to this contract."

The statute of Pennsylvania to which reference was made is in these words: "That all life and fire insurance policies upon the lives or property of persons within this Common-

wealth, whether issued by companies organized under the laws of this State, or by foreign companies doing business therein, which contain any reference to the application of the insured or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties." Laws of Pennsylvania, 1881, No. 23, p. 20.

Whether the Circuit Court erred in excluding the application which, by the terms of the contract, constituted the consideration of the company's promise to pay, is a question that need not be considered. If error was committed in this particular, it was one for the benefit of the plaintiff in the action; for, if the application had been admitted in evidence as part of the contract of insurance, the agreement and warranty of the assured not to die by his own act, whether sane or insane, within two years from the date of the policy, would have precluded any judgment against the insurance company. *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 666. Upon this writ of error therefore we must assume that the contract of insurance contained no such agreement or warranty by the assured, nor any express condition avoiding the policy in case of suicide. Besides, the defendant does not insist that this court should determine the rights of the parties upon the basis that the application of Runk constituted part of the contract of insurance. It may be added that we do not wish to be understood as expressing any opinion upon the question whether the Circuit Court erred either in its construction of the Pennsylvania statute of 1881, or in applying that statute to the policies here in suit.

At the trial in the Circuit Court, the plaintiff submitted the following points:

Opinion of the Court.

1. The evidence was not sufficient to warrant the jury in finding that the deceased entered into the contracts of insurance evidenced by the policies sued upon with the intention of defrauding the company.

2. The evidence was not sufficient to warrant the jury in finding that the deceased entered into the contracts of insurance with the intention of committing suicide.

3. The evidence upon the part of the defendant did not warrant any inference of fact constituting a defence in law to the plaintiff's right to recover the amount due upon the policies.

4. The mere fact that the insured committed suicide did not, standing alone, avoid the policies, there being no condition in them to that effect.

5. If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, such self-destruction will not of itself prevent recovery upon the policies.

The company submitted the following points as the basis of instructions to the jury :

1. There could be no recovery by the estate of a dead man of the amount of policies of insurance upon his life, if he takes his own life designedly, whilst of sound mind.

2. If the jury found that Runk committed suicide when he was of sound mind, being morally and mentally conscious of the act he was about to commit, of its consequences, and of its nature, with the deliberate intent to secure to his estate and to his creditors, the amount of the policies sued upon, there could be no recovery.

3. If the jury found that Runk obtained the policies of insurance sued upon at a time when he was insolvent and an embezzler, with the intent thereby to secure, in case of his death, from the defendant, a fund with which to pay those to whom he was indebted, and whose property he had embezzled, and subsequently committed suicide, whilst of sound mind, with the deliberate intent to carry out this scheme, there could be no recovery.

4. The defendant was entitled to set off the loss occasioned by the failure of Runk to keep his agreement not to die by his own hand within two years of the date thereof; and the amount of this loss cannot be less than that of the policies sued upon.

The court disaffirmed the plaintiff's first, second and third points without comment. It disaffirmed the plaintiff's fourth point relating to the effect upon the rights of the assured of suicide standing alone, and affirmed the defendant's first point relating to the same matter.

The plaintiff's fifth point was affirmed, the court, however, accompanying its affirmance of that point with some observations to be presently referred to.

It will be observed that the plaintiff's first and second points assumed that the evidence was not sufficient to warrant a finding that the assured entered into the contracts of insurance with the intention either to defraud the company or to commit suicide. The court rightly refused to so instruct the jury. When the last policies were taken out by Runk he was carrying insurance on his life for an amount large enough to require annual premiums of about $12,000. His income, so far as the record shows, was inadequate to meet such a burden. And yet, in 1891, he largely increased the insurance on his life, and added about $8000 to the sum to be paid annually for premiums. Besides these facts, it appeared that on the day before his death he avowed that his debts must be paid, and that they could only be paid with his life. That avowal was in a letter written to his partner, in which he said that he had deceived the latter, and could only pay his debts *with his life*. That letter concluded: "This is a sad ending of a promising life, but I deserve all the punishment I may get, only I feel my debts must be paid. This sacrifice will do it, and only this. I was faithful until two years ago. Forgive me. Don't publish this." On the same day he wrote to his aunt, to whom he was indebted in a large sum, saying, among other things: "Forgive me for the disgrace I bring upon you, but it is the only way I can pay my indebtedness to you." In addition, he left for the guidance of his executor a memoran-

dum of his business affairs, prepared just before his death, and which tended to show that he was at that time entirely himself.

In view of these and other facts established by the evidence, the court did not err in disaffirming the first and second of plaintiff's points. We may add that, under the charge to the jury, it became unnecessary for them to inquire whether the policies were taken out with the intention of defrauding the insurance company or of committing suicide. The court said to the jury: "What constitutes insanity, in the sense in which we are using the term, has been described to you, and need not be repeated. If this man understood the consequences and effects of what he was doing or contemplating, to himself and to others, if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the subject; otherwise he was not. Here the insured committed suicide, and, as the evidence shows, did it for the purpose, as expressed in his communication to the executor of his will, as well as in letters written to his aunt and his partner, of enabling the executor to recover on the policies, and use the money to pay his obligations. I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defence to this suit. The only question, therefore, for consideration is this question of sanity. There is nothing else in the case. That he committed suicide, and committed it with a view to the collection of this money from the insurance companies and having it applied to the payment of his obligations, is not controverted, and not controvertible. It is shown by his own declaration, possibly not verbal, but written. The only question, therefore, is whether or not he was in a sane condition of mind, or whether his mind was so impaired that he could not, as I have described, properly comprehend and understand the character and consequences of the act he was about to commit. In the absence of evidence on the subject he must be presumed to have been sane. The presumption of sanity is not overthrown by the act of committing suicide. Suicide

may be used as evidence of insanity, but standing alone it is not sufficient to establish it. . . . If you find him to have been insane, as I have described, your verdict will be for the plaintiff. Otherwise it will be for the defendant."

It thus appears that the case was placed before the jury upon the single issue as to the alleged insanity of the assured at the time he committed suicide, and with a direction to find for the plaintiff if the assured was insane at that time, and for the company if he was then of sound mind.

Assuming that the jury obeyed the instructions of the court, their verdict must be taken as finding that the assured was not insane at the time he took his life. We must then inquire whether the observations of the trial court on the subject of insanity were liable to objection.

We have seen that the plaintiff asked the court to instruct the jury that if the assured intentionally killed himself when his reasoning faculties were so far impaired by insanity that he was unable to understand the moral character of his act, even if he did understand its physical nature, consequence and effect, such self-destruction would not of itself prevent recovery upon the policies.

This was the only instruction asked by the plaintiff which undertook to define insanity, and, as before stated, it was given by the court. But in giving it the court said: "We must understand what is meant and intended by the term 'moral character of his act.' It is a point which has been used by the courts, and is correctly inserted in the term; but it is a term which might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts, to himself as well as to others — in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would — then he is to be regarded by you as sane. Otherwise he is not." Substantially the same obser-

vations were made in that part of the charge, which is above given.

The plaintiff insists that the definition of insanity, as given by the trial court, was much narrower than was required or permitted by the decisions of this court. It is said that the impairment not only of the moral vision but also of the will, leaving the deceased in a condition of inability to resist the impulse of self-destruction, has been accepted by this court as describing a phase of insanity or mental unsoundness. One of the cases to which the plaintiff referred in support of this view is *Davis* v. *United States*, 165 U. S. 373, 378, which was a prosecution for murder. It was there held that the accused was not prejudiced by the following instruction given to the jury: "The term 'insanity' as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing; or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." This was substantially what had been held by this court in previous cases. *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Bigelow* v. *Berkshire Life Ins. Co.*, 93 U. S. 284; *Insurance Co.* v. *Rodel*, 95 U. S. 232; *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121; *Connecticut Life Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527.

In *Terry's case*, above cited, — which was an action upon a life policy declaring the policy void if the assured died by his own hand, — it became necessary to instruct the jury on the subject of insanity. The court said: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary

act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

Recurring to the ruling of the court in the present case, it is not perceived that the plaintiff had any ground to complain that its definition of insanity was too strict or too narrow. His fifth point, in general terms, defined insanity as being a condition in which the reasoning faculties are so far impaired that the person alleged to be insane when committing self-destruction was unable to understand the moral nature of his act, even if he understood its physical nature. This definition was not rejected. On the contrary, it was accepted, the court at the time making some observations deemed necessary to show what, in law, was meant by the words "moral nature of his act." By those observations, the jury were informed that if the assured understood what he was doing, and the consequences of his act or acts to himself and to others — that is, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would — then he was to be regarded as sane; otherwise, not.

It is suggested that the attention of the jury should have been brought specifically or more directly to the fact that unsoundness of mind exists when there is an impulse to take life which weakened mental and moral powers cannot withstand — a condition in which there is no continued existence of a governing will strong enough to resist the tendency to self-destruction. But the words of the charge, although of a general character, substantially embodied these views. The court stated the principal elements of a condition of sanity as contrasted with insanity. What it said was certainly as specific as the instruction asked by the plaintiff. If the plain-

tiff desired a more extended definition of insanity than was given, his wishes, in that respect, should have been made known. The court having affirmed his view of what was evidence of insanity, and such affirmance having been accompanied by observations that brought out with more distinctness and fulness what was meant by the words "moral character of his act," the plaintiff has no ground to complain; for nothing said by the court upon the question of insanity was erroneous in law or inconsistent with that which the plaintiff asked to be embodied in the charge.

No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life.

This brings us to the question whether the insurance company was liable — assuming that it was not a part of the contract enforceable in Pennsylvania, that the assured should "not die by his own act whether sane or insane," within two years from the date of the policy.

It is contended that the court erred in saying to the jury, as in effect it did, that intentional self-destruction, the assured being of sound mind, is in itself a defence to an action upon a life policy, even if such policy does not, in express words, declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise?

Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a

larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury. *Vicksburg & Meridian Railroad* v. *Putnam*, 118 U. S. 545, 554. If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of his life.

That the parties to the contract did not contemplate insurance against death caused by deliberate, intentional self-destruction when the assured was in sound mind, is apparent from the "provisions, requirements and benefits" referred to in and made part of the policy. They show that the policy was issued on the twenty-year distribution plan, and was to be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue; that, after three full annual premiums were paid, the company

would, upon the legal surrender of the policy, before default in the payment of any premium, or within six months thereafter, issue a non-participating policy for a paid up insurance, payable as provided, for the amount required by the provisions of the New York statute of May 21, 1879, Laws of New York, c. 347; that the assured was entitled to surrender the policy at the end of the first period of twenty years "and the full reserve computed by the American table of mortality, and four per cent interest, and the surplus, as defined above, will be paid therefor in cash;" that if the assured surrendered the policy the total cash value at the option of the policy holder should be applied "to the purchase of an annuity for life, according to the published rates of the company at the time of surrender;" that after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that "he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements of the company as to age, and military or naval service in time of war shall be observed;" that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured should not be disputed; and that the party whose life was insured should always wear a suitable truss. These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event.

In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns,

that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract.

There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind — the policy being silent as to suicide — is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy — taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns — expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

Is the case any different in principle if such a policy is silent as to suicide, and the event insured against — the death of the assured — is brought about by his wilful, deliberate act when in sound mind? Light will be thrown on this question by some of the adjudged cases, having more or less bearing upon the precise point now before this court for determination.

The plaintiff insists that the question just stated is answered in the affirmative by the opinion in *Life Ins. Co.* v. *Terry*,

15 Wall. 580. As before stated, that was an action upon a life policy, containing the condition that it should be void if the assured should "die by his own hand;" and the controlling question was whether the condition embraced the case of an assured who committed self-destruction at a time when his reasoning faculties were so far impaired that he was unable to comprehend the moral character, the general nature, consequences and effect of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist. There was no question in that case as to the effect upon the rights of the parties of intentional self-destruction, where the policy contained no provision as to suicide. In the course of the review of the adjudged cases reference was made in the opinion of this court to *Borradaile* v. *Hunter*, 5 Mann. & Gr. 639, and also to *Hartman* v. *Keystone Ins. Co.*, 21 Penn. St. 466, 479. In the former case it appeared that the assured threw himself into the Thames and was drowned, and the jury found that he voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong. The question was as to the liability of the insurance company on a policy issued to the assured containing a clause or proviso that the policy should be void if "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel." Maule, Erskine and Coltman, JJ., held that the company was not liable, while Tindall, C. J., was of the opinion that the proviso embraced cases of felonious suicide only, and not cases of self-destruction whilst the assured was under the influence of frenzy, delusion or insanity. In the latter case it appeared that the assured committed self-destruction by taking arsenic. The Supreme Court of Pennsylvania held that there could be no recovery, Chief Justice Black saying: "The conditions of the policy are, that it shall be null and void 'if the assured shall die by his own hand, in or in consequence of a duel, or by the hands of justice,' etc. The plaintiff argues that the first clause here quoted

does not embrace a suicide committed by swallowing arsenic. Where parties have put their contracts in writing their rights are fixed by it. But the contract is what they meant it to be, and when we can ascertain their meaning from the words they have used, we must give it effect. One rule of interpretation is, that we must never attribute an absurd intent if a sensible one can be extracted from the writing. No absurdity could be greater than a stipulation against suicide in a duel. The words 'die by his own hand,' must, therefore, be disconnected from those which follow. Standing alone, they mean any sort of suicide. Besides this, the court was very plainly right in charging that if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life that his representatives cannot recover for that reason alone." Mr. Justice Hunt, delivering the opinion in *Terry's case*, made an observation in relation to the two cases just cited which is supposed to be favorable to the plaintiff's contention. He said: "In *Hartman* v. *Keystone Ins. Co.* the doctrine of *Borradaile* v. *Hunter* was adopted, with the confessedly unsound addition that suicide would avoid a policy although there was no condition to that effect in the policy." This observation of the learned justice was irrelevant to the case before the court, and cannot be regarded as determining the point in judgment. If it was meant there could be a recovery by the personal representative of an assured who took out the policy, and who, in sound mind, took his own life — the policy being silent in reference to suicide — we cannot concur in that view.

In *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 600, which was an action by the assignee of a life policy, the defence, in part, being that the assignee murdered the assured in order to get the benefit of the policy, Mr. Justice Field, speaking for this court, said: "Independently of any proof of the motives of Hunter [the assignee] in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it, when, to secure its immediate payment, he murdered the assured. It would be a reproach to

the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

In *Hatch* v. *Mutual Life Ins. Co.*, 120 Mass. 550, 552, it appears that a policy of insurance on the life of a married woman provided that "if the said person whose life is hereby insured shall die by her own act or hand, whether sane or insane, the policy should be null and void." It was in proof that the assured died by reason of a miscarriage produced by an illegal operation performed upon and voluntarily submitted to by her with intent to cause an abortion, and without any justifiable medical reason for such an operation. The court, observing that this voluntary act on the part of the assured was condemned alike by the laws of nature and by the laws of all civilized States, and was known by the assured to be dangerous to life, said: "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth." The report of the case shows that it was decided without reference to the questions raised by the special clauses of the policy.

The subject was considered by the Supreme Court of Alabama in *Supreme Commandery &c.* v. *Ainsworth*, 71 Alabama, 436, 446. Chief Justice Brickell, delivering the unanimous judgment of that court, said:

"In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud, or the criminal misconduct of the assured is, in contracts of marine or of fire insurance, an

implied exception to the liability of the insurer. *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Citizens' Ins. Co.* v. *Marsh*, 41 Penn. St. 386; *Chandler* v. *Worcester Mut. Fire Ins. Co.*, 3 Cush. 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money. The doctrine asserted in *Fauntleroy's case*, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion, that voluntary, criminal self-destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction or implication exceptions into such contracts, which usually contain special exceptions." Again: "The fair and just interpretation of a contract of life insurance, made with the assured, is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing, or intended to produce it;" and that "the extinction of life by disease, or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and, therefore, are forbidden by public policy, reference is often made to the case of *The Amicable Society &c.* v. *Bolland*, 4 Bligh, N. S. 194, 211, known as *Fauntleroy's case.*

Opinion of the Court.

That was an action by assignees in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of Fauntleroy, to his executors, administrators or assigns. The assured was convicted of forgery, and for that offence was executed. The Lord Chancellor, after observing that the question was whether the parties representing and claiming under one who effects insurance upon his life, and afterwards commits a capital felony, for which he was tried and executed, could recover the amount named in the policy, said: "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money — is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

Referring to that case, Bunyon in his work on Life Insurance says: "It would render those natural affections which make every man desirous of providing for his family, an inducement to crime; for the case may be well supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force when death arose from any such cause would be a fraud

upon the insurers, for a man's estate would thereby benefit by his own felonious act. Hence the rule of law when there is no condition whatever, but in that case, if the suicide or self-destruction takes place when the assured is *insane* and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money." 3d ed. p. 96; 2d ed. p. 72.

In *Moore* v. *Woolsey*, 4 Ell. & Bl. 243, 254, in which the question was as to the rights of an assignee under a policy providing that if the assured should die by duelling or by his own hand, or the hand of justice, it should be void as to the personal representative of the assured, Lord Campbell, C. J., said that, "if a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk: a stipulation that, in either case, upon such an event the policy should give a right of action, would be void."

For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit.

The case presents other questions, but they are of minor importance, and do not affect the substantial rights of the parties.

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

Affirmed.

Mr. Justice Peckham did not take part in the consideration or decision of this case.

BENJAMIN v. NEW ORLEANS.

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

No. 188. Argued January 10, 1898. — Decided January 31, 1898.

After the answers of this court to the questions of the Circuit Court of Appeals in this case, reported in *New Orleans* v. *Benjamin*, 153 U. S. 411, Benjamin amended his bill in the Circuit Court by inserting an averment that "each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made." The city demurred on the ground that the case was not one of equitable cognizance, and that the amendment was insufficient to show jurisdiction. This demurrer was sustained in the Circuit Court, and the Circuit Court of Appeals affirmed its decree because the necessary diversity of citizenship was not affirmatively shown. *Held*, that this judgment of the Circuit Court of Appeals was final, and could not be appealed from.

THE case is stated in the opinion.

Mr. J. D. Rouse for appellant. *Mr. William Grant* was on his brief.

Mr. Branch K. Miller for appellees.

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

This was a bill filed by Henry W. Benjamin, "an alien and a subject of the Kingdom of Great Britain," on February 9, 1891, in the Circuit Court of the United States for the Eastern District of Louisiana, "against the city of New Orleans, a municipal corporation, created by the laws of the State of Louisiana and a citizen of said State; the city of Kenner, also a municipal corporation created by the laws of and a citizen of said State; the Police Jury of the Parish of Jefferson and

the Police Jury of the Parish of St. Bernard, political corporations created by the laws of and citizens of said State," seeking to collect, in the manner and on the grounds therein set forth, certain Metropolitan Police warrants or certificates. The defendants other than the city of New Orleans seem to have dropped out in the course of the proceedings.

The jurisdiction of the Circuit Court was attacked by defendant but was maintained, and a decree entered in favor of complainant, from which defendant appealed to the Circuit Court of Appeals for the Fifth Circuit, whereupon that court certified certain questions to this court, by the answers to which it was determined that no such dispute or controversy arose in the case as gave jurisdiction to the Circuit Court without regard to the diverse citizenship of the parties, and that as the suit was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the judiciary acts of 1887 and 1888, by the assignee thereof, and it did not appear that it could have been brought in that court by the assignors, the jurisdiction of the Circuit Court could not be maintained on the ground of diverse citizenship. *New Orleans* v. *Benjamin*, 153 U. S. 411.

On receipt of the answers certified from this court, the Circuit Court of Appeals reversed the decree of the Circuit Court and ordered that court to dismiss the bill, unless by amendment its jurisdiction could be made affirmatively to appear. Thereupon complainant amended the bill by inserting the following: "And your orator avers that each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

The city of New Orleans demurred for the reasons that the case was not one of equitable cognizance, and that the amendment was insufficient to show jurisdiction. The Circuit Court sustained the demurrer on both grounds and dismissed the

bill, (71 Fed. Rep. 758,) whereupon the cause was taken to the Circuit Court of Appeals, which affirmed the decree because the necessary diversity of citizenship was not affirmatively shown. 41 U. S. App. 178.

The case was not brought here directly from the Circuit Court of the United States on the question of the jurisdiction of that court as such, nor did the Circuit Court of Appeals, when the case came before it for the second time, certify any question on which it desired our instruction.

On the contrary, this is an appeal from a judgment of the Circuit Court of Appeals affirming the decree of the Circuit Court, and the inquiry at once presents itself as to our jurisdiction to entertain such appeal.

By the sixth section of the judiciary act of March 3, 1891, the judgments or decrees of the Circuit Courts of Appeals are made final in certain classes of cases, and, among others, "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States." This case confessedly did not belong to either of the other classes, and if it fell within the class just mentioned, this appeal will not lie.

The judicial power extends to controversies between citizens of different States; and between citizens of a State and citizens or subjects of foreign States; but from the judiciary act of 1789 to the act of August 13, 1888, it has been provided in substance, (the differences being immaterial here,) that no Circuit Court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." And, to avoid the operation of this limitation, it is necessary in such cases that the record should show that the suit could have been maintained in the Circuit Court in the name of the assignor. *Parker* v. *Ormsby*, 141 U. S. 81.

As this suit stood, after it had been determined that the jurisdiction of the Circuit Court could not be invoked on the ground that the cause of action arose under the Constitution or laws of the United States, the jurisdiction rested on the fact that the complainant was an alien and the defendant a citizen of Louisiana, although, by reason of the restriction, it was also essential that it should appear that complainant's assignors might have brought suit in the Circuit Court if they had not assigned their claims.

But the jurisdiction was none the less dependent on diverse citizenship as between complainant and defendant because it might be defeated if complainant did not bring himself within the restriction. The diverse citizenship of the assignors of the claims was not another ground of jurisdiction than the diverse citizenship of complainant and defendant, and the sixth section, in referring to cases in which the jurisdiction is dependent entirely on diverse citizenship between the opposite parties to the suit or controversy, refers to cases where no other distinct ground of jurisdiction is relied on. It frequently happens that more than one ground is set up as between the same parties, and also separate and different grounds in respect of one or more of several parties. We think the case, within the intent and meaning of that section, clearly belongs to the class in which the judgments and decrees of the Circuit Court of Appeals are made final.

Appeal dismissed.

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

CESSNA v. UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 78. Argued and submitted January 4, 1898. — Decided February 21, 1898.

The decision of the Court of Private Land Claims that the ayuntamiento of El Paso had no power to make a grant, like the one in controversy in this case, entirely outside of the four square leagues supposed to belong to El Paso, and that even if it had such power, the conditions of the alleged grant were never performed by the grantee, and therefore that he acquired no title to the property, was correct.

On January 9, 1893, the appellants as plaintiffs filed their petition in the Court of Private Land Claims, praying that their title to a tract of land in the Territory of New Mexico, and near to the city of El Paso, Texas, be confirmed. The plaintiffs named as defendants, besides the United States, the unknown owners of the Dona Ana Bend Colony, Mesilla Colony and Bracito Grants. The United States as well as certain individuals representing themselves to be the owners of these grants appeared and answered. Thereafter a trial was had, and on June 26, 1895, the court entered a decree, finding that the plaintiffs' claim of a land grant had not been sustained by satisfactory proof, and dismissing the petition. From such decree the plaintiffs brought this appeal.

The facts disclosed by the record, and about which there is little dispute, were substantially as follows: In April, 1823, one Doctor John Heath, or Juan Gid, as his name is written in the Spanish, petitioned the ayuntamiento or general council of El Paso for a grant of a tract of land, which petition was acted upon by the ayuntamiento, and a tract five leagues square was granted to him. This petition was in these words:

"Dr. Don Juan Gid, citizen of the United States of North America, in the best legal form allowed by law, appears before your honorable body and states: That, not having received up to date any answer to the communication of December last of last year, which I presented to the former

ayuntamiento, the predecessor of your honorable body, which (communication), approved in all its parts, was forwarded to His Imperial Majesty by the same, for which reason and because of the increase (ampleacion) of the power which is given to your honorable body by the law of colonization which was issued by the National Instituent Assembly (Junta) of the Empire on the 3d of January of the present year. For these reasons I again have recourse through this, repeating my request to your honorable body, adding that I offer to bring for the settlement of the land of El Bracito, which I ask may be given to me, thirty families of Christian Catholics, and among them blacksmiths, gunsmiths, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors of medicine, and to establish a hospital with its corresponding drug store and proper stock therein, with the necessary instruments for all operations; also to build a warehouse supplied with all kinds of merchandise for wholesale; the necessary machines for the manufacture of cotton and cloth goods, another for the manufacture of gunpowder, offering, until payment of the expense of transportation, to furnish the amount of this article all this jurisdiction may need at the very low price of one dollar per pound; it being first class for the use of arms; with the understanding that in all the said trades there shall be admitted for instruction the youths whose parents may see fit to dedicate them thereto; the children of this country (suelo) having the preference thereto.

"In view of what has been said and because, for establishing the said machinery, utilizing the farms, grazing stock and for the other field interests, it is indispensable that it have the extension which is necessary therefor, it behooves me to demonstrate to your honorable body that the land which may be assigned to me, limiting me to the smallest amount, be at least enough for (sea lo menos para) an hacienda, and that said designation be made for me on both sides, that is to say, that it be on both sides of El Bracito, because the said land being broken it is necessary to leave out various portions of it. I also propose to your honorable body that, until time

permits whatever else may be desirable, this settlement be attached to the parish of this jurisdiction: likewise that the pasture and woodlands be common, with the same privilege as other people of this locality: recommending that it be without prejudice to those farms (sementeras), and that the petitioner be the person to whom is entrusted the distribution of said lands, he being considered the legitimate justice of said families.

"Candor of mind being what I most appreciate, and to join myself with my brethren, the faithful inhabitants of this Empire, living always in the simple peace, in order to dispel all rumors of hatred, I ask your honors that, you being pleased, and in order that the said law of colonization be executed in all its parts, notice of this, my petition, be given to the individuals of this jurisdiction, in order that all these gentlemen who like may better or equal it with a view to the right of preference, in which act your honorable body, to whom is entrusted the power of father of this country (patria), will weigh at their true value, the incalculable benefits that result from my petition whereupon, far from seeking means to deprive it thereof, it would be encouraged in every way to procure their increase.

"Wherefore, I ask and petition your honorable body to be pleased to accede to what I petition, being pleased to pardon the fault that this my petition is not upon paper of the proper seal, for there is none in this place, I being ready to pay the fees that belong to the national treasury. I protest that I do not act in bad faith, and the necessary, etc.

"Paso, April 7th, 1823.

"JUAN GID."

Certain proceedings were had upon this petition, which it is unnecessary to mention in detail.

On April 22 this order was made by the ayuntamiento:

"This ayuntamiento having on this day received that which by its order was to be executed by the commission appointed from its midst to do the surveying that was to be done in the land of El Bracito, this being five leagues in each direction,

the whole of it composing an 'hacienda,' according to article 5 of the colonization plan; which land was granted by this ayuntamiento to Don Juan Gid for the purpose of settlement as stated afterwards, and he being satisfied with what was done in all its parts by the said commission, it was entered as a minute in due witness thereof the president and other members of which that is composed signing it before me, the secretary, to which I certify. José Ygnacio Rascon, José Morales, José Maria Belarde, José Francisco Carbajal, Juan Maria Barela, Antonio Prudencio, José Maria García, Saturnino Aguiar, José Manuel García, Lorenzo Provencio, José Albares.

"JUAN MARIA PONCE DE LEON, *Secretary.*"

And on the 25th the following:

"The present expediente in which there has been granted to Don Juan Gid, Anglo-American of the United States, the lands of El Bracito for settlement being considered by this ayuntamiento as closed, proceed to what is to be done under the tariff in force in this ayuntamiento and by its secretary that Juan Gid may know what fees he is to pay for what has been done therein placing the original in the archive as a perpetual testimony, but nevertheless to this shall be sent, together with a certified copy, by the first mail or safe-conduct to the governor of this province for his superior information; another of the same kind being given to the party in interest for his protection. And by the present order the president and members of this corporation so determined and signed it, before me, the secretary, to which I certify. José Ygnacio Rascon, José Morales, José Maria Belarde, José Francisco Carbajal, Saturnino Aguiar, José Manuel García, Lorenzo Provencio.

"JUAN MARIA PONCE DE LEON, *Secretary.*"

"It is a copy of the original expediente which on petition of Don Juan Gid was made in order to grant to him for settlement the land of El Bracito, in accordance with the colonization plan, together with what is afterward stated: which original remains accordingly in the archive, to which I certify.

"JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]"

Statement of the Case.

A copy of these proceedings was sent to the governor of the province, and the following action was taken by the provincial deputation:

"In the session of the 17th of the present month the acting governor of this province, Captain José Antonio Vizcarra, presented to this deputation the reports which your honorable body makes to him in an undated official communication which said chief received; and he also presented another official letter, dated the 26th of last April, accompanied by a copy of the proceedings had by your honorable body in giving to the foreigner Mr. John Heath, at the Bracito, possession of land belonging to the people of that jurisdiction.

"The deputation in the same session resolved to express to your honorable body the surprise it felt at the violent and mistaken procedure with which you conducted yourselves in giving land to foreigners, not only with prejudice to the inhabitants of that jurisdiction, but also in violation of the same law of which your honorable body availed itself in order to carry into effect the possession referred to, thus opening the door to the continual complaints of its people: this deputation refraining from making other observations to your honorable body, on account of the colonization law, which was the moving cause in the concession of the Bracito land to the said Heath having been repealed; but proceeding to direct your honorable body that, in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families that he offers to bring, it should notify the said Heath, through the plenipotentiary of the United States resident in New Mexico, or in some other manner which it may deem more prompt and effective, that the possession which has been given to him at the Bracito, belonging to that jurisdiction of El Paso, was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed.

"And I communicate it to you by direction of the said deputation, with the understanding that I shall communicate to you the decision that may be arrived at when the petition

of Mr. Albo and the other persons of that town shall have been discussed, your honorable body notifying me of the receipt of and compliance with these instructions.

"God preserve your honorable body many years.

"Santa Fé, June 19, 1823, the third year of independence and the second of liberty.

"FRANCISCO JAVIER CHAVEZ. [SCROLL.]

"JUAN BAUTISTA VIGIL. [SCROLL.]

"*Deputy Secretary.*"

It does not appear that notice of this action of the provincial deputation was at the time communicated to Heath, for soon after the final order of the ayuntamiento he returned to this country and to the State of Missouri, of which State he had theretofore been a citizen, made a disposition of his property, and collected a body of colonists, with whom, in the year 1824, he proceeded to El Paso, with a view of taking possession of this tract of land. Instead of being permitted to occupy the tract, he was banished from the country, forced to abandon the property that he had brought with him, and sent back to the United States a bankrupt. He returned to Missouri, where he lived until he died, in the year 1851. Petitioners claim under him.

The national colonization law of January 4, 1823, under which these proceedings were had, is, so far as it can have any application to the present case, translated by Rockwell (Rockwell's Spanish Laws, p. 617) as follows:

"Art. 1. The government of the Mexican nation will protect the liberty, property and civil rights of all foreigners, who profess the Roman Catholic apostolic religion, the established religion of the Empire.

"Art. 2. To facilitate their establishment, the executive will distribute lands to them, under the conditions and terms herein expressed.

"Art. 3. The empresarios, by whom is understood those who introduce at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they

intend to introduce for that purpose; and any other particulars they may deem necessary, in order that with this necessary information, the executive may designate the province to which they must direct themselves; the lands which they can occupy with the right of property, and the other circumstances which may be considered necessary.

"Art. 4. Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

"Art. 5. The measurement of land shall be the following: Establishing the vara at three geometrical feet, a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two or more sitios; five sitios shall compose one hacienda."

"Art. 7. One labor shall be composed of one million square varas, that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two or more labors. These labors can be divided into halves and quarters, but not less.

"Art. 8. To the colonists, whose occupation is farming, there cannot be given less than one labor, and to those whose occupation is stock raising, there cannot be given less than one sitio.

"Art. 9. The government of itself or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

"Art. 10. Establishments made under the former government which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

"Art. 11. As one of the principal objects of laws in free governments ought to be to approximate, so far as is possible, to an equal distribution of property, the government, taking

into consideration the provisions of this law, will adopt measures for dividing out the lands, which may have accumulated in large portions, in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands to be fixed by appraisers."

"Art. 19. To each empresario, who introduces and establishes families in any of the provinces designated for colonization, there shall be granted at the rate of three haciendas and two labors, for each two hundred families so introduced by him, but he will lose the right of property over said lands should he not have populated and cultivated them in twelve years from the date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

"Art. 20. At the end of twenty years the proprietor of the lands, acquired in virtue of the foregoing article, must alienate two thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one third part.

"Art. 21. The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting from the day of the promulgation of this law, the executive can diminish the premium as it may deem proper, giving an account thereof to Congress, with such information as may be deemed necessary.

"Art. 22. The date of the concessions for lands constitutes an inviolable law for the right of property and legal ownership; should any one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

"Art. 23. If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced, in which case the respective ayuntamiento can grant it to another.

"Art. 24. During the first six years from the date of the concession the colonists shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

"Art. 25. The next six years from the same date they shall pay half tithes, and the half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens."

"Art. 29. Every person shall be free to leave the empire, and can alienate the lands over which he may have acquired the right of property, agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law."

There is a dispute as to the proper translation of section 4, the original of which is:

"Art. 4. Las familias que por si mismas vengan á establecerse, se presentarán immediatamente al respectivo Ayuntamiento del lugar en que quieran radicarse, para que conforme á las órdenes con que se hallen del Gobierno se les designe por aquel cuerpo el terreno que les corresponda segun la industria que van á plantear;"

and a translation thereof, as furnished by Mr. Tipton, a special agent and Spanish expert of the Department of Justice in the office of the United States attorney for the Court of Private Land Claims, is:

"Art. 4. The families who come of themselves to settle shall present themselves immediately to the respective ayuntamiento of the place at which they desire to establish themselves in order that, in conformity with the orders which they have from the executive, there be designated to them by that body the lands to which they are entitled according to the industry which they are going to undertake."

At the time of the enactment of this colonization law Iturbide was the Emperor of Mexico. Soon thereafter a revolution followed. He abdicated March 20, 1823, and his banishment was ordered by a decree of the Constituent Congress of Mexico, April 23, in these words:

"The Sovereign Constituent Congress of Mexico, in the session of yesterday, decreed the following:

"1. That the coronation of Agustin de Iturbide being an

act of violence and of force, and void in law, there is no occasion to discuss the abdication he makes of the crown.

"2. Consequently, it also declares as void the hereditary succession and the titles that have emanated from the coronation; and that all the acts of the late government, from the 19th of May to the 29th of March last, are illegal, but subject to revision by the present Congress for their confirmation or revocation.

"3. The supreme executive authority will cause the prompt departure of Agustin de Iturbide from the territory of the nation."

Article 10 of the original draft of the treaty of Guadalupe Hidalgo, as agreed upon between the commissioners representing this Government and Mexico, was as follows:

"Art. 10. All grants of land made by the Mexican Government, or by the competent authorities in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican Government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfil the said conditions within the periods limited within the same, respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which the said grants shall not be obligatory upon the State of Texas in virtue of the stipulations contained in this article. The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid elsewhere than in Texas, put in possession under such grants; and in default of the fulfilment of the conditions of any such grant within the new period, which, as above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void." (Message of the President of the United States, transmitting papers relative to the treaty

of Guadalupe Hidalgo, Feb. 8, 1849, Ex. Doc. 50, H. R. 30th Cong., 2d Sess. p. 17.)

That article, however, was stricken out by the Senate of the United States, and in the message of President Polk the reasons for its rejection are stated in the following language (Ib. 32):

"The objection to the tenth article of the original treaty was not that it protected legitimate titles, which our laws would have equally protected without it, but that it most unjustly attempted to resuscitate grants which had become mere nullities, by allowing the grantees the same period after the exchange of the ratifications of the treaty, to which they had been originally entitled after the date of their grants, for the purpose of performing the conditions on which they had been made. In submitting the treaty to the Senate I had recommended the rejection of this article. That portion of it in regard to lands in Texas did not receive a single vote in the Senate. This information was communicated by the letter of the Secretary of State to the Minister of Foreign Affairs of Mexico, and was in possession of the Mexican Government during the whole period the treaty was before the Mexican Congress, and the article itself was reprobated in that letter in the strongest terms. Besides, our commissioners to Mexico had been instructed 'that neither the President nor the Senate of the United States can ever consent to ratify any treaty containing the tenth article of the treaty of Guadalupe Hidalgo in favor of grantees of land in Texas or elsewhere.' And again, 'should the Mexican Government persist in retaining this article, then all prospect of immediate peace is ended, and of this you may give them an absolute assurance.'"

And in the treaty as ratified, 9 Stat. 922, were left the following provisions which guarantee only the rights of Mexicans to property belonging to them in the territory (9 Stat. 929, art. 8):

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove

Counsel for Appellants.

at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever. . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

The act creating the Court of Private Land Claims, (Act of March 3, 1891, c. 539, 26 Stat. 854,) provides in section 13, 26 Stat. 860:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

The eighth subdivision of the same section also contains this limitation:

"No concession, grant or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition or requirement was performed within the time and in the manner stated in any such concession, grant or other authority to acquire land."

Mr. Robert Rae and *Mr. J. B. Cessna* for appellants. *Mr. T. B. Catron* was on their brief.

Mr. Solicitor General, *Mr. Special Assistant Attorney General Reynolds* and *Mr. Frank Springer* for appellees submitted on their brief.

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

The Court of Private Land Claims was of the opinion that the ayuntamiento or town council had no power to make a grant such as this of a tract entirely outside the four square leagues supposed to belong to the town; and, secondly, that even if it had such power the conditions of the alleged grant were never performed by Heath, and therefore he acquired no title to the property.

The colonization law of January 4, 1823, was in force only a short time, having been suspended by the decree of April 11, 1823, and superseded by the law of August 18, 1824. Few proceedings were had under it, and therefore its true meaning cannot be considered as determined by any settled usage of the Mexican authorities. Indeed, counsel for appellants, with all their industry, have been able to find but one other grant made or attempted to be made under its authority. It is, to say the least, difficult to discern in this law any warrant for an original grant by the ayuntamiento. Article 2 provides that "the executive will distribute lands." This is in accord with the settled policy of the old Spanish law, which reserved to the king the power of granting lands. Doubtless this power was often exercised under the directions of the king by subordinate officials, but full control was retained by him. So here the executive retains the control of the distribution of lands. It is true the article provides that such distribution shall be "under the conditions and terms herein expressed," but that simply means the conditions and terms under which the executive will act. Article 3 refers to grants to empresarios, and that specifically declares that they "shall previously contract with the executive," who will "designate the province to which they must direct themselves; the lands which they can occupy." It is said that Heath does not come

within the terms of this article because he did not propose to introduce at least two hundred families, and this contention is doubtless correct. Article 4, upon which the plaintiffs specially rely, makes provision for families who emigrate "not included in a contract," evidently referring thereby to the empresario contracts specified in the preceding section. Such families are directed to "present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish." Accepting the contention of plaintiffs that Heath comes within the scope of this article, we note these limitations: The emigrating families are to present themselves to the ayuntamiento of the "place where they wish to settle," not the ayuntamiento of the town nearest to the land upon which they wish to settle. The natural meaning of this is that when families desire to settle within the limits of a town they shall present themselves to the ayuntamiento of that town for a designation of the lands they may occupy. It would be strange to find that a town council was empowered to grant lands outside the limits of the town and anywhere within the territory or department in which it was situated, while it is not strange to find that council authorized to locate emigrants upon those vacant lands not exceeding four leagues square which, according to Spanish and Mexican custom, were ordinarily appurtenant and subject to the jurisdiction of the town. We do not mean to intimate that El Paso in fact possessed a territory of four square leagues over which it had jurisdiction, although that seems to have been the opinion of the Court of Private Land Claims, for it said: "El Paso, like other Spanish towns, is presumed to have had a grant of four square leagues of land, and the ayuntamiento had the power to make allotments of land within the four leagues so granted."

This matter was considered in *United States* v. *Santa Fé*, 165 U. S. 675, 699, and the conclusion was reached after full examination that it was not true under the Spanish law that every town was entitled to a grant of four leagues square, the

court saying: "The inference to be deduced from all these documents supports the theory that under the Spanish laws, as found in the recopilacion, all towns were not entitled by operation of law to four square leagues, but that at a late date the Spanish officials had adopted the theory that four square leagues was the normal quantity which might be designated as the limits of the new pueblos to be thereafter created."

Still it was undoubtedly true that by special grant or contract many towns did have such an area of contiguous and dependent territory, and it would seem that this article gave the ayuntamiento authority to designate such portion of those lands as it deemed suitable to the industry which the emigrating families proposed to undertake.

We notice another limitation in this article, and that is that the designation by the ayuntamiento is to be made "in conformity with the instructions of the executive." This contemplates, as preliminary to the action of the ayuntamiento, some instructions from the executive, either general or special. Within the letter of this provision the executive might, in a given case, authorize the ayuntamiento of a particular town to designate lands outside of the town lands proper for emigrating families; but surely in this article there is no general grant of power to every town council to give away lands anywhere within the territory or department without any previous instructions or directions from the executive. Neither is the power contended for to be found in article 23, which simply authorizes the ayuntamiento, in case any colonist shall fail to cultivate the land which has been given him, to regrant the same tract to another. It might well be that the ayuntamiento should have power after the lapse of a grant to regrant the same tract to another party. But it does not follow therefrom that the power to regrant lapsed lands implies a power to make an original grant.

Neither is the plaintiffs' case helped by the assertion that the fact of a grant presumes the power to make it. Counsel quote from *United States* v. *Peralta*, 19 How. 343, 347: "The presumption arising from the grant itself makes it *prima facie*

evidence of the power of the officer making it, and throws the burden of proof on the party denying it."

Whatever may be the scope of this proposition, we find in these proceedings a distinct declaration that the town council regarded its action as only preliminary, and requiring for finality the approval of the government. In the first resolution passed by the ayuntamiento on the petition of Dr. Heath it is recited:

"1. That, saving the superior determination of the government to which this shall be given, his proposals and petition are admitted, and when he presents himself, the land he asks for shall be assigned to him in these terms: The head (toma) of the Bracito shall be the central point of the square of said 'hacienda;' that is to say, two and a half leagues in a straight line up the river, and two and a half leagues down the river, the same being observed in the sides that form the square."

And in the letter transmitting the proceedings to the governor it is said:

"The imitative circumstances of the new settlers and the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial in promoting settlement, agriculture, arts, etc., place this corporation under the necessity of making known to your superiority the resolution, that your excellency may be pleased to dictate whatever may be your pleasure in the matter, whether it be by yourself or after consulting the most excellent provincial deputation."

And again —

"In order to avoid jealousies among private individuals and interests of some breeders of stock who generally are prejudicial to these in the development of agriculture, and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of article 4, inasmuch as to reject it, difficulties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this ayunta-

miento, to which it very closely belongs to look out for their happiness, has without delay, put in operation the franchise of the law; this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination.

* * * * *

"This ayuntamiento has found it convenient and worthy of public confidence to bring all of the foregoing before your excellency and the most excellent provincial deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter, which is what is desired."

So that the ayuntamiento assuming to act declared specifically that it did so "subject to the superior determination," and submitted its action to the governor of the province.

Further, on the receipt of this communication by the acting governor, it was presented to the provincial deputation, which expressly disapproved the proposed grant, and directed that notice of its disapproval should be promptly communicated to Dr. Heath. The language of the resolution passed by the provincial deputation is clear. It declares that the action taken by the ayuntamiento was not only with prejudice to the inhabitants of that jurisdiction, but also in violation of law. It is true that it does not point out wherein the violation of law consists, and refrains from further observations on account of the repeal of the colonization law, but it does direct the ayuntamiento to give notice to Heath, through the United States minister, or in some other manner, that the possession given to him was "through a mistaken opinion and wrong understanding in relation to the colonization law already repealed," and that this notice should be given in order to prevent any claim for damages in case Dr. Heath should introduce into the province the families that he had offered to bring. Even if the disapproval had been based solely on the fact that the colonization law of 1823 had been repealed, that would have been sufficient, for whatever might be adjudged the power of the ayuntamiento, and although it might have made a grant without reference to the provincial depu-

tation or the governor of the province, yet, for reasons which to it were satisfactory, it expressly declared that the grant was subject to their approval, and in case that approval was withheld, of course the grant never became operative.

The other case to which counsel refer, in which the ayuntamiento assumed to act under the law of 1823, instead of supporting the contention that it had absolute power in the matter, tends in the other direction, and supports the opposite contention, for in that, as in this, it referred its action for approval to the governor of the province. That case was of a grant of a tract on the left side of the Rio Grande, made to Don José Lerma by this same ayuntamiento of El Paso, the proceedings in respect to which were introduced in evidence. They show that upon the petition of Lerma, on August 23, 1823, the ayuntamiento passed a resolution declaring that it deemed it proper to make the grant, but adding: "Let all that has been done be brought to the knowledge of the most excellent deputation of Chihuahua in order that it may approve this grant, if it be its superior pleasure."

In pursuance of this resolution the application was presented to the deputation of Chihuahua, which on October 10, 1823, approved the proposed grant in the following words:

"Agreeably to the resolution of the enlightened council of the town of El Paso, this most excellent deputation have deemed it proper to approve the grant of all the lands, woods and 'sierras' applied for by the resident Don José Lerma, it being of advantage to the nation to open fields and to form settlements resulting in public utility, that enlightened council being ordered to appoint a commission that shall proceed to survey these lands and to give possession to the party interested, in the name of the supreme powers of the nation, of the lands, 'sierras,' woods and pasturages applied for by him on the left side of the Rio Bravo del Norte."

On the receipt of such approval on October 30, 1823, the ayuntamiento proceeded to pass this resolution:

"Having received the foregoing application and approbation of the most excellent provincial deputation of Chihuahua to granting and putting the resident Don José Lerma in pos-

session of the unimproved lands, woods, pasturages and 'sierras' for which he made application for the purpose of settling on the line of the Rio Bravo del Norte and on the left side from opposite the 'Ojo del Toro,' or be it the 'Sierra de todos Santos,' to the 'Sierra Blanca,' the enlightened council of this town, in compliance with the order of said most excellent deputation, resolved to appoint a commission of respectable and honorable persons who shall proceed to survey and delineate those lands and to put said Don José Lerma in possession thereof."

It also appointed a commission to set off the tract to Lerma. On December 12, 1823, on the report of that commission, it entered the following order:

"The land grant applied for by the resident Don José Lerma being approved by the enlightened council and by the most excellent provincial deputation of the city of Chihuahua, as is evidenced by the foregoing proceedings carried on by the president of the appointed commission, who is also the president of this corporation, let this record be referred to its secretary for taxation of the per diem and writing therein, according to the tariff in force in this council, in order that the party interested may be informed of the fees he must pay."

Even this action did not seem to resolve all doubts as to the validity of this grant, for, in a petition presented by Lerma to the constitutional governor of the State of Chihuahua in 1828, he set forth the action of the ayuntamiento and the provincial deputation in 1823, and the delivery to him of the tract, and then, after alleging that the subsequent ayuntamiento refused to acknowledge the validity of the grant, added:

"In these terms he appeals to your excellency, praying that he be recognized in his rights of ownership of the lands which belonged to him, confirming him in his said property, which was granted to him in order that a settlement be formed in said lands, and that the council of the town of El Paso be notified accordingly. I pray for justice and make the necessary protestation at Paso del Norte, May 12, 1828."

Upon such petition the following action was taken:

"To the president of the council of the town of El Paso del Norte:

"The decree or title of possession ordered to be given by the provincial deputation and the council of El Paso del Norte in the year 1823, whereby fifty leagues of land on the left side of the Rio Bravo were granted to Don José Lerma, has been ratified and confirmed by the second constitutional congress of this State in consideration of distinguished military services rendered to the Republic by the retired lieutenant, José Lerma:

"Therefore, this government considers that the land transferred by the granted bounty is an exclusive property of the said Lerma, ratifying it in all its parts. The council of El Paso del Norte will act accordingly. God and liberty.

"Chihuahua, June 30, 1828."

This order of the governor, as will be seen, did not rest the validity of the grant upon the action of the ayuntamiento, or even upon its action as approved by the provincial deputation, but recited that the title had been ratified and confirmed by the second constitutional congress of the State. So that the only other case in which, as said by counsel, action was taken under this law of 1823 by any ayuntamiento clearly shows that it did not understand that it had absolute power, but that its proceedings required approval by the provincial deputation, or some higher authority. The Court of Private Land Claims was right in its conclusions that no final grant had ever been made to Doctor Heath of the tract in controversy.

But it is unnecessary to rest the case upon this alone, for even if the ayuntamiento had full and final jurisdiction in the premises and had made an absolute and unconditional grant—one beyond the power of any superior authority to disapprove and annul, still we think the judgment of the Court of Private Land Claims was right, because, as indisputably appears from the evidence, when Doctor Heath came with his colonists to take possession of the tract, the Mexican authorities repudiated the alleged grant, denied his rights and practically drove him from the country. Not only that, but, as the record shows, the Mexican government thereafter granted to other parties large portions of the same tract. The disavowal, repudiation, expulsion and subsequent grants were in no respect the irregular acts of a mere mob or other unauthorized parties. They

were the deliberate official proceedings of the duly constituted authorities of the Mexican government. This repudiation commenced in 1824 and continued until the cession of territory to the United States, under the treaty of Guadalupe Hidalgo. During all those years, so far as the record shows, no action was taken by Doctor Heath to enforce his claim or recover damages from the government of Mexico for the alleged wrongs done him. Neither were any proceedings taken by him, or those claiming under him, from the treaty of cession until the presentation of this petition before the Court of Private Land Claims. In other words, for seventy years (more than twenty of which the land was within the dominion of the government of Mexico) this claim was permitted to lie dormant. Other people have passed into possession of parts, at least, of the tract, and are occupying it under subsequent grants from that government. Twice during this lapse of time was provision made for an adjustment of claims of citizens of the United States against the government of Mexico. On April 11, 1839, a convention was entered into between the two nations referring to four commissioners all claims of citizens of the United States against Mexico which had been presented to this government for consideration. 8 Stat. 526. And again, in the treaty of Guadalupe Hidalgo, there was a further provision of like nature. 9 Stat. 922. Article 14 of that treaty released the Mexican government in these words:

"The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed."

The fifteenth article, which created the commission, directed that it should be guided and governed by the principles and rules of decisions prescribed by the first and fifth articles of a prior unratified convention, and in the first of those articles it was provided —

"The said commissioners, thus appointed, shall, in the presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two republics."

So that if Doctor Heath had any claim against the Mexican government on account of being deprived of this alleged grant he could, by a presentation of it under one or the other of these treaties, have received full compensation. The fact that he made no claim is persuasive evidence that he did not understand that what had taken place amounted to a complete grant.

Further, when the United States received this territory under the treaty of Guadalupe Hidalgo they refused to recognize as still valid and enforceable all grants which had been assumed to be made prior thereto by the Mexican authorities. Article 10 as proposed by the commissioners was rejected by this government and stricken out from the treaty. That article not only contemplated binding this government to respect all grants which would have been recognized as valid by the government of Mexico if no cession had been made, but also proposed to give to grantees who had failed to perform the conditions of their grants, and whose failure to perform might be deemed to have avoided the grants, further time to perform the conditions. By the rejection of this article this government distinctly declared that it did not propose to recognize any grants which were not at the time of the treaty of cession recognized by the Mexican government as valid or any whose conditions, either precedent or subsequent, had not been fully performed.

In this respect the action taken was in harmony with the general rule of international law. It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed upon every individual. There may be an exception when the dis-

possession and wrong of the grantor nation were so recently before the cession that the individual may not have had time to appeal to the courts or authorities of that nation for redress. In such a case perhaps the duty will rest upon the grantee nation, but such possible exception has no application to the present case and in no manner abridges the general rule that among the burdens assumed by the nation receiving the cession is not the obligation to right wrongs which have for many years theretofore been persisted in by the grantor nation. Because Mexico had more than twenty years before the cession forcibly taken from Doctor Heath land that was rightfully his and given part or all of it to other persons it does not follow that when the United States accepted the cession they came under obligations to do that which Mexico had failed to do, place Doctor Heath in possession and restore to him the land of which he had been thus wrongfully deprived. Such action if taken might well expose this government to just claims for compensation in behalf of the subsequent grantees of Mexico, who apparently took no personal part in the wrongs done to Heath. Doctor Heath may have had a claim against Mexico for those wrongs, but he failed to prosecute his claim in the way prescribed, and he cannot now make his failure to pursue such prescribed way a reason for enforcing a title which that nation had refused to recognize. So long as Mexico repudiated his claim to this tract his only recourse was by direct appeal or through the intervention of this government to seek compensation for the property of which he had been deprived. When this government accepted the cession of the territory it did not thereby assume an obligation to satisfy any pecuniary demands which he as an individual may have had against the Mexican government. In other words, it took that territory bound to respect all rights of property which the Mexican government respected, but under no obligations to right the wrongs which that government had theretofore committed.

But even if there were an obligation on the part of this government, either under the general rules of international law or the terms of the treaty of cession, to recognize plain-

tiffs' claim to this particular tract, yet the time, manner and conditions of enforcing it would depend upon the will of Congress. And in creating the Court of Private Land Claims Congress has prescribed the character of claims which that court may determine and the conditions which must attach to any claim which it may enforce. This claim, even if the grant in its inception was valid, was not one which it was within the province of the Court of Private Land Claims to approve and confirm. The eighth clause of section 13 forbids the confirmation of a grant made upon any condition or requirement, either antecedent or subsequent, unless it appears that such condition and requirement had been performed within the time and in the manner stated in the grant. That certain conditions or requirements were attached to this grant is evident from a perusal of the application and the order. That they were not performed is admitted by plaintiffs. Their contention is that performance was prevented by the Mexican authorities, and having been prevented it should be considered that performance was waived and the title had become absolute. Whatever may be said as to the duty of this government to treat a condition whose performance was prevented by the Mexican authorities as a condition performed does not detract from the proposition that the Court of Private Land Claims is not vested with such power. It is a mere creature of statute with prescribed and limited powers. It has no general equity jurisdiction. It can confirm a grant made upon condition only when such condition was performed. It is not under the statute at liberty to treat anything as equivalent to performance. Cases in which there was no performance of the conditions of the grant are cases which must be considered as reserved by Congress for further action on its part. So that under the terms of the act creating the Court of Private Land Claims, even if there were no other objections to the proceedings, the admitted fact that the conditions and requirements of this grant were never performed is sufficient to justify the ruling of the court in dismissing the petition.

Of course, the observations above made may not be appli-

cable to a case in which the Mexican government had subsequently to the original grant and prior to the cession waived the performance of the conditions. For as it had power in the first instance to make the grant without conditions, its action in subsequently waiving or removing such conditions was equivalent to an original grant without conditions.

We have not deemed it necessary to consider the matter of limitations and laches. That this is an old claim is evident, seventy years having elapsed between its inception and its prosecution. Whether it must also be adjudged a stale claim and beyond judicial recognition need not be determined. The other reasons presented for its rejection are sufficient.

We see no error in the proceedings, and the judgment is

Affirmed.

BAKER *v.* CUMMINGS.

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

No. 189. Argued January 14, 17, 1898. — Decided February 21, 1898.

Stuart v. *Hayden*, 169 U. S. 1, affirmed to the point that when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous.

Metropolitan National Bank v. *St. Louis Dispatch Co.*, 149 U. S. 436, affirmed to the point that courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law.

In this case the court arrives at the conclusion, on the evidence, that if the false representations as to the earned fees were made by Baker as alleged, there was entire knowledge thereof by Cummings more than three years before the filing of his bill, which is the time in which an action at law for such a cause is barred in the District of Columbia, and that the conduct of Cummings, in permitting Baker to go on and prosecute the claims as if they were his own, debars him from proceeding in a court of equity; but in so holding the court must not be considered as intimating that it concludes that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings.

This suit was commenced by appellee Cummings on Febru-

ary 1, 1890, by a bill filed on the equity side of the Supreme Court of the District of Columbia against Baker, the appellant. In substance, the bill set forth the formation about the year 1874 of a partnership between Cummings and Baker for the practice of law in the city of Washington; that the expenses were to be borne and the profits shared equally between the partners; that the firm some years thereafter became attorneys for the collection of claims against the United States in favor of certain inspectors of customs for arrears of pay claimed to be due them. It alleged that on September 6, 1886, Cummings sold to Baker all his interest in the fees earned but not then divided, and those yet to be earned from such claims, and that there was consequently a dissolution of the partnership as to these matters, but that it continued as to all other business until September, 1889, when the partnership was dissolved. The object of the bill was to procure a cancellation and annulment of the sale of the fees in inspector cases made as above stated and of the written instrument of assignment by which it was evidenced, on the ground of false representations claimed to have been made by Baker to Cummings in the negotiations for the sale, which representations were averred to have brought about the consent to the sale and the execution of the assignment to carry out the same. The fraud specified was, in substance, this: That Baker had misrepresented the amount of the fees then actually earned by the firm and undivided between the partners on the inspectors' claims, for which appropriations had then been made by Congress, by stating to Cummings that the then earned fees only equalled about $20,000, when in truth and in fact they were, to the knowledge of Baker, about $32,000; that as to the future claims then in the hands of the firm but not then allowed by the Treasury Department or appropriated for by Congress, Baker had knowingly largely understated the amount thereof by representing them to be only $80,000, when in fact they then amounted to about $275,000. The relief prayed was an annulment of the sale; a full settlement of the partnership affairs, treating the fees in the inspector cases as being a part of the partnership assets; and in aid of the final settlement which

was asked, there was also a prayer that Baker be enjoined from prosecuting an action instituted by him against Cummings, in December, 1889, to recover $2712.81 and interest, it being averred that Baker's right to this amount was involved in a settlement of the entire partnership affairs.

The answer of Baker denied that there had been any fraud practised upon Cummings in the purchase of his interest in the fees in the inspector cases, and the alleged misrepresentations as to both classes of fees, whether earned or to be earned, was expressly denied. The averment, that the complainant had sold his interest in the fees on a basis of his ownership of one half therein, was directly traversed, and on the contrary it was alleged that the assignment resulted from the following circumstances and had been made upon these conditions: That the existence of claims by inspectors of customs against the Government had been discovered by Baker, and that he had procured the business of prosecuting them for the firm for a compensation, in most cases, of twenty-five per cent of the sum collected, and had substantially by his own labors pressed them to a successful issue, and that the result of his exertions had been to earn for the partnership a considerable sum of money, which had been, prior to 1886, divided between the partners equally; that during the course of the business Cummings had given little or no attention to the inspectors' claims, but on the contrary had neglected not only these claims, but the partnership affairs generally; that, in consequence of these facts, for months prior to September, 1886, Baker had determined to put an end to the partnership, and had so informed Cummings; that for the purpose of preventing this dissolution and securing a continued association with him (Baker) in business, which Cummings desired, an agreement had been entered into between the partners that Cummings, instead of taking an equal interest in the earnings of the firm from the inspectors' cases, should dispose of his rights therein on the basis of his having only a one-third instead of a one-half interest; that on this agreement, as to the proportion in which the partners should be entitled to the fees, and Cummings's judgment of the future result of claims unallowed and unap-

propriated for, which were in their very nature largely conjectural, the sale was made for a consideration of $15,000 cash to be paid by Baker to Cummings, the latter to retain in addition the full amount of all fees due to him for his services as assignee of an insolvent banking firm, which latter amount, without the release, it was averred, would have been an asset of the partnership, and was estimated to equal $10,000, of which Baker's share would have been one half.

The answer, moreover, averred that at the time of the sale Cummings had full information of the condition of the business in the inspector cases and dealt with his eyes open; that as a partner he was not only familiar with the general manner in which the business was conducted, but also, about two weeks prior to the sale, he received from Baker papers and documents which fully informed him of the exact condition of the claims, his interest in which it was proposed to sell, the papers and documents in question having been handed to Cummings during the pendency of the negotiations in order that he might ascertain the precise situation.

In addition, the answer averred that immediately after the sale, and before Cummings had cashed a check for $15,000, given him by Baker in payment of the amount of the purchase price, Cummings was put in possession of papers and documents which were acted upon by him, and which, if any fraudulent representation had been made in relation to the sale, fully informed him of the fact in ample time to have protected his interest: and although this full information was given him, before the purchase price was collected, Cummings made no pretence of any deceit practised upon him, or made any complaint as to the contract, but continued in the partnership as a member of the firm as to other business, and that the first complaint which was made by him of any unfairness in the transaction was nearly three years after the sale, and then only after Baker had insisted upon payment to him by Cummings of a sum which Baker claimed was due him, and had moreover expressed his unalterable intention to dissolve the partnership. The defence of the bar of the statute of limitations was specially pleaded.

At the hearing a decree was entered for complainant, and a reference was made to an auditor to state the accounts between the parties. Pending the hearing on such reference, an appeal from the interlocutory decree was prosecuted to the Court of Appeals of the District of Columbia, where a judgment of affirmance was rendered. 4 App. D. C. 230. Subsequently, on confirmation of the report of the auditor, a final decree was entered in favor of the complainant for the sum of $32,772.14, with interest thereon from the 1st day of July, 1895, until paid, in which sum was embraced a credit to Baker of the items claimed by him in his action at law against Cummings. From this final decree an appeal was taken to the Court of Appeals for the District, by which it was affirmed. 8 App. D. C. 515. This appeal was then taken.

Mr. S. R. Bond and *Mr. George F. Edmunds* for appellant.

Mr. Franklin H. Mackey for appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

Before approaching a discussion of the issues which we deem it necessary to pass upon in order to conclude the controversy which the record presents, it will subserve the purpose of clearness of statement to give a brief outline of the proof as to matters about which there is no substantial controversy and to point to the controverted question, thus eliminating from view irrelevant contentions, and concentrating the attention on the material issues.

1. The existence of the partnership was established as alleged, and the fact that the claims of the inspectors had been unearthed by Baker, and had been mainly secured by him for the firm on a contingent fee of twenty-five per cent, and had been almost exclusively prosecuted by him, was established beyond question. That Cummings had not given any great attention to the business for several years, and that Baker was dissatisfied therewith and had threatened to dis-

solve the partnership many months before September, 1886, though not explicitly admitted by Cummings, was also conclusively established.

2. The sale of Cummings's interest in the inspector fees, both earned and unearned, for a consideration which embraced a cash payment of $15,000, was also established beyond dispute. That in the negotiations which preceded the sale Cummings contemplated something besides a mere division between himself and Baker in equal proportions of the rights of each in and to the fees, was also indisputably proven. This is testified to by Cummings himself as follows:

"I said, 'Mr. Baker, I make you this proposition: I will take one half fees in all the cases in which we have powers of attorney and contracts prior to the 1st of January, 1886, or I will take one third of all the fees in all the cases (leaving him two thirds), or I will take $15,000, as you offer, according to what you think is the best for me.'"

Undoubtedly, also, the proof establishes that when the sale was made the fees for cases allowed and appropriated for, then undivided, amounted to about $32,000, and that the claims subsequently allowed and appropriated for largely exceeded $80,000. From these conceded facts there arises a grave contention; Cummings claiming that, as he was entitled to an equal share of the fees, he was led, by the misrepresentations of Baker, into making a seeming sale of his interest, receiving as a consideration virtually nothing but his own money; Baker, on the other hand, contending that the transaction between the parties did not contemplate a mere division of their interest, but a sale by Cummings of his rights on the basis of his being entitled only to a one-third interest in the fees, in order to obtain a continuance of the partnership as to other matters, and that the sum of $15,000 and the right of Cummings to retain the assignee's fees before referred to, was fixed by Cummings, from his knowledge of the business and his investigations made at the time, as a fair equivalent for his agreed one-third right as above stated.

3. Nor does any real dispute exist as to the fact that when the active negotiations for the sale begun, papers were handed

Cummings by Baker, from which an understanding of the state of the whole business could have been derived; that these papers were taken home by Cummings and retained for several weeks until just before the sale was consummated. Whilst as to these facts there is no conflict in the proof, there is a controversy as to whether it was established that Cummings examined the papers carefully so as to put himself in possession of the information which might have been obtained from them; Cummings claiming that the papers were of such a confused nature that he could have arrived at an accurate knowledge only by inquiry, labor and investigation, which he did not make, as he preferred to rely upon Baker's special acquaintance with the status of the claims. Baker, on the other hand, claiming that he had no greater information than was accessible to Cummings, and that the latter dealt on the faith of his own knowledge and estimate, and not upon information derived from or representations made by Baker personally.

4. The proof also establishes, and there is no contention on the subject, that on the evening of the sale or the morning of the day following, Baker left the city of Washington for the State of New Hampshire; that he left Cummings in the office, and before going placed in his hands a document known in the record as Exhibit H. M. B., No. 3, to enable Cummings to look after any matters in the inspector cases which might require attention during his (Baker's) absence; that at the same time Baker left with Cummings the bank deposit book of Baker, with his check book containing signed and unfilled checks to be used as occasion required in the making of remittances or payments in the inspector cases; that Cummings acted upon this authority and made deposits of drafts collected from the Government, drew checks for amounts due claimants, and made entries indicating these latter facts upon the schedule in question; that at the time of Baker's departure Cummings had not cashed the check given him by Baker as the consideration for the sale, and that Cummings cancelled it, and on different occasions filled up three of the signed checks left by Baker, for the sum of $5000 each, and collected

the same, thus acquiring the consideration referred to. The proof further established that Baker remained absent for nearly a month, and on his return found Cummings in the office as usual; that they continued thereafter to occupy the same office, and that no complaint was made by Cummings as to the fairness of the sale until nearly three years thereafter, at which time Baker was pressing a claim against Cummings, and had told him that he was going to dissolve the partnership.

The controverted issue arising from the foregoing unquestioned facts is this: Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated; whilst Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve partnership, not only establishes the want of foundation for Cummings's assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred.

It results from the foregoing that the facts as to the controverted matters are embraced in a narrow compass, and that the whole case really resolves itself into two issues: 1st. Does the proof establish that the purchase and sale in question was as claimed by Cummings, or as asserted by Baker? In that question is necessarily embraced the further one of whether Cummings, at the time of the sale, had actual knowledge of the fraudulent representations claimed to have been made by Baker. This is, in terms, included, because it would be impossible in reason to declare that one had been deluded or deceived by misrepresentations into entering into a contract if he had actual knowledge when the contract was made that the alleged inducing representations were false. 2d. Conceding that Cummings was misled by the fraudulent representations of Baker as alleged, did he immediately after the

sale, and before the collection by him of the cash consideration of the sale, discover that the representations were untrue, and thereby become aware that he had been grossly deceived and defrauded, and did he, with such knowledge, say nothing about the matter, collect the cash consideration, remain silent, and continue in partnership with Baker, occupying the same office for years, and only assert that he had been deceived when a dissolution of the partnership was threatened and he was pressed to pay a sum which Baker claimed Cummings owed him? This latter inquiry assumes a twofold aspect, for although in the bill, in the opinions below, and in the argument at bar, the efficient misrepresentation, which it is asserted rendered the assignment void, was the fraudulent statement as to the sum of the fees on the claims then allowed and appropriated for, nevertheless it is also, as we have seen, asserted in the bill and contended in argument that there was a misrepresentation as to the pending claims not yet acted upon by the department, and which were then unappropriated for by Congress.

We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that, if there was fraud and misrepresentation, Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration because if it be found that such was the case, the question whether the fraud originally existed will become immaterial, in view of the defences of limitation and laches. Moreover, in reviewing the question of knowledge, we will do so in the order stated, that is, first, discovery of the alleged fraud and misrepresentation as to the amount of fees collected and in process of collection from claims appropriated for at the time of the sale; and, second, discovery of the misrepresentation as to the amount of pending claims from which further fees were expected. Here, also, it is to be premised that if the first proposition be found to be well taken, an examination of the second will be wholly unnecessary. This, obviously, is the case, for as the statute of limitations began to run from the time when suit might have been brought to annul the sale, it

results that the discovery of the falsity of *any* material and fraudulent representation by which the sale had been induced, gave rise to the right to commence an action to rescind, and therefore fixed the period when the statute of limitations commenced its course.

I. — *Did the schedules left with Cummings the day after the sale, when Baker went off to New Hampshire, and which remained in the custody of Cummings and were practically under his control, convey to Cummings full knowledge that he had been grossly deceived as to the amount of fees collected, as alleged by him, if his statement that such false representation had been made was true, and did he remain silent for three years thereafter?*

In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this court in numerous cases — of which *Stuart* v. *Hayden*, 169 U. S. 1, decided at the present term, is the last expression — that when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous.

To determine whether Cummings knew immediately after the sale, and before he had collected the price thereof, whether misrepresentations had been made to him and fraud practised upon him as to fees from cases then appropriated for, it is, of course, essential to see clearly what were the misrepresentations asserted to have been made, and what was the fraud claimed to have been perpetrated. They were, as alleged in the bill, that Baker, with a knowledge that the fees from the claims allowed and appropriated for were $32,000, had concealed the fact from Cummings, and represented that such fees were only equal to $20,000 or thereabouts. It is obvious then that the fraudulent representation alleged was not as to the amount of the claims allowed and appropriated for upon which the fee of twenty-five per cent was to be calculated, but as to the sum of the fees to arise from the calculation. And this is unmistakably established by the testimony of Cummings in his examination on the 29th of February, 1892, where he said, in describing the representation made by Baker to him:

"I asked Mr. Baker how many fees there were that were due us in cases that had been adjudicated and for which appropriation had been made, and which were then in the process of collection, and he said about $20,000, or not more than $22,000. I was somewhat surprised at that, and I so expressed my surprise to him; he said that our fees in some of those cases were not as much as usual; some only about 10, 15 or 20 per cent."

It is not reasonable to infer that surprise could have arisen as to the amount of fees if there had been no antecedent knowledge of the sum of the claims on which the fees were to be calculated. The fact that Cummings had approximate general knowledge of the amount of the claims is not only shown by the particular statement just cited, but by his declaration that he observed when appropriations were made, knew at the time that the appropriation of August, 1886, had been made, and also knew that practically all of the inspector cases were controlled by his firm. As all the fees earned which were embraced in the sale arose from claims covered by the appropriation made in August, 1886, it follows that these statements by Cummings and his admitted knowledge of the August appropriation taken together leave no doubt that Cummings was fully informed as to the sum of the claims from which the earned fees arose. Indeed, the possibility of any other view of the testimony is removed by a statement of Cummings subsequently made, and to which we shall hereafter more fully refer, in which he plainly says that he knew that the gross amount coming in on the basis of the usual compensation was $32,000, and supposed that the reduced amount arose from charges against it.

Now, then, the issue of fact to be determined is this: Could it have been possible for Cummings to have received the schedule in question on the morning after the sale, to have dealt with it, to have made entries on it at various times, without being informed that the fees of the firm were not less than 25 per cent in a sufficient number of cases to have justified any belief whatever that the sum of the fees was reduced from $32,000 to $20,000? The schedule left in his hands by

Baker contained seven sheets. In one column was the name of the claimant, in another the total allowance, in a third the fee, in a fourth the amount of the remittance to the claimant, in a fifth the date of the remittance, in a sixth whether remitted by check, in a seventh the number of the check, and in an eighth column the date of the check. The amount of the aggregate fees appearing on each sheet was added up and stated at the bottom of the column. With such total stated, the only act required to ascertain the aggregate amount of all the fees was to sum the footing of the sheets. And yet the want of knowledge by Cummings of the fraud is predicated upon the proposition that although these sheets were in his hands for nearly a month, while he was dealing with them making entries on them, he was so careless as never even to make the addition which would have conveyed to him absolute knowledge of the fact that the fraud had been committed. But even the addition was not necessary, for if the fraudulent misrepresentation was made, it was not, as we have seen, as to the gross amount, but as to the net fees to be realized from the gross amount, that is, that the diminished amount arose from the fact that in the cases on the schedule the firm was getting less than 25 per cent. But on the sheets, in the column of fees immediately next to the column of amount allowed, the sum of the fee in each case was stated, and no eye could even casually look at the schedule without observing that nearly all the fees were stated therein at the rate of 25 per cent, and not at a diminished rate. However, to hold that Cummings did not derive knowledge from the schedule, the reasoning must go yet further. Out of 106 names on the schedule, there were only five where the fees stated were less than 25 per cent, and in four of these five cases the fact that the fee was a reduced percentage was made evident by the statement expressed in figures immediately opposite the name of the claimant, giving the exact percentage upon which the fee was calculated. The mind, then, is driven to the conclusion that the testimony beyond doubt establishes that Cummings knew immediately after the sale and before he collected the price that Baker had made to him a gross and wilful misrepresentation, if the

statement was made by Baker to which Cummings testifies, and which he asserts operated to induce him to part with his interest.

Overwhelming as is the proof that the schedule conveyed to Cummings the knowledge of the fraud if it had been perpetrated, such fact is unquestionably shown by Cummings's further testimony. At a subsequent stage of his examination when he was questioned on the subject and his possession of the schedule had been developed, he frankly admitted that his possession of the schedule and his dealings with it had informed him that Baker's representation which he swore had been made about the diminished percentage was untrue, but that he had on such discovery lulled himself into security by the belief that there must have been another reason for Baker's statement of the reduction in the amount of fees, that is, the large sums which Baker might have had to pay out to other attorneys, and presumably under this belief he remained silent. We extract a question and answer bearing on this subject:

"Q. Now, then, your check was paid in that way. When did you first obtain any knowledge as to the amount of claims which had been collected by Baker upon the first class of cases — I allude to the class of cases in which he said there were from $20,000 to $22,000 in fees, the cases in which appropriation had already been made; and you may also state at the same time when you first discovered in regard to the other class of cases in which no appropriation had been made — when you first discovered the amount?

"A. The amount of the claims that had been adjudicated and which were in the process of collection I discovered, of course, within a day or two after Mr. Baker had delivered me the schedules, and I continued the collections, because these schedules contained the name, the amount, the fee and all the data pertaining to each case, and it was hard for me to reconcile the amount of fees that he said and the amount of fees that were on the schedule, and I know often we had to pay out a large amount of our fees to other attorneys, as I frequently had paid one half of a fee to a local attorney to work

up the evidence, and I had supposed the great diminution of these fees from what I supposed, viz., $32,000, in the vicinity of $30,000, was owing to the division with other lawyers. It has been my habit in a number of cases — I write down my ideas of things, and on that occasion I sat down and I made a private memorandum for myself, giving my impressions of the matter, wondering as to whether I had done the best or not and wondering if the facts were — "

However unreasonable may be this explanation, and however natural is the inference that, if Cummings had discovered that his partner had made a gross misstatement to him and defrauded him, he would not have completed the sale by collecting the consideration, but would have called his attention to the facts when the partner returned a month after, need not be discussed since the reason given by Cummings for his conduct is rendered wholly nugatory by another consideration, which is this: The seventh of the sheets left in the custody of Cummings contained a statement of the sums to be paid to other attorneys by the firm on the claims mentioned in the schedule. The form of this sheet was slightly different from that of the others. It showed the name of the attorney to whom the fee was due, in the next column in what case the fee was due, in the third column the date of the remittance of the fee, in the fourth column whether remitted by check, and in the fifth the date of the check. Now, if, as demonstrated by the proof and as admitted by Cummings himself in his second statement, his dealings with and relations to the schedule conveyed to him knowledge that there was no truth in Baker's supposed representation as to reduced percentages coming to the firm, how in reason can it be denied that knowledge that the amount could not have been materially reduced by fees paid to other attorneys must have also been conveyed to him when the schedule plainly showed the fact as to the amounts to be paid other attorneys and that they aggregated less than $1500. Indeed, it is justly to be inferred from the testimony that, as the facts shown by the schedule were developed and Cummings's memory was refreshed by the examination thereof, his mental condition changed, and he reached the

conclusion that he had been previously mistaken in saying that, although the schedule had informed him of the amount, he had been lulled into security, since he subsequently swore that the schedules gave him no information whatever, because he did not look at them at all. His statement to this effect is as follows:

"When Mr. Baker handed me that paper and called my attention to the fact that all had not been collected, and that quite a number of payments were still to be made, I simply put it in my desk; I paid no attention to it, because I considered the trade was made. I had nothing to do with it, but simply took that paper, and when a power of attorney would come in with power to cash the draft I would make the proper entry, but it never came into my head that there was anything wrong about it. I considered that I had sold out to Mr. Baker for a fair consideration. I had no idea that I was being paid with my own money."

So, also, on cross-examination in rebuttal, the following question was asked and answer given by complainant:

"Q. Mr. Cummings, you have stated that Exhibit H. M. B., No. 3, (the schedule we have been referring to,) in answer to a question by Mr. Claughton, was in your possession, and that you paid no attention to it and put it aside. You did not take enough interest in it to go over it and see what it was?

"A. The transaction was closed, as I supposed."

Again, after being cross-examined at some length and being called upon to explain his delay in instituting the present proceedings, and after he had stated that in 1886 he knew of the fact of the appropriation in August of that year by Congress, he was asked to state if he had discovered any facts in 1888 in relation to the appropriation of 1886 which he did not have in 1886. The reply was:

"A. I knew no more about the standing of the appropriations of 1886 for these cases and of the settlements thereunder for two years after those settlements were made; in other words, I had no knowledge of the appropriation of 1886 until my suspicions were aroused in 1888. *I supposed it was all fair and square.*

"I don't know that I learned anything in 1888 of consequence about the appropriation of 1886, but it was only when the three appropriations, amounting to about $240,000 in 1888, instead of the $80,000 as was represented to me, that I began to inquire into the matter, and my knowledge of the appropriation of 1886 and of the fees thereunder was gained by taking the appropriation of 1886 and going into the First Auditor's Office and seeing what drafts were delivered to Mr. Baker or Cummings, or Cummings and Baker, under the appropriation of 1886. When I had gotten the list of those drafts I got the correct amount of them.

"I think it was in the fall or winter of 1888 or 1889 when I got the list. I did not get a list; I made a list and I went back to my office and I took the Treasury executive document containing the allowances of those cases, and I estimated, as far as I could, and I believe that I am correct, that Mr. Baker received $135,000 on the claims of 1886.

"I don't remember now that I knew anything about the appropriation of 1886, intervening between 1886 and 1888, though I may have done so, but I do not remember it."

But the "list" referred to did not give him as much information as was contained in the schedule which was handed to him immediately after the sale, and which he had in his sole custody for more than three weeks. Nor can the statement of the witness that the schedule was not looked at, overcome the inherent probabilities as to the knowledge which must have been conveyed, in view of their contents, of the length of time they were in Cummings's possession, of his entries thereon and dealings therewith, and, above all, his previous sworn statement. In other words, the last statement that knowledge was not conveyed by the schedule cannot be taken as true without repudiating the previous declaration that the schedule had given the knowledge, but that its so doing did not excite suspicion, for a reason which the schedules themselves show could not have existed.

From the record we infer that this result must have produced an impression on the mind of Cummings, for, later on in his examination, when his attention was called to the fact that

if he had been deceived by Baker as to the sum of the fees when the sale was made, he could not have escaped discovering it when the schedules were handed him after the sale, he again changed his position and declared that he did not then take any action because the discovery of the misrepresentation as to the amount of the fees earned had not excited his suspicions, because of the immateriality of such misrepresentations.

"A. I am not going to give ideas, but simply facts. My whole idea as to whether I had made a poor trade or not had nothing to do with the amount of fees received in 1886, but solely and entirely on account of the future business that would come in; when Mr. Baker had told me that there was only $75,000 or $80,000 more of cases, out of which there would be a possible $20,000 of fees, I did not know whether that was correct or not, and, as I stated, I could not tell, but time alone would tell."

The situation, then, is this: Looking at the case, as made by the testimony of Cummings, it is impossible to avoid reaching two conclusions; 1st, that Cummings knew the exact condition of the earned fees shortly after the sale, and knew also that he had been grossly deceived if his statement of the transaction was the true one, and that with this full information he collected the price of the sale and remained quiescent for three years without complaining and without attempting to have the wrong rectified; 2d, that this conduct on his part is first attributed to one cause, and then to another and conflicting one. When both of these explanations are shown by the proof to be untrue, then the matter is finally explained by him by the statement that on the discovery of the facts he so acted, because he attached no importance whatever to the amount of the fees earned at the time of the sale, and considered that he had not been defrauded by the untrue representations which he asserted had been made in reference thereto. But the bill of complaint, as we have seen, proceeds, and the judgments below rested, upon the theory that the representation as to the amount of the earned fees at the time of the sale was the most material ground for rescinding the contract.

Our conclusion is, that the evidence not only clearly but beyond all question or dispute overwhelmingly shows that if the false representations as to the earned fees were made as alleged, there was entire knowledge thereof by Cummings. And, for reasons heretofore stated, this conclusion renders unnecessary any inquiry into the question of when Cummings discovered the falsity of the alleged representations as to the amount of pending claims.

The question which arises is: Can Cummings invoke the aid of a court of equity to afford him the relief which he seeks? A negative answer is compelled by a consideration of the most elementary principles.

As said in *Metropolitan National Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448: "Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law." That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the Statutes of Limitation of Maryland of 1715, c. 23, § 2, in force in the District of Columbia. 1 Kilty's Statutes, 111; Comp. Laws Dist. Col., c. 42, § 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity.

Apart, however, from the bar of the statute of limitations, the facts as to the full knowledge of the fraud, if any existed, by Cummings more than three years before the filing of his bill, and his conduct after he obtained it, his permitting Baker to go on and prosecute the claims as if they were his own, debars Cummings from invoking a court of conscience to put him in a much better position than he could possibly have occupied if he had spoken and asserted his rights in due season.

There cannot be a doubt that the right existed in Baker to have dissolved the partnership at any time. If this right on his part had been exercised, Cummings would not have been

in a position to have availed himself of the labors of Baker in prosecuting the future claims to a successful culmination, and would not therefore have been a participant in the profits arising therefrom. If with a full knowledge of the fraud Cummings chose to remain silent, to permit Baker to go on with the prosecution of the claims, to incur the expenditure of time and labor not only in the cases in which he was successful but in the cases in which he failed, Cummings cannot in conscience be allowed to reap the rewards which he could not possibly have obtained had he spoken with reasonable promptness, when the knowledge of the fraud if it existed was brought home to him in the most pointed and unequivocal way.

These broad considerations of equity and justice were not applied below because it was deemed that the occasion for their enforcement had not arisen, for two reasons: First, because it was thought that even if Cummings discovered the fraud in ample time to have availed himself of his rights, he was lulled into not doing so by his faith and confidence in Baker and his disinclination to believe that Baker had perpetrated so gross a fraud upon him. Second, because it was said as Cummings's share of the earned fees, upon the theory of a half and half division, was equal to the price which he received, there was no consideration for the sale, and the transaction was wholly void, hence there was no room for the application either of the statute of limitations or the doctrine of laches. In other words, that the partnership continued as to the inspector claims just as if no sale had been made. And the doctrine was carried to its logical outcome, since the judgment below awarded to Cummings a share in the fees earned by Baker, from contracts not under the control of the firm at the time of the sale of the interest in the inspector cases, but which were acquired by Baker thereafter.

But neither of these views meets our approbation. The first is completely answered by the fact that the analysis of the evidence which we have made conclusively establishes that if the fraud was perpetrated as alleged, the fullest knowledge was conveyed to Cummings more than three years before he brought his suit. Under this state of facts the

reasoning comes then to this, that there is no doctrine, either of limitation or of laches, applicable to a case of alleged fraud even although the party obtains almost at once full knowledge thereof, if he choose without due reason to affirm that he did not act because he was unwilling to believe his own senses. Reduced to its ultimate deduction, the proposition maintains this doctrine, that if one against whom a fraud has been perpetrated and who thereafter is in all respects fully informed of its nature and extent, chooses not to act, his so electing may continue indefinitely, provided only he declares not that he did not know, but that knowing he did not believe.

The second proposition, conceding *arguendo* the facts are as it assumed them to be, that is, that the price was paid Cummings from his own money, leads in reason to an equally impossible result, since its consequence is substantially to affirm that neither limitation nor laches can be applied in equity when from a given view of the proof it is considered that a fraud has been committed of such a nature as to avoid a contract. That this is the logical outcome of the proposition is shown by its application to the case under consideration. Whether or not Cummings was paid by his own money depends upon an analysis of the facts and a finding as to their preponderance. If the theory of Baker be true that the contract contemplated a division between the partners as to the claims in question, not upon the basis of one half each, but upon the basis of two thirds to Baker and one third to Cummings, because the claims had been largely realized by the efforts of Baker, and because, as a consideration for so dividing, Baker agreed as to other business to continue the partnership with Cummings when otherwise he would have dissolved, there can be no pretence for the claim that Cummings was paid with his own money. To say, then, that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings. But the principle by which the bar of the statute of limitations is enforced by a court of equity and upon which the doctrine of laches rests is that equitable powers will not be exercised to discover whether one has been wronged when, with full

knowledge of the alleged wrong, he has allowed the bar of the statute of limitations to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief. By the effect of the proposition referred to these principles are subverted, and a new doctrine arises which may be thus stated: A court of equity will not grant relief against fraud where the one against whom the fraud has been committed has, after its discovery, allowed the bar of the statute of limitations to be accomplished, unless there has been fraud, and if there has been such fraud neither laches nor limitation can ever apply.

Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings.

It follows that the decree of the Court of Appeals of the District of Columbia must be reversed, and the cause be remanded to that court, with directions to set aside the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill, and it is so ordered.

UNITED STATES *v.* KLUMPP.[1]

CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 159. Argued January 20, 1898. — Decided February 21, 1898.

In paragraph 297 of the tariff act of August 27, 1894, c. 349, 28 Stat. 509, providing that "the reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, eighteen hundred and ninety-five," the words "manufactures of wool" had relation to the raw material out of which the articles were made, and, as the material of worsted dress goods was wool, such goods fell within the paragraph.

[1] The docket title of this case is "The United States, Appellant, *v.* Alexander Murphy & Co."

Statement of the Case.

On the thirtieth day of August, A.D. 1894, John F. Klumpp and others, doing business as a partnership under the name of Alexander Murphy & Co., imported into New York certain merchandise consisting of women's and children's dress goods composed of worsted. The collector classified this merchandise and assessed it for duty under paragraph 395 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, at twelve cents per square yard and fifty per cent *ad valorem*. The importers protested, claiming the goods to be dutiable under paragraph 283 of the tariff act of August 27, 1894, c. 349, 28 Stat. 509, at forty per cent, or fifty per cent *ad valorem*, according to the value per pound.

The Board of General Appraisers overruled the protest (G. A. 2769), and the importers carried the matter to the Circuit Court, which reversed the decision of the Board of General Appraisers. *Murphy* v. *United States*, 68 Fed. Rep. 908. On an appeal to the Circuit Court of Appeals for the Second Circuit, the decision of the Circuit Court was affirmed. *Murphy* v. *United States*, 38 U. S. App. 467. The case was then brought here on certiorari.

It was admitted below "that the classification of the merchandise by the collector was worsted dress goods, at twelve cents per square yard and fifty per cent ad valorem under schedule K, paragraph 395 of the tariff act of October 1, 1890."

And "that the merchandise in controversy is worsted dress goods, made from the fleece of the sheep, which has been combed and spun into worsted yarn, and is not composed of the hair of the camel, goat, alpaca or other animal than sheep."

Paragraph 395 of Schedule K of the act of October 1, 1890, entitled "Wool and Manufactures of Wool," read: "On women's and children's dress goods, coat linings, Italian cloth, bunting, and goods of similar description or character composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, and not specially provided for in this act, the duty shall be twelve cents per square yard, and in addition thereto fifty per centum ad valorem: *Provided*, That on all such goods weighing over four ounces per square yard the duty per pound shall be four times the duty imposed

by this act on a pound of unwashed wool of the first class, and in addition thereto fifty per centum ad valorem."

Paragraph 283 of Schedule K of the act of August 27, 1894, c. 349, entitled "Wool and Manufactures of Wool," provided: "On women's and children's dress goods, coat linings, Italian cloth, bunting or goods of similar description or character, and on all manufactures, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, including such as have india rubber as a component material, and not specially provided for in this act, valued at not over fifty cents per pound, forty per centum ad valorem; valued at more than fifty cents per pound, fifty per centum ad valorem."

Paragraphs 280 to 286, inclusive, under this schedule, provided for duties on articles made, or composed, "wholly or in part of wool, worsted or the hair of the camel, goat, alpaca or other animals," except that paragraph 282, which referred to blankets, etc., omitted the word "worsted."

Paragraphs 287 to 296, inclusive, related to carpets, mats, etc., and the concluding paragraph of the schedule read: "297. The reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, eighteen hundred and ninety-five."

Paragraph 685, one of the paragraphs of the free list, was as follows: "685. All wool of the sheep, hair of the camel, goat, alpaca and other like animals, and all wool and hair on the skin, noils, yarn waste, card waste, bur waste, slubbing waste, roving waste, ring waste and all waste, or rags composed wholly or in part of wool, all the foregoing not otherwise herein provided for."

Mr. Solicitor General for appellant.

Mr. W. Wickham Smith for appellees. *Mr. Charles Curie* was on his brief.

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

Women's and children's dress goods, "composed wholly or

in part of wool, worsted, the hair of the camel, goat, alpaca or other animals," were dutiable under paragraph 395 of the act of October 1, 1890, at twelve cents per square yard and fifty per cent *ad valorem;* under paragraph 283 of the act of August 27, 1894, at forty or fifty per cent *ad valorem*, according to value. But by paragraph 297, the reduction of the rates of duty on "manufactures of wool" was not to take effect until January 1, 1895. And if that paragraph applied to worsted dress goods for women and children, then the collector was right, and the judgment must be reversed.

Was it intended that the words "manufactures of wool," as used in this paragraph, should include or exclude worsted goods?

Worsted goods are made out of wool, and are necessarily a manufacture of wool. The Century Dictionary defines "worsted" as a noun: "A variety of woollen yarn or thread, spun from long-staple wool which has been combed, and in the spinning is twisted harder than is usual;" and as an adjective: "Consisting of worsted; made of worsted yarn; as worsted stockings."

"Worsted is but wool, spun and twisted in a particular manner," said Mr. Justice Story, in *Whiting* v. *Bancroft*, 1 Story, 560. And in *Cahn* v. *Seeberger*, 30 Fed. Rep. 425, it was found by Judge Blodgett that: "Worsted is made by combing long fibred wools so that the fibres usually lie or are arranged alongside each other, while wool is treated by carding it so as to interlock the fibres with each other."

As between worsted yarns and woollen yarns the Encyclopædia Britannica says that the fundamental distinction "rests in the crossing and interlacing of the fibres in preparing woollen yarn, — an operation confined to this alone among all textiles, while for worsted yarn the fibres are treated, as in the case of all other textile materials, by processes designed to bring them into a smooth, parallel relationship with each other." Vol. 24, p. 658.

Although through the introduction of improved processes of manufacture, it gradually became possible to comb shorter and finer varieties of wool, and thus to manufacture worsted

goods of higher grade and better quality, approximating worsted to woollen goods, and removing the reason for any distinction between them in the matter of duties, the tariff laws prior to May 9, 1890, made a distinction in that respect between woollen and worsted goods, resting on the difference in the process of manufacture; but the raw material was, of course, always the same, namely, wool.

By the tariff acts of April 27, 1816, c. 107, 3 Stat. 310; of May 22, 1824, c. 136, 4 Stat. 25; May 19, 1828, c. 55, 4 Stat. 270; July 14, 1832, c. 227, 4 Stat. 583; August 30, 1842, c. 270, 5 Stat. 548, worsted stuff goods were recognized as manufactures of wool.

By the acts of July 30, 1846, c. 74, 9 Stat. 42; March 2, 1861, 12 Stat. 252, Res. 15; July 14, 1862, c. 163, 12 Stat. 543; June 30, 1864, c. 171, 13 Stat. 202; March 2, 1867, c. 197, 14 Stat. 559; March 3, 1883, c. 121, 22 Stat. 488, "manufactures of wool not otherwise provided for," were separated from "manufactures of worsteds not otherwise provided for," and distinct duties levied on each, while from 1861 distinct duties were levied on articles specifically described, whether manufactured of wool or worsted.

In *Seeberger* v. *Cahn*, 137 U. S. 95, 97, it was held that cloths popularly known as diagonals, and in trade as worsteds, were subject to duty under the act of March 3, 1883, as manufactures of worsted and not as manufactures of wool, the ground of decision being thus stated by Mr. Justice Gray delivering the opinion of the court:

"In the interpretation of the customs acts, nothing is better settled than that words are to receive their commercial meaning; and that when goods of a particular kind, which would otherwise be comprehended in a class, are subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties.

"Of the two successive paragraphs in the customs act of 1883, upon which the parties respectively rely, the first imposes a certain scale of duties on 'all manufactures of wool of every description, made wholly or in part of wool, not spe-

cially enumerated or provided for in this act;' and the second imposes a lower scale of duties on 'all manufactures of every description, composed wholly or in part of worsted.' . . .

"Though worsted is doubtless a product of wool, and might in some aspects be considered a manufacture of wool, yet manufactures of worsted being subjected by the second paragraph to different duties from those imposed by the first paragraph on manufactures of wool, it necessarily follows that a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of this statute."

This decision was announced November 17, 1890, but the controversy had been pending for a long time in the courts, and on May 9, 1890, an act was passed, "providing for the classification of worsted cloths as woollens," by enacting: "That the Secretary of the Treasury be, and he hereby is, authorized and directed to classify as woollen cloths all imports of worsted cloth, whether known under the name of worsted cloth or under the name of worsteds or diagonals or otherwise." 26 Stat. 105, c. 200.

And since that date no distinction for customs purposes between woollens and worsteds has been recognized by Congress.

By the act of October 1, 1890, the same duties were levied upon worsted and woollen goods. Paragraphs 375 to 387 divided all wools, hair of the camel, goat, alpaca and other like animals into three classes, and levied certain duties on each class. Paragraphs 391 to 398 provided for certain duties on described articles, whether made wholly or in part of "wool, worsted, the hair of the camel, goat, alpaca or other animals."

By the act of August 27, 1894, wool was put on the free list (par. 685), and the paragraphs of the act of October 1, 1890, classifying wools and levying duties on the different classes, were omitted. Paragraphs 280 to 286, inclusive, of Schedule K of this act prescribed duties on certain enumerated articles, whether composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animal.

There was no distinction made by either of these acts be-

tween manufactures of wool and manufactures of worsted for the purposes of duty, and the word "worsted" seems to have been used out of abundant caution and as conducive to greater certainty.

The act of July 24, 1897, commonly known as the Dingley act, omits the repetition of the words "wool, worsted, hair of the camel, goat, alpaca and other animals," and uses the single word "wool." Paragraph 383 provides: "Whenever, in any schedule of this act, the word 'wool' is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the sheep, camel, goat, alpaca or other animal, whether manufactured by the woollen, worsted, felt or any other process." 30 Stat. 151, c. 11.

Manifestly the distinction on which the decision in *Seeberger* v. *Cahn* turned was done away with by the acts of October 1, 1890, and August 27, 1894, as well as by that of May 9, 1890, and there certainly is no imperative ground for its reinstatement by technical construction.

The reason for the postponing of the taking effect of the reduction of duties obviously had nothing to do with the process of manufacture, but related to the material of which the goods were composed, which material had been relieved from duty by paragraph 685 of the act.

Congress undoubtedly concluded that the manufacturers of goods from wool had laid in a large stock of material, which equitably they should be allowed a reasonable time to work off, and that there was probably on hand a large stock of goods, to dispose of which reasonable time should be allowed, rather than that the large dealers should be induced to bring in foreign goods at a cost which involved ruinous competition; while at the same time the wool growers ought to have their original market until they could adjust themselves to the new condition of things.

The specific rate was compensatory, and, when stricken out, and the duty on raw material abolished, a postponement was provided for in order to avoid injustice.

But the reason for postponing the reduction on manufact-

ures of wool, which, on the face of the act, we think properly imputable to Congress, is as applicable to worsted goods as to any other goods fabricated from wool.

It will be perceived that the acts of 1890 and 1894 did not levy a duty on "worsted dress goods," *eo nomine*, nor on worsted dress goods by commercial designation, nor on worsted dress goods as distinguished from woollen dress goods; but a duty on dress goods, whether made of "wool, worsted, the hair of the camel, goat, alpaca or other animals." The description is addressed to the quality and material of the goods, namely, women's and children's dress goods, made of wool, worsted, etc.

The principle then that the special designation of an article by its commercial meaning should prevail over general terms used in the same or a later act, has no application.

In *Barber* v. *Schell*, 107 U. S. 617, the words "cotton laces, cotton insertings," etc., used in the act of 1846, were held to be designations of articles by special description of quality and material, and the general provision of 1857, transferring to Schedule C "all manufactures composed wholly of cotton, which are bleached, printed or dyed," whereby a different duty was imposed on such goods, was held to apply. Mr. Justice Blatchford said: "The designations qualified by the word 'cotton' in the act of 1846 are designations of articles by special description, as contra-distinguished from descriptions by a commercial name or a name of trade. They are designations of quality and material." *Cadwalader* v. *Zeh*, 151 U. S. 171, 178.

It is argued that the same reasoning which brings worsted goods within the words "manufactures of wool," would also compel the inclusion of goods composed of the hair of the camel and other animals, confessedly not covered by the phrase.

Doubtless wool considered as the sheep's coat might be said to be the sheep's hair, and fleeces of the hair of the Angora goat, the Llama, the Alpaca, and other like animals, might be called their wool. In the Encyclopædia Britannica, (9th ed. vol. 24, p. 653,) under the title of "Wool and Woollen Manu-

factures," it is said: "Wool is a modified form of hair, distinguished by its slender, soft and wavy or curly structure, and by the highly imbricated or serrated surface of its filaments. The numerous varieties of the sheep are the most characteristic, as they are also by far the most important, producers of wool; but the sheep is by no means the only animal which yields wool employed for industrial purposes. The alpaca and other allied fibres obtained from the alpaca and its congeners in South America, the mohair yielded by the Angora goat and the soft, woolly hair of the camel are all wools of much industrial importance, while the most costly wool in the world is that yielded by the Cashmere goat of the Himalayan Mountains. At what point indeed it can be said that an animal fibre ceases to be hair and becomes wool it is impossible to determine, because in every characteristic the one class by imperceptible gradations merges into the other, so that a continuous chain can be formed from the finest and softest merino to the rigid bristles of the wild boar." G. A. 2834; *Lyon* v. *United States*, 8 U. S. App. 409, 413.

But the acts of 1890 and 1894, as well as prior tariff acts, distinguished the wool of the sheep from the hair of the camel, goat and other like animals, as raw materials. And there is nothing in this record from which to conclude that Congress felt obliged to make concessions by way of alleviating the effect of the act of 1894 on the production of the hair of the camel, the goat, the alpaca, and so on, in this country, or on manufactures thereof.

We think that the words "manufactures of wool," in paragraph 297, had relation to the raw material out of which the articles were made, and that as the material of worsted dress goods was wool, such goods fell within the paragraph.

Judgment of the Circuit Court of Appeals reversed; judgment of the Circuit Court also reversed, and the cause remanded to that court with a direction to affirm the decision of the Board of General Appraisers.

BARRETT *v.* UNITED STATES (No. 1).

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

Argued January 21, 1898. — Decided February 21, 1898.

When a bill of exceptions does not contain the evidence, it is impossible for this court to know the ground on which the trial court proceeded in overruling a motion on the evidence to compel the district attorney to elect, and an exception in that regard will not be considered.

In December, 1894, when the proceedings took place which are questioned in this case, there were not two judicial districts in the State of South Carolina, to the territorial limits of each of which the jurisdiction of the Circuit Court of the United States was confined.

The legislation on this subject from the commencement of the Government reviewed.

BARRETT was indicted, with others, as stated in the caption of the transcript of the record, "at a Circuit Court of the United States for the Fourth Circuit in and for the District of South Carolina, begun and holden at Columbia in the district aforesaid, on the fourth Monday in November, 1894, before the Honorable Wm. H. Brawley, United States Judge for the District of South Carolina, holding said Circuit Court according to the form of the act of Congress in such cases made and provided," for conspiracy to commit an offence against the United States, under sections 5440 and 5480 of the Revised Statutes, and, having been duly tried, was found guilty, and sentenced to imprisonment and fine.

To review this judgment, this writ of error was prosecuted.

The indictment commenced as follows:

"United States of America, } To wit: In the Circuit Court.
District of South Carolina, }

"At a stated term of the Circuit Court of the United States for the District of South Carolina, begun and holden at Columbia, within and for the district aforesaid, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and ninety-four, the jurors of the United States of America within and for the district aforesaid upon their

oaths respectively do present that Charles P. Barrett, [and others naming them,] together with divers other evil-disposed persons to the jurors aforesaid unknown, late of the district aforesaid, on the first day of July, in the year of our Lord one thousand eight hundred and ninety-two, at Spartanburg, in the State of South Carolina aforesaid, in the district aforesaid and within the jurisdiction of this court, being persons of evil minds and dispositions, wickedly devising and intending to commit the offence against the United States hereinafter set forth, fraudulently, maliciously and unlawfully did combine, conspire, confederate and agree together between and among themselves to commit against the United States this offence —etc., etc."

Certain exceptions were taken to the action of the court in refusing to sustain a challenge to the array of both grand and petit jurors on the ground that they were drawn from both the eastern and western districts of South Carolina, when the alleged offence was charged in the indictment to have been committed in the county of Spartanburg in the western district of said State; to the order of the court overruling defendant's demurrer to the indictment on the ground that the offence was charged to have been committed in the county of Spartanburg, in the State of South Carolina, the same being in the western district of said State, although the indictment was found in the city of Columbia in the county of Richland in the eastern district thereof; to the refusal of the court to sustain defendant's plea to the jurisdiction on the ground that, although the alleged offence was charged to have been committed in the county of Spartanburg, the same being in the western district of South Carolina, the trial was sought to be had in the city of Columbia in the county of Richland, in the eastern district of said State; to the denial by the court of defendant's motion that the district attorney be required to elect on which one of several conspiracies disclosed by the evidence to have been committed, if any, he would ask for a conviction; and to the refusal of the court to arrest judgment because the grand jurors who found the indictment and the petit jurors who found the verdict were drawn from the west-

ern and eastern districts of South Carolina, although the offence was alleged to have been committed in the county of Spartanburg in the western district; because the indictment was found in the county of Richland in the eastern district at a time not authorized by law for the sitting of the United States court for the western district, and because the trial was had in the county of Richland in the eastern district for an offence committed in the western district.

Mr. Charles C. Lancaster for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendant in error.

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

As to the action of the court overruling defendant's motion on the evidence to compel the district attorney to elect, the bill of exceptions does not contain the evidence, and it is impossible for this court to know the ground on which the Circuit Court proceeded. The exception in that regard need not therefore be considered.

In respect of the other exceptions, they all present the same objection in different forms, namely, that the State of South Carolina was divided into two judicial districts, and that an indictment could not be lawfully found in the Circuit Court of the United States held in the eastern district or a trial be therein had, for a criminal offence committed in the western district.

The Constitution provides that the trial of crimes shall be had in the State "where the crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed," Art. III, § 2, cl. 3; and by Amendment VI, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law."

This indictment was found December 3; the trial had December 6 to 11; and the defendant sentenced December 12, 1894, in the Circuit Court in session at Columbia. Were there at that time two judicial districts in South Carolina within the intent and meaning of the Constitution and the acts of Congress in that behalf?

The circuit court of each judicial district sits within and for that district; and its jurisdiction as a general rule is bounded by its local limits. *Toland* v. *Sprague*, 12 Pet. 300, 328; *Devoe Manufacturing Company, Petitioner*, 108 U. S. 401. At the same time courts may be required to be held at different places in a judicial district, and prosecutions for offences committed in certain counties may be required to be tried, and writs and recognizances to be returned at each place, but this does not affect the power of the grand jury sitting at either place to present indictments for offences committed anywhere within the district. *Logan* v. *United States*, 144 U. S. 263. As to where trials shall be had in a judicial district depends entirely on the legislation upon the subject. *Rosencrans* v. *United States*, 165 U. S. 257; *Post* v. *United States*, 161 U. S. 583.

By the judiciary act of September 24, 1789, c. 20, the then United States were divided into thirteen districts, of which New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Georgia and South Carolina each constituted one district, called by the name of the State, as for instance, "South Carolina district;" while a part of the State of Massachusetts was erected into a district "called Maine district," and a part of the State of Virginia into a district "called Kentucky district," the remaining part of the State of Massachusetts being made a district "called Massachusetts district," and the State of Virginia, except so much thereof as was thereby made the district of Kentucky, a district "called Virginia district." 1 Stat. 73.

The plan was to make each of the States a judicial district, and to direct the appointment of a judge, a clerk to be ap-

pointed by him, a district attorney and a marshal, for each district. But that part of Massachusetts now constituting the State of Maine and that part of the State of Virginia now forming the State of Kentucky were erected into independent districts under the names of "Maine District" and "Kentucky District," and the district court established in each was invested with the powers of a Circuit Court.

By the fourth section these districts, "except those of Maine and Kentucky," were divided into three circuits, called the eastern, the middle and the southern circuits; and it was provided that circuit courts should be held "in each district of said circuits," by two of the justices of the Supreme Court and "the district judge of such districts."

North Carolina having ratified the Constitution, November 21, 1789, Congress by the act of June 4, 1790, c. 17, 1 Stat. 126, gave effect to the judiciary act of 1789 in that State, erecting it into a district to be called "North Carolina district," establishing a district court with one judge, and annexing the district to the Southern circuit. Rhode Island having ratified the Constitution, May 29, 1790, a similar act to give effect to the judiciary act was passed June 23, 1790, c. 21, 1 Stat. 128, by which Rhode Island was annexed to the Eastern circuit.

From the first, then, district courts have been, in exceptional instances, vested with Circuit Court jurisdiction.

On February 21, 1823, an act was passed, c. 11, entitled "An act to divide the State of South Carolina into two judicial districts," as follows: "That the State of South Carolina be, and the same is hereby divided into two districts, in manner following, that is to say: the districts of Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens and Fairfield; shall compose one district, to be called the western district, and the residue of the State shall form one other district to be called the eastern district. And the terms of the said district court, for the eastern district, shall be held at Charleston, at such times as they are now directed by law to be holden. And for the trial of all such criminal and civil causes, as are by law

cognizable in the district courts of the United States which may hereafter arise or be prosecuted, or sued, within the said western district, there shall be one annual session of the said district court holden at Laurens court-house, to begin on the second Monday in May in each year; to be holden by the district judge of the United States of the State of South Carolina; and he is hereby authorized and directed to hold such other special sessions as may be necessary for the despatch of the causes in the said court, at such time or times as he may deem expedient, and may adjourn such special sessions to any other time previous to a stated session." 3 Stat. 726.

By an act approved May 25, 1824, c. 145, entitled "An act to alter the times of holding the Circuit and District Courts of the United States for the district of South Carolina," 4 Stat. 34, it was provided that the Circuit Court "for the district of South Carolina" should annually be held "at Charleston on the second Tuesday of April; and at Columbia on the third Tuesday of November," etc.; and that "the times of holding the district court of the United States at Laurens court-house, South Carolina, shall be so altered that the said court shall hereafter convene on the Tuesday next ensuing after the adjournment of the Circuit Court of the United States at Columbia."

On March 3, 1825, this act was amended by providing that "the Circuit Court for the district of South Carolina at Columbia, South Carolina, shall commence on the fourth Tuesday of November, annually." 4 Stat. 124, c. 78.

By an act of May 4, 1826, c. 37, the sessions of the Circuit Court "for the District of South Carolina" were again changed, 4 Stat. 160; and again February 24, 1829, c. 19, 4 Stat. 335.

By the act of March 1, 1845, 5 Stat. 730, c. 39, it was provided, referring to the Circuit Court, "that the spring term of said court shall be held in and for the district of South Carolina at Charleston, on the Wednesday preceding the fourth Monday of March."

By an act approved August 16, 1856, c. 119, entitled "An

act to alter the time for holding the district court in South Carolina, and for other purposes," 11 Stat. 43, it was provided that so much of the act of May 25, 1824, as provided "for holding the District Court of the United States at Laurens court-house, South Carolina, on the Tuesday next ensuing after the adjournment of the Circuit Court of the United States at Columbia, be and the same is hereby repealed; and that in place thereof the said court shall be held at Greenville court-house, South Carolina, on the first Monday in August in each year." And it was further provided that the jurors for said court, grand as well as petit, should be drawn "from the inhabitants of Greenville district, South Carolina," except that the jurors for the first term of the court should be drawn at "the term of the district court to be holden in the city of Charleston;" and further that "the said district court for Greenville, in addition to the ordinary jurisdiction and powers of a District Court of the United States, shall have jurisdiction of all causes (except appeals and writs of error) which now are or may be hereafter made cognizable in a Circuit Court of the United States, and shall proceed in the same manner as a Circuit Court."

The act of July 15, 1862, c. 178, 12 Stat. 576, provided that "the districts of South Carolina, Georgia, Alabama, Mississippi and Florida, shall constitute the fifth circuit;" and repealed the act or acts which vested circuit court powers in the district courts for the districts of Texas, Florida, Wisconsin, Minnesota, Iowa and Kansas; while by the act of March 3, 1863, c. 100, 12 Stat. 794, the districts of California and Oregon were constituted the tenth circuit; and so much of any act or acts as vested in the district courts for California and Oregon the power and jurisdiction of circuit courts was repealed.

By the act of July 23, 1866, c. 210, 14 Stat. 209, it was provided that "the districts of Maryland, West Virginia, Virginia, North Carolina and South Carolina shall constitute the fourth circuit."

The act of April 10, 1869, c. 22, 16 Stat. 44, authorized the appointment of a circuit judge "for each of the nine existing judicial circuits;" but that act, by the act of July 1, 1870, c.

186, was not to be construed "to require a circuit court to be held in any judicial district in which a circuit court was not required to be held by previously existing law." 16 Stat. 179.

In the Ku Klux Cases, tried in the Circuit Court at Columbia, in the fall of 1871, before Circuit Judge Bond and District Judge Bryan, Mr. Reverdy Johnson objected to the issue of a venire to summon additional grand and petit jurors "from the body of the district" embracing the whole State, though he admitted that "it is true that the circuit court has jurisdiction, as a court, over the entire district of South Carolina." The court ruled that so far as the circuit court was concerned there was but one district in South Carolina. South Carolina Ku Klux Trials, pp. 8, 9, 10.

The Revised Statutes were adopted June 22, 1874, (the second edition being published in 1878,) and contain the following sections:

"SEC. 530. The United States shall be divided into judicial districts as follows:

"SEC. 531. The States of California, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont and West Virginia, each, constitute one judicial district."

"SEC. 546. The State of South Carolina is divided into two districts, which shall be called the eastern and western districts of the district of South Carolina. The western district includes the counties of Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens and Fairfield, as they existed February 21, 1823. The eastern district includes the residue of said State."

"SEC. 551. A district judge shall be appointed for each district, except in the cases hereinafter provided. Every such judge shall reside in the district for which he is appointed, . . .

"SEC. 552. There shall be appointed in each of the States of Alabama, Georgia, Mississippi, South Carolina and Tennessee, one district judge, who shall be district judge for each of the districts included in the State for which he is appointed, and shall reside within some one of the said districts. . . ."

"SEC. 571. The district courts for the western district of Arkansas, the eastern district of Arkansas at Helena, the northern district of Mississippi, the western district of South Carolina and the district of West Virginia, shall have in addition to the ordinary jurisdiction of district courts, jurisdiction of all causes, except appeals and writs of error, which are cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court.

"SEC. 572. The regular terms of the district courts shall be held at the times and places following: . . . In the eastern district of South Carolina, at Charleston, on the first Monday in January, May, July and October. In the western district, at Greenville, on the first Monday in August."

"SEC. 604. The judicial districts of the United States are divided into nine circuits as follows: . . . Fourth. The Fourth Circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina and South Carolina. . . ."

"SEC. 608. Circuit courts are established as follows: One for the three districts of Alabama, one for the eastern district of Arkansas, one for the southern district of Mississippi and one for each district in the States not herein named; and shall be called the circuit courts for the districts for which they are established."

"SEC. 658. The regular terms of the circuit courts shall be held in each year, at the times and places following. . . : In the district of South Carolina, at Charleston, on the first Monday in April; and at Columbia, on the fourth Monday in November."

"SEC. 767. There shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina, a person learned in the law, to act as attorney for the United States in such district. . . . The district attorney of the eastern district of South Carolina shall perform the duties of district attorney for the western district of said State."

Section 776 makes similar provision as to United States marshals for said districts.

"SEC. 563. The district courts shall have jurisdiction as follows:

"First. Of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, . . . the punishment of which is not capital. . . ."

"SEC. 629. The circuit courts shall have original jurisdiction as follows: . . . Exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offences cognizable therein."

The Revised Statutes were compiled under an act of June 27, 1866, c. 140, providing "for the revision and consolidation of the statute laws of the United States," 14 Stat. 74, the appointment of three commissioners being thereby authorized to accomplish the work. These commissioners were directed to arrange the statutes and parts of statutes "under titles, chapters and sections, or other suitable divisions and subdivisions, with headnotes briefly expressive of the matter contained in such divisions; also with side notes so drawn as to point to the contents of the text and with references to the original text from which each section is compiled."

By the act of March 2, 1877, c. 82, 19 Stat. 268, the preparation and publication of a new edition of the Revised Statutes was provided for, the work to be done by a single commissioner, who was required to add to the marginal references made in the previous revision.

In *United States* v. *Lacher*, 134 U. S. 624, 626, we said: "If there be any ambiguity in section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law. *United States* v. *Bowen*, 100 U. S. 508, 513; *United States* v. *Hirsch*, 100 U. S. 33; *Myer* v. *Car Company*, 102 U. S. 1, 11. And it is said that this is especially so where the act authorizing the revision directs marginal references

as is the case here. 19 Stat. c. 82, § 2, p. 268; Endlich on Int. Statutes, § 51."

Section 546 appears under "Title XIII. The Judiciary. Chapter one. Judicial Districts;" and the cross-reference in the margin is to the act of "21 Feb. 1823, c. 11, § 1, v. 3, p. 726."

When, then, Congress enacted this section it seems to have construed the act of 1823, not as dividing the State into two judicial districts, as indicated in the title of the act, but into two districts in the sense of geographical divisions, which is in harmony with the language used in the body of the act. At all events, the phraseology of section 546 is only consistent with the conclusion that the State constituted but one judicial district, containing two divisions, which were "called the eastern and western districts of the district of South Carolina."

And it should be remembered that there was, during all this time, (and this has prevailed from thence hitherto,) but one judge, one attorney and one marshal for the district of South Carolina.

It is said that in the first draft of the commission to revise the statutes, the commissioners recommended the adoption of a section corresponding to section 546, in this language: "The district of South Carolina is divided into two divisions, which will be called the eastern and western divisions of the district of South Carolina. The western division includes the counties of Lancaster, etc., as they existed February 21, 1823. The eastern division includes the residue of said State." And it is argued that because section 546 was couched in its present language, notwithstanding the recommendation, that it therefore follows that Congress intended to divide the State into two judicial districts. We cannot concur in that view. While the use of the word "division" might have been more felicitous, yet we think the meaning of the statute was sufficiently plain, and that it would be inadmissible to recur to the draft of the commissioners to create a doubt where none existed. Moreover, it would be a much greater stretch of construction to say that because Congress did not see fit to use the word "division," therefore it should be held that the

words actually employed, "of the district of South Carolina," were inadvertently inserted, and should be rejected altogether.

It should be noted that by section 608 Circuit Courts were established for each district in the States not therein named, the States specified being Alabama, Arkansas and Mississippi and yet that by section 571 certain district courts, including that for the western district of South Carolina, retained circuit court powers.

Nevertheless, it was held by Chief Justice Waite, sitting with Judge Bond in the Circuit Court in 1877: "As to the question of the jurisdiction of this court throughout the entire State of South Carolina, we decide, for the purposes of this trial, in favor of the jurisdiction. This is in accordance with the uniform practice of the court, without objection from any quarter, for nearly half a century." *United States* v. *Butler*, 1 Hughes, 457, 463.

And in 1886, it was said by Simonton, J., holding the Circuit Court: "All parts of the State of South Carolina are within the jurisdiction of this court. Its process runs all through the State. It does not know, in the sense which affects its jurisdiction, either the eastern or western district." *Young* v. *Merchants' Ins. Co.*, 29 Fed. Rep. 273, 275.

However we are relieved from considering the effect upon the jurisdiction of a Circuit Court having jurisdiction throughout a State, constituting a single judicial district, of a part of the district being subjected to the jurisdiction of the district court clothed with circuit court powers, as the act of February 6, 1889, c. 113, 25 Stat. 655, in terms "established a circuit court of the United States in and for the western district of Arkansas, the northern district of Mississippi and the western district of South Carolina, respectively, as the said districts are now constituted by law;" and withdrew circuit court powers from said district courts.

By the act of April 26, 1890, c. 165, 26 Stat. 71, it was provided that there should be "four regular terms of the Circuit Court of the United States for the District of South Carolina in each year, as follows: In the city of Greenville on the

first Monday of February and on the first Monday in August; in the city of Charleston on the first Monday of April; and in the city of Columbia on the fourth Monday of November;" and that "the office of the clerk of said court shall be kept in the cities of Charleston and of Greenville, and the clerk shall reside in one of the said cities and shall have a deputy in the other." And although the act then went on to prescribe terms "of the District Courts for the Eastern District of South Carolina," and "of the District Court in the Western District of South Carolina," we think the operation of the prior sections was not thereby affected.

It may be added that in the legislative, executive and judicial appropriation act of May 28, 1896, c. 252, §§ 7, 9, appropriations were made for the salaries (among others) of the United States district attorney "for the eastern and western districts of the district of South Carolina," and of the United States marshal "for the eastern and western districts of the district of South Carolina." 29 Stat. 140.

From this review of the statutes we are unable to arrive at any other conclusion than that in 1894, when these proceedings were had, there were not two judicial districts in the State of South Carolina, to the territorial limits of each of which the jurisdiction of the Circuit Court was confined; and that the exceptions in this regard must be held not to have been well taken.

It is also suggested in the brief for plaintiff in error that error supervened in that the record does not affirmatively show the issue of the venire for the grand and petit juries; nor that the defendant was arraigned; nor that he was personally present when the verdict was rendered and sentence pronounced.

But the record does show that the indictment was duly returned; that motions to quash the indictment and the venire of grand and petit juries were made and overruled; that the defendant pleaded "not guilty" to said indictment; that the trial came on on that issue, and a petit jury was duly empanelled and sworn; that trial was had and a verdict of guilty returned, and sentence thereon entered; and that no exceptions

were saved to any of these proceedings other than the exceptions before mentioned.

The result is that the judgment must be

Affirmed.

BARRETT *v.* UNITED STATES (No. 2).

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

No. 175. Argued January 21, 1898.— Decided February 21, 1898.

It having been decided in *Barrett* v. *United States, ante,* 218, that the State of South Carolina constitutes but one judicial district, it follows that the indictment in this case was properly remitted to the next session of the District Court of that district.

THE case is stated in the opinion.

Mr. Charles C. Lancaster for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

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

This was an indictment for conspiracy under section 5440 of the Revised Statutes, found by the grand jury "in the Circuit Court of the United States for the District of South Carolina begun and holden at Columbia within and for the district aforesaid, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and ninety-four," and on motion of the "United States attorney for the District of South Carolina," was by the Circuit Court, January 30, 1895, by order entered on its minutes, "remitted from the Circuit Court of the United States for the district of South Carolina to the district court of the United States for the western district of South Carolina."

At the February term, 1895, of the District Court held at Greenville, in the western district, the District Judge presiding, the defendant pleaded not guilty; the cause was tried, defendant was found guilty, and, thereupon, was sentenced to imprisonment and fine. From this judgment a writ of error was prosecuted to this court.

On the trial defendant raised certain objections presented by exceptions, which are enumerated in a bill of exceptions; by demurrer that the indictment was found in the eastern district of South Carolina, although the crime was charged to have been committed in the western district; by preliminary plea, "that the jurors of the grand jury by whom the indictment was found were drawn, summoned and empanelled from both the eastern and western districts of South Carolina, instead of from the western district of said State alone;" that the indictment was found in the circuit court of the United States for South Carolina, held in the city of Columbia, in the eastern district of said State, and was remitted to the district court for the western district of said State; by motion on the close of the testimony for the United States, "that the attorney for the United States be required to elect on which one of the conspiracies he would ask for a conviction," that is, of several distinct conspiracies, which the evidence tended to show; by motion in arrest that the grand jurors, who found the indictment, were drawn, summoned and empanelled from both the districts when the crime was charged to have been committed in one of them; that the indictment was found in the eastern district at a time when there was no law authorizing the "holding any court of the United States for the western district of South Carolina;" because the indictment was remitted "not to the district court of the United States for the eastern district of South Carolina, but to the district court of the western district of said State."

The court overruled all these objections, in whatever form presented, and defendant excepted.

Sections 817, 1037 and 1038 of the Revised Statutes are as follows:

"Sec. 817. The grand and petit jurors for the district

court, sitting in the western district of South Carolina, shall be drawn from the inhabitants of said district who are liable, according to the laws of said State, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term."

"SEC. 1037. Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offence charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. . . .

"SEC. 1038. Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein."

No objection was raised that the petit jury by which defendant was tried was not, and it was conceded at the bar that it was, in fact, drawn from the inhabitants of the western district of the district of South Carolina, and no complaint is preferred in that regard.

We have just decided that the State of South Carolina constitutes but one judicial district, and, this being so, the indictment was properly remitted, in accordance with section 1037, to the next session of the district court of that district, begun and holden on the first Monday of February, 1895, in the western district of the district.

All other questions have been disposed of adversely to plaintiff in error in the preceding case.

Judgment affirmed.

LEVIS *v.* KENGLA.

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

No. 173. Argued January 11, 12, 1898. — Decided February 21, 1898.

Decree affirmed on a question of fact only.

THE case is stated in the opinion.

Mr. Henry E. Davis for appellant. *Mr. H. B. Moulton* was on his brief.

Mr. J. Holdsworth Gordon for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed by the mortgagor of land in the District of Columbia, more than fifteen years after the sale and conveyance of the land under a power in the mortgage, to redeem the land and to enforce a trust therein.

The Supreme Court of the District of Columbia, after a hearing upon pleadings and proofs, dismissed the bill; and its decree was affirmed by the Court of Appeals. 8 App. D. C. 230. The plaintiff appealed to this court.

The following facts were either admitted or clearly proved: Philip Levis, being the owner of the land, on October 29, 1875, made a first mortgage thereof to trustees to secure the payment of his note to one Clokey for $2000, payable in three years with interest at the annual rate of ten per cent; and on May 13, 1876, made a second mortgage to one Weaver, as trustee, to secure the payment of a promissory note to Charles R. Kengla and George M. Kengla for $300, payable in one year, with like interest. Under this second mortgage, default having been made in the payment of the $300 note, the land was advertised for sale "subject to a prior trust of $2000;" and on October 29, 1877, was accordingly sold by auction, and was bought by the two Kenglas for the sum of $1000,

subject to the first mortgage for $2000. The plaintiff remained in possession of the land for about a year after the sale, and then removed upon notice from the Kenglas to quit, and they have ever since remained in possession. On January 17, 1878, Weaver, as trustee under the second mortgage, conveyed the land to the Kenglas, in accordance with the terms of the sale, and received from them the price of $1000. On May 26, 1879, the Kenglas, with the knowledge of Levis, sold and conveyed part of the land to one Hume for the sum of $2756.89. Levis never claimed any interest in the land, after the conveyance to the Kenglas on January 17, 1878, until he filed the original bill in this case against them on March 29, 1893.

In the bill, the plaintiff alleged that, when the land was put up for sale by auction on October 29, 1877, there being present no bidders nor any persons interested in the purchase of the property except the defendants, the threatened sale was objected to by the plaintiff, and was only permitted to be made, without protest, upon an oral statement by the defendants that they only desired to obtain out of the property the amount of the incumbrances thereon, and that, if he would permit them to go through the form of a sale, they would take and hold the property for his benefit, and would reconvey it to him, or so much thereof as was left after sufficient had been sold to satisfy their claim, together with the costs of the sale; whereupon, relying upon their promise, he suffered an informal sale of the property to be made to them by the trustee.

The defendants, answering under oath, denied that, at any time before the sale to them, there was any understanding, agreement or suggestion, of any kind whatsoever, between them and the plaintiff, to impeach or qualify the absolute purchase of the property by them for their own use and benefit; and alleged that, after that sale, the plaintiff informed them that he believed he could obtain a purchaser for the property at a greater price; that, wishing the plaintiff to obtain as much as possible out of the property, they informed him that if he could obtain such purchaser within two weeks

from the day of sale, they would convey the property to such purchaser, and turn over to the plaintiff the increased price obtained; that the plaintiff endeavored to obtain such purchaser, but finally came to them and informed them that he had failed to find a purchaser; whereupon they obtained a deed from the trustee.

Upon a careful consideration of the conflicting testimony introduced at the hearing, this court fully concurs in one of the positions taken by the Court of Appeals, and stated in its opinion as follows: "The complainant has not established his case by any such preponderance of testimony as is required by the rules of law to overthrow the title of the defendants. On the contrary, the preponderance of testimony is wholly against him. It is unreasonable to suppose that the defendants, having a good security as it stood, would have converted themselves into permanent trustees for an indefinite period for the sole and exclusive benefit of the complainant, the latter never at any time concerning himself with the payment of interest or taxes, or the care of the property in any way, for fifteen years. To establish such an arrangement as this, very positive and satisfactory evidence would be required; and without going into any examination of the testimony, it is sufficient for us here to say that, in our opinion, the testimony wholly fails to establish any such arrangement, or any arrangement whatever upon which a court of equity would be justified in acting. It would seem to be a conclusive answer to the complainant's pretensions, that when, within a year after the sale, and when they deemed their indulgence to him to have reached its legitimate limit, they gave him notice to quit the premises, and thereby plainly intimated to him that they regarded any interest which he might have had in the premises as at an end, he submitted to the notice, without protest, and acquiesced in his exclusion from the property. This conduct, coupled with his utter disregard thereafter of any liability, either in regard to the property or in regard to the indebtedness, is wholly inconsistent with the existence of any such trust arrangement as that which he claims to have been made between him and the defendants." 8 App. D. C. 237.

Statement of the Case.

This view being decisive of the case, it becomes unnecessary to consider the defence of laches, or that of the statute of frauds; and a discussion of the testimony in detail could be of no value as a precedent, and would serve no useful purpose. *Harrell* v. *Beall*, 17 Wall. 590; *Tyler* v. *Campbell*, 106 U. S. 322.

Decree affirmed.

WETZEL *v.* MINNESOTA RAILWAY TRANSFER COMPANY.

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

No. 94. Argued January 25, 1898. — Decided February 21, 1898.

The decree of the Circuit Court, affirmed by the Circuit Court of Appeals, dismissing the bill in this case on the ground of laches was correct, and that decree is affirmed.

This was a bill in equity filed in the United States Circuit Court for the District of Minnesota, by the widow (since remarried) and heirs at law of George W. Remsen against the Minnesota Railway Transfer Company, and over two hundred other defendants, to establish title to one hundred and sixty acres of land situate within the corporate limits of the city of St. Paul, which the complainants contended was held in trust for them by the defendants. The land was estimated to be of the value of over one million dollars.

The facts of the case are substantially as follows: George W. Remsen was a private in Company K, Third Regiment, United States Infantry, and served in the Mexican war. By virtue of his enlistment as a soldier he became entitled, under section 9 of the act of Congress of February 11, 1847, c. 8, 9 Stat. 123, to locate a quarter section of government land, subject to private entry, under the regulations and restrictions established by the Commissioner of the General Land Office. This section further provided that in case of the death of

the soldier his right under the act should descend to his widow and minor children ; and, further, that in the event of the issuance of a land warrant to the minor children of a deceased soldier "then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the orphans' or other court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested."

Remsen died in the military service in October, 1847, and thereafter a land warrant was issued on September 30, 1848, to "Elizabeth Remsen, widow, Harriet A. Remsen, Mary Ann Remsen, John W. Remsen, Elizabeth Remsen and George W. A. Remsen, children, heirs at law, of George W. Remsen, deceased." On October 6, 1848, Mrs. Remsen qualified as guardian of all the minor children of Remsen, (except Harriet A., who was then seventeen years of age,) before the orphans' court for the county of Philadelphia, Pennsylvania.

The land warrant issued to the widow and minor children of Remsen was never located by any or either of them, but was sold and assigned on October 11, 1848, to one Nathan C. D. Taylor, of St. Croix County, Territory of Minnesota, who subsequently located it upon the land in controversy and to whom a patent was issued by the Government on March 20, 1850, and from whom all the defendants in this case, directly or indirectly, claim title.

The sale and assignment of the warrant were made without an order authorizing or confirming it, so far as appears, of the orphans' court appointing Mrs. Remsen as guardian, and were consummated by Mrs. Remsen, acting in her own right and as the guardian of the minor children, with whom was joined Harriet A. Remsen.

It was contended by the complainants in the Circuit Court, as well as in the Circuit Court of Appeals, that the sale and assignment of the land warrant to Taylor were utterly void as to the interests of all the minor children of George W. Remsen, other than Harriet A., who joined in the assignment, because the sale and assignment made by the mother as guar-

dian was not authorized by any order or decree of the orphans' court of the county of Philadelphia.

The Circuit Court dismissed the bill on the ground of laches. 56 Fed. Rep. 919. Upon appeal that decree was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 27 U. S. App. 594. Whereupon the complainants appealed to this court.

Mr. Ernest Howard Hunter and *Mr. John W. Hinsdale* for appellants.

Mr. Cushman K. Davis for appellees. *Mr. Frank B. Kellogg* and *Mr. C. A. Severance* were on his brief.

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

The Circuit Court dismissed this bill on the ground of laches, and the Circuit Court of Appeals affirmed its action. There can be no doubt whatever of the correctness of this conclusion. Indeed, a stronger case for the application of the doctrine of laches can scarcely be imagined. The warrant, which was issued in 1848, entitled the widow and minor children of Remsen to a grant of one hundred and sixty acres of public lands. This warrant was never located by the persons to whom it was issued, who appeared to have lived in Philadelphia, and to have been in straitened circumstances.

The warrant was sold by them in 1848 to Nathan C. D. Taylor, and there is nothing to show that it did not realize for the widow and heirs its market value. Indeed, the Court of Appeals found that it was sold for its full value, and the widow testified that the proceeds were applied to the support of herself and the minor children of the deceased soldier. No fraud in the transaction was alleged or proved. Nothing appears to impeach the validity of the sale, except the fact that the widow, who had been appointed guardian of all the minor children, except the eldest, did not procure the consent of the orphans' court in Philadelphia to make the sale, as required by the

statute. This was doubtless a technical defect; but it did not show that the warrant was not actually transferred by the widow, acting for herself and her children, (except one who consented in her own behalf,) or that they did not receive full consideration for such transfer.

It is true that the locator and his grantees in possession may have been in law chargeable with the knowledge that an order of the orphans' court was never obtained; but in view of the fact that the widow and heirs of Remsen lived in Philadelphia, a thousand miles from St. Paul, it is scarcely a matter of surprise that they did not investigate this subject with that care which they probably would have exercised had that court been more accessible. Particularly is this so, when it is considered that the officers of the land department, subsequently and after a full review of the facts, decided the warrant to have been properly transferred to Taylor, and issued a patent to him.

It was not the foresight of the widow or heirs of Remsen which caused this warrant to be located upon lands so near to the thriving city of St. Paul, but that of Taylor, who appears to have been a resident of Minnesota; and this suit is a manifest attempt of the complainants to take to themselves the benefit of his action, in which they did not participate and of which they were entirely ignorant for over thirty years after the location had been made.

Conceding that the minors were not affected by laches until they became of age, it appears that the youngest of them reached his majority in 1863, at which time the lands were worth about $1500. Then, if not before, the exercise of diligence became incumbent upon them. It was their duty to have informed themselves and to have acted. It is scarcely possible that they should not have known that their father was a soldier in the Mexican war, and they were chargeable by law with knowledge of the fact that he was entitled to a land warrant. If they did not know this as a matter of fact it was because their mother and eldest sister had failed to inform them of it; and it is inequitable to charge upon the defendants the entire consequences of this ignorance.

Knowledge of the transfer seems to have finally come to them, not through any exertion of their own to inform themselves of the facts, but by an accidental meeting with a lawyer from Minnesota, who had in some way, probably by an examination of the title, become cognizant of the defect in the transfer. It was a mere matter of chance when they would be informed of the defect in the defendants' title, or whether it would ever come to their knowledge at all. To permit them now, after a lapse of forty-four years from the time the warrant was issued, and of thirty years from the time the youngest child became of age, to impeach the transaction, would be an act of the most flagrant injustice to the present holders of the property. This property, which was probably not worth more than one or two hundred dollars at the time of the location of the land warrant, is now estimated to be worth at least a million, and is covered, or partly covered, by houses and business blocks. In the forty-four years that have elapsed since the warrant was issued these lands have been platted and sold in lots to purchasers, who were probably ignorant in fact, if not in law, of any defect in the title, and relied upon the validity of the transfer from the widow and heirs of Remsen and upon the patent from the United States, which appears to have been regularly issued after an examination of all the facts attending the granting, transfer and location of the land warrant by the officers of the land department. While the fact that the complainants were ignorant of the defect in the title and were without means to prosecute an investigation into the facts may properly be considered by the court, it does not mitigate the hardship to the defendants of unsettling these titles. If the complainant may put forward these excuses for delay after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure. The interests of public order and tranquillity demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable.

If any authority were needed for the action of the courts below in dismissing the bill upon the ground of laches, it would be found in *Felix* v. *Patrick*, 145 U. S. 317. In that case a half-breed woman, belonging to the Sioux nation, received in 1857 a certificate of land scrip, issued under the then existing law, which provided that no "transfer or conveyance of any of said certificates shall be valid." Notwithstanding this provision the woman sold the scrip and executed a blank power of attorney, also a quitclaim deed in blank, in which the name of the attorney, the description of the land and the name of the grantee were afterwards filled in by the grantee, who had caused the papers to be executed. The grantee thereafter located a tract of land, and subsequently Congress confirmed his title to the same. The half-breed was ignorant of all these facts until 1887. In 1888, she having died in the meantime, her representatives filed a bill in equity against the grantee, charging him with having fraudulently obtained the power of attorney and the quitclaim deed, but failing to state when and how the frauds were discovered. It was held that as the bill did not state the time when the frauds were discovered, so that the court might clearly see whether they could have been discovered before, the bill was fatally defective; and, that under the circumstances, it would be inequitable to disturb the title of the defendants, who held adversely as against the half-breed woman, and not by virtue of the power of attorney or quitclaim deed, which passed no title, or by the confirmatory act of Congress which granted no additional rights.

Upon the facts disclosed in this record, it is entirely clear that the decree of the court below was correct, and it is therefore

Affirmed.

Syllabus.

DULL *v.* BLACKMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 192. Argued January 18, 19, 1898. — Decided February 21, 1898.

On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the District Court of Pottawattamie County, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit was pending in the Supreme Court of the State of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the Supreme Court of New York had gone to decree, and attached a copy of that decree. The suit in the Supreme Court of the State of New York was commenced on the 3d of November, 1892. Blackman was served personally within the limits of that State, but the other defendants therein, Wright, Phelan and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them, notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed made by him and his wife to Blackman, and enjoining the several defendants from further prosecut-

Statement of the Case.

ing the action in the Iowa court. After certain other pleadings and amendments thereto had been made the case in the District Court of Pottawattamie County, Iowa, came on for hearing, and upon the testimony that court entered a decree quieting Phelan's title to the land as against any and all other parties to the suit, subject, however, to certain mortgage interests which were recognized and protected, but which are not in any way pertinent to this controversy between Dull and wife and the defendants in error. On appeal to the Supreme Court of the State such decree was, on January 21, 1896, affirmed. *Held*, that the decree of the Supreme Court of Iowa was right, and that it should be affirmed.

The facts in this case are as follows: On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the District Court of Pottawattamie County, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit

was pending in the Supreme Court of the State of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the Supreme Court of New York had gone to decree, and attached a copy of that decree. The suit in the Supreme Court of the State of New York was commenced on the 3d of November, 1892. Blackman was served personally within the limits of that State, but the other defendants therein, Wright, Phelan and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them. Notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed made by him and his wife to Blackman, and enjoining the several defendants from further prosecuting the action in the Iowa court. After certain other pleadings and amendments thereto had been made the case in the District Court of Pottawattamie County, Iowa, came on for hearing, and upon the testimony that court entered a decree quieting Phelan's title to the land as against any and all other parties to the suit, subject, however, to certain mortgage interests which were recognized and protected, but which are not in any way pertinent to this controversy between Dull and wife and the defendants in error. On appeal to the Supreme Court of the State such decree was, on January 21, 1896, affirmed, from which judgment of affirmance plaintiffs in error have brought the case here.

Mr. Alfred G. Safford and *Mr. Isaac N. Flickinger* for plaintiffs in error. *Mr. Omri F. Hibbard* was on their brief.

Mr. Winfield S. Strawn for defendants in error.

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

The contention of the plaintiffs in error, and in it is the only question of a Federal nature presented by the record, is that the courts in Iowa did not give that full faith and credit to the decree rendered in the Supreme Court of the State of New York to which under the Constitution of the United States it was entitled. From the foregoing statement of facts it appears clearly that although the suit in the Iowa court was originally commenced by Blackman, and though his name was, under the practice prevailing in Iowa, never dropped from the title of the case, it was by reason of the intervention of Phelan and the orders of the court simply prosecuted in his name for the benefit of Phelan, the intervenor; that this intervention of Phelan, and his petition in support thereof, making the plaintiffs in error and others defendants thereto, was filed on the 17th of September, 1892, nearly two months before the commencement of the suit in New York. It also appears that while Blackman, Phelan, Wright and others were named as parties defendant to the suit in New York, Blackman was the only one served within the territorial jurisdiction, and the only one appearing in that court. The other defendants were attempted to be brought in by service of summons in the State of Nebraska, and never entered any appearance in the suit. It is true the decree in the Supreme Court of the State of New York was entered before the trial of this case in the District Court of Iowa, and the record of the proceedings in the New York court was in evidence at the trial in the Iowa court. It further appears from the findings of fact made by the trial court in Iowa, and sustained by the Supreme Court of that State, that the entire right and title had passed from Blackman to Phelan in September, 1892, nearly two months before the commencement of the suit in New York.

Upon these facts we remark that as the land, the subject-matter of this controversy, was situate in Iowa, litigation in respect to its title belonged properly to the courts within that State, *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, 107, although if all the parties interested in the land were brought personally before a court of another State, its decree would be

conclusive upon them and thus in effect determine the title. The suit in New York was one purely *in personam*. Any decree therein bound simply the parties before the court and their privies, and did not operate directly upon the lands. As said by this court in *Carpenter* v. *Strange*, 141 U. S. 87, 105:

"The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The court has no 'inherent power, by the mere force of its decree, to annul a deed or to establish a title.'"

In that suit the only party defendant subject to the jurisdiction of the court was Blackman. The other parties were not served with process within the limits of the State of New York and never entered any appearance in the case. The service attempted to be made by delivering a copy of the summons to them in the State of Nebraska was ineffectual to bring them within the jurisdiction of that court.

"Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability. *Pennoyer* v. *Neff*, 95 U. S. 714, 727.

"Such a decree, being *in personam* merely, can only be supported, against a person who is not a citizen or resident of the

State in which it is rendered, by actual service upon him within its jurisdiction." *Hart* v. *Sansom*, 110 U. S. 151, 155.

We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelan acquired his rights prior to the institution of the suit in New York and was therefore not privy to that judgment.

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment unless made a party to the suit. . . . No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner. The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee, judgment creditor, attachment creditor, or other lienholder." Freeman on Judgments, (1st ed.,) § 162.

As Phelan was not brought within the jurisdiction of the New York court, and as the suit in that court was instituted nearly two months after he had acquired full title to the real estate, the decree of that court did not bind him as a party, nor bind him as in privity with Blackman, his grantor. The Supreme Court of Iowa did not err in so holding.

The decree is

Affirmed.

UNITED STATES v. LOUISVILLE.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 105. Argued January 5, 6, 1898. — Decided February 21, 1898.

The act of March 3, 1891, c. 540, providing for the payment to the city of Louisville of the amount found due under the act of June 16, 1890, c. 424, was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary, and were limited to the clerical functions of making payment as directed by the act.

By the act of February 25, 1893, c. 165, making provision for the payment of further and other claims of the same character, Congress did not intend to in anywise open the transactions which had been closed by the payment of the moneys directed in the act of 1891.

This is an appeal from a judgment of the Court of Claims in favor of the city of Louisville, based upon a petition filed in that court for the recovery of seventeen thousand and some odd dollars, alleged to be due the city from the Government on account of taxes improperly collected.

It appears that between the years 1862 and 1872 the city of Louisville, Kentucky, owned a large amount of bonds and stock of the Louisville and Nashville Railroad Company, upon which the company paid interest and declared cash dividends, retaining, however, during most of the time an undistributed surplus. Under the internal revenue law, § 122, act of June 30, 1864, c. 173, 13 Stat. 223, 284, in force during this period, the company paid taxes to the United States upon its gross receipts, its undistributed surplus, the interest payable on its bonds, and its cash dividends. The taxes paid on interest and dividends were deducted from the amounts due as interest and dividends, so that the revenues of the city of Louisville accruing from these sources were diminished to the extent of such deductions;

[1] The docket title of this case is "The United States, Appellant, v. The Commissioners of the Sinking Fund of the City of Louisville, and the City of Louisville."

but these deductions were not known to the Commissioners of the Sinking Fund of the city until the time had expired for an application to the Government to be repaid the taxes so deducted.

In 1872, in the case of *United States* v. *Railroad Company*, 17 Wall. 322, this court decided that a tax under the above-named section 122 of the internal revenue act, upon the interest on bonds issued by a railroad company, was a tax upon the creditor and not upon the corporation paying it, and that a municipal corporation, being a portion of the sovereign power of a State, was not subject to taxation by Congress upon its municipal revenues.

The time for making application for repayment of the taxes thus illegally obtained having passed, Rev. Stat. §§ 3220, 3228, resort was had to Congress, which enacted the statute approved June 16, 1890, c. 424, 26 Stat. 157. The statute authorized and required the Secretary of the Treasury and the Commissioner of Internal Revenue "to audit and adjust the claim of the board of sinking fund commissioners of the city of Louisville, Kentucky, for internal revenue taxes on dividends on shares of stock owned by said board for said city of Louisville in the Louisville and Nashville Railroad Company, to the extent such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim and render judgment thereon, in the same manner and with the same effect as if said claim had been presented and prosecuted within the time fixed and limited by law."

Pursuant to the provisions of this act, the city of Louisville presented to the proper officers of the Treasury Department its claim to recover taxes to the amount of $65,578.32, of which the officers allowed $42,514.03, the latter sum being made up, as stated, of two items, one of $24,801.14, taxes which had been deducted from cash dividends, and $17,712.89, taxes which had been deducted from surplus profits which, on the 17th of November, 1867, had been set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend, which was directed to be distributed in February, 1868. The amount of $42,514.03, having been

audited and allowed, was reported by the Secretary of the Treasury to Congress for its action, there being no appropriation from which the money awarded the city could be paid.

Under the act of March 3, 1891, c. 540, being an appropriation to supply deficiencies, 26 Stat. 862, at 867, Congress provided as follows: "Payment to city of Louisville, Kentucky: For payment to the city of Louisville, Kentucky, the amount found due, under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260, of the present session, $42,514.03." The amount thus appropriated was duly paid to the city, as directed by Congress.

Subsequently another application was made to Congress, and that body passed the act approved February 25, 1893, 27 Stat. 477, a copy of which is set forth in the margin.[1]

Under this act the city of Louisville applied to the proper officers of the Government for a further refund of $34,667.80 on account of taxes claimed to have been illegally exacted. One item in this last-named claim, amounting to $3008.40,

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[1] "Chap. 165. An act for the benefit of the State of Kentucky, Logan and Simpson Counties, and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the Sinking Fund Commissioners of the State of Kentucky, of Logan and Simpson Counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said Boards of Sinking Fund Commissioners, respectively, and to said State, counties and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose any statute of limitations to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hun-

the appellants insist was for taxes collected by the Government from the railroad company upon its undistributed surplus in 1868 and 1871, and that this item had been included in the claim presented in 1890, but had not been allowed because, as stated in the determination made by the Commissioner of Internal Revenue, the act of June 16, 1890, under which the application for refunding was made, limited an adjustment of the claim "to the extent that such taxes were deducted from any dividends due and payable, and did not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts."

The Acting Commissioner of Internal Revenue audited and adjusted the claim made under the act of 1893, at its full amount, and as incidental to such audit and adjustment he assumed to reëxamine the claim allowed in 1891. The result of such reëxamination of the latter claim was a reduction to the extent of $3548.89, which sum was deducted from the amount allowed under the act of 1893, reducing it to the sum of $31,359.02. When the claim reached the First Comptroller a further sum of $17,633.85 was deducted by him, which consisted principally of the amount allowed and paid in 1891 for taxes on surplus, which left a balance payable to the city of $13,725.17, for which sum the Comptroller directed a draft to be issued. To recover the amount thus deducted from the claim as audited and allowed under the act of 1893, the city of Louisville commenced this proceeding in the Court of Claims, which rendered judgment in its favor for the amount demanded. The Government brought the case here for review.

Mr. Charles C. Binney for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

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dred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect, as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts, when ascertained, as aforesaid and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved February 25, 1893."

Mr. Alphonso Hart for appellees. *Mr. Fontaine T. Fox* was on his brief.

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

The claim here made is that the officers of the Government committed an error in auditing and allowing the amount paid in 1891 for taxes on surplus, as those taxes, it is said, were not referred to in the act of 1890 and should not have been reported to Congress or ordered paid by it, and that the power to review this action (if not previously existing) was created by the act of 1893, above set forth.

We think the judgment of the Court of Claims is right. By the payment under the act of 1891 the questions involved were ended. It was not only an auditing and allowance by the proper officers of the Treasury of a claim over which they had jurisdiction, but the amount was paid under the direct commandment of an act of Congress specifically appropriating the particular sum reported to it as due to the city of Louisville and for the payment of which the authority of Congress was needed.

Laying for a moment the act of 1893 out of view, it seems clear to us that there was no power on the part of the officers of the Treasury to reëxamine the correctness of the claim paid by virtue of the act of 1891, or to reverse that action on the ground that a mistake of law had been made in the decision reported to Congress upon which it passed the act last named. The officers who acted under the statute of 1890 (the Secretary of the Treasury and the Commissioner of Internal Revenue) performed their duties in examining, auditing and allowing the claim as they thought the facts and the law required. It was not the case of an allowance of an ordinary claim against the Government by an ordinary accounting officer, any more than was the case of *United States* v. *Kaufman*, 96 U. S. 567, 570, or that of *United States* v. *Savings Bank*, 104 U. S. 728. When the decision of these officials was by the Secretary of the Treasury reported to Congress and an appropriation made

by that body in 1891 of the specific sum mentioned in the report, with directions to pay the amount thus appropriated to the city of Louisville, the time for examination had passed, and it was the duty of the proper officers of the Government to pay the money as directed by the statute.

We also think the subsequent statute of 1893 gave no right to the Treasury officers to interfere with or in any manner to review the action of the Government under the statutes of 1890 and 1891. It may be true that a small portion of the claim made by the city under the act of 1893 had theretofore been made under the act of 1890, but that portion had then been rejected and, of course, never audited, allowed or paid. Because a small sum which had once been rejected was included in the principal claim made by the city in 1893, no sort of foundation was thereby laid for the assertion of a right on the part of the Government to review and, in substance, reverse the prior action of the Treasury Department in allowing a claim which had been thereafter affirmed by Congress with a substantial direction to pay the amount thereof, and which had been paid accordingly.

The authority given by the act of 1893 required the officers therein named to audit and adjust the claims of the city of Louisville for internal revenue taxes to the extent that such taxes were deducted from any dividends or interest due and payable to the city *and which had not been theretofore refunded*, and for this purpose the statute of limitations was repealed and certain sections of the Revised Statutes were made applicable, and the amounts, when ascertained and not theretofore refunded, were directed to be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year (1893). We think this provision gave no jurisdiction to interfere with or to review the action of the Treasury officials under the act of 1890, or the action of Congress in enacting the statute of 1891.

The act of 1891 was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary,

Counsel for Parties.

and were limited to the clerical functions of making payment, as directed by the act. *United States* v. *Jordan*, 113 U. S. 418. It cannot be possible that Congress had the least intention, when making provision for the payment of other and further claims of the same character, to in anywise open the transactions which had been closed by the payment of the moneys directed by the act of 1891. We have no doubt whatever that if Congress had any such intention it would have made it clear by the use of far different language from that which is contained in the act of 1893. It would have said, in so many words, that, in proceeding under the statute of 1893, the officers named therein should examine into the correctness of the decisions arrived at in 1890 and 1891.

The judgment of the Court of Claims was right, and it should, therefore, be

Affirmed.

LOGAN COUNTY *v.* UNITED STATES.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 167. Argued January 5, 6, 1898. — Decided February 21, 1898.

Where a railroad company pays a tax on its undistributed surplus under the internal revenue act of June 30, 1864, c. 173, 13 Stat. 223, it is thereby paying a tax upon its own property, and such payment cannot be regarded as a payment of a tax upon a stock dividend thereafter declared by the company.

The case is stated in the opinion.

Mr. Charles C. Binney for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Alphonso Hart for appellees. *Mr. Fontaine T. Fox* was on his brief.

[1] The docket title of this case is "The Commissioners of the Sinking Fund of Logan County and the County of Logan, Kentucky, Appellants, *v.* The United States."

Opinion of the Court.

Mr. Justice Peckham delivered the opinion of the court.

This application was made to recover taxes heretofore paid, and, like the one in the preceding case, it is based upon the statement that the tax could not be imposed as against the county of Logan, because it was a municipal corporation, and not subject to taxation by Congress upon its municipal revenues. *United States* v. *Railroad Company*, 17 Wall. 322. Therefore, if it appear that the railroad company has deducted from the dividend due the county the amount of any tax paid to the Government on a stock dividend issued by the company, the appellants are entitled to recover. The facts are quite simple.

On the 14th of March, 1894, the appellants filed their petition in the Court of Claims for the refunding of taxes which they claimed to be entitled to under the act of February 25, 1893, c. 165, 27 Stat. 477. The act is set out in full in the margin in the preceding case of *United States* v. *City of Louisville*, *ante*, p. 249. The claim made herein was for internal revenue taxes alleged to have been illegally assessed, and amounting to the sum of $17,606.14. Under the provisions of the statute above cited the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, audited and adjusted this claim at the sum of $15,397.75, and in due course of procedure it came to the Comptroller of the Treasury, who directed a warrant to issue for the sum of but $9533.54 (the total amount withheld from the county on account of taxes on cash dividends), and he refused to include in the warrant the sum of $5864.21, being the balance of the $15,397.75 which had been audited and adjusted as above mentioned, because, as the Comptroller held, the claim for taxes paid on account of stock dividends was illegal and unauthorized, and this suit is brought to recover the sum which was rejected by the Comptroller, and which he refused to pay. The Court of Claims gave judgment in favor of the Government and dismissed the petition of claimants, who have appealed to this court from the judgment of dismissal.

The point first made by the counsel for the claimants is

that the audit and adjustment made by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, under the act of Congress of 25th of February, 1893, was an award having all the force of a judgment which could not be questioned either by the Comptroller of the Treasury or by the courts, except for fraud or mistake. The cases of *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, are cited for the purpose of showing the conclusiveness of the action of the officers above named.

All that those cases hold is, that where in a case somewhat similar to this the claim had been allowed by the officers named in the statute, "the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or Treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress." *United States* v. *Savings Bank*, 104 U. S. 728, at 733. The question of the conclusiveness of the action of the officers of the Government under their general powers is also referred to in *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, and it is there held that the Government is not bound by the act of its officers in making an unauthorized payment under misconstruction of the law. However, the act of the Commissioner of Internal Revenue and the Secretary of the Treasury in approving the claim may be assumed to be *prima facie* evidence that the amount so approved by them was due the claimant from the Government, and the burden therefore rested upon the Government of showing that the allowance of

the amount claimed in this proceeding was made through a mistake on the part of those officials. Unless this mistake is made apparent by the findings of the court below, its judgment in refusing to give effect to the allowance of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, might have to be reversed. If, however, the findings show that those officials did make a mistake in allowing that portion of the claim made which is now in suit, the judgment of the court below, so far as this point is concerned, must be affirmed.

The defence made by the Government upon the merits is based on the provisions of the statute of 1893, and upon the allegations that the findings of the court below substantially show there were no taxes paid upon any stock dividends declared in 1867 or 1868. It is added that the claim on the part of the county of Logan was not in reality for any taxes actually paid on "dividends in scrip" or "stock dividends" issued to appellants, but that it was for a certain proportion of the taxes paid by the railroad company on that part of its profits which were not distributed in dividends, and which in fact constituted what the internal revenue acts of 1864 and 1866 called "profits carried to the account of any fund or used for construction," and which funds were taxable under those acts, as the property of the corporation.

Counsel insists that a tax upon undistributed profits in the treasury or belonging to the corporation is like a tax on gross earnings, a tax on the corporation on account of its own property, and not to be thereafter recovered by this claimant, either under the act of 1893 or under those sections of the United States Revised Statutes therein alluded to.

It must be remembered that the Court of Claims under the act of 1893 was simply given jurisdiction to examine a claim which was otherwise barred by the statute of limitations. The act gave no other right and created no claim against the Government not otherwise existing. The right of recovery for an illegal tax had been provided for by the Revised Statutes of the United States, section 3220, and that remedy could have been pursued for two years after the payment of

any such tax. Rev. Stat. § 3228. In this case the time thus limited had expired, and the act of 1893 was passed for the purpose of setting aside the bar of the then existing statute. The right to demand the refunding of the money in dispute must depend therefore upon the question whether any tax on a stock dividend had been collected from the company by the Government, and a proportionate amount thereof deducted by the company from the dividend otherwise due the county. No deduction of any tax from the scrip dividend due to the claimant was ever made in terms. It is sought to be inferred from the fact that a prior payment of a tax by the company on its undistributed surplus had thereby diminished that fund by the amount of the tax, and that a stock dividend must be assumed to represent profits not distributed in cash dividends, and that the claimant would have received more stock if the profits had not been diminished by the payment of the tax from which it is said a municipal corporation was exempt under the decision of the Supreme Court in the case of *Wisconsin Central Railroad* v. *United States*, above cited. Of course, the payment of the tax diminished the profits of the company by just that amount. But, at the time when it was paid, the full amount thereof was due the Government from the company itself, and not one penny could properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. All taxes which were levied on the property of the company were payable in their full amount by the company, and not a dollar could be legally deducted from such tax on account of the character of any owners of its stock. Consequently, when a stock dividend is declared, the fact that the directors might have chosen to declare a larger one if it had not been for the payment of the taxes the company had made on its own property, is entirely immaterial. So is the fact, if it be a fact, that the total stock dividend was reduced by the amount which the company had theretofore paid as a tax upon its undistributed surplus.

There is no finding of the court below which in terms shows that the tax in question here was ever paid on a "stock" or

"scrip" dividend. All that appears is that a stock dividend of forty per cent on its capital was declared by the railroad company by a resolution adopted on the 16th of November, 1867, which provided that the stock should be issued on February 10, 1868.

The court below did find that prior to the passage of the act of February 25, 1893, certain proceedings had theretofore taken place in the Treasury Department relative to the same taxes paid by the same railroad company. (The court in this finding referred to the proceedings in regard to the claim made by the city of Louisville for a return of taxes, under the circumstances detailed in that case, just decided, *ante*, p. 249, and which are therein set forth.)

The court then set forth in this case the finding made in the *Louisville case*, and in that case, after speaking of the fact that cash dividends had been declared upon the stock of the railroad company, and that there existed a large amount of undistributed surplus in the treasury of the railroad company, the finding continued: "These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections."

Taking all the facts as found by the court below, it appears that the only tax paid was paid on the undistributed surplus of the company while it remained such surplus in its hands and while it was a portion of its own property, as much so as anything else owned by it, and that thereafter the company declared a stock dividend of forty per cent upon its old capital.

By the provisions of the internal revenue act of 1864, section 122, a stock dividend was subject to a tax of five per cent. So far as material the section provides: "That any railroad . . . that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund,

or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum," etc.

Under this plain provision of the statute it is perfectly clear that the stock dividend in question was a proper subject of taxation. But, as already mentioned, there is no finding that any such tax has been paid, and, of course, none that any deduction on its account was ever made from any dividend due the county. On the contrary, from the findings that have been made, it appears that the only tax which has been paid was paid by the railroad company upon its undistributed surplus at a time when such fund was its own absolute property. That fact, taken in connection with the declaration of the dividend of forty per cent upon the amount of the capital of the railroad company, does not show a payment of the tax on the stock dividend declared under the resolution mentioned.

It is plain that this surplus fund, which, at the time it was taxed, belonged to the company, was not distributed to the stockholders, nor was it converted into stock by reason of the stock dividend. If it had been a cash dividend sufficiently large in amount to cover the surplus, then the payment of the dividend would have affected the distribution of the fund. But no distribution could take place by any stock dividend. Such a dividend distributed nothing but stock, which made the stockholder neither richer nor poorer than he was before it was issued.

Although the court finds that the undistributed surplus of the railroad company was held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections, yet such fact does not advance us a step in the direction of showing that any duties were paid on the stock dividend. The tax or duties had been

paid by the company on a fund which then belonged to it. Unless payment of the tax on this undistributed surplus was in substance a payment of the five per cent tax on the stock dividend, then there is no finding that any such payment was ever made. That payment cannot be so regarded because the tax on the undistributed surplus was a tax upon the property of the company and was paid as such by the company, and if the amount thereof were deducted by the company from its subsequent stock dividend, that would be an act of the company, and would not render the prior payment of the tax on the undistributed surplus improper even with regard to Logan County. Otherwise all payments of taxes made by a company upon its own property would be subject to a deduction proportioned to the amount of its stock held by States or other corporations of a municipal character. The adoption of the resolution for a stock dividend, together with the issue of the stock, could have absolutely no effect upon the undistributed surplus fund, so far as any distribution thereof was concerned. The shareholder got no more interest in or right to that fund than he had before, and the prior payment of the tax upon it did not thereby decrease the amount of the forty per cent dividend upon the old capital by a penny. And yet it is only upon the payment of the tax which the company made on its property, in the shape of its undistributed surplus, that the claimants can by this record found their claim to recover their proportion of such tax. If allowed, then the claimant could, upon the same reasoning, recover its proportion of every tax paid by the company upon any other of its property, unless the statute of limitations applied. If the company in fact reduced its stock dividend by the amount of the tax which it had previously paid on the surplus fund belonging to it, such fact gives no support to the claim of the county to recover from the Government an amount of a perfectly legal tax. And as before stated, the proof really is that there was no other payment of a tax than one upon the surplus as the property of the company.

An effort is made to show that this payment of a duty or tax on the undistributed fund might be treated as a payment

of such duty or tax on the stock dividend, under the proviso contained in section 121 of the statute of 1864, which reads: "*Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any . . . railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

It is perfectly apparent that this proviso includes only cash dividends. It is a dividend which is to include for distribution any part of the surplus or contingent fund of a railroad or other company. How can a stock dividend distribute a fund? As already remarked, a stock dividend distributes nothing but stock. Hence, there is no sense in applying the statute to a case where no distribution of a fund is made and where the fact of a double payment on the fund cannot arise. The proviso clearly refers to a case where a surplus has already paid duty and where subsequently to that time it is distributed to the shareholders. Under such circumstances that portion of the dividend which has thus once paid its duty of five per cent is not to be taxed again when distributed to the shareholders. But so long as there is no distribution, the tax paid on the surplus as surplus and which belonged to the corporation when the tax was paid, is not to be credited on or deducted from a subsequent tax upon a stock dividend which does not distribute the surplus nor in any manner change its ownership.

We agree, therefore, with the opinion of the court below, and we hold that where a railroad company pays a tax on its undistributed surplus under the act of 1864, it is thereby paying a tax upon its own property, and that such payment cannot be regarded as a payment of the tax upon a stock dividend thereafter declared by the railroad company.

The judgment of the Court of Claims should, therefore, be

Affirmed.

THOMAS *v.* GAY.

GAY *v.* THOMAS.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Nos. 287, 439. Argued and submitted October 21, 22, 1897. — Decided February 21, 1898.

The act of the legislature of the Territory of Oklahoma of March 5, 1895, c. 43, which provided that "when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes," was a legitimate exercise of the Territory's power of taxation, and, when enforced in the taxation of cattle belonging to persons not resident in the Territory grazing upon Indian reservations therein, does not violate the Constitution of the United States.

The Supreme Court of the Territory in this case sustained the authority of the board of equalization to increase the assessment or valuation, and in a subsequent case decided the other way. In view of the fact that the judgment in this case is reversed, and the case remanded for further proceedings, this court declines to pass upon the question.

THESE are cross-appeals from the Supreme Court of the Territory of Oklahoma. The facts, as stated in the opinion of the court below, were as follows:

The appellants are non-residents of the Territory of Oklahoma and owners of large herds of cattle that were kept and grazed, during a portion of the year 1895, in parts of the Osage Indian reservation in this Territory.

The appellees are the board of county commissioners, treasurer and sheriff of Kay County, Oklahoma Territory.

On the third Monday in February, 1894, the Supreme Court of the Territory of Oklahoma, by an order entered on the journals of said court, attached to said county of Kay, for judicial purposes, all the Kaw or Kansas Indian reservation and all of the Osage Indian reservation north of the township line dividing townships 25 and 26 north. All of said reservations so attached to said Kay County for judicial purposes by such

order are without the boundaries of said Kay County as established by the governor and are not within the boundaries of any organized county of this Territory. Said territory so attached to said county of Kay for judicial purposes is comprised wholly of lands owned and occupied by Indian tribes, and consists principally of wild, unimproved and unallotted lands used for grazing purposes; that plaintiffs in error during the year 1895 and during the month of April of said year drove, transported and shipped to the ranges and pastures in that part of said Osage Indian reservation attached to said Kay County for judicial purposes, as aforesaid, large herds and numbers of cattle, which were taken to said reservation in pursuance and by virtue and authority of certain leases to plaintiffs in error for grazing purposes made by the Osage tribal government under the supervision of the agent in charge of said tribe and upon the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, and said cattle of said plaintiffs in error were on the first day of May kept and grazed on that part of said Indian reservation attached to said Kay County for judicial purposes, as aforesaid.

By an act approved March 5, 1895, c. 43, the legislative assembly of the Territory of Oklahoma amended section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, so that the same reads as follows: "That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes," and authorized the board of county commissioners of the organized county or counties to which such unorganized country, district or reservation is attached to appoint a special assessor each year, whose duty it should be to assess such property, and conferred upon such special assessor all the powers and required him to perform all the duties of a township assessor. The assessor so provided for was required to begin and perform his duties between the first day of April and the 25th day of May of each year and

to complete his duties and return his tax lists on or before June 1, and the property therein authorized to be assessed, it was provided, should be valued as of May 1, each year.

In pursuance of the provisions of said act the county commissioners of said Kay County did duly appoint a special assessor for the year 1895 to assess such cattle as were kept and grazed and any other personal property situated in the unorganized country and parts of Indian reservations attached to said Kay County for judicial purposes, and said special assessor did, by virtue of said appointment, assess all the personal property in the territory so attached to the county of Kay for judicial purposes, including all of the cattle of the said appellants kept and grazed in said reservation on the first day of May, 1895. The said special assessor assessed the property of these appellants so located on said territory attached to said county of Kay for judicial purposes, as aforesaid, and returned the same upon an assessment roll at the total valuation of $760,469; that thereafter the said sum was, by the clerk of said county, carried into the aggregate assessment for said county, and by him certified to the auditor of the Territory; that the Territorial board of equalization in acting upon the various assessments of the various counties as certified to said board raised the aggregate valuation of the property returned for taxation upon the tax rolls of said county of Kay thirty-five per cent, and the county clerk for said county carried out the raised valuation so certified to him by said Territorial board of equalization against the property of these appellants and made the aggregate valuation of such property $1,026,634. Thereafter the Territorial board of equalization levied and duly certified to the county clerk of the county of Kay tax levies for Territorial purposes for the year 1895 as follows: General revenue, three mills on the dollar; university fund, one half mill on the dollar; normal school fund, one half mill on the dollar; bond interest fund, one half mill on the dollar; board of education fund, one half mill on the dollar.

The board of county commissioners for the county of Kay made the following levies for the year 1895: for salaries, five

mills on the dollar; for contingent expenses, three mills on the dollar; for sinking fund, one and one half mills on the dollar; for court expenses, two and one half mills on the dollar; for county supplies, three mills on the dollar; for road and bridge fund, two mills on the dollar; for poor fund of said county, one mill on the dollar; for county school fund of said county, one mill on the dollar.

The county clerk of said county of Kay carried the valuation of the property of these plaintiffs in error upon the tax rolls of said county, and against the same extended the levies as aforesaid, and charged against the property of these plaintiffs in error in the aggregate the sum of $26,174.16.

Before these taxes became delinquent, plaintiffs in error began to remove or attempted to remove their respective property from the territory attached to Kay County for judicial purposes and beyond the limits of Oklahoma Territory. The treasurer of said Kay County issued tax warrants for the several amounts of taxes levied against the property of each of said plaintiffs in error, and delivered the same to the sheriff of said county for execution; said sheriff seized certain property of each of appellants by virtue of such tax warrants. The appellants filed their several petitions in the District Court of Kay County, and, on application, obtained injunctions restraining the appellees from making any further attempt to collect such taxes. Afterwards, on motion, the several actions were consolidated into one. To the petition filed in such consolidated action the defendants in error filed a general demurrer. At the hearing, the District Court sustained the demurrer in part and overruled it in part, holding that all of the levies made for Territorial purposes and the county levy for court expenses were valid, and as to those levies the injunction was dissolved, and as to all of the other county levies such injunctions were made perpetual. From that part of the order and judgment of the court, dissolving the injunction as to the Territorial taxes and the one county fund levy, plaintiffs appealed. From that part perpetuating the injunction as to all of the county levies, except that for court expenses, the defendants appealed and filed their cross-petitions

in error, and the case was taken to the Supreme Court of the Territory. In that court the judgment of the District Court was affirmed. Three of the four judges, who sat in the case, agreed in holding that the taxes levied for territorial and court expense funds were valid; two were of opinion that the balance of the taxes were unauthorized; one was of opinion that all the taxes were validly levied, and the fourth judge dissented *in toto*. From that judgment of the Supreme Court of the Territory both parties appealed to this court.

Mr. Henry E. Asp and *Mr. John W. Shartel* for Gay.

Mr. J. F. King for Thomas and others, county commissioners, submitted on their brief.

Mr. Jeremiah M. Wilson and *Mr. O. F. Goddard* filed a brief on behalf of other owners of cattle grazing on the reservations.

Mr. H. S. Cunningham filed a brief on behalf of the Territory.

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

It is claimed that the legislative assembly of the Territory of Oklahoma was without power to enact the law of March 5, 1895, providing for the taxing of cattle grazing upon the Indian reservations under leases granted by the Indians, because, both before and since the creation of said Territory, exclusive jurisdiction over said Indians and their lands, and over all matters in any way affecting them, or in which they are interested, is in the United States.

It is, indeed, true that the lands in question, constituting the reservations of the Osage and Kansas Indians, are portions of lands previously granted by patent of the United States, in pursuance of the treaty of May 6, 1828, 7 Stat. 311, and of the treaty of December 29, 1835, 7 Stat. 478, to the Cherokee

Nation of Indians, and that it was provided, in those treaties, that the lands so granted should not, without the consent of the Indians, at any future time be "included within the territorial limits or jurisdiction of any State or Territory."

In the subsequent treaty with the Cherokees of July 19, 1866, 14 Stat. 799, 804, it was stipulated that the United States might "settle friendly Indians in any part of the Cherokee country west of the 96th degree, to be taken in a compact form, in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, . . . said land to be paid for to the Cherokee Nation, at such price as may be agreed upon between the said parties in interest, subject to the approval of the President."

On the 26th of June, 1866, a treaty was made with the Osage Indians, 14 Stat. 687, wherein it was provided that a large part of the reservation then occupied by that tribe in Kansas was sold outright to the Government for a certain sum of money, and by article 16 of said treaty it was provided that "If said Indians should agree to remove from the State of Kansas and settle on land to be provided for them by the United States in the Indian Territory, on such terms as may be agreed upon between the United States and the Indian tribes now residing in said Territory, or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian Territory."

On July 15, 1870, 16 Stat. 335, Congress passed an act, providing, in substance, that whenever the Osages should agree thereto, in such manner as the President should prescribe, said Indians should be removed from their said diminished reservation in the State of Kansas to the lands to be provided for them in the Indian Territory, "to consist of a tract of land

in compact form, equal in quantity to 160 acres for each member of tribe, to be paid for out of the proceeds of the sales of their lands in the State of Kansas;" and subsequently the Osages were established upon their present reservation, and the Cherokees were paid therefor the sum of $1,650,600; and by an act approved June 5, 1872, 17 Stat. 228, Congress confirmed this reservation in said Cherokee country.

The history of the transfer of the so-called Kaw or Kansas Indians from their reservation in the State of Kansas to lands bought from the Cherokee Nation, constituting their present reservation, was similar to that of the Osages, and calls for no special narration.

In 1883, sufficient money having been realized from the sales to pay for said lands, a deed was duly executed by the Cherokees conveying all their rights and title in and to the United States for the use of the said Osage and Kansas Indians, which deed is recorded in volume 6 of the Indian Deeds in the office of the Commissioner of Indian Affairs in the Department of the Interior.

It is alleged that, by no subsequent treaty, have either the Cherokee or the Osage or Kansas Indians consented that the lands here in question should be included within the limits or jurisdiction of the Territory of Oklahoma; and it is accordingly now contended that under the provision contained in the Cherokee treaties, the lands therein designated should never be embraced within the limits of a Territory or State without the consent of said Indians, the exemption or right thereby created runs with the land, subject to which said lands, or any part thereof, could be conveyed to other Indians, and is not a right belonging solely to the Cherokees, which ceased to exist when the ownership of the Cherokees therein terminated.

Whether, without express stipulation to that effect, the right granted by treaty to the Cherokee Nation, to be exempt, as to their lands, from inclusion within the limits of any Territory or State, passed with the grant of a portion of such lands to the Osage and Kansas Indians, we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890, 26 Stat. 81,

creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.

It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. *Foster* v. *Neilson*, 2 Pet. 253, 314; *Taylor* v. *Morton*, 2 Curtis, 454.

"In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. . . . In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered." *The Cherokee Tobacco*, 11 Wall. 616.

That was a case where an act of Congress extended the revenue laws as respected tobacco over the Indian territories, regardless of provisions in prior treaties that exempted tobacco raised by Indians on their reservations.

The grant of legislative power to the Territory of Oklahoma, contained in the sixth section of the organic act, was as follows:

"The legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall

any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

With the Indian reservations brought, by valid legislation, within the limits of the Territory, and with the broad grant of legislative power contained in the section just quoted, we are next to consider objections urged to the validity of the act of the territorial assembly, approved March 5, 1895, wherein it provides that "when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes."

Our attention is called to the following provision contained in the first section of the organic act:

"Nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians, or to affect the authority of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights, which it would have been competent to make or enact if this act had not been passed."

And also to section 3 of the act of February 28, 1891, c. 383, 26 Stat. 794, as follows:

"Where lands are occupied by Indians, who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council, speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

And the contention is that, irrespective of the question whether said lands are, by the treaties, excluded from the

limits and jurisdiction of the Territory of Oklahoma, the taxation of cattle located for grazing purposes upon the reservations, under leases duly authorized by act of Congress, is a violation of the rights of the Indians and an invasion of the jurisdiction and control of the United States over them and their lands.

As to that portion of the argument which claims that, even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & Northern Railway* v. *Fisher*, 116 U. S. 28, and *Maricopa & Phœnix Railroad* v. *Arizona*, 156 U. S. 347, in which it was held that the property of railway companies traversing Indian reservations are subject to taxation by the States and Territories in which such reservations are located.

But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.

But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431. There the State of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that State, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a reference to the amount of the tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw

their burthen on the carrying company, and thus, in effect, become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burthen on interstate commerce. A similar view was taken in the case of *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, where a tax imposed by the State of Kentucky on the intangible property of a company which owned and maintained a bridge over a river between two States was contended to be objectionable as constituting a burthen upon interstate commerce, but it was held 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 and thus be a burthen on interstate commerce, was too remote and incidental to make it a tax on the business transacted. *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185.

The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians, and not on the cattle belonging to third parties.

It is further contended that this tax law of the Territory of Oklahoma, in so far as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or impose a servitude upon, a lawful commercial intercourse with the Indians, over which Congress has absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.

The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a State or Territory, of property of others than Indians would be an interference with

Congressional power. It was decided in *Utah & Northern Railway* v. *Fisher*, 116 U. S. 28, that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the Territory of Idaho was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process. The question was similarly decided in *Maricopa & Phœnix Railroad* v. *Arizona Territory*, 156 U. S. 347.

The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that as such a tax is too remote and indirect to be deemed a tax or burthen on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.

These views sufficiently dispose of the objections urged against the power of the legislative assembly of Oklahoma to pass laws taxing property within the limits of the Indian reservations and belonging to persons not Indians. We must now consider the objections made to the mode in which that power was exercised in the act of March 5, 1895.

The most fundamental of these objections is found in the assertion that, so far as non-resident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax.

The organic act, as we have already seen, extends the exterior boundary of the Territory around these Indian reservations. It also provided for the division of the Territory into council and representative districts, and for the election of a legislative assembly and of a delegate to Congress. The Indian reservations were not included within any of the council or representative districts. The act provided that there should be seven counties, and fixed the county seats, and under the authority of the act the governor established the boundaries of these counties. The legislature was authorized to change the boundaries of the original counties, but was not given authority to include these Indian reservations, or any lands not then

open to settlement in any of the counties. By section nine it was provided that the Territory should be divided into three judicial districts; that the Supreme Court should define such judicial districts; and that the territory not embraced in organized counties should be attached, for judicial purposes, to such organized county or counties as the Supreme Court should determine. In May, 1890, the Supreme Court made an order attaching the several Indian reservations to certain organized counties for judicial purposes, and by an order on February 3, 1894, attached the reservations in question in this case to Kay County for judicial purposes.

As already stated, by the act of March 5, 1895, it was provided that when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes; and provision was made for the appointment of a special assessor for such unorganized country, district or reservation. Under this condition of affairs it is contended that the taxing power cannot be lawfully exerted as respects property within these reservations. It is said that those to be affected by the tax have no voice in the election of the legislature to make the laws by which they are to be governed; that they have no school facilities for their children; that they cannot organize towns, so as to have the benefit of the police and sanitary laws of the Territory; that the officers of Kay County have no authority to expend any portion of the moneys raised by this taxation in improving roads within the Indian reservation; that they cannot participate in the election of the territorial delegate; and that they are not benefited by the taxes appropriated for salary fund, contingent expense fund, sinking fund, road and bridge fund, poor fund, etc.

Undoubtedly there are general principles, familiar to our systems of state and Federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty

or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. But these principles, as practically administered, do not mean that no person, man, woman or child, resident or non-resident, shall be taxed, unless he was represented by some one for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out. Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. *Mager* v. *Grima*, 8 How. 490; *Witherspoon* v. *Duncan*, 4 Wall. 210. So, likewise, it is settled law that the property, both real and personal, of non-residents may be lawfully subjected to the tax laws of the State in which they are situated.

The specific objection made to the validity of these taxes as imposed on personal property located in unorganized countries or in the reservations does not seem to us to be well founded. We have already cited the cases of *Utah & Northern Railway Company* v. *Fisher*, 116 U. S. 28, and *Maricopa & Phœnix Railroad* v. *Arizona*, 156 U. S. 347, wherein territorial tax laws were held to have a valid operation over property lying within Indian reservations. *Union Pac. Railroad* v. *Peniston*, 18 Wall. 5, 37, was a case where unorganized country was attached by law to an organized county for judicial and revenue purposes, and the law was sustained, as appears in the decision delivered by Mr. Justice Strong, as follows:

"It remains only to notice one other position taken by the complainants. It is that if the act of the State under which the tax was laid be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized country of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes."

In *Llano Cattle Co.* v. *Faught*, 5 S. W. Rep. 494 (Texas), the case was that an unorganized country was attached by law to the organized county of Scurry for judicial purposes. The officers of Scurry County assessed and levied county taxes upon the cattle of the plaintiff, a foreign corporation, kept in the unorganized country, and it was held that the unorganized country, being in effect a part of the county to which it was so attached, the collection of taxes on such personalty of a non-resident may be enforced by the tax collector of the latter county. We are referred to similar decisions in Kansas: *Philpin* v. *McCarty*, 24 Kansas, 393; in Ohio: *Kemper* v. *McClelland*, 19 Ohio, 308; in Iowa: *Hilliard* v. *Griffin*, 33 N. W. Rep. 156; in Michigan: *Comins* v. *Township of Harrisville*, 45 Michigan, 442.

It is further contended that, while the taxes assessed for territorial and court expense funds may be valid, yet that the balance of the taxes, levied for county purposes and expended within the geographical limits of Kay County, are unauthorized, for the reason that the people on these reservations are not interested in such taxes, and receive no benefit from their expenditure. But, as it seems to us, it cannot be maintained that those plaintiffs whose cattle are within the protection of the laws of Oklahoma receive no benefit from the expenditures in Kay County. Certainly they have some advantage in the improvement of the roads within that county, when they journey to and from the towns and settlements in the organized county. They are interested in the prevalence of law and order in the communities adjacent to their property, and in the provision made for the care of the poor and insane. It is to be presumed that they have a right to send their children to the schools in the organized county.

The cases, both state and Federal, are numerous in which it has been held that taxes, otherwise lawful, are not invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared.

In *Kelly* v. *Pittsburg*, 104 U. S. 78, the complaint was that certain water, street, gas, school and other taxes were unlawfully assessed against the property of the plaintiff, which,

though lying within city limits, were not benefited by such taxes; but this court, affirming the Supreme Court of Pennsylvania, said:

"We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for waterworks are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed. There are items styled city tax and city buildings which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. . . . It may be true that the plaintiff does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It is probably true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burthens and fairness in their distribution among those who must bear them?

"We cannot say judicially that the plaintiff received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city or a State is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself."

It is no objection to a tax that the party required to pay it derives no benefit from the particular burthen; *e.g.* a tax for school purposes levied upon a manufacturing corporation. But, in truth, benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with national persons receive in the additional security to their property and profits. *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53.

In Cooley on Taxation, 16, the result of a wide examination of the cases is thus stated:

"If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the Government affords him; but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of Government, that the benefit received from the Government is in proportion to the property held, or the revenue enjoyed under its protection; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximation to justice and equality. But, as before stated, other considerations are always admissible; what is aimed at is, not taxes strictly just, but such taxes as will best subserve the general welfare of the political society."

The fact that the taxes in question are levied on personal property only and thus exempt real property is urged as an objection to the validity of the act. It is claimed that such an exemption operates as an unjust discrimination.

As the owners of the cattle taxed own no real estate within the Indian reservation, this objection, if sound, would render

it impossible to tax the cattle at all. But it is the usual course in tax laws to treat personal property as one class and real estate as another, and it has never been supposed that such classification created an illegal discrimination, because there might be some persons who owned only personal property, and others who owned property of both classes. Again, it is complained that this law violates the principle of uniformity, and operates as an unjust discrimination, because it provides for an assessment of cattle, kept and grazed on the Indian reservations, at a different time from that provided for the assessment of personal property, including cattle, in the organized country.

It is not unusual for tax laws to authorize the assessment of different classes of property at different dates, and even of the same classes of property in different localities at different dates. Such matters of regulation must be supposed to be within the power of the State or Territory, and to have their reasons in special facts known to the legislature. We are informed that the revenue laws of Oklahoma provide that real estate shall be valued for taxation on the first day of January, and personal property in the organized counties on the first day of February of each year, and the personal property upon the reservations on May 1. The gravamen of the complaint is that cattle are fatter and more valuable on May 1 than on February 1, and hence there is an inequality in the assessments. On the other hand, it is claimed that if the cattle on the reservations were to be valued for taxation in February, the larger part would escape taxation, as they are not driven to the reservations till April.

A similar objection was urged against the validity of a tax law of the State of Wisconsin, wherein April 1 was fixed as the date for assessing saw logs belonging to non-residents and May 1 for assessing saw logs of residents. The court said:

"It is claimed that this law violates the principle of uniformity in providing for an assessment of the logs of a non-resident at a different time than that provided in the case of residents; that for the same reason it discriminates unjustly against non-residents. But I am of opinion that the case

does not come within either of these principles. . . . The legislature was aware that the logs of non-residents as well as resident owners were liable to be floated out of the State in the month of April." *Nelson Lumber Co.* v. *Loraine* (Ct. Ct. of U. S. for Dist. of Wisconsin), 22 Fed. Rep. 54.

In Missouri a statute was held valid which provided that real property should be assessed every two years in all counties outside of St. Louis, and that all property in the city of St. Louis should be assessed every year, for state and municipal taxes, and this although in the particular case it was shown that this difference in the time of the assessments made a considerable difference in the amount of the taxes. *State* v. *New Lindell Hotel Co.*, 9 Mo. App. 450.

A law providing different times for assessments for state taxes in the State of New York was held to be legal. *People* v. *Commissioners of Taxes*, 91 N. Y. 593.

Several other provisions of the act in question are pointed to as creating discriminations against taxpayers whose property is in the unorganized district and reservations, such as these; that city and township assessors are required to be residents and qualified voters in the township or city where elected, but there is no such requirement imposed on the special assessor appointed by the board of county commissioners to assess the personal property in the reservations and unorganized districts; that the several township and city assessors are required to meet at the county seat and agree upon an equal cash basis of valuation of all property that they may be called upon to assess, but in this matter the special assessors do not participate; that the township assessor, clerk and treasurer are a township board of equalization, and the mayor, city clerk and city assessor are a city board of equalization, but that, in the case of the unorganized districts and reservations, the board of county commissioners act as a board of equalization, etc.

Without undertaking to enumerate all the instances in which there is some difference of procedure in respect to property assessed within the organized counties and property assessed in the unorganized districts and reservations, or to

consider minutely the several objections that are urged to such differences, we do not perceive that the questions suggested are for the courts. Clearly these are matters of detail within the legislative discretion. It is the lawmaking power which is to determine all questions of discretion or policy in ordering and apportioning taxes; which must make all the necessary rules and regulations, and decide upon the agencies by means of which the taxes shall be collected. When, as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated, or taken for private purposes, the judiciary has the right and duty to interpose. But such a case is not presented by this record.

These views dispose of the objections urged against the validity of the act of March 5, 1895, and leave only for consideration error assigned to the action of the territorial board of equalization in adding thirty-five per cent to the assessment or valuation made by the officer or officers to whom the duty to make the assessment is by the statute expressly committed. It is alleged that this order by the board of equalization was unauthorized and void.

We learn from the opinion of the Supreme Court of Oklahoma in the present case that this question of the power of the territorial board of equalization to raise the valuation of the properties to be taxed had been, in the previous case of *Wallace* v. *Bullen*, decided affirmatively, and that such decision was followed in the present case.

We are informed, however, by the brief filed in behalf of the petitioners that subsequently, on September 3, 1897, in the case of *Gray* v. *Stiles*, 49 Pac. Rep. 1083, the subject was again considered and an opposite conclusion reached. It is also asserted in said brief that the question is one of general importance, and that a final decision of it may affect the validity of municipal obligations heretofore issued in the Territory.

Such allegations disclose that there are parties not represented before us whose interests are involved in the inquiry. The case was heard in the trial court on a demurrer to the

petition, and the question of the validity of the action of the board of equalization in raising the assessed values throughout the Territory was put by the Supreme Court, without discussion, on its previous decision in the case of *Wallace* v. *Bullen*. We are also informed by the briefs that the case just mentioned is now pending before the Supreme Court on an order for a rehearing. Whether the facts pertaining to the action of the board of equalization in this particular were the same in *Gray* v. *Stiles* as those in this case, we cannot say from this record.

In such circumstances, we think it would be premature for this court to determine the question.

As, for the reasons before given, the judgment of the Supreme Court must be reversed, that court will have an opportunity to deal with this question, if it think fit, upon a rehearing.

The judgment of the Supreme Court of Oklahoma is accordingly reversed, and the cause is remanded with directions to proceed in conformity with this opinion.

BAKER *v.* GRICE.

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

No. 336. Argued January 26, 1898. — Decided February 21, 1898.

While Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the statement of the case (below), to issue a writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction, by the discharge of a prisoner, unless in cases of peculiar urgency, but should leave the prisoner to be dealt with by the courts of the State; and even after a final determination of the case by those courts should ordinarily leave the prisoner to his remedy by writ of error from this court.

Upon the facts appearing in this case no sufficient case was made out for the exercise of the jurisdiction of the Circuit Court by the issue of a

Statement of the Case.

writ of *habeas corpus* to take the prisoner out of the custody of the state court.

It is the rule of courts, both state and Federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court.

THIS appeal is from an order of the United States Circuit Court for the Northern District of Texas, made upon a return to a writ of *habeas corpus*, issued by that court to inquire into the cause for the detention of the petitioner, William Grice, who, it was alleged, was unlawfully restrained of his liberty by and held in the custody of J. W. Baker, the sheriff of McLennan County, Texas. After a hearing, the Circuit Court, on the 22d of February, 1897, discharged the petitioner. 79 Fed. Rep. 627.

The petition for the writ was filed on the 9th of December, 1896, and therein the petitioner, among other things, made the following allegations: That he was unlawfully restrained of his liberty by the sheriff of McLennan County, Texas, having been surrendered by his sureties under a recognizance which he had theretofore given; that he was detained by the sheriff under an indictment preferred against him and other citizens of the United States on the 21st of November, 1894. The indictment charged that William Grice, E. T. Hathaway and several others, named in the indictment, unlawfully combined and engaged among themselves and with others, who were unknown to the grand jury, in a conspiracy against trade, and that they had created a trust by a combination of their capital, skill and acts for the purpose of creating and carrying out restrictions in trade. The indictment was based upon an act passed by the legislature of Texas on the 30th of March, 1889, which is generally known and described as the anti-trust act of that State. When the indictment was presented, the defendants (including the petitioner herein) were arrested and brought before the proper court and entered into a recognizance conditioned for their appearance in court from day to day and term to term to answer the indictment. On the 2d of December, 1895, the case was regularly called, and the defendants, pursuant to the provisions of the code of crim-

inal procedure of the State of Texas, announced a severance, and thereupon E. T. Hathaway, one of the defendants named in the indictment, was placed on trial to answer the charges contained therein. Before proceeding to trial on the merits, he in effect demurred to the indictment on the ground, among others, that the above named act of the State of Texas was a violation of the Federal Constitution, for reasons which he stated. The demurrer was overruled and the trial of the cause was then proceeded with, and on the 12th of December, 1895, a verdict of guilty as charged in the indictment was rendered, and the jury assessed defendant's punishment at a fine of $50. Hathaway duly took proceedings for the purpose of obtaining a review by the Court of Criminal Appeals of the State of Texas of the various matters raised by the demurrer and in the course of his trial.

Under the law of Texas, one who is convicted of a felony, although the punishment imposed is only a fine, is still necessarily subjected to confinement in the jail pending the determination of any appeal which he may take, and under that provision the defendant Hathaway was subjected to confinement in jail pending the determination of his appeal.

It was argued in the Court of Criminal Appeals on the 29th day of January, 1896, and was not decided until the 24th day of June, 1896, leaving the defendant Hathaway in the meantime incarcerated in the McLennan County jail. On the last mentioned day the Court of Criminal Appeals decided the case, but did not pass upon the constitutionality of the act under which the indictment was framed, although that question had been raised in the court below and presented to the appellate court on the argument of the appeal. The court decided the appeal upon another ground, which the petitioner herein calls a technical ground of pleading, the court holding that because the indictment presented failed to charge Hathaway with knowingly carrying out as agent the stipulations, purposes, prices, etc., under the alleged conspiracy, the admission of evidence to that effect over the objection of the defendant was unwarranted in law, and the conviction was therefore invalid. The appellate court there-

upon reversed the judgment and remanded the cause for a trial *de novo*.

Since the rendition of this judgment two terms of the criminal court in the proper county have been held, one of which was drawing near its close at the time that the petitioner filed his petition, December 9, 1896, and the petitioner then makes this allegation: that "While this petitioner, together with his co-defendants who have been arrested and placed in recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his co-defendants not only to the shame and contumely of an indictment for felony, but denying to him and his co-defendants the right to be heard in his defence in said court as a citizen of the United States, and whereby this petitioner, as well as his co-defendants, are without remedy in the state courts of Texas for the assertion and vindication of their rights under the Constitution of the United States." It is then shown in the petition that on the 24th of November, 1896, Hathaway, one of his co-defendants, procured from the Circuit Court of the United States a writ of *habeas corpus*, requiring the sheriff of McLennan County, who then had him in custody, to produce the body of said Hathaway, and that the writ was served upon the sheriff, who made return that he held his prisoner under the indictment above mentioned.

A hearing before the court was then set for the 7th of December, 1896, and notice thereof was given to the sheriff and prosecuting officers of the county of McLennan, advising them of the proceedings and of the time when the matter would be inquired into. On the 7th of December, the state court dismissed the indictment and prosecution as against Hathaway, leaving the same to stand unimpaired as to the petitioner herein and his co-defendants. This action on the part of the state court, the petitioner charges, was for the purpose of defeating the jurisdiction of the United States court upon the writ of *habeas corpus*, which had then been issued,

and to thereby prevent that court from passing upon the constitutional rights of said Hathaway. After this discharge by the state court, the sheriff made return, setting up that fact and that he claimed no further right or custody over the relator.

The petitioner then avers that the act in question violates the Constitution of the United States for the reasons which he names, and that by reason of the premises "he is without remedy for the assertion and vindication of his rights as a citizen of the United States under the Constitution thereof; that he has stood under indictment for felony, charged with the violation of said alleged statute of the State of Texas, approved March 30, 1889, for the period of two years without being afforded an opportunity by the state courts of Texas for the assertion of his rights, as aforesaid, as a citizen of the United States. Your petitioner believes, and so avers, that it is the purpose and intent of the state authorities of the State of Texas to prevent, if possible, any appeal by this petitioner to the courts of the United States for the vindication of his rights as aforesaid as a citizen of the United States. In view of the premises herein recited and without the interposition of this honorable court for his due protection and the due conservation of his rights, as a citizen of the United States, he is practically remediless by an appeal in regular course or otherwise." The petitioner, therefore, asked for a writ of *habeas corpus* in order that he might be discharged from custody.

The writ having been duly served, the sheriff made return showing that he held the petitioner by virtue of a writ issued upon the indictment, and he further alleged that the authorities had been anxious and ready to accord all the defendants under the indictment that speedy trial which they were guaranteed under the constitution and the laws of the State of Texas; that the delay had come in great part from the action of the defendants; that at the first term of court after the indictment was presented, the case was set down for trial on the 14th of March, and was thereafter continued by agreement between the State and the defendants; that at the succeeding

Statement of the Case.

September term the case was set down for trial on October 4, and on that day it was postponed upon motion of the defendants and set down for the November term, to be tried on the 2d of December, 1895, and that when the cause was called on that day the defendants, including the petitioner, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating a trial of the petitioner herein. The sheriff further returned that the purpose of the petitioner and his co-defendants was, as he believed, to defeat the jurisdiction of the courts of Texas in the administration of its laws; and that the relator and his co-defendants had agreed among themselves to have their several sureties surrender them into the custody of the sheriff, and that by their own acts and at their own request and by their own procurement the sureties of petitioner and his co-defendants did surrender them, and on the day of the surrender and contemporaneously with it a writ of *habeas corpus* from the Circuit Court was served upon the sheriff, commanding him to produce before the court *instanter* the body of petitioner.

Attached to the return were the affidavits of the sureties of the petitioner, in which they said in substance that the petitioner wanted them to surrender him to the sheriff on the day named, and that by his request they went to the lawyer's office and met the petitioner and accompanied him to the office of the sheriff, where they surrendered him to the sheriff.

The petitioner filed a replication which was in substance an admission of the truth of many of the allegations made in the return and the accompanying affidavits, but denied their materiality, and claimed that they furnished no answer to the allegations of the petitioner, as contained in his petition. The relator did deny that he had conspired or confederated for the purpose of defeating the jurisdiction of the courts of Texas or the administration of its laws; on the contrary, he alleged that for two years he and his co-defendants had submitted to the jurisdiction of the courts of Texas for the purpose of trial, and that when it became evident to the petitioner and his co-defendants that a trial was not to be had except at some

indefinite period in the future, if ever, then the petitioner "as a citizen of the United States proceeded to exercise his rights as such citizen and to call upon the courts of the United States to vindicate his rights as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of said courts of Texas, but for the purposes as indicated."

After hearing the parties, the Circuit Court decided that a proper case had been made out for its interference by virtue of the writ of *habeas corpus*, and thereupon held that the statute of the State of Texas called the anti-trust law was a violation of the Constitution of the United States, and, consequently, void. The court, therefore, discharged the petitioner, and from that order this appeal has been taken.

Mr. M. M. Crane for appellant.

Mr. George Clark and *Mr. Joseph H. Choate* for appellees. *Mr. John D. Johnson* and *Mr. D. C. Bolinger* were on *Mr. Clark's* brief. *Mr. S. C. T. Dodd* was on *Mr. Choate's* brief.

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

The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. *Ex parte Royall*, 117 U. S. 241; *Whitten* v. *Tomlinson*, 160 U. S. 231. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of

error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U. S. 372, and *In re Neagle*, 135 U. S. 1, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.

The ground for the discharge of the petitioner in this case, as given by the court below, was because of the opinion of that court that the anti-trust law of the State of Texas violated the Constitution of the United States, and was therefore void. The question of the validity of that act of course exists whether the case be in the state court or a hearing transferred to the Federal court by virtue of the writ of *habeas corpus*. It is the duty of the state court, as much as it is that of the Federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question, and to hold the law void if it violate that instrument. But the state court is not bound to decide the constitutional question when there are other grounds for reversing a conviction under the law, upon pain of having its omission furnish a ground for Federal interference.

The special circumstances creating what the court below regarded as a necessity for its immediate action, and which made the case one of urgency, are stated in the opinion of the court rendered in discharging the prisoner.

The first circumstance stated is that the Court of Criminal Appeals did not decide, when it had the opportunity, the question of the constitutionality of the act in question, and that that court, while deciding it was unnecessary to pass upon the constitutional questions raised, "referred favorably to the decisions of the Supreme Court of the State in which the anti-trust law had been sustained in this regard." It is matter of common occurrence — indeed, it is almost the undeviating rule of the courts, both state and Federal — not to decide constitutional questions until the necessity for such decision arises in the record before the court. This court has followed that practice from the foundation of the Government, and we can see no reason for just criticism upon the action of the state court in refusing to decide the question of the constitutionality of this act, when, at the same time, it held in substance that there was no evidence upon which to sustain the conviction of the defendant upon the indictment then before it, and that therefore the judgment should be reversed. In granting a new trial, it cannot properly be urged that the court failed to fulfil its duty towards the defendant in any degree whatever, because it did not decide the constitutional question as desired by him. The decision of the case was upon such a ground that the probability was that no conviction of the defendant could thereafter be had under that indictment. When the judgment of conviction was reversed the defendant Hathaway gave bail, and remained at large until the proceedings for his discharge were taken some six months after the judgment of reversal had been given.

Criticism is also made upon the fact that the state court did not discharge Hathaway after the decision upon his appeal until the Circuit Court issued the writ of *habeas corpus* some six months thereafter. It does not appear that Hathaway had applied to have his case tried, nor to be discharged from the indictment by reason of the decision granting him a new trial. However that may be, Hathaway's case was finished by his actual discharge, and it has no further bearing upon the action of the state court in this case.

It is also said that since the trial of Hathaway and the

granting of a new trial to him the case of the petitioner has not been called for trial, and that two terms of court since the granting of a new trial to Hathaway had come and the second one was about expiring at the time when the petitioner filed his petition in the Circuit Court for this writ. Here again there is no allegation and no proof that any attempt had been made on the part of this petitioner to obtain a trial in the state court or that he had been refused such trial by that court upon any application which he made. It is the simple case of a failure to call the indictment for trial, the petitioner being in the meantime on bail and making no effort to obtain a trial and evincing no desire by way of a demand that a trial in his case should be had.

We do not say that a refusal to try a person who is on bail can furnish any foundation for a resort to the Federal courts, even in cases in which a trial may involve Federal questions, but in this case no refusal is shown. A mere omission to move the case for trial (the party being on bail) is all that is set up, coupled with the assertion that defendant was eager and anxious for trial, but showing no action whatever on his part which might render such anxiety and eagerness known to the state authorities.

It was also stated that the petitioner could expect little better results on a trial of his case in the state court than obtained upon the trial in the *Hathaway case.* We think this statement is entirely without proof or even probability. The petitioner was indicted as one of several defendants under the same statute, and it is claimed that those of them mentioned in the indictment who resided in Texas were situated similarly to Hathaway. The probability, therefore, would be exceedingly strong that if the petitioner were tried upon the indictment found against him he would have to be acquitted by direction of the court for lack of evidence, under the decision of the Criminal Court of Appeals in Hathaway's case.

We are of opinion that neither one of the grounds taken by the court below nor all combined furnish any reason for the discharge of petitioner upon the writ issued by that court. The surrender of the petitioner by his bail at his request and

his consequent imprisonment furnishes in itself no ground of urgency for the interference of a Federal court. The imprisonment is entirely voluntary, and while the surrender by his bondsmen may be good for the purpose of avoiding any technical objection to the issuing of the writ founded upon the fact that the petitioner was on bail, yet the fact of imprisonment under such circumstances adds nothing to the strength of his case as calling for the interposition of the Federal court. This whole case is clearly nothing but an attempt to obtain the interference of a court of the United States when no extraordinary or peculiar circumstances exist in favor of such interference.

Upon the facts appearing herein, we think no sufficient case was made out for the exercise of the jurisdiction of the Circuit Court. We come to this decision irrespective of the question of the validity of the state statute and without passing upon the same or expressing any opinion in regard thereto.

If this application had been made subsequently to a trial of the petitioner in the state court and his conviction upon such trial under a holding by that court that the law was constitutional, and where an appeal from such judgment of conviction merely imposing a fine could not be had, excepting upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, a different question would be presented and one which is not decided in this case, and upon which we do not now express any opinion.

The order of the Circuit Court for the Northern District of Texas must be reversed, and the case remanded to that court with instructions to set aside the order discharging the prisoner, and to enter an order remanding him to the custody of the sheriff.

In BAKER *v.* AUSTIN, No. 337; BAKER *v.* HAWKINS, No. 338; and BAKER *v.* FINLEY, No. 339, involving the same question and argued with this case, the same order is made.

WILLIS *v.* EASTERN TRUST AND BANKING COMPANY.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 383. Submitted October 18, 1897. — Decided February 21, 1898.

A summary process to recover possession of land, under the landlord and tenant act of the District of Columbia, (Rev. Stat. D. C. c. 19,) can be maintained only when the conventional relation of landlord and tenant exists or has existed between the parties; and cannot be maintained by a mortgagee against his mortgagor in possession after breach of condition of the mortgage, although the mortgage contains a provision that until default the mortgagor shall be permitted to possess and enjoy the premises, and to take and use the rents and profits thereof, "in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

This was a summary process to recover possession of land in the city of Washington, under section 684 of the Revised Statutes of the District of Columbia, commenced September 17, 1894, by complaint before a justice of the peace, by the Eastern Trust and Banking Company against Edward M. Willis and William G. Johnson, each of whom pleaded title in Johnson; and the case was thereupon certified to the Supreme Court of the District of Columbia.

In accordance with a general rule of that court, requiring the plaintiff, in such a process, to file "a declaration making demand for the possession of the premises, with a description thereof, as in ejectment," the plaintiff filed a declaration, demanding possession of the land, describing it by metes and bounds, and alleging that the defendants entered thereon, and unlawfully ejected the plaintiff therefrom, and unlawfully detained the same from the plaintiff.

The parties submitted the case to the determination of the court, without a jury, upon an agreed statement of facts, in substance as follows:

The plaintiff was a corporation organized under a charter granted by the legislature of the State of Maine, by which it

was located at the city of Bangor in the county of Penobscot, and was authorized to establish agencies elsewhere in that State. Johnson was sued as assignee of the American Ice Company, a corporation of Maine, and doing business at Bangor and also at the city of Washington; and Willis was sued as the tenant or lessee of Johnson.

On December 2, 1889, by an indenture, in the nature of a mortgage, executed in Maine, and duly recorded in that State and in the District of Columbia, the American Ice Company conveyed to the Eastern Trust and Banking Company, "and its successors, in trust, with full power of succession to and enjoyment of the franchises of the corporation, all its real estate, wharves, icehouses, boarding-house, stables, boilers, elevator and machinery, situated in the town of Hampden in said county of Penobscot, and in the city of Washington in the District of Columbia, together with all and singular the privileges and appurtenances thereto belonging," to secure the payment of bonds of the ice company to the amount of $40,000, payable to the trust company at its office in Bangor in equal instalments of $5000 each, in three, four, five, six, seven, eight, nine and ten years after date, with interest. The deed provided, among other things, as follows:

First. "Until default shall be made in the payment of the principal or interest of said bonds or some of them, or in the maintenance of insurance, or in the payment of taxes or assessments as herein provided, or until default shall be made in respect to something by these presents required to be done by said party of the first part, the American Ice Company shall be permitted and suffered to possess, manage, develop, operate and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues and profits thereof, in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

Second. If the ice company shall pay the principal and interest, and do all other things required to be done on its part, this deed shall be void. But if any default shall be made, and shall continue for ninety days, the whole amount of the bonds, principal and interest, shall be deemed immediately due and

payable, "and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted, or intended so to be, and to take possession of the whole or any part thereof," and to sell and dispose of the same by public auction in Bangor, giving notice, as therein required, in newspapers published in Bangor and in Washington, and "in its own name, or in the name of the American Ice Company, to make, execute, acknowledge and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance of the property so sold; and any sale made as aforesaid shall be a perpetual bar, both at law and in equity, against the American Ice Company, and all persons claiming by, through or under it, from claiming the property, rights, interests and franchises so sold, or any interest therein." The proceeds of the sale, after payment of expenses, shall be paid over ratably to the bondholders, and the remainder, if any, to the ice company.

Third. "The foregoing provision for a sale under the power aforesaid is cumulative with the ordinary remedy of foreclosure by entry or suit therefor; and the trustee hereunder may, upon default being made as aforesaid, institute and carry out proceedings to foreclose this mortgage or deed of trust, by suit or otherwise, in such manner as may be authorized by law for the foreclosure of mortgages of real estate. And the American Ice Company hereby waives any and all rights of sale or redemption, now or hereafter provided by the statutes of Maine or of the United States."

The bonds were duly issued, as recited in the mortgage, and were delivered to and held by purchasers for value in the regular course of business. The first instalment of the bonds, and all interest which fell due on or before December 1, 1892, were paid. The rest of the bonded debt, and the interest thereon, were never paid, and were due and payable at the time of the commencement of this suit.

On October 13, 1893, the ice company executed to Johnson an assignment of all its property for the benefit of its creditors, under the act of Congress of February 24, 1893, c. 157. 27 Stat. 474. Johnson accepted the assignment, and assumed

the duties of assignee; and as such, on January 29, 1894, executed to Willis a lease in writing of all the ice company's real estate in the city of Washington, for one year from that date, at a monthly rent of $130.

After the default which took place on December 1, 1893, had continued more than ninety days, a majority of the bondholders directed the trust company to proceed in the execution of the trust. In pursuance of that direction, and of the power contained in the mortgage, the trust company advertised and exposed the whole mortgaged property for sale by auction at Bangor on May 4, 1894. The sale was adjourned until September 8, 1894, when the property was sold, and was purchased by a committee of the bondholders, and for their benefit. The terms of the sale have not yet been complied with, nor any deed made to the purchasers, it being understood and agreed between them and the trustee, at the time of the sale, that the trustee should first obtain possession of the property.

The trust company, on July 30, 1894, caused a thirty days' notice to quit to be served on Johnson and on Willis; and on September 17, 1894, commenced this suit to recover possession of the property by causing a seven days' summons to be issued to each of them by a justice of the peace of the District of Columbia; and thereupon subsequent proceedings took place as above stated.

Upon the agreed statement of facts, the Supreme Court of the District of Columbia gave judgment for the defendants. The plaintiff appealed to the Court of Appeals, which reversed the judgment, and remanded the case with directions to enter judgment for the plaintiff. 6 App. D. C. 375. The defendants sued out a writ of error from this court, which was dismissed for want of jurisdiction. 167 U. S. 76. They then obtained from this court this writ of certiorari to the Court of Appeals, under the act of March 3, 1897, c. 390. 29 Stat. 692; 167 U. S. 746.

Mr. Calderon Carlisle and *Mr. William G. Johnson* for Willis and Johnson.

Mr. B. F. Leighton for the Trust and Banking Company.

Opinion of the Court.

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

Sections 680–691 of the Revised Statutes of the District of Columbia, contained in chapter 19, entitled "Landlord and Tenant," are a reënactment of the act of Congress of July 4, 1864, c. 243, entitled "An act to regulate proceedings in cases between landlord and tenants in the District of Columbia." 13 Stat. 383.

By sections 681 and 682, (reënacting section 1 of the act of 1864,) "a tenancy at will shall not arise or be created without an express contract or letting to that effect, and all occupation, possession or holding of any messuage or real estate, without express contract or lease, or by such contract or lease the terms of which have expired, shall be deemed and held to be tenancies by sufferance;" and "all estates at will and sufferance may be determined by a notice in writing to quit of thirty days."

By section 684, (reënacting section 2 of the act of 1864,) "when forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise," then, "on written complaint, on oath, of the person entitled to the premises, to a justice of the peace, charging such forcible entry or detainer of real estate, a summons may be issued to a proper officer, commanding the person complained of to appear and show cause why judgment should not be rendered against him."

The statute further provides as follows: The summons shall be served at least seven days before the appearance of the party complained of. If it appears by default, or upon trial, that the plaintiff is entitled to the possession of the premises, he shall have judgment and execution for the possession and costs; if the plaintiff fails to prove his right to possession, the defendant shall have judgment and execution for his costs. If, upon trial, the defendant pleads title in himself, or in another person under whom he claims the premises, the case is

to be certified to the Supreme Court of the District of Columbia, and each party is to recognize to the other, the defendant "to pay all intervening damages and costs and reasonable intervening rent for the premises," and the plaintiff to enter the suit and to pay all costs adjudged against him. An appeal to the same court may be taken by either party against whom judgment is rendered by the justice of the peace. Rev. Stat. D. C. §§ 685–689; Act of July 4, 1864, c. 243, §§ 2–4; 13 Stat. 383, 384.

This plaintiff is the mortgagee of land in the District of Columbia, under a deed of trust to secure the payment of certain bonds, in instalments payable in successive years, with interest; and providing that until default the mortgagor shall be permitted to possess and enjoy the property, and to take and use the income, rents, issues and profits thereof, "in the same manner, to the same extent and to the same effect, as if this deed had not been made;" but that, if any default be made, and be continued ninety days, the trustee may enter upon the property, and sell the same by public auction, or may pursue the ordinary remedy of foreclosure by entry or suit, as authorized by law.

The mortgagor assigned the property to an assignee for the benefit of creditors; the assignee made a lease in writing thereof for a year at a monthly rent; default was made and continued for ninety days; and the mortgagee, after giving the assignee and his lessee thirty days' notice to quit, instituted this process against them to recover possession under the landlord and tenant act of the District of Columbia.

The principal question presented by the record is whether, in a case like this, where there has been neither forcible entry nor detainer by force, a mortgagee entitled to possession after condition broken is within the scope and effect of the statute.

In *Barber* v. *Harris*, (1888) 6 Mackey, 586, affirmed by this court in *Harris* v. *Barber*, (1889) 129 U. S. 366, cited in support of the judgment below, this question was not and could not be decided. That case arose upon a writ of certiorari to a justice of the peace, by which his judgment for

possession under the statute was sought to be set aside upon allegations that the plaintiff was a purchaser at a sale under a mortgage, and the conventional relation of landlord and tenant did not exist between the parties, and therefore the justice of the peace had no jurisdiction. The ground on which both the Supreme Court of the District of Columbia and this court declined to set aside the judgment of the justice of the peace was, that the existence of the relation of landlord and tenant between the parties, and the jurisdiction of the justice of the peace over the case, were sufficiently shown by general allegations in the complaint that the plaintiff was entitled to the possession of the premises, and that they were detained from him and held without right by the defendant, tenant thereof by the sufferance of the plaintiff, and whose tenancy and estate therein had been determined by thirty days' notice to quit; and that these allegations could not be contradicted upon that writ of certiorari. See 6 Mackey, 594, 595; 129 U. S. 368, 371.

In *Jennings* v. *Webb*, (1892) 20 D. C. 317, 322, in which it was decided that one tenant in common could not maintain this form of proceeding against his co-tenant, Justice Cox, speaking for Justices Hagner and James, as well as for himself, said: "There seems to be a little misapprehension of the nature of this proceeding. While our rule requires the plaintiff to file a declaration, as in ejectment, that does not convert the proceeding into an action of ejectment at all, in which the plaintiff recovers upon the strength of his title. In this proceeding, unless he establishes the relation of landlord between himself and the defendant, no matter what the form of declaration is, he is not entitled to recover. I have always held that at special term, and that is the opinion that we entertain now. It is still a landlord and tenant proceeding."

In two earlier cases, a purchaser at a sale under a deed of trust in the nature of a mortgage had been declared, by the Supreme Court of the District of Columbia in general term, to be entitled to maintain this proceeding against the mortgagor, who had remained in possession without the plaintiff's consent, and had been served with a thirty days' notice to quit.

But in the first of those cases this was wholly *obiter dictum*, the appeal to the general term being dismissed because the judgment in special term was final; and in the other case no question appears to have been raised upon the construction of the statute. *Luchs* v. *Jones*, (1874) 1 McArthur, 345; *Fiske* v. *Bigelow*, (1876) 2 McArthur, 427.

Afterwards, in *Loring* v. *Bartlett*, (1894) 4 App. D. C. 1, the Court of Appeals, speaking by Chief Justice Alvey, reversing a judgment of the Supreme Court of the District of Columbia, and quoting from *Birch* v. *Wright*, 1 T. R. 378, 382, 383, refrained from expressing a definite opinion upon the question "whether the simple and ordinary relation of mortgagor and mortgagee involves the relation of landlord and tenant by implication of law, within the meaning and sense of the statute;" and maintained the suit, solely upon the ground that a provision, in a trust deed to secure the payment of promissory notes, by which the mortgagee and her heirs and assigns were to be permitted "to use and occupy the said described premises, and the rents, issues and profits thereof to take, have and apply, to and for her and their sole use and benefit, until default be made in the payment of said notes or any of them," constituted a re-demise from the mortgagee to the mortgagor, which would support a proceeding under the statute. The cases relied on in support of that decision were *Georges Creek Co.* v. *Detmold*, 1 Maryland, 225, 236, and some English cases, all of which were ordinary actions of ejectment, and none of them under statutes like that now in question.

The decision in *Loring* v. *Bartlett* was followed by the Court of Appeals in the present case, without further discussion. 6 App. D. C. 375, 383.

Upon full consideration of the terms of the act of Congress, and in view of the existing state of the law in this country at the time of its passage, this court is unable to concur in the conclusion of the Court of Appeals.

The common saying that a mortgagor in possession is tenant at will to the mortgagee has been often recognized to be a most unsafe guide in defining the relation of mortgagee and

mortgagor, or in construing statutes authorizing landlords to recover possession against their tenants by summary process before a justice of the peace.

In *Moss* v. *Gallimore*, (1779) Lord Mansfield said: "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only so *quodam modo*. Nothing is more apt to confound than a simile. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases." 1 Doug. 279, 282, 283. And in *Birch* v. *Wright*, (1786) Mr. Justice Buller said: "He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands." 1 T. R. 378, 383.

Under early statutes of the State of New York, providing that any tenant at will, or at sufferance, or for years, holding over without permission of his landlord after the expiration of his term, or after default in the payment of rent, might be removed from the possession upon a proceeding commenced by the landlord before a justice of the peace, it was constantly held by the Supreme Court of the State that a mortgagee could not maintain this process against a mortgagor in possession; and Chief Justice Savage said that for some purposes, indeed, the mortgagor, after condition broken, was considered as tenant to the mortgagee; but that the statute "was clearly designed to afford a speedy remedy where the conventional relation of landlord and tenant existed, and not where that relation is created by operation of law;" and "the legislature never intended that the mortgagee should have a right to proceed under this statute to obtain possession of the mortgaged premises after forfeiture." N. Y. Stat. of 1820, c. 194; 2 Rev. Stat. of 1828, pt. 3, c. 8, tit. 10, §§ 28 *& seq*; *Evertson* v. *Sutton*, (1830) 5 Wend. 281, 284; *Roach* v. *Cosine*, (1832) 9 Wend. 227, 231, 232; *Sims* v. *Humphrey*, (1847) 4 Denio, 185, 187; *Ben-*

jamin v. *Benjamin*, (1851) 5 N. Y. 383, 388; *People* v. *Simpson*, (1863) 28 N. Y. 55, 56.

It is true, as has been heretofore observed by this court, that in the State of New York the courts of law had, by a gradual progress, adopted the views of courts of equity in relation to mortgages, and considered the mortgagor, whilst in possession and before foreclosure, as the real owner, except as against the mortgagee, and as having the right of possession, even as against the mortgagee; whereas by the law of Maryland, prevailing in the District of Columbia, the legal estate is considered as vested in the mortgagee, and, as soon as the estate in mortgage is created, the mortgagee may enter into possession, though he seldom avails himself of that right. *Van Ness* v. *Hyatt*, 13 Pet. 294, 299.

But the mortgagee has been equally held not to be entitled to maintain against the mortgagor a summary landlord and tenant process in States where, as in New England, the mortgagee is held to be the owner of the legal title. 1 Jones on Mortgages, § 58.

The Revised Statutes of Massachusetts of 1836, c. 104, §§ 2, 4–9, contained provisions very similar to those of §§ 2–4 of the act of Congress of July 4, 1864, as to the cases in which and the persons by and against whom the proceedings might be instituted, the service of summons, the form of judgment, and the removal of the case, by certificate or by appeal, into a court of record.

In that chapter of the Massachusetts statutes of 1836, section 2 was as follows: "When any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, and also when the lessee of any lands or tenements, or any person holding under such lessee, shall hold possession of the demised premises, without right, after the determination of the lease, either by its own limitation, or by a notice to quit, as provided in the sixtieth chapter," (section 26 of which provided that estates at will might be terminated by either party by notice of three months, or by the landlord by fourteen days' notice in case of non-payment of rent,) "the person entitled to the premises may

be restored to the possession thereof, in the manner hereinafter provided." And by section 4, "the person entitled to the possession of the premises" might obtain from a justice of the peace a summons to answer to a complaint charging the defendant with being in possession of the land in question, and holding it unlawfully and against the right of the plaintiff.

It was the settled construction of that statute by the Supreme Judicial Court of Massachusetts, that a mortgagee, even after he had entered for the purpose of foreclosure, could not maintain an action against his mortgagor to recover possession of the mortgaged premises. "Whilst the parties stood in the relation of mortgagor and mortgagee," said Chief Justice Shaw, "the defendant was not lessee, within the meaning of this statute. A mortgagor in possession is sometimes, in a loose sense, said to be tenant at will to the mortgagee. But he is not liable to rent, or to account for rents and profits; these he holds to his own use. He is like a tenant at will, because the mortgagee may enter upon the estate at his will, if he can do so peaceably, when not restrained by covenant." *Larned* v. *Clarke*, (1851) 8 Cush. 29, 31. And again: "The present statute contemplates three cases in which this process will lie: 1. Forcible entry; 2. Forcible detainer; 3. A tenant holding against his landlord, either (1) after the determination of a lease by its own limitation; or (2) after the expiration of a notice to quit duly given; or (3) after a notice of fourteen days, for non-payment of rent. In the present case, the proof shows no forcible entry, no forcible detainer, no holding over of a tenant of demised premises. These are the only cases contemplated in this statute in which this summary process will lie. Although, in a loose sense, a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the Revised Statutes, c. 104, § 2. He is not lessee, or holding under a lessee, or holding demised premises without right, after the determination of the lease. The remedies of a mortgagee are altogether of a different character, clearly marked out by law." *Hastings* v. *Pratt*, (1851) 8 Cush. 121, 123. See also *Dakin* v.

Allen, (1851) 8 Cush. 33; *Gerrish* v. *Mason*, (1855) 4 Gray, 432.

In chapter 137 of the General Statutes of Massachusetts of 1860, the provisions of the Revised Statutes of 1836, above mentioned, were substantially reënacted, section 2 being put in the following form: "When a forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when the lessee of land or tenements, or a person holding under such lessee, holds possession without right, after the determination of the lease by its own limitation, or by notice to quit, or otherwise, the person entitled to the premises may be restored to the possession in the manner hereinafter provided." The words "or otherwise" were apparently added in that section, because of its having been decided, under the earlier statute, that "the determination of the lease by its own limitation" did not include its determination by the lessor's entry for breach of a condition in the lease. *Fifty Associates* v. *Howland*, (1846) 11 Met. 99; *Whitwell* v. *Harris*, (1871) 106 Mass. 532.

By section 5 of the statute of 1860, "the person entitled to the possession of the premises" may obtain from a justice of the peace a summons "to answer to the complaint of the plaintiff, for that the defendant is in possession of the lands," "which he holds unlawfully and against the right of the plaintiff."

The provision, above quoted, of the statute of 1860, which defines the circumstances under which this summary process may be commenced before a justice of the peace, is almost exactly like the corresponding provision of the act of Congress of 1864, as will appear by putting the two together, with those words of the Massachusetts statute which have been omitted in the act of Congress printed in italics, and the words added in the act of Congress enclosed in brackets, as follows: "When *a* forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when *the lessee of land or tenements, or a person holding under such lessee, holds* possession [is held] without right, after the *determination* [estate is determined by the terms] of the lease by its own limitation, or by notice to quit, or otherwise."

This provision, as incorporated in the act of Congress, though somewhat condensed in form, is essentially in the same words, and of precisely the same meaning, as the provision of the statute of Massachusetts. While it omits the words "the lessee of land or tenements, or a person holding under such lessee," it still, like the Massachusetts statute, (in cases where there is neither forcible entry nor forcible detainer,) is restricted to cases in which "the lease" has been determined, and differs in this respect from the provision in the first section of the act of Congress, which defines tenancies by sufferance.

The statute of Massachusetts and the act of Congress resemble each other in many other respects. Each authorizes "the person entitled to the premises" to recover possession by complaint to a justice of the peace. Each authorizes the complaint to be in general terms; in Massachusetts, alleging that the defendant is in possession of the land, and holds it unlawfully and against the right of the plaintiff; in the District of Columbia, "charging a forcible entry or detainer of real estate." Each requires the summons to be served seven days before appearance. The provisions as to the form of the judgment of the justice of the peace for either party are exactly alike in both statutes. Each statute provides that, when the title is put in issue, the case may be certified to a court of record; that from any judgment of the justice of the peace an appeal may be taken by either party to that court; and that upon such removal, either by certificate or by the defendant's appeal, the defendant shall recognize to the plaintiff, with sufficient sureties, to pay intervening rent and damages. Mass. Gen. Stat. of 1860, c. 137, §§ 6–10; Act of Congress of July 4, 1864, c. 243, §§ 2–4; Rev. Stat. D. C. §§ 684–689.

The resemblance between the provisions of the Massachusetts statute of 1860 and of the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded. *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Pennock* v.

Dialogue, 2 Pet. 1, 18; *Metropolitan Railroad* v. *Moore*, 121 U. S. 558, 572; *Warner* v. *Texas & Pacific Railway*, 164 U. S. 418, 423. In *Metropolitan Railroad* v. *Moore*, just cited, where provisions of statutes of New York, regulating judicial procedure, had been incorporated by Congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted those provisions as then understood in New York and already construed by the courts of that State, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia.

Before the passage of the act of Congress of 1864, the Supreme Judicial Court of Maine had held that a mortgagee could not proceed against his mortgagor under a statute of that State, the leading sections of which provided that "a process of forcible entry and detainer may be commenced against a disseizor, who has not acquired any claim by possession and improvement; and against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice;" "and against a tenant at will, whose tenancy has been terminated" by notice to quit, in which last case "the tenant shall be liable to the process aforesaid without further notice, and without proof of any relation of landlord and tenant." Maine Rev. Stat. of 1857, c. 94; *Reed* v. *Elwell*, (1858) 46 Maine, 270, 278, 279; *Dunning* v. *Finson*, (1859) 46 Maine, 546, 553. See also *Sawyer* v. *Hanson*, (1845) 24 Maine, 542; *Clement* v. *Bennett*, (1879) 70 Maine, 207.

Similar opinions have been expressed in cases arising in other States under statutes differing in language, but having the same general purpose. *Davis* v. *Hemenway*, (1855) 27 Vermont, 589; *McCombs* v. *Wallace*, (1872) 66 No. Car. 481; *Greer* v. *Wilbar*, (1875) 72 No. Car. 592; *Necklace* v. *West*, (1878) 33 Arkansas, 682; *Nightingale* v. *Barens*, (1879) 47 Wisconsin, 389; *Steele* v. *Bond*, (1881) 28 Minnesota, 267; *Chicago, Burlington & Quincy Railroad* v. *Skupa*, (1884) 16 Nebraska, 341. We have not been referred to, and are not aware of, a single case in any State in which a summary

process of this kind has been maintained by a mortgagee against his mortgagor, unless specifically given by distinct provision in the statute.

The view which has been generally, if not universally, entertained by the courts of the several States upon this subject has been well expressed by the Supreme Court of Minnesota in *Steele* v. *Bond*, above cited, as follows: "The act concerning forcible entries and unlawful detainers, so far as it affords a remedy for landlords against tenants who unlawfully detain the premises after a default in the payment of the rent, or the expiration of the term, must be construed as similar acts have always been construed, by the courts of other States, to apply only to the conventional relation of landlord and tenant. It was not intended as a substitute for the action of ejectment, nor to afford means of enforcing agreements to surrender possession of real estate, where either that relation does not exist or has not existed. The foundation fact upon which the jurisdiction rests is that the tenant is in possession of the land in consequence and by virtue of that relation, and unlawfully withholds possession after a default in the performance of the terms upon which he entered, or after his term has expired." 28 Minnesota, 273.

Considering the terms of the act of Congress, the settled construction, before the passage of that act, of the statute of Massachusetts from which it appears to have been taken, and the general course of decision in this country under statutes on the same subject, the reasonable conclusion is that, in order to sustain this form of proceeding, the conventional relation of landlord and tenant must exist or have existed between the parties.

A mortgagee holds no such relation to a mortgagor in possession. The mortgagor, though loosely called a tenant at will of the mortgagee, is such in no other sense than that his possession may be put an end to whenever the mortgagee pleases. Lord Mansfield, in *Moss* v. *Gallimore*, 1 Doug. 279, 283; Lord Selborne, in *Lows* v. *Telford*, 1 App. Cas. 414, 426; Shaw, C. J., in *Larned* v. *Clarke*, 8 Cush. 29, 31; *Carroll* v. *Ballance*, 26 Illinois, 9, 19. The mortgagee may take possession

at any time; but, so long as there has been no breach of condition of the mortgage, this right is rarely exercised, and the mortgagor is usually permitted, by oral or tacit agreement with the mortgagee, or by express stipulation in the mortgage, to remain in possession. 2 Bl. Com. 158; *Moss* v. *Gallimore*, above cited; *Colman* v. *Packard*, 16 Mass. 39; *Flagg* v. *Flagg*, 11 Pick. 475, 477; *Jamieson* v. *Bruce*, 6 Gill & Johns. 72, 75; *Van Ness* v. *Hyatt*, 13 Pet. 294, 299. Until the mortgagee takes actual possession, the mortgagor is not liable, without an express covenant to that effect, to pay rent, and is entitled to take the rents and profits to his own use. *Teal* v. *Walker*, 111 U. S. 242, 248–251, and cases cited; *Freedman's Saving Co.* v. *Shepherd*, 127 U. S. 494, 502; *Larned* v. *Clarke*, above cited.

When the mortgagor remains in possession with the assent of the mortgagee, without formal agreement, no one would think of saying that there was a lease from the mortgagee to the mortgagor, or that the relation of landlord and tenant existed between them. An express stipulation in the mortgage, that the mortgagor may remain in possession until breach of condition, is intended merely to put in definite and binding form the understanding of the parties as to the exercise of their rights as mortgagor and mortgagee, and not to create between them a distinct relation of tenant and landlord. *Anderson* v. *Strauss*, 98 Illinois, 485.

That such was the understanding and intention of the parties to the deed of trust in this case is apparent from its terms, by which the American Ice Company mortgages all its real estate, wharves, icehouses and other buildings and machinery; and it is provided that, until default, the mortgagor "shall be permitted and suffered to possess, manage, develop, operate and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues and profits thereof, in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

The result is, that the plaintiff is not entitled to maintain this process, but must be left, so far as the aid of a court of

Counsel for Plaintiff in Error.

justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment, or a bill of foreclosure. Comp. Stat. D. C. c. 48, § 1; c. 55, § 10; *Hogan* v. *Kurtz*, 94 U. S. 773; *Hughes* v. *Edwards*, 9 Wheat. 489.

Judgment of the Court of Appeals reversed, and case remanded with directions to affirm the judgment of the Supreme Court of the District of Columbia.

RICHMOND AND ALLEGHANY RAILROAD COMPANY *v.* R. A. PATTERSON TOBACCO COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 172. Submitted January 4, 1898. — Decided February 21, 1898.

Section 1295 of the Virginia Code of 1887, enacting that "when a common carrier accepts for transportation anything, directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge" does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line; and it does not conflict with the provisions of the Constitution of the United States, touching interstate commerce.

THE case is stated in the opinion.

Mr. H. T. Wickham and *Mr. Henry Taylor, Jr.*, for plaintiff in error.

Mr. A. W. Patterson for defendant in error.

Mr. Justice White delivered the opinion of the court.

In August, 1888, the Patterson Tobacco Company delivered to the Richmond and Alleghany Railroad, which was then in the hands of receivers, a lot of tobacco consigned to Mann and Levy, Bayou Sara, Louisiana. On receiving the tobacco the railroad issued a bill of lading whereby it was expressly stipulated that it should only be liable for the transportation of the goods over its own line, and beyond this was to be responsible solely as a forwarder, that is to say, that all its obligations should be discharged if it safely carried the goods over its own road, and delivered them to a connecting carrier. The limitations on this subject in the bill of lading were full and clear, and there is no question that if the rights of the parties are to be measured by the terms of the bill of lading, the carrier was not liable for a loss happening beyond its line. When this shipment was made there was no law of the State of Virginia forbidding or purporting to forbid a carrier, in receiving goods for interstate shipment, from restricting its liability in accordance with the tenor of the bill of lading in question. In fact, the Supreme Court of Appeals of Virginia in this case expressly held that the Virginia law sanctions a contract made by a carrier to that effect. The bill of lading for the tobacco, issued as above stated, was not signed by the shipper, although at the time the freight was received and when the bill was issued the Code of Virginia contained the following provision:

"When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof

to the consignor that the loss or injury did not occur while the thing was in his charge." Sec. 1295, Virginia Code of 1887.

The tobacco not having been delivered to the consignees, the shippers sued the Richmond and Alleghany Railroad for the value thereof, on the assumption that the railroad was responsible as a common carrier for the non-delivery. The corporation relied for its defence on the contract embodied in the bill of lading, and on the fact that the tobacco had been duly transferred to a connecting carrier, and was thereafter lost. The case was submitted to the trial court on an agreed statement, admitting the receipt of the goods, the issue of the bill of lading, the fact that it was not signed by the shipper, and the loss of the tobacco beyond the lines of the defendant. The plaintiff rested on the statute above quoted, and the defendant company on its claim that the statute was a regulation of interstate commerce, and therefore in conflict with the Constitution of the United States. The trial court held the railroad liable, and from a judgment of the Supreme Court of Appeals of the State of Virginia, affirming its action, this writ of error is prosecuted.

The Supreme Court of Appeals of Virginia in its able opinion, and the counsel of both parties at bar conceded, that an attempt on the part of a State to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines would be a regulation of interstate commerce, and therefore void. We shall, therefore, not examine this question, but shall proceed to a consideration of the case without expressing any opinion upon it. It is manifest that the statute of the State of Virginia in question does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as to liability on an interstate shipment beyond its own line as it may deem proper, provided only the

evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form is as obvious as is the difference between the sum of the obligations of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown.

The failure to bear this plain distinction in mind is the fallacy which is involved in all the contentions which are pressed by the plaintiff in error. It is of course elementary that, where the object of a contract is the transportation of articles of commerce from one State to another, no power is left in the States to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several States to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least, until Congress, by general legislation, has undertaken to govern the subject. But it is said, although the learned court below announced as an abstract principle that under the law of Virginia a carrier was free, when receiving an interstate shipment, to limit his liability to his own line, the conclusion reached by the court was inconsistent with this ruling, and, in effect, substantially repudiated its correctness. The line of reasoning by which this proposition is supported is this: If there had been no statute, it is said, the court admitted that the terms of the bill of lading would have exempted the carrier from liability beyond its own line, but by applying the statute to the bill of lading it did not so exempt the carrier, therefore the statute was so enforced as to prevent the carrier from contracting, and hence its application negatived the power to contract for such exemption. But the inconsequence is in the argument of the plaintiff in error and not in the reasoning or the conclusion of the court. The inadequacy of the bill of lading to protect the carrier from liability beyond

its own line resulted, it is true, from the statute, but not because the statute forbade the carrier from contracting so as to limit his liability, but because the contract which he did make was not in the form required by law, and therefore was not evidence that there was such a contract. Indeed, the entire argument upon which it is asserted that error was committed by the court below, but manifests in varying forms of statement the fallacy already noticed, that is, it comes from obscuring the difference between substance and form, between a power to contract and the asserted right in availing of the authority, to disregard the requisites essential to show a valid contract, and this confusion of thought also marks the difference between the case now presented and the very many adjudged cases cited by the plaintiff in error in support of its proposition.

Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary. In the case of *Chicago &c. Railway Co.* v. *Solan*, 169 U. S. 133, 137, 138, it was said:

"They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

"Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving or management of all railroad trains passing through the State to submit to an

examination by a local board as to their fitness for their positions, or to prescribe the mode of heating passenger cars in such trains. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628. See also *Western Union Telegraph Co.* v. *James*, 162 U. S. 650; *Hennington* v. *Georgia*, 163 U. S. 299; *Gladson* v. *Minnesota*, 166 U. S. 427."

These views dispose of the substantial questions which the case presents, for the contention which arises on the concluding sentences of the statute, imposing upon a carrier a duty where the loss has not happened on the carrier's own line to inform the shipper of this fact, is but a regulation manifestly within the power of the State to adopt.

Affirmed.

UNITED STATES *v.* GARLINGER.

APPEAL FROM THE COURT OF CLAIMS.

No. 166. Argued January 4, 5, 1898. — Decided February 21, 1898.

Article 420 of the Treasury Regulations, providing that night watchmen shall be divided into two watches as nearly as possible, both watches to perform duty every night, and empowering the surveyor of the port to make such changes in the division of the watches as he may deem expedient, and to appoint the hours of duty for different watches; and that when it is necessary to assign a night watchman to a vessel, or to any other all night charge, the night watchman so assigned must remain on the vessel or on his charge until relieved, and will be excused from performing duty the following night, does not authorize the payment of an extra day's work to a night watchman so employed during the whole night, and again put upon duty in the following night.

It is not possible for the Secretary of the Treasury, by passing regulations, to divide a day's service into parts, and to attach to each part the pay for a full day's work.

Where payments for work done in Government employ are made frequently and through a considerable period of time, and are received without objection or protest, and where there is no pretence of fraud or of circumstances constituting duress, it is legitimate to infer that such pay-

Statement of the Case.

ments were made and received on the understanding of both parties that they were made in full; and such a presumption is much strengthened if the employé waits two years after the expiration of his service before making any demand for further compensation.

This was an action brought by Dixon N. Garlinger, in the Court of Claims, against the United States, wherein he sought to recover for alleged extra service rendered by him while in the employ of the United States. The trial court found the facts to be as follows:

I. The claimant, a citizen of the United States, was appointed, by the collector of the port of Baltimore, a night inspector in the customs service at Baltimore in 1882. He took the oath of office and entered upon the discharge of the duties of night inspector of customs on April 1, 1882, and continued in office until August 25, 1886, a period of 1608 days.

II. During the above-named period the claimant was paid for 1608 days, of which 1353 payments were for night service when he was present rendering actual service, and 255 were for night service when he was absent and off duty.

III. During the 1353 days of night service the claimant was required to perform duty as night inspector from sunset to sunrise and until relieved by the day inspector, the length of the night service consequently varying, and sometimes extending from 5 P.M. of one day until 10 A.M. of the succeeding day. During this time the claimant was not allowed to be off duty on the succeeding night, after having been on duty two watches, except in the 255 instances set forth in Finding II, when he was off duty and received pay. That is to say, he performed the duties of both the first and second watch on 1098 nights without additional compensation and without being allowed to be off duty on any alternate night.

IV. The petition not having been filed until August 24, 1888, 144 days of the number last above stated, are barred by the statute of limitations, leaving 954 days as the subject of the present suit.

V. The claimant objected to his superior officer, the surveyor of the port, against his being required to perform the duties of both watches in one night without being excused

from the performance of duty on the following night, and he subsequently remonstrated at various times.

VI. At the time of his entering the service as night inspector he was furnished by his superior officers with a copy of the regulations promulgated by the Secretary of the Treasury for his governance and defining his duties. It was customary for the surveyor of the port to furnish such regulations to inspectors and others at the time of their entering the customs service. The regulations hereinafter quoted were among those so given to the claimant.

VII. The laws and regulations for the government of officers of customs under the superintendence and direction of surveyor of ports, 1877, were issued by the Secretary of the Treasury to the custom-house authorities of all ports, including the port of Baltimore, and were in operation in all of the principal ports, except Baltimore, in which the practice of the port at the time of the claimant's appointment was not, and had not been, in accordance with the requirement of the regulations making two night watches and relieving the first watch at midnight. There the surveyor of the port had always required the night inspectors to serve from sunset to sunrise.

VIII. The following are among the regulations given to the claimant when he entered the service, above referred to:

"ART. 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches.

"Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

"Night watchmen must not quit their charge on being relieved without making their presence personally known to

the officer relieving them. Night watchmen, when on duty, must wear their official badge."

Upon the foregoing findings of fact, the court decided, as a conclusion of law, that the claimant was entitled to recover $2862.

Mr. George Hines Gorman for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. F. P. Dewees and *Mr. L. T. Michener* for appellee. *Mr. W. W. Dudley* and *Mr. R. R. MacMahon* were on their brief.

Mr. Justice Shiras delivered the opinion of the court.

Dixon N. Garlinger, the plaintiff in the court below, was employed by the collector of the port of Baltimore, as a night inspector in the customs service, from April 1, 1882, till August 25, 1886. For his services he was entitled to be paid three dollars per day for each day's work actually performed; and it is a conceded fact that he was so paid for each and every day he was in the service.

Two years after he ceased to be so employed he brought this action, claiming to recover additional compensation, and recovered a judgment for the sum of $2862.

The plaintiff based his claim for additional pay upon two grounds, viz., that by the Laws and Regulations for the Government of Officers of Customs under the superintendence and direction of Surveyors of Ports, issued in 1877 by the Secretary of the Treasury, it was, among other things, provided as follows: "The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches. Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or

on his charge, until relieved, and he will be excused from performing any duty the following night;" and that, in disregard of this regulation, and of his objections and remonstrances, he was required to perform the duties of both watches in some nights, without being excused from the performance of duty on the following nights.

It is contended that, from these facts, the law will imply a contract between the claimant and the United States, whereby the former will be entitled to be paid for both watches, as if they constituted two days' service.

On the part of the United States it is claimed that the regulation quoted did not constitute an express contract of employment between the parties; that the facts negative any notion of an implied promise to pay any additional sum beyond the statutory rate of three dollars per day; that, even if a breach of contract were shown, no recovery could be had beyond the sum already paid; that there is no obligation on the United States because such a regulation, if it is to receive the construction placed upon it by the court below, is in conflict with the law, and, therefore, null and void; that the construction placed upon the regulation by the court is erroneous; that the regulations of 1877 were repealed and ceased to be in force at any time after March 24, 1883, by reason of subsequent regulations, which should have been applied by the court below.

Section 2733 of the Revised Statutes, under the authority of which the claimant was employed, was as follows:

"Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary or expedient to employ, as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed."

Section 1764 of the Revised Statutes provides that "No allowance or compensation shall be made . . . for any extra service whatever which any officer or clerk may be required to perform, unless expressly authorized by law;"

and section 1765, that "No officer in any branch of the public service or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation in any form whatever from the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states it is for such additional pay, extra allowance or compensation."

Of these provisions, while they were part of the act of August 23, 1842, c. 183, 5 Stat. 508, and before they were carried into the Revised Statutes, it was said by this court, in *Hoyt* v. *United States*, 10 How. 108, 141: "It [this statute] cuts up by the roots those claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation."

Many cases to the same effect, construing these provisions, are collected in *United States* v. *King*, 147 U. S. 676, and in *Mullett's Administratrix* v. *United States*, 150 U. S. 566, 570, where it was said that, "obviously, the purpose of Congress, as disclosed by these sections, was that every officer or regular employé of the government should be limited in his compensation to such salary or fees as were by law specifically attached to his office or employment. 'Extras,' which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service."

We are unable to accept the contention that it was competent for the Secretary of the Treasury, by passing regulations, dividing a day's service into parts, to attach to each part the pay for a full day's work. By the word "day" in section 2733, Congress evidently meant the calendar day; and the purpose of Congress in prescribing the pay of three dollars for every day, and in forbidding any allowance or compensation for extra services, would be defeated if the regulation in question were to be construed as providing that a period of twenty-four hours might be so divided as to justify two or more payments,

to the same person, of the amount fixed for the daily compensation.

Nor do we think that such a construction can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches. In such a case, the provision is that he will be excused from performing any duty the following night. This express provision negatives the inference that if he serves an all-night watch he will be entitled to double pay, and it certainly does not afford a ground on which to base an implied contract for full pay for both watches.

United States v. *Martin*, 94 U. S. 400, does not help this claimant's case, for there the court was construing a statute of Congress declaring that eight hours should constitute a day's work for all laborers, workmen and mechanics. Rev. Stat. sec. 3738. It is not pretended that the present claimant falls within the provisions of that statute. He stands only on the regulation already quoted, and which must be interpreted in such a way as to consist with the statutes mentioned.

It is not found that the claimant himself ever demanded, during the period of his service, the compensation he now seeks. What he complained of was that, after he had performed an all-night service, he was not excused from duty the following night. He was not employed for any specific period, and was at liberty to quit the service if he thought the duties too onerous. He, however, elected to remain during the period above mentioned, and to receive the compensation awarded him by the collector, without any protest as to its insufficiency. It may be fairly presumed that the collector, in paying, and the claimant, in accepting, the money paid, supposed that the payments were in full. Such a course of conduct, we think, brings this claimant within the principle of well-settled cases, that the receipt of payment, purporting to be in full, where there is no fraud or coercion, cannot afterwards be repudiated as insufficient. *Baker* v. *Nachtrieb*, 19 How. 126; *United States* v. *Child*, 12 Wall. 232; *De Arnaud* v. *United States*, 151 U. S. 483.

Such a principle is especially applicable to the transactions of the government, whose expenditures are met by legislative

appropriations. We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of time, and were received without objection or protest, and where there is no pretence of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.

These views sufficiently dispose of the case, and render it unnecessary to consider the other contentions urged on behalf of the government.

The decree of the Court of Claims is reversed, and the cause is remanded to that court with directions to dismiss the claimant's petition.

PAYNE *v.* ROBERTSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 20. Submitted January 17, 1898. — Decided February 28, 1898.

A deputy marshal of the United States, duly appointed as such prior to the passage of the act of March 2, 1889, c. 412, providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President of March 23, 1889, fixing the time of the opening of the lands for settlement, and who entered on said lands and remained there in his official character prior to the day fixed for said opening, was thereby disqualified from making a homestead entry immediately upon the lands being opened for settlement.

PAYNE, the appellant here, filed his bill of complaint in the District Court for the county of Logan and Territory of Oklahoma, First Judicial District, against the present appellees. It was averred in the bill that prior to the passage of the act of Congress of March 2, 1889, providing for opening the Oklahoma lands for settlement, the complainant had been

duly appointed and qualified as a deputy marshal of the United States, and that after the proclamation of the President, on March 23, 1889, declaring that said lands would be open to settlement after noon of the 22d of April, 1889, complainant, in pursuance of orders of his superior officer, the marshal of the United States for the District of Kansas, went into the Territory, to the locality where the United States land office at Guthrie was located, for the purpose of preserving public order. That being rightfully in said Territory and possessed of all the qualifications required by the act of Congress to authorize an entry of lands in such Territory for the purpose of a homestead, complainant, after twelve o'clock noon of said April 22, 1889, settled upon a named quarter section of land, at once commenced digging a well thereon, and claimed the same as his homestead, and that on the next day he duly entered said tract of land at the United States land office in Guthrie, paid the necessary charges and expenses connected with such entry, and thereafter fully complied with all other requirements of the homestead law. Though the bill averred that at the time of his going into the Territory to perform the duties of deputy marshal, complainant "had formed no purpose or intention in regard to selecting and taking a homestead when said lands should be duly opened to settlement," nevertheless it was averred elsewhere in the bill, that in reliance on certain opinions and assurances of the Commissioner of the General Land Office and the Secretary of the Interior, claimed to have been communicated to parties similarly situated as was the complainant, to the effect that persons so situated were not disqualified from entering a homestead when the lands became opened to settlement, complainant remained in the Territory and made the settlement in question. It was further averred that, subsequent to such entry and settlement, the defendant Fitzgerald went upon and claimed said tract of land as a homestead, and that other parties, by force and against the notice and warning of the complainant, proceeded to stake off and occupy a large portion thereof as a townsite in violation of law and of the prior superior homestead rights of the complainant. It was also averred

that on May 9, 1889, the townsite claimants instituted proceedings in the United States land office at Guthrie, Oklahoma, to obtain a cancellation of the homestead entry of complainant, and that ultimately such entry was cancelled, the Secretary of the Interior approving the action of the Commissioner of the General Land Office in ordering such cancellation, on the ground that complainant was disqualified by his presence in the Territory prior to the time fixed in the proclamation of the President, from making the entry. It was further averred that subsequently the Secretary of the Interior, in pursuance of the provision of the act of May 14, 1890, c. 207, appointed the defendants Robertson, Foster and Schnell to prove up and enter the tract of land claimed for a townsite, in trust for the inhabitants of a town to be called East Guthrie, and that after final entry by such trustees a patent of the United States was duly issued to them, which it was claimed vested in said defendants the legal title to the land covered by the patent.

In conclusion, complainant averred that he had done all things required by law in order to be entitled to a final patent, and that he was the equitable owner of the land claimed by him; that the Secretary of the Interior had misapplied and misconstrued the law in cancelling the entry of complainant; and he prayed that the townsite trustees might be divested of the legal title to the tract in question and it be vested in complainant. The bill was demurred to upon various grounds, and the demurrer being sustained a decree was thereupon entered dismissing the bill. On appeal, this decree was affirmed by the Supreme Court of the Territory, and from the decree of affirmance an appeal was taken to this court.

Mr. Henry N. Copp, *Mr. S. D. Luckett*, *Mr. John W. Daniel* and *Mr. Amos Green* for appellant.

Mr. Solicitor General, *Mr. Horace Speed* and *Mr. Bayard T. Hayner* for appellees.

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

In sustaining the demurrer the lower courts passed upon but one of the grounds stated therein, namely, that which asserted that the complaint did not set forth a cause of action. This contention went to the merits of the case and called for a decision of the question whether the Secretary of the Interior, upon the facts found by him, properly held that Payne was disqualified from making his alleged entry. As this is the pivotal point in the case and its decision is free from difficulty, we shall confine ourselves, in this opinion, to its consideration.

The ruling of the Secretary of the Interior that the settlement made by complainant was invalid is averred in the bill to have been based upon the following finding of facts:

"Ransom Payne made homestead entry for the N. W. $\frac{1}{4}$ of section nine (9) on April 23, 1889. Said Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2, 1889, (16 C. L. O. 10, 11,) providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President fixing the day for said opening, and he entered said Territory prior to April 22, and was there at noon of that day in obedience to orders issued by his superior officer, and he was there in the discharge of his official duties. Immediately after 12 o'clock noon of April 22 he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as his age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement."

The statute which it is claimed was misconstrued and misapplied by the Secretary of the Interior in his decision sustaining the cancellation of Payne's entry, is that portion of section 13 of the Indian appropriation act approved March 2, 1889, c. 412, 25 Stat. 980, 1004, which, after stipulating for the disposal of lands acquired from the Seminole Indians to actual settlers under the homestead laws only, except as therein otherwise provided, declared that "until said lands are opened for settlement by proclamation of the President, no person

shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto." It was also claimed that the Secretary misconstrued and misapplied the proclamation of the President of date March 23, 1889, 26 Stat. 1544, fixing the time for the opening of the lands for settlement, particularly that portion which reads as follows:

"Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested by said act of Congress, approved March second, eighteen hundred and eighty-nine, aforesaid, do hereby declare and make known, that so much of the lands, as aforesaid, acquired from or conveyed by the Muscogee (or Creek) Nation of Indians, and from or by the Seminole Nation of Indians, respectively, as is contained within the following-described boundaries, viz.: . . .

"Will, at and after the hour of twelve o'clock, noon, of the twenty-second day of April, next, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations and restrictions contained in said act of Congress, approved March second, eighteen hundred and eighty-nine, and the laws of the United States applicable thereto. . . .

"Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A.D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect."

The question presented is, therefore, solely this: Was the complainant disqualified by reason of his entry into the Territory and his presence there at the hour of the opening of the Territory for settlement, under the circumstances stated in the finding of the Secretary, from making a homestead entry immediately upon the lands being opened for settlement?

This question is governed by the case of *Smith* v. *Townsend*, 148 U. S. 490. The point there presented was whether a

railroad section hand, residing with his family on a railroad right of way within the Territory, and who by reason of his employment and residence was present therein at the hour of noon on April 22, 1889, could immediately thereafter legally enter upon public land adjoining said right of way and claim the same as a homestead. A construction was rendered necessary of the second section of the act of March 1, 1889, c. 317, 25 Stat. 757, 759, ratifying and confirming an agreement with the Muscogee (or Creek) Indians, whereby a large body of their lands, subsequently included in the Territory of Oklahoma, had been ceded to the United States. The section referred to declared the ceded land to be part of the public domain and subject to homestead entry. The concluding sentence of the section read as follows:

"Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto."

A construction was also required of the substantially similar provision contained in the act of March 2, 1889, heretofore quoted, and of the "warning" notice contained in the proclamation of March 23, 1889, which we have also heretofore referred to. To aid in construing these provisions resort was had to the history of the times, in order to ascertain the reason of the statutes as well as their meaning, and the conclusion was deduced (p. 496) that the purpose of the legislative provisions referred to was "to secure equality between all who desired to establish settlements in that Territory. The language is general and comprehensive: 'Any person who may enter upon any part of said lands . . . prior to the time that the same are opened to settlement . . . shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.' 'Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto.' No excep-

tion is made from the general language of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language."

And, again, at page 500, the court observed:

"The evident intent of Congress was, by this legislation, to put a wall around this entire Territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads."

Subsequently, conceding that Smith, the appellant in the case, was lawfully on the right of way of the railroad company, and that he possessed all the qualifications prescribed by the general homestead law, it was said (p. 500):

"He did not have the qualifications prescribed by this statute; and there is nothing to prevent Congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what Congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the Territory — Indian agents, *deputy marshals*, mail carriers, and many others; and, if it intended that these parties, thus rightfully within the Territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter' — 'rightfully or wrongfully' is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settle-

ment, numbers of settlers will immediately pour into it and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities."

And in concluding its opinion the court held that "one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and spirit of the statute, disqualified to take a homestead therein."

The reasoning of the opinion to which we have referred is fully applicable to the facts of the case under review; indeed, the very character of case now presented was referred to in illustration. In accordance with the views there expressed, we must, therefore, hold that as the appellant was within the Territory just prior to, and at the moment of, time when the land first became legally open to settlement, he was disqualified at that time from entering upon and claiming lands therein as a homestead. Manifestly, Congress did not intend that one authorized to enter the Territory in advance of the general public, solely to perform services therein as an employé of the Government, should be at liberty, immediately on the arrival of the hour for opening the Territory to settlement, to assume the status of a private individual and "actual settler," and make selection of a homestead, thus clearly securing an advantage in selection over those who, obedient to the command of the President, remained without the boundaries until the time had arrived when they might lawfully enter.

Affirmed.

UNITED STATES v. EATON.

APPEAL FROM THE COURT OF CLAIMS.

No. 174. Submitted January 4, 1898. — Decided February 28, 1898.

Congress has power, under the Constitution, to vest in the President authority to appoint a subordinate officer, called a vice-consul, to be temporarily charged with the duty of performing the functions of the consular office.

The Revised Statutes confer upon the President full power, in his discretion, to appoint vice-consuls, and fix their compensation, to be paid out of the allowance made by law for the principal consular officer in whose place such appointment shall be made.

The facts that the minister resident and consul-general at Siam had obtained a leave of absence from the President, and was ill and unable to discharge his duties, and that the vice-consul previously appointed had not qualified, and was absent from Siam, created a temporary vacancy and justified an emergency appointment to fill it.

The accounting officers of the Government did not err in treating the salary fixed by law for the joint service of minister resident and consul-general at Siam as indivisible.

There was no error in allowing Eaton compensation for a period during which he performed the duties of the office before his official bond was received and approved.

A consular officer must account to the Government for fees received by him for administering upon the estates of citizens of the United States, dying within the limits of his jurisdiction.

In October, 1890, Sempronius H. Boyd was commissioned as minister resident and consul-general of the United States to Siam; he qualified and proceeded to his post, and was in June, 1892, engaged in the discharge of his official duties. At that time, being seriously ill, Boyd was granted by the President a leave of absence. Before leaving Bangkok, Siam, Boyd, to quote from the findings of fact, "believing his illness would terminate fatally, and being desirous to protect the interests of the Government during his absence and until the then expected arrival from the United States of Robert M. Boyd, whom Sempronius Boyd desired should act as consul-general, the latter called to his aid Lewis A. Eaton (now a plaintiff herein, who was then a missionary at Bangkok) and asked him

to take charge of the consulate and its archives. Thereupon the following letter, dated June 21, 1892, was written by Boyd:

"U. S. Legation and Consulate-General,
"*Bangkok, June* 21, 1892.

"Krom Luang Devawongsee Varoprokan,
"*Minister for Foreign Affairs:*

"Monsieur le Ministre: It is with exceeding regret to me to be forced to abandon my diplomatic and consular duties at the court of His Majesty, with the enjoyment, pleasure, comfort and genuine friendship so marked and distinguished, which the representative of the United States fully appreciated and imparted to his Government.

"All the physicians advise me to go soon to a cold climate. The President has wired me to that effect. In 20 or 30 days I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate and do designate L. A. Eaton vice-consul-general until I am able to assume. If not incompatible with public affairs, I beg you to so regard him.

"Monsieur le Ministre, I am too weak and feeble to call in person, which I would so much like to have done, and expressed my thanks and that of my Government to the foreign office and attachés.

"With assurance of my high consideration, I have the honor to be, Monsieur le Ministre, your obedient servant."

Boyd thereupon administered to Eaton an oath to faithfully discharge the duties of the office of vice-consul-general, etc. The findings state that Boyd believed he had authority for this action. Robert M. Boyd, who is referred to above, was then in the United States, and, although appointed as vice-consul, had not qualified. Sempronius H. Boyd remained in Siam until the 12th day of July, 1892, when he left for the United States, and on his departure he turned over to Eaton, as the representative of the Government of the United States, all the archives and property of the legation. Boyd arrived at his home, in the State of Missouri, on August 27, 1892, and although his leave of absence expired October 26, 1892, he did

not, on account of illness, return to his post, but remained at his home, where he died June 22, 1894. Eaton, on the departure of Boyd, was the sole person "in charge of the interests of the Government at Bangkok, and performed whatever duties were required there of either a minister resident or a consul-general, with the knowledge of the Department of State and with that department's approval. The department acknowledged his communications and acted upon them as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing." On "September 2, 1892, Eaton executed (under instructions from the Department of State) an official bond, calling himself acting consul-general of the United States at Bangkok; this was received at the Department of State and was approved January 3, 1893; subsequently, under instructions from the Department of State, dated January 24, 1893, he executed another bond as vice-consul-general of the United States at Bangkok, which was approved by the Secretary of State April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and consent of Eaton's sureties thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the Department of State, directing him to insert the date of his appointment in the blank space reserved for the date."

On November 2, 1892, the Secretary of State wrote Eaton, enclosing him the commission of Robert Boyd, which had been issued in 1891, as vice-consul at Siam. In February, 1893, Robert Boyd appeared in Siam, and, in accordance with the instructions of the Secretary of State, Eaton introduced him as vice-consul, and on May 18 he qualified, when Eaton's performance of the duties of the office ceased. The findings below say:

"Eaton rendered to the accounting officers of the Treasury his account for salary for the entire period of his service, in which he charged and claimed one half of the salary of $5000 per annum appropriated for said post of minister resident and consul-general, from July 12, 1892, to October 26, 1892; that is, from the departure of the minister to and including the

date on which the leave of absence for sixty days (excluding transit time) expired, and the full salary at the rate of $5000 per annum from October 27, 1892, to May 17, 1893, inclusive.

"Eaton also rendered with his salary account a return of all fees collected during the entire period of his service, both fees official and unofficial, including fees notarial and fees and fines received in the United States consular court at Bangkok, amounting in all to $245.41.

"Eaton also rendered to the Department of State his account of disbursements from the contingent fund of the legation and consulate-general from July 1, 1892, to April 30, 1893, which was there approved.

"In the settlement of said accounts by the accounting officers of the Treasury the sum of $5.73, expended by Eaton for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

"In the settlement of Eaton's salary accounts by the Treasury the total amount of fees received, to wit, $245.41, was charged to him and covered into the Treasury. The one half salary from July 12, 1892, to October 26, 1892, amounting to $726.90, was suspended for 'further information,' which was thereafter furnished; but this sum remains unpaid. The full salary from October 27, 1892, to May 17, 1893, amounting to $2792.35, as approved by the Department of State, was allowed and credited. Deducting from this $245 leaves in Eaton's favor a balance of $2546.94, which was certified to his credit by the First Comptroller December 4, 1893, no part of which has been paid."

It is inferable from the facts found that the amount of compensation which the accounting officers of the Government settled and allowed in favor of Eaton, as above stated, was withheld from him because of a claim advanced by Sempronius H. Boyd to the entire salary as minister resident and consul-general during a part of the time for which a portion of or the whole of the salary had been allowed Eaton. Indeed, on the 16th of June, 1894, Sempronius H. Boyd sued in the court below to recover his full salary as minister resident and consul-

general from July, 1892, to February 11, 1893. Thereupon in December, 1894, Eaton commenced his action to recover the sums embraced in the following items:

A. For notarial or unofficial fees charged to him in the settlement of his salary account by report No. 162,708, as aforesaid, as per Exhibit C herewith	$177 41
B. For the item of salary suspended in the settlement of his accounts for salary by report No. 162,708, as aforesaid	726 90
C. For the balance of salary found due to claimant by report No. 162,708, as aforesaid, and certified to his credit	2546 94
D. For item expended for contingent expenses by claimant, and suspended in the settlement of his account therefor by report No. 162,709, as aforesaid	5 73
	$3456 98

The court below consolidated the two cases, and on its finding the facts above recited, rejected the claim of Sempronius H. Boyd, his widow having been substituted as a party plaintiff on his death, and allowed the full amount of the claim sued for by Eaton. From this judgment the United States alone appeals.

Mr. Assistant Attorney General Pradt and *Mr. Charles W. Russell* for appellants.

Mr. John C. Chaney and *Mr. John R. Garrison* for appellee.

Mr. Justice White, after making the foregoing statement of the case, delivered the opinion of the court.

The errors relied upon to obtain a reversal rest on three contentions: 1st. That the appointment of Eaton as acting

vice-consul was without warrant of law, and hence not susceptible of ratification by the State Department. 2d. Even if the appointment was authorized by law, the statute conferring the power was in violation of the Constitution of the United States. 3d. Because, even conceding the appointment to have been valid, the court allowed a sum in excess of the amount which the claimant was legally entitled to recover. We will dispose of these contentions in the order stated.

In the third paragraph of section 1674, Revised Statutes, the following definition is found: "Vice-consuls and vice-commercial agents shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls or commercial agents, when they shall be temporarily absent or relieved from duty." And this definition by Congress of the nature of a vice-consulship was not changed by the amendment to section 4130 of the Revised Statutes by the act of February 1, 1876, c. 6, 19 Stat. 2, as the obvious purpose of that act was simply to provide that where the words "minister," "consul" or "consul-general" were generally used, they should be taken also as embracing the subordinate officers who were to represent the principals in case of absence. In other words, that where a delegation of authority was made to the incumbent of the office, the fact that the name of the principal alone was mentioned should not be considered as excluding the power to exercise such authority by the subordinate and temporary officer, when the lawful occasion for the performance of the duty by him arose. Provision for the appointment and the pay of vice-consuls are found in the following sections of the Revised Statutes:

"Sec. 1695. The President is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice-consuls, vice-commercial agents, deputy consuls and consular agents, therein, in such manner and under such regulations as he shall deem proper; but no compensation shall be allowed for the services of any such vice-consul, or vice-commercial agent, beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment

shall be made. No vice-consul, vice-commercial agent, deputy consul or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the President."

"SEC. 1703. Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed, as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer; . . ."

The Consular Regulations, promulgated with the approval of the President, contain the rules adopted in execution of the powers expressed in the above provisions. When the appointment in controversy took place, the regulations of 1888 were in force, and in sections 36, 87 and 471 thereof were found the rules governing the appointments of vice-consuls and temporary vice-consuls and the manner of their payment. These sections are as follows:

"36. Vice-consuls-general, deputy consuls-general, vice-consuls, deputy consuls, vice-commercial agents, deputy commercial agents and consular agents are appointed by the Secretary of State, usually upon the nomination of the principal consular officer, approved by the consul-general (if the nomination relates to a consulate or commercial agency), or if there be no consul-general, then by the diplomatic representative. If there be no consul-general or diplomatic representative, the nomination should be transmitted directly to the Department of State, as should also the nomination for subordinate officers in Mexico, British India, Manitoba and British Columbia. The nomination for vice-consul-general and deputy consul-general must be submitted to the diplomatic representative for approval, if there be one resident in the country. The privilege of making the nomination for the foregoing subordinate officers must not be construed to limit the authority of the Secretary of State, as provided by law, to appoint these officers without such previous nomination by the principal officer. The statutory power in this respect is reserved, and it will be exercised in all cases in which the

interests of the service or other public reasons may be deemed to require it."

"87. In case a vacancy occurs in the offices both of consul and vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State. In those countries, however, where there are consuls-general, to whom the nominations of subordinate officers are required to be submitted for approval, the authority to make such temporary appointments is lodged with them. Immediate notice should be given to the diplomatic representative of the proposed appointment, and, if it can be done within a reasonable time, he should be consulted before the appointment is made. If such a vacancy should occur in a consulate general, the temporary appointment will be made by the diplomatic representative."

"471. The compensation of a vice-consul-general, vice-consul, or a vice-commercial agent is provided for only from that of the principal officer. The rules in respect to his compensation are as follows, viz.:

"1. In case the principal officer is absent on leave for sixty days or less, in any one calendar year, and does not visit the United States, the vice-consular officer acting in his place is entitled to one half of the compensation of the office from the date of assuming its duties, unless there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice-consular officer is entitled to the full compensation of the office.

"2. If the principal visits the United States on such leave and returns to his post, the foregoing rule will include the time of transit both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise, the rule will embrace only the time of absence, not exceeding sixty days,

together with the time of transit from his post to his residence in the United States."

It is plain that the above sections of the Revised Statutes confer upon the President full power, in his discretion, to appoint vice-consuls and fix their compensation; that they forbid any appointment, except in accordance with the regulations adopted by the President, with a limitation, however, that the compensation of these officers, if appointed, should be solely "out of the allowance made by law for the principal consular officer in whose place such appointment shall be made." The regulations just quoted come clearly within the power thus delegated. The legality of the appointment in question is then first to be determined by ascertaining whether it was authorized by the regulations. Before analyzing the text of the regulations their general purpose must be borne in mind. The first section referred to, (36,) lodges the power in the Secretary of State in all cases to appoint a vice-consul or vice-consul-general. The manifest object of the provision was to prevent the continued performance of consular duties from being interrupted by any temporary cause, such as absence, sickness or even during an interregnum caused by death and before an incumbent could be appointed. This was secured by the designation in advance of a subordinate and temporary official who, in the event of the happening of the foregoing conditions, would be present to discharge the duties. Section 87 provided for a condition of affairs not embraced in section 36, that is, for the case where there would arise a temporary inability to perform duty on the part of both the consul and vice-consul. The two provisions together secure an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall either the regular incumbent of the office of consul or the vice appointee.

In view of the recognition of Eaton by the State Department and the express approval of his bond as vice-consul, it would result that, at least from the date of the official action of the Secretary of State, he would be entitled to be treated

as appointed by that officer under section 36. But as the sum of the salary allowed by the court below antedated the approval of the bond, we pretermit this question, and come to consider whether Eaton's designation was within the regulation for emergency appointments provided in section 87.

The first requisite for calling the emergency power into play exacted by this regulation was, that there should be a vacancy in the office both of consul-general and vice-consul. It is clear that the findings establish that there was such vacancy within the meaning of the regulation. The fact that the minister resident and consul-general had obtained a leave of absence from the President, and was sick and unable to discharge his duties, and that the vice-consul previously appointed had not qualified, and was absent from Siam, did not, it is argued, justify an emergency appointment, because these facts did not create a vacancy in the narrower sense of that word. But the vacancy to which regulation 87 relates cannot be construed in a technical sense without doing violence to both the letter and spirit of the statute which authorized the regulation, and without destroying the true relation and harmonious operation of the two rules on the subject expressed in sections 36 and 87. That the statute did not contemplate a merely technical vacancy in the office of a consul-general, before a vice-consul could be appointed, clearly results from the fact that it defines the latter and subordinate officer as one "who shall be substituted temporarily to fill the places of consuls-general . . . when they shall be temporarily absent or relieved from duty." The power to make the appointment when the consul-general was only temporarily absent of necessity conveyed authority to do so, although there might be no vacancy in the office but simply an absence of the principal officer. The provision of the statute limiting the pay of the vice-consul or temporary officer out of the pay of the principal official, the incumbent, is also susceptible of but one construction, that is, that the temporary officer could be called upon to discharge the duties, even although there was an incumbent where from absence or other adequate cause he ceased temporarily to perform his duties. Regulation 36, adopted in

pursuance of the statute and providing for the appointment of vice-consuls simultaneously or concurrently with the appointment of consuls, and regulating their pay, is as clear on this subject as is the statute. As regulation 87 but adds another safeguard to that created by the general terms of 36, by providing for a contingency not contemplated in 36, that is, the case of vacancy in both the consular and vice-consular offices, it follows that the word "vacancy" in 87 imports provision for a condition like unto that contemplated by the law and provided for in 36. Looking at the two regulations together, and taking in view their purpose, it is obvious that the appointment of the temporary officer for which they both provide depended not solely on a technical vacancy, but included a case where there arose a mere absence or inability of the principal and vice-officer to discharge the duties of the consular office.

Nor is it true to say that because regulation 87 confers the power to appoint an emergency vice-consul-general "on the diplomatic representative," therefore Boyd, who was both minister resident and consul-general, was without authority to make a temporary appointment to the latter office. The argument by which this proposition is supported is as follows: As Boyd filled both offices, if there was inability to discharge the duties of the one, there was also like inability as to the other, and therefore incapacity to designate in one character a temporary officer to fill the duties of the other. The error here lies in assuming that because an official is temporarily prevented from performing the duties of his office thereby he becomes without capacity to make an emergency appointment. There is no essential identity between the two conditions, and it was because of their evident distinction that the regulations caused the existence of one condition, the temporary failure to perform duty, to give rise to the other; that is, the birth of the power to make the temporary appointment. It would lead to an absurd conclusion to construe the regulation as meaning that the very circumstance which generated the power to make the appointment had the necessary effect of preventing the coming into being of the power created.

If the two offices of minister resident and consul-general be treated as distinct and separate functions, although vested in the same natural person, the authority was clearly in the minister to appoint the vice-consul-general. If, on the other hand, the two functions be considered as indivisible the like result follows, since the mere fact that the officer had obtained a leave or was sick and unable to be present in his office and discharge its duties did not deprive him of the capacity to make a temporary appointment. In its ultimate analysis, the proposition we have just considered substantially maintains that in no case where the duties of the minister resident and consul-general are united in one person can an emergency consul-general be designated under section 87. It would follow that in every such case where leave of absence was granted or sickness arose, and there was no vice-consul-general present, the public interest must inevitably suffer in consequence of the closing of the consular office. But the very purpose of the statute and regulations was to guard against such a contingency. The evil consequences to result from admitting the proposition is conceded, but the result is attributed not to error in the argument, but to a presumed omission in the regulations, which should, it is urged, be corrected, not by judicial construction, but by an amendment or change in the regulations. The error in the proposition, however, cannot be obscured by assigning the consequences which flow from it to a defect in the regulations, when, if a sound rule of interpretation be applied, the supposed omission does not arise.

The construction rendered necessary by a consideration of the text of the statute and the regulations, by the remedy intended to be afforded, and the evil which it was their purpose to frustrate, is that the power to designate in case of the absence or the temporary inability of the consul-general was lodged in a superior officer, if there was such officer in the country where the consul discharged his duty, and, if not, on the happening of the conditions contemplated by the rule the officer highest in rank was authorized to make the temporary appointment. Doubtless it was this construction which caused the Department of State to recognize Eaton's appointment

and the Secretary of State to approve his bond as vice-consul-general. The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.

The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution. Although article II, section 2, of the Constitution requires consuls to be appointed by the President "by and with the advice and consent of the Senate," the word "consul" therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the heads of departments." Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered. The manifest purpose of Congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of that word. A review of the legislation on the subject makes this quite clear. Section 1674, Revised Statutes, took its source in "An Act to regulate the Diplomatic and Consular Systems of the United States," approved August 18, 1856, c. 127, 11 Stat. 52. Whilst in the earlier periods of the Government, officers known as vice-

consuls were appointed by the President and confirmed by the Senate, the officials thus designated were not subordinate and temporary, but were permanent and in reality principal officials. 7 Opinions Attorneys Gen. 247; 3 Jefferson's Writings, 188. During the period, however, whilst the office of vice-consul was considered as an independent and separate function, requiring confirmation by the Senate, where a vacancy in a consular office arose by death of the incumbent, and the duties were discharged by a person who acted temporarily, without any appointment whatever, it would seem that the practice prevailed of paying such officials as *de facto* officers. In 1832 the Department of State submitted to Mr. Attorney General Taney the question of whether the son of a deceased consul, who had remained in the consular office and discharged its duties, was entitled to the pay of the office. In replying, the Attorney General said:

"If, after the death of Mr. Coxe, his son performed the services, and incurred the expenses of a residence there, and his acts have been recognized by the Government, I do not perceive why he should not receive the compensation fixed by law for such services. He was *de facto* consul for the time and the public received the benefit. . . . The practice of the Government sanctions this opinion, as appears by the papers before me; and in several instances similar to this since the law of 1810, the salary has been paid. . . . The public interest requires that the duties of the office should be discharged by some one; and where, upon the death of the consul, a person who is in possession of the papers of the consulate, enters on the discharge of its duties, and fulfils them to the satisfaction of the Government, I do not perceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public, and if he is so recognized, the law of Congress entitles him to his salary." 2 Opinions Attorneys Gen. 523, 524.

The terms of the law and its construction, in practice for more than forty years, sustain the theory that a vice-consul is a mere subordinate official and we do not doubt its correctness.

We come, then, to consider the errors assigned as to the

amount of the salary. Prior to February 26, 1883, the consular official at Bangkok was of the third class, and his salary was $3000. At the date mentioned, an appropriation was made for minister resident and consul-general to Siam, $5000. 22 Stat. 424, c. 56. It was on this salary, which was reiterated in subsequent appropriations, that the allowance to Eaton was computed by the accounting officer of the Treasury, and adjudged by the court below. It is first claimed that as the vice appointment related only to the consul-general's office and not to that of minister resident, there was error in computing the allowance on the basis of the salary of both offices. Although both the statute and the regulations provide for the payment of the vice official from that of the principal officer, and of this fact Congress presumably had knowledge, yet in no case for the appropriation for the salary of the minister resident and consul-general to Siam has there been an attribution of a portion thereof to one function and another part to the other. On the contrary, Congress has treated the compensation of the two as an indivisible unit. As the duties of the two offices have thus been inseparably blended by Congress, and presumably the performance of the function of one office embraced of necessity the discharge of the duties of the other, we do not think the accounting officers erred in treating the salary fixed for the joint service as indivisible, and in not attempting an apportionment, when Congress had failed to direct that such division be made, or to furnish the method of making it. Indeed, the finding that Eaton executed all the duties of both offices required of him by the State Department, during his temporary tenure, implies that he performed, at the request of the State Department, as consul-general all the functions of minister resident. Thus the facts bring the case directly within Revised Statutes, § 1738, which provides that a consular officer may exercise diplomatic functions in the country to which he is appointed, when there is no officer of the United States empowered to discharge such duties therein, and when the consular officer is "expressly authorized by the President to do so." Conclusive cogency results from these considerations when it is borne in mind that

by the treaty between Siam and the United States there was but one diplomatic and consular officer of the United States in Siam, and that by the express terms of one of the later treaties with Siam the word "consul-general" of the United States therein used is defined to include any consular officer of the United States in Siam. 23 Stat. 782, 783.

It is further argued that as the vice-consul is required by law (Rev. Stat. § 1698) before he enters on the execution of his trust to give bond, that there was error in allowing Eaton compensation for a period prior to the approval of his bond by the Secretary of State on April 3, 1893. The finding by the court below that Eaton entered on the discharge of his duties when designated, at once communicated with the Department of State, and was recognized as consul-general and allowed to perform all the duties of that office, answers this contention. It is settled that statutory provisions of the character of those referred to are directory and not mandatory. In *United States* v. *Bradley*, 10 Pet. 343, which was a suit upon a bond given by one Hall as paymaster, it was contended that as the bond required by the statute to be executed before an appointee could enter upon the duties of the office had not been furnished, Hall was not accountable as paymaster for moneys received by him from the Government. The court, however, held otherwise, saying, per Story, J. (p. 365): "The giving of the bond was a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster." In *United States* v. *Linn*, 15 Pet. 290, suit was brought upon an undertaking executed by Linn as receiver of public moneys, with sureties. A contention was advanced like that made in the *Bradley case*. The undertaking in question was not executed under seal, while the statute required that the appointee should, before entering upon the duties of the office, execute a "bond." In holding the undertaking enforceable as a common law obligation, and answering the claim that it was not valid for want of a consideration, the court, per Thompson, J., said (p. 313): "The emoluments of the office were the

considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment." And, in referring approvingly to the decision in the *Bradley case*, and in reiterating the reasoning of the opinion in that case to which we have already alluded, the court said (p. 313): "According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was given. And although the law requiring security was directory to the officers entrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law." At page 314 it was also observed that it was not the mere appointment of Linn as receiver that formed the consideration of the instrument sued upon, but the emoluments and benefits resulting therefrom.

It is true, as claimed by counsel for the Government, that in the opinion delivered in the subsequent case of *United States* v. *LeBaron*, 19 How. 73, expressions are found which appear inconsistent with those to which we have just called attention. But the question presented in the *LeBaron case* was as to the proper construction of the language of a bond which had been given by a Government official, subsequent to his permanent appointment as a deputy postmaster, which bond was executed at the time the appointee was performing the duties of the office under a temporary appointment made during a recess of the Senate. Suit having been brought for a breach of the condition of the bond, it was contended that the terms of the instrument stipulated only for liability for the proper performance of the duties of the office under the first appointment. It was held, however, that as the statute required the giving of bond before the appointee could enter upon the execution of the duties of the office, it could not be presumed that the bond was intended to relate back to an earlier date than the time of its acceptance, and that its terms should be given a prospective and not a retrospective operation. In the course of the reasoning on this branch of the

case general expressions were used to the effect that the appointee could not act and the bond could not take effect until its approval; and in discussing the further contention that the appointee was not in office under the second appointment at the time the bond took effect, because his commission had not been sent to him, and was not actually transmitted until after the death of the President who had made the appointment, it was observed that the acts required by the statute to be performed by the appointee before he could enter on the possession of the office under his appointment were "conditions precedent to the complete investiture of the office;" and that "when the person has performed the required conditions, his title to enter on the possession of the office is also complete." But this general language must be confined to the precise state of facts with reference to which it was used, and does not warrant the inference that it was intended to overrule the doctrine enunciated in the *Bradley* and *Linn cases*, which were not even referred to. Indeed, that this was not supposed to be the deduction proper to be drawn from the reasoning in the *LeBaron case*, is shown by the fact that in the later case of *United States* v. *Flanders*, 112 U. S. 88, the doctrine of the earlier cases was carried to its legitimate result. In the *Flanders case*, the precise question raised in the case at bar was presented and decided. A collector of internal revenue who was required before entering upon the duties of his office to give bond and who was also required to take an oath before becoming entitled to the salary or emoluments of the office, failed to give bond or take the oath until more than two months after he had been allowed to enter upon the duties of the office. In a suit upon the bond, credit was claimed for compensation for services performed during the period preceding the taking of the oath and giving of bond, and the allowance was resisted by the Government on the ground that under the statutory provisions referred to the right to compensation did not exist. The court, however, held otherwise, saying (p. 91):

"If the collector is appointed, and acts and collects the moneys, and pays them over and accounts for them, and the

Government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments' of the office.

"But we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commission as compensation, does not arise until he takes and subscribes the oath or affirmation, but that when he does so his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the Government accepted, provided he has paid over and accounted for such moneys."

This was evidently the view taken by the State Department, since on January 24, 1893, when the bond was returned for reëxecution in another form, Eaton was directed to insert therein the date of his original appointment. These considerations dispose of all the questions presented, except the contention that there was error in awarding to Eaton certain items of fees collected and reported to the Treasury and charged to him, included in which were commissions of $67.91 earned on the settlement of two estates, and the sum of $5.73 disbursed by Eaton for lights upon the birthday of the King of Siam. We need only examine the legality of the two items just mentioned, as the sole objection made to the validity of the others is that Eaton was not entitled to charge them, because he was not lawfully acting as consul-general.

It is contended that the fees collected for settlement of estates should not be allowed, because the services were "official," and we are referred to paragraph 508, subdivision 69, of the Consular Regulations of 1888, as supporting this claim. On the part of the appellee, however, it is urged that the point has been held otherwise in *United States* v. *Mosby*, 133 U. S. 273, where it is said a similar objection to like charges was decided to be without merit.

It was held in the *Mosby case* that the Court of Claims properly allowed to Mosby — who had been consul at Hong Kong

from February, 1879, to July, 1885 — the sum of $8.21, as "five per cent commission on the estate of Alice Evans, May, 1881." In disposing of the matter the court said (p. 287) that "this evidently was a fee in the settlement of a private estate, and was properly allowed." It does not distinctly appear whether the fee there considered was controlled by the Consular Regulations of 1874 or by those of 1881. This is obvious when it is considered that the regulations of 1881 were only promulgated in May of that year. The regulations controlling this case are those of 1888, which in the respect in question are substantially like those of 1881, whilst fees earned prior to May, 1881, were governed by the regulations of 1874, which differed on the subject from those of 1881. Indeed, this difference between the two was referred to in the *Mosby case*, where it was said (p. 280):

"Paragraph 321 of the Regulations of 1874 is as follows: '321. All acts are to be regarded as "official services" when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States.' It is to be observed that this paragraph used the word 'required,' and does not say that all acts are to be regarded as official services when the consul uses his seal and title officially, or either of them."

* * * * *

"Paragraph 489 of the Regulations of 1881 reads as follows: '489. All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees received therefor are to be reported and accounted for to the Treasury of the United States,' except when otherwise expressly stated therein."

In view of the fact that it is not certain when the fees in question in the *Mosby case* were earned and of the difference between the Consular Regulations of 1874 and 1881, we shall not inquire into the correctness of the decision in the *Mosby case* as applied to the precise facts there considered, but will examine the question here presented in the light of the Consular Regulations of 1888 and as one of first impression.

Opinion of the Court.

By section 1745 of the Revised Statutes, the President is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged by diplomatic and consular officers for official services, "and to designate what shall be regarded as official services, besides such as are expressly declared by law." Section 1709 of the Revised Statutes makes it the "duty" of consuls and vice-consuls to administer upon the personal estate left by any citizen of the United States who shall die within their consulate.

The fact that the statute makes it the duty of a consul to administer on personal estates gives rise to the clearest implication that fees for such services were official fees, and the regulations on the subject promulgated by the President clearly support this view. Thus, in the tariff of consular fees contained in paragraph 508 of the Consular Regulations of 1888 it is provided, in item numbered 56, as follows:

"56. For taking into possession the personal estate of any citizen who shall die within the limits of a consulate, inventorying, selling and finally settling and preparing or transmitting, according to law, the balance due thereon, five per cent on the gross amount of such estate. If part of such estate shall be delivered over before final settlement, two and one half per cent to be charged on the part so delivered over as is not in money, and five per cent on the gross amount of the residue. If among the effects of the deceased are found certificates of foreign stocks, loans or other property, two and one half per cent on the amount thereof. No charge will be made for placing the official seal upon the personal property or effects of such deceased citizen, or for breaking or removing the seals."

And, by paragraph 375 of the same regulations, a consular officer is directed to report to the Treasury Department fees of this character, and if he be a salaried officer to hold the same subject to the order of the department. This decisive provision is besides supplemented by paragraph 501 of the regulations, in which it is declared that "all acts or services for which a fee is prescribed in the tariff of fees are to be regarded as *official* services, and the fees charged and received

therefor are to be reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein."

As the statute made it the official duty of a consul to administer upon the estates of American citizens dying within the consular district, and the President, by virtue of the power vested in him, has clearly placed such duties in the category of "official services," and required the fees earned therefor to be accounted for as "official fees," it is plain that the accounting officer of the Treasury properly charged Eaton with the amount of such fees, and that the Court of Claims erred in its ruling to the contrary.

The ground of objection urged to the allowance by the Court of Claims of the item of $5.73 is stated in the brief to be that the disbursement "was personal or diplomatic and wholly foreign to consular business." We are unable, however, to say that the Court of Claims erred in its finding in respect to this item, as follows: "The petty item for lights upon the King's birthday was approved by the Department of State, and appears to be a charge within the discretion of that department; it is therefore allowed."

It follows from the foregoing considerations that the only error committed by the court below was in treating the fees for the settlement of estates as unofficial, when they should have been held to be official. But this does not render it necessary to reverse the judgment in its entirety, but only to modify the same. Rev. Stat. sec. 707; *Ballew* v. *United States*, 160 U. S. 187. This modification will be effected by deducting from the principal sum of $3456.98, found due by the Court of Claims, $67.91, being the amount of the fees improperly allowed. The judgment of the Court of Claims is therefore modified by reducing the amount thereof to $3389.07, and as so modified it is

Affirmed.

BELEY *v.* NAPHTALY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 180. Submitted January 5, 1898. — Decided February 28, 1898.

The patent to the defendant in error does not preclude this court from inquiring into the effect of the act of July 23, 1866, c. 219, "to quiet land titles in California;" and the court holds that that act does not require proof of an actual grant from the Mexican authorities to some grantee through whom the title set up is derived; but that the proper officers of the United States had jurisdiction to issue a patent upon being satisfied of the existence of those facts in regard to which it was their province to determine; and that the act includes those who, in good faith and for a valuable consideration, have purchased land from those who claimed and were thought to be Mexican grantees or assigns, provided they fulfil the other conditions named in the act.

The facts in this case do not show, as matter of law, that Millett could not have been a *bona fide* purchaser of these lands for a valuable consideration; and whether in fact he were so was a fact to be determined by the Government on the issue of the patent, which precluded further inquiry into that question.

A person who was within the statute and had the right to purchase land as provided therein, could assign or convey his right of purchase and his grantee could exercise that right.

The rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter were all acts within his jurisdiction.

THE defendant in error, who was the plaintiff below, brought this action in the Circuit Court of the United States for the Northern District of California to recover the possession of certain lands described in his complaint; and also the value of the rents, issues and profits thereof. He alleged that he was the owner in fee of the lands in question and entitled to their possession, and that while such owner the defendants wrongfully entered upon the lands and ousted him therefrom, and have since wrongfully withheld from him the possession thereof. He further alleged that he was the owner of the land by virtue of a patent duly and regularly issued to him by the United

States in the year 1893, under and in pursuance of the provisions of the act of Congress of April 24, 1820, c. 51, 3 Stat. 566, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, and also under the provisions of section 7 of the act of Congress of July 23, 1866, c. 219, entitled "An act to quiet land titles in California," and that the defendants denied the validity of that patent.

The defendants answered, denying the various allegations of the complaint, and the case came to trial without a jury, a jury having been waived by all the parties.

The plaintiff put in evidence the patent issued to him from the United States for the land described in the complaint, and proved that while he was in the peaceable and quiet possession of such land the defendants entered upon it and ousted him therefrom, and have ever since detained the land from him. He also proved its rental value.

The bill of exceptions contains the following:

"It was then admitted by the defendants' counsel that at the time of the issuance of the patent hereinbefore described the lands therein and in the complaint described were public lands of the United States, subject to sale under the laws of the United States. It was here conceded by defendants' counsel that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein, or any part thereof, either by certificate of purchase, patent or anything of the kind.

"The plaintiff then rested."

The plaintiff's action rests primarily upon section 7 of the statute of the United States, entitled "An act to quiet land titles in California," approved July 23, 1866. 14 Stat. 218, 220. That section, so far as material, reads as follows:

"Sec. 7. *And be it further enacted*, That where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and

have used, improved and continued in the actual possession of the same according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the commissioner of the general land office, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries."

To maintain their defence, the defendants then offered in evidence the application made by the plaintiff to purchase the lands from the United States pursuant to the seventh section above quoted. The application and the accompanying papers were offered for the purpose of showing that there had, in fact, never been any grant from the Mexican government to the Romeros, through whom, as supposed Mexican grantees, the plaintiff below derived his claim, and by reason of which claim he had made application to the land office under the provisions of the seventh section of the above-mentioned act of Congress. The papers offered in evidence by defendants showed that while the country was under Mexican rule the Romeros had taken proceedings to obtain a grant of lands, which included the land in question, from the Mexican government, and that such proceedings had certainly gone as far as a final decree by the governor providing for the making of a grant asked for, but there was no record evidence of any actual grant ever having been made. The facts as to the documentary evidence in the case are fully set forth in the report of the case of *Romero* v. *United States*, 1 Wall. 721.

The evidence so offered by defendants was objected to on the part of the plaintiff as immaterial, incompetent and irrelevant for the purpose of affecting the validity of the patent under which the plaintiff claimed title to the lands in question. The court sustained the objection and the defendants duly excepted. Thereupon the defendants rested, and the court ordered judgment to be entered in favor of the plaintiff and

against the defendants for a recovery of the land in accordance with the prayer of the complaint. This judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, 44 U. S. App. 232, and the case is brought here for review.

Mr. Henry F. Crane for plaintiffs in error.

Mr. A. T. Britton and *Mr. A. B. Browne* for defendant in error.

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

I. The defendant in error insists that his patent is conclusive evidence that he is a purchaser within the meaning of the seventh section of the statute above quoted, and that no fraud being alleged, no evidence can be received for the purpose of in any other way invalidating the patent issued to him by the Government of the United States.

The patent does not preclude this court from construing the act of 1866, nor does it preclude an inquiry by the court whether the patent was issued without authority or against the expressed will of Congress, as manifested in the statute. *Burfenning* v. *Chicago &c. Railway*, 163 U. S. 321, and cases there cited. If it were so issued, it is the duty of the court to give no weight to it. The proper construction of the act of 1866 is, therefore, the first question to be considered.

In order that a person may avail himself of that act, is it necessary that an actual grant from the Mexican authorities to some grantee through whom the title is derived should be proved? If so, the judgment in favor of the plaintiff in this case must be reversed, as no such grant was proved. We are of opinion, however, that the statute does not require proof of such a grant.

When the United States took possession of that portion of the country in which the lands in question are situated, it is public knowledge that there were many claims made by

private individuals to lands under alleged grants from the preceding Mexican government. In order to ascertain and settle the questions arising thereunder, Congress, on the 3d of March, 1851, passed an act, c. 41, 9 Stat. 631, in which a commission was constituted and before which claims of that character might be proved. The eighth section provided, "That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

It will be noticed that the jurisdiction here given was only to decide upon the validity of the claim presented, and if the commission decided that the claims were not valid ones, as derived from the Mexican or Spanish government, it was the duty of the commission to reject them. Provision was made for a review of the decision of the commissioners by the District Court of the district in which the lands claimed were situated, which court, upon such review, was authorized and required "to decide on the validity of such claim," and an appeal from the decision of the District Court was allowed to be taken to the Supreme Court of the United States.

It appeared, from the documents offered in evidence in this action, that the Romeros had presented their claim to this commission, which had rejected it as not being a valid claim, and this rejection had been affirmed by the District Court and by the Supreme Court in the case in the first of Wallace, mentioned above. There must undoubtedly have been, at the time of the enactment of the act of 1866, many cases existing

in that part of the country, where claims of *bona fide* purchasers for value founded upon supposed rights or grants derived from the Mexican or Spanish government had been held to be invalid by the commission appointed under the act of 1851, and where, notwithstanding such decision, the claimants had remained in possession of the lands as originally acquired by them, there being no valid adverse right or title to the lands of which they were in possession, excepting that of the United States. This would have been the natural result arising from the difficulty in making formal and sufficient proof before the commission of valid rights and titles derived from the Mexican or Spanish government. It was only valid claims that the commission had power to allow. Where claims had been made and theretofore adjudged invalid by the Supreme Court of the United States, Congress had, in some instances, by private act, permitted those who were *bona fide* purchasers from the claimant whose claim had been adjudged invalid, or from his assigns, to enter the land so purchased according to the lines of the public surveys then provided for, at $1.25 per acre, to the extent to which the lands had been reduced to possession at the time of the adjudication by the Supreme Court. Such is the act, approved March 3, 1863, c. 116, 12 Stat. 808, entitled "An act to grant the right of preëmption to certain purchasers of the 'Soscol Ranch' in the State of California." See also a similar act, approved June 17, 1864, c. 133, 13 Stat. 136; also the act approved July 2, 1864, c. 218, 13 Stat. 372; also the act approved March 3, 1865, c. 115, 13 Stat. 534.

Other acts were also passed by Congress recognizing in effect the equitable rights of parties who were grantees of those who had claimed a right or title under the Mexican or Spanish government, and which right or title had subsequently been held to be invalid by the courts of our own Government. The hardship to be relieved from by these special acts and by the general act of 1866 did not solely exist in the fact that there had been a formal grant from the Mexican authorities, which was in some manner defective, so that no valid claim or right could grow out of such grant, but it also existed when a claimant in possession of land which he

had *bona fide* and for a valuable consideration purchased of one who claimed his right or title from the Mexican or Spanish government by way of a grant therefrom, was nevertheless unable to prove such grant, and as a consequence could not prove any valid title or claim in himself. Whether such invalidity were on account of some defect in the proceeding which resulted in a defective grant or whether it existed by reason of an inability to prove an actual grant was not material, so long as the claim of title actually rested upon what was in good faith supposed to have been a valid claim under the government of Mexico, and so long as there was no valid adverse right or title other than that of the United States. Persons occupying lands which they possessed under such circumstances and by such a claim were entitled to considerate treatment from the Government of the United States. They had in good faith paid a valuable consideration for the land of which they were in possession by virtue of such purchase, and they ought to have the first right to make good their title by purchase from the Government at the lowest price named.

The defendants on the trial conceded these lands were, when the patent in this case was issued, public lands of the United States, subject to sale under the laws thereof, and that they did not intend to connect themselves in any manner or form with the title of the United States to the lands in question. There is no proof or offer of any proof in the record tending to show the existence of any adverse valid claim to the land, other than the United States, and the admission just alluded to taken in connection with the absence of such proof shows that when the patent issued there existed in fact no other adverse valid claim upon the land than that of the United States. Those who could not show actual grants from the Mexican government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation.

"Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.* In Bacon's Abridgment, Statutes 1, 5; Puffendorf, book 5, chapter 12; Rutherford, pp. 422, 527; and in Smith's Commentaries, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless were not within the statutes, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction. . . . In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: '*Æquitas est correctio legis generaliter latæ qua parti deficit.*'" *Riggs* v. *Palmer*, 115 N. Y. 506, 510. Opinion by Earl, J.

Construing the act of Congress of 1866 under the circumstances above outlined, and in view of the general rules of construction already stated, we hold that the provisions of the seventh section of that act include such a case as this. The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. When the act, therefore, speaks of *bona fide* purchasers for a valuable consideration of lands from Mexican grantees or assigns, which grants have subsequently been rejected, we do not think that the words "grantees" and "grants" should have such a rigid and technical construction as to require the actual existence of a formal grant from the government of Mexico, but we are of opinion the act should be construed in accordance with what we conceive to have been its plain purpose, which was to cover the case of those persons who in good faith and for a valuable consideration have purchased lands (and taken and retained their possession) from those who claimed and were supposed to be Mexican grantees, but whose claims had been subsequently rejected. Otherwise, it seems to us clear that the purpose for which this

seventh section was passed would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for.

The circumstances existing at the time of the passage of this act necessarily lead to the belief that the purpose of its enactment was to remedy (by purchase of the land from the United States at the lowest rate) a defect in a title supposed to have been derived from the Mexican government, where the claimant had in good faith and for a valuable consideration purchased from one who claimed to be a Mexican grantee, or from his assigns, and where there was no adverse claim other than that of the United States. A remedial statute ought not to be so construed as to defeat in part the very purpose of its enactment. *United States* v. *Hodson*, 10 Wall. 395.

In the case now before us it appears there had been very strong parol evidence of the existence of an actual grant from the Mexican government, but it was not thought to be strong enough to overcome the absence of any record evidence of such a grant. We think that under the statute of 1866 record proof of the existence of a grant was not necessary in order to give the officers of the United States jurisdiction to issue the patent upon being satisfied of the existence of those facts in regard to which it was their province to determine. The act has received the same construction in the Supreme Court of California in the case of *Bascomb* v. *Davis*, 56 California, 152. The court there construed it so as to include those who in good faith and for a valuable consideration had purchased lands which were supposed to have been granted by the Mexican government, and who had used, improved and continued in the actual possession of the lands as provided in the act. This construction by the California court is entitled to very high consideration, and especially is this so in a case where the act was directed to a condition of things in existence at the time of its passage and with which the courts of that State would be particularly familiar.

In *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, this court construed an act of Congress which alluded to lands "granted as aforesaid" as including lands *purporting* to have

been "granted as aforesaid," and this inclusion was made because the court was satisfied, taking all things into consideration, that such construction was what Congress meant. The court simply carried out that intention by supplying a word not found in the act.

For the reasons thus given we think this act includes those persons who in good faith and for a valuable consideration have purchased land from those who claimed and who were thought to be Mexican grantees or assigns, provided they fulfil the other conditions named in the act.

II. Coming to the conclusion we have, there is another objection made to the title on the part of the plaintiffs in error. They urge that the statute requires that the person who purchased the land should have made his purchase from the Mexican grantee or his assignee in good faith, and it is stated that as the defendant in error made his purchase from a remote grantee of the Romeros on the 15th of May, 1876, twenty years after the claim had been rejected by the commissioners appointed under the act of 1851, eighteen years after it had been rejected by the United States District Court, and thirteen years after it had been rejected by this court, it was clear as a legal result from these facts that he could not be a purchaser in good faith.

It appears however that on the 8th of August, 1859, one S. P. Millett became a grantee and entered into the possession of the lands, used, improved and cultivated them, and continued in the actual possession thereof according to the lines of the original purchase until 1868, and that the defendant in error claims through Millett by several mesne conveyances. Plaintiffs in error object that Millett was not a purchaser in good faith because he did not purchase until October, 1859, before which time the claim of the Romeros had been rejected by the commissioners and by the United States District Court. An appeal from those decisions was pending at the date above mentioned before this court, and it was therein contended that the Romeros had a valid claim under the Mexican government such as should have been recognized by the commissioners and by the District Court, and such as ought to be recognized by

the Supreme Court. We do not think the facts thus stated show, as matter of law, that Millett could not have been a *bona fide* purchaser of these lands for a valuable consideration, and whether in fact he were such *bona fide* purchaser was a question to be determined by the Government on issuing the patent, and an inquiry into that question of fact is precluded by the patent itself.

III. It is also objected that even if Millett were adjudged a purchaser in good faith from a Mexican grantee, he could not convey to another his right under the statute of 1866, but that it was a mere personal privilege which he might exercise to purchase the land at the minimum price established by law. We think that a person who was within the statute and who had the right to purchase land as provided therein was not confined to the actual purchase himself, but that he could assign or convey such right, and that his grantee or assignee, immediate or remote, could, so far as this point is concerned, exercise the same right of purchase which he had before he conveyed or assigned.

In *Thredgill* v. *Pintard*, 12 How. 24, the court recognized the right of an individual in possession of land and who was entitled to a preëmption right therein to convey such right to another.

In *Webster* v. *Luther*, 163 U. S. 331, it was held that persons entitled under the Revised Statutes, section 2304, to enter a homestead, who may have theretofore entered under the homestead laws a quantity of land less than 160 acres, and who had the right under section 2306 to make an additional entry for the deficiency, could transfer such right by a proper conveyance.

In the above cases the general rule of law which discourages all restraints upon alienation was recognized, and the assignment of a right before entry was held valid, one of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right. Nor is any such restriction to be found in the act of 1866.

Upon this question it must be assumed that Millett was a purchaser in good faith. Being such a purchaser he could

assign his right and title to another, and the rights under such assignment were not affected by the fact that the defendant in error did not purchase his title until many years after the final determination by this court that no formal, actual or valid grant had ever been made by the Mexican government to the Romeros.

IV. We are also of opinion that the rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter by the Secretary, were all acts within the jurisdiction of that officer. The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office. The Secretary who made the first decision herein, could have granted a rehearing and reversed his former ruling.

The case of *United States* v. *Stone*, 2 Wall. 525, has no bearing adverse to this proposition. In that case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially; that if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the land office is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does *Noble* v. *Union River Logging Railroad*, 147

U. S. 165, touch the case. The principle therein decided was in substance the same as in the *Stone case*, *supra*. The control of the department necessarily ceased the moment the title passed from the Government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted. See also *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, at 592.

We have considered the other questions raised herein but do not think any error was committed in their disposition by the courts below. The judgment of the Circuit Court of Appeals must be

Affirmed.

Mr. Justice Harlan dissented.

Smith *v.* Naphtaly. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. No. 181. Submitted with No. 180. Mr. Justice Peckham delivered the opinion of the court. In this case, counsel for the appellant concedes that if the court should hold that the sale of the land mentioned in the patent involved in the foregoing case were a valid sale, then the judgment in this case should be affirmed. As we do so hold, the judgment herein is, therefore,

Affirmed.

Mr. Justice Harlan dissented.

Same counsel and same briefs as in No. 180.

HOLDEN *v.* HARDY (No. 1).

HOLDEN *v.* HARDY (No. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Nos. 261, 264. Argued October 21, 1897. — Decided February 28, 1898.

The provisions in the act of March 30, 1896, c. 72, of Utah, providing that "The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger;" that "The period of employment of workingmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger;" and that "Any person, body corporate, agent, manager or employer who shall violate any of the provisions of sections one and two of this act shall be deemed guilty of a misdemeanor," are a valid exercise of the police power of the State, and do not violate the provisions of the Fourteenth Amendment to the Constitution of the United States by abridging the privileges or immunities of its citizens, or by depriving them of their property, or by denying to them the equal protection of the laws.

The cases arising under the Fourteenth Amendment are examined in detail, and are held to demonstrate that, in passing upon the validity of state legislation under it, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some States methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals or classes had proved detrimental to their interests; and other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection: but this power of change is limited by the fundamental principles laid down in the Constitution, to which each member of the Union is bound to accede as a condition of its admission as a State.

THESE were writs of error to review two judgments of the Supreme Court of the State of Utah, denying applications of the plaintiff in error, Holden, for his discharge upon two writs of *habeas corpus*, and remanding him to the custody of the sheriff of Salt Lake County.

The facts in case No. 261 were substantially as follows: On June 20, 1896, complaint was made to a justice of the peace of

Statement of the Case.

Salt Lake City that the petitioner Holden had unlawfully employed "one John Anderson to work and labor as a miner in the underground workings of the Old Jordan mine in Bingham cañon, in the county aforesaid, for the period of ten hours each day; and said defendant, on the date aforesaid and continuously since said time, has unlawfully required said John Anderson, under and by virtue of said employment, to work and labor in the underground workings of the mine aforesaid, for the period of ten hours each day, and that said employment was not in case of an emergency or where life or property was in imminent danger, contrary," etc.

Defendant Holden, having been arrested upon a warrant issued upon said complaint, admitted the facts set forth therein, but said he was not guilty because he is a native-born citizen of the United States, residing in the State of Utah; that the said John Anderson voluntarily engaged his services for the hours per day alleged, and that the facts charged did not constitute a crime, because the act of the State of Utah which creates and defines the supposed offence is repugnant to the Constitution of the United States in these respects:

"It deprives the defendant and all employers and employés of the right to make contracts in a lawful way and for lawful purposes;

"It is class legislation, and not equal or uniform in its provisions;

"It deprives the defendant, and employers and employés of the equal protection of the laws; abridges the privileges and immunities of the defendant as a citizen of the United States, and deprives him of his property and liberty without due process of law."

The court, having heard the evidence, found the defendant guilty as charged in the complaint, imposed a fine of fifty dollars and costs, and ordered that the defendant be imprisoned in the county jail for a term of fifty-seven days, or until such fine and costs be paid.

Thereupon petitioner sued out a writ of *habeas corpus* from the Supreme Court of the State, annexing a copy of the proceedings before the justice of the peace, and praying his dis-

charge. The Supreme Court denied his application, and remanded him to the custody of the sheriff, whereupon he sued out this writ of error, assigning the unconstitutionality of the law.

In the second case the complaint alleged the unlawful employment by Holden of one William Hooley to work and labor in a certain concentrating mill, the same being an institution for the reduction of ores, for the period of twelve hours per day. The proceedings in this case were precisely the same as in the prior case, and it was admitted that there was no distinction in principle between the two cases.

Mr. Jeremiah M. Wilson for plaintiff in error. *Mr. C. W. Bennett*, *Mr. R. Harkness*, *Mr. A. Howat* and *Mr. W. M. Bradley* were on his brief.

In both of these cases is involved the constitutionality of the same statute of Utah, the only difference being that in the first the defendant Holden was convicted of a violation of section one of said act, while in the latter he was prosecuted and convicted under the second section. We will, therefore, consider them together, referring in the following statement to the record in the first case.

I. The statute of Utah involved herein is in conflict with the Constitution of the United States, and is not a valid exercise of the police power of the State.

Before presenting our views in detail concerning the repugnance of this statute to the Constitution of the United States, and to the various clauses of the Fourteenth Amendment which we think applicable to the matter in controversy, we deem it appropriate to ask the attention of the court, at the outset, to some of the most conspicuous of the authorities bearing upon the general question as to the scope of this police power, and as to the subjects relating to which it may properly be invoked.

(*a.*) We have not found in any of the text-books or cases an authoritative statement defining and limiting the exact

scope and range of this power. In fact, this court itself, in the case of *Stone* v. *Mississippi*, 101 U. S. 814, has declined to specifically define it; but in the case of *New York* v. *Miln*, 11 Pet. 102, 139, will be found probably as concise and comprehensive a general definition of the term as could be given. The court says:

"We are aware that it is at all times difficult to define any subject with proper precision and accuracy. If this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering [the police power]. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State or of any individual within it."

The court, however, is careful to add that this jurisdiction or power can only be exercised where it is not "surrendered or restrained by the Constitution of the United States."

See also *Lake View* v. *Rose Hill Cemetery Co.*, 70 Illinois, 191; *Commonwealth* v. *Alger*, 7 Cushing, 53, 84; *Railroad Company* v. *Husen*, 95 U. S. 465; *State* v. *Noyes*, 47 Maine, 189, 211; *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vermont, 149; *In re Jacobs*, 98 N. Y. 98, 107; *Austin* v. *Murray*, 16 Pick. 121, 126; *Watertown* v. *Mayo*, 109 Mass. 315, 319; *Coe* v. *Schultz*, 47 Barb. 64; *In re Cheesebrough*, 78 N. Y. 232.

To be valid, legislation enacted for the purpose of promoting the public health, morals or welfare must be of such a character that it will affect and be for the benefit of the whole community, or at least the part of it which is brought into contact with the evils sought to be remedied. Such an enactment must not be so limited in its terms that it can and will, as in the present case, operate upon but one of many classes of employers and employés of the same general description, living and doing business under the same general conditions, even though the occupation in which they are engaged

may be injurious to themselves. In other words, it must relate and have reference to the result to the health and welfare of the community of the act or omission or the condition sought to be prevented or remedied, and not to the result of such act or omission to the author or person who is responsible for such condition or engaged in the dangerous or injurious occupation — that is, provided such person is *sui juris* and does not come within the class of persons (such as women, children, etc.) over which, as has been held in some of the States, the State has the right, to a limited extent, to exercise control for their own good and welfare, and thus indirectly for the welfare of the public.

It is, therefore, not within the power of the legislature to prevent persons who are *sui juris*, and otherwise perfectly competent to contract, from entering into employment and voluntarily making contracts in relation thereto merely because the employment in which they are to engage, although perfectly legal and proper in itself, may be considered by the legislature to be dangerous or injurious to the health of the employé; and if such right to contract cannot be prevented, it certainly cannot be restricted by the legislature to suit its own ideas of the ability of the employé to stand the physical and mental strain incident to the work. The character of the work to be performed, the number of hours a day in which the employé shall work, and the amount of compensation to be paid therefor are purely and necessarily personal matters between the parties to the contract, and are regulated by the terms thereof and by the will of the employer, influenced by considerations as to the requirements of his business and the condition of the market for his products, etc., and it is clear, as it seems to us, that so long as the employment does not interfere with the rights or health of others, the legislature cannot prevent it or regulate any of its terms.

If, for any reason, the condition of the market should become such that there was no sale or demand for the product of an iron mine, for example, and the owner, in consequence of this condition, should find that he was running his business at a loss, it would be ridiculous to say that he would

not have a perfect right to lay off some of his hands altogether, or to work them all half time, or arbitrarily to reduce the number of working hours of all to any extent he might think necessary or advisable; and if he could do that, we do not see why he could not, for the purpose of meeting an increased demand for the product of his mines and the competition from other sources, or if for any reason the condition of the market warranted it, increase the number of hours of his workmen to ten or any other number more than eight that they might be willing to work or contract with him for.

A case here directly in point is that of *In re Jacobs*, *supra*, where the court had under consideration a law of New York prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses, etc. In the opinion the court says: "To justify this law *it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manufacture may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health.*"

(*b.*) But however this may be, it is well settled that, when relating to business enterprises, the business or occupation at which such regulations are directed must be affected with a "public interest," and that the regulation must be for the protection or benefit of the public generally, as we have above contended, and not of an individual or segregated class of individuals under the circumstances we have mentioned.

This court, in the case of *Munn* v. *Illinois*, 94 U. S. 113, 126, defines the property that is subject to police regulation as follows: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

See also Cooley's Constitutional Limitations, 476, 720, (4th ed.); Tiedman's Limitation of Police Powers, §§ 178, 179.

In *United States* v. *Martin*, 94 U. S. 400, 403, in which this court was called upon to construe section 3738 of the Revised Statutes, providing that eight hours shall constitute a day's work for employés of the Government, it was held that said statute was "in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based on that theory," but the court distinguishes between such a direction and the principle involved in the case at bar, as follows:

"The English statute books are full of assizes of bread and ale, commencing as early as the reign of Henry II., and regulations of labor, and many such are to be found in the statutes of the several States. It is stated by Adam Smith, as the law in his day, that in Sheffield no master cutler or weaver or hatter could have more than two apprentices at a time, and so lately as the 8th George III. an act, which remained unrepealed until 1825, was passed, prohibiting, under severe penalties, all master taylors in London, or within five miles of it, from giving, or their workmen from accepting, more than two shillings seven pence half penny a day, except in the case of general mourning." Smith's Wealth of Nations, 125, (6th Oxford edition of 1869.) "*A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen, and at whatever degree of skill, and at whatever price they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested.* The statute of the United States does not interfere with this principle."

(*c*) From the foregoing authorities it would seem to result that an enactment of the legislature, made in pursuance of the police power of a State, or a police regulation, must be for the purpose of enforcing a duty and to punish acts or omissions which may be right or wrong according to the time, place or manner of doing them — that is, the exercise of what would otherwise be a right at a time, place or in a manner injurious to the public, is prohibited. A general criminal law is to

punish something wrong in itself, without regard to the time, place or manner of doing it, and of course such a law, whether enacted by original or delegated authority, is not a police regulation.

Therefore, the violation of the maxim *sic utere tuo ut alienum non lædas* covers every case in which the exercise of the police power would be valid or legitimate; and we think no case of a valid police regulation can be found which will not come under this maxim, and which does not refer to the limitation of the exercise of what, under proper circumstances, would be a right, and only becomes a wrong because of its excessive exercise or consequent injury to the health, welfare or morals of the public. Police regulations are, therefore, not enacted for the purpose of punishing wrongs, as such, but to enforce duties to the public in respect to matters which can only become wrongs *sub modo*. The right to destroy property to stay a conflagration and in case of war, etc., is also distinguishable, and is based upon the maxim *salus populi, suprema lex*. So of the right of eminent domain; though exercised for a public use, it is based on compensation. In a police regulation, there is only restraint for the public welfare.

If the constitution of the State requires the legislature to enact laws respecting the health of miners and others, the law to be valid must relate to the duty of the employer to his employés in the respects we have indicated, and must not interfere with the relation of the parties that rests solely on contract.

The present law has no relation to health or safety, either of the public or the persons affected, or, if so, only in a very remote degree; while its direct and principal effect is to interfere with the rights and liberties of the contracting parties.

It is apparent that if the police power extends to matters affecting contract relations and in which the public health, etc., is in no way concerned, there is practically no limit to its exercise; and all business conducted in the States, whether of a public, *quasi*-public or strictly private nature, could be made subject to such laws regulative thereof as the legislatures of

the respective States might see fit to adopt, and the personal liberty of the citizen, secured to him by the Constitution of the United States, would be entirely subverted.

(*d*) In this connection we desire to suggest that the constitutionality of this statute must be considered in the light of its effect upon the class of persons upon whom it operates, and upon the relation of the prohibition therein contained to the general public. When this is taken into consideration, it is apparent that, even if by any possibility it could fairly be said (as was assumed and said by the court below) that the enforcement of the provision contained in said measure could be conducive to the health or welfare of the employés enumerated therein, and in that respect is not unconstitutional, still it is so flagrantly violative of the rights and liberties of the citizens affected thereby — both of the employer and the employé — that it is brought in direct conflict with the Constitution of the United States, if not of the constitution of Utah, and cannot for that reason be allowed to stand.

Therefore, even if this act can fairly be assumed to have been a measure adopted by the legislature of Utah for the protection of the health or welfare of the class of persons affected thereby, it is, nevertheless, unconstitutional, because, when actually applied, it is found to be in contravention of the principles, and destructive of the rights and liberties of the citizen to which we have above pointed. To repeat the language of this court in *Boyd* v. *United States*, 116 U. S. 616, 635, varying it slightly to suit the circumstances of this case, we have no doubt that the legislature, in enacting this statute, "was actuated by perfectly proper motives," but we presume that "the vast accumulation of public business brought before it prevented it, on a first presentation, from noticing objections which have become developed by time and the practicable application of the objectionable law."

II. The statute in question abridges privileges and immunities of the plaintiff in error to which he is entitled as a citizen of the United States.

The plaintiff in error in this case is a native-born citizen of

the United States, and was at the time of his arrest, and now is, a citizen of the State of Utah, and as such was and is entitled to all the privileges and immunities of citizens of the United States as secured to them by the Constitution.

It seems to be settled by the decisions of this court, and of many others that have had this subject under consideration, that among the privileges and immunities secured to the citizen by the Fourteenth Amendment is the right "to pursue unmolested a lawful employment in a lawful manner." *Live Stock Association* v. *Crescent City Co.*, 1 Abb. U. S. 388, 389. Incidental to this there is, of course, the further right to enter into contracts relating to the character of the services to be performed, the amount of compensation to be paid and received therefor, and the period of time or the number of hours per day required to perform such labor.

The allowance to the employer of labor, and the workingman, of perfect freedom and liberty in this respect is absolutely and manifestly essential in this age of constant progress in business affairs and of great and increasing competition, to enable the employer and laborer, alike, to maintain life and to render any legitimate employment or business in which they may be engaged successful. Whatever may be the wisdom or necessity for enacting laws restrictive of the hours of labor of women, children or orphans, or the advisability of enacting such laws with reference to the employés in the various kinds of business enterprises that are held to be affected with a public interest, it is perfectly obvious, because of their great diversity and the character and necessities of the different kinds of private business enterprises, that it would be impossible to devise a law or regulation limiting the hours of employment of such employés that would operate with any degree of equality or with anything like justice upon the employers and employés in all private business enterprises, or even those of the same general class.

In the Constitution of the State of Utah itself, this distinction is recognized, and only the hours of work of employés of the "state, county and municipal governments" are attempted to be regulated thereby, the law here in question being claimed

to have been authorized and passed under the additional provision that "the legislature shall pass laws to provide for the health and safety of employés in factories, smelters and mines." The law, however, fails to make any such provision with reference to employés in factories.

Such laws as to public employés are regarded by the courts merely as directions from a principal to his agent, and as such are held to be competent; but, in the case of private employment or labor, as so aptly stated by this court, "principals, so far as the law can give the power, are entitled to employ as many men, and of whatever degree of skill, and at whatever price, they think fit, and except in some special cases, as of children and orphans, the hours of labor and the price to be paid are left to the determination of the parties interested." *United States* v. *Martin*, 94 U. S. 400.

Applying the principle last stated to the present case, it cannot be said that an act making it a misdemeanor for a private and independent mine operator to employ his workman more than eight hours a day, except in cases of emergency where life or property is in imminent danger, and subjecting him to fine and imprisonment in consequence of a violation of such provision, does not infringe or abridge the right of both the employer and laborer, to make contracts which persons and corporations in other lines of business may make, and that it does not thus abridge the privileges and immunities so secured to them as citizens of the United States.

We refer particularly to some of the authorities supporting our contention, from which it will be seen that, while the courts do not attempt specifically and in detail to enumerate and define all of these privileges and immunities, they are practically unanimous in holding that the right to pursue, in a lawful manner, a lawful vocation or trade, unmolested by laws in any way restrictive of that right, is a privilege that is protected and secured to the citizen by the Constitution of the United States. See *Ward* v. *Maryland*, 12 Wall. 418, 430; the concurring opinions of Justice Field and of Justice Bradley in *Butchers' Union Co.* v. *Crescent City*, 111 U. S., at pages 757 and 764 respectively; the dissenting opinion of Mr. Jus-

tice Field in the *Slaughterhouse cases*, 16 Wall. 97; *Ex parte Kubach*, 85 California, 274; *In re Eight Hour Law*, 39 Pac. Rep. 328; *In re House Bill No.* 203, 39 Pac. Rep. 431; *Leep* v. *Railway Co.*, 58 Arkansas, 407; *State* v. *Goodwill*, 33 West Virginia, 179; *Wally* v. *Kennedy*, 2 Yerg. 554; *People* v. *Otis*, 90 N. Y. 48; *Godcharles* v. *Wigeman*, 113 Penn. St. 431; *Commonwealth* v. *Perry*, 155 Mass. 117; *In re Jacobs*, 98 N. Y. 98; *Shaver* v. *Pennsylvania Company*, 71 Fed. Rep. 931; *People* v. *Marx*, 99 N. Y. 377; *People* v. *Gillson*, 109 N. Y. 389; *Millett* v. *People*, 117 Illinois, 294; *In re Tiburcio Parrott*, 1 Fed. Rep. 481; *Low* v. *Rees Printing Co.*, 41 Nebraska, 127; *Frorer* v. *People*, 141 Illinois, 171.

III. This statute also violates the provision of the Fourteenth Amendment that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

It is not necessary here to enter upon any extended analysis of the provisions of the statute in question for the purpose of showing how unequally it affects, and how it discriminates against, all citizens of the State of Utah who are engaged in the business of mining, smelting, etc. This has already been done in what we have said under the head of police power. What we have already said is sufficient to show that, under the operation of the law, all other persons in the State, no matter in what business or occupation they may be engaged, are left entirely at liberty to make whatever contracts they please in respect of the character of the work to be performed, the amount to be paid therefor, and the number of hours that shall constitute a day's work in all occupations which by the law of the land are properly the subjects of contract.

The act in the case at bar, in sections 1 and 2, says that eight hours shall constitute a day's work only for those who are employed in underground mines or workings, smelters and other institutions for the reduction or refining of ores, and, in section 3, says that "any person, body corporate, agent, manager or employer who shall violate any of the provisions of sections 1 and 2 of this act shall be deemed

guilty of a misdemeanor." This comparatively small class of people is in terms singled out by the legislature, made to bear this unjustifiable and unequal burden, and deprived of liberties and rights of property that are enjoyed by every other citizen in the State who is engaged in any of the vast number of employments not enumerated in the act, and which by the law of the land they are protected in the enjoyment of and have the right in the courts to enforce.

This free and unrestricted right to engage in any calling that is permitted under the law, and to make necessary and lawful contracts with reference thereto, is one of the fundamental and inalienable rights of the citizen, without which, of course, no condition of social, commercial or financial prosperity could exist in a community or State that is in any way dependent on other communities or States for an interchange of commodities or commerce, and "must, therefore, be free in this country to all alike upon the same conditions. The right to pursue 'such callings' without let or hinderance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright, for 'the property which every man has is his own labor, and, as it is the original foundation of all other property, so it is the most sacred and inviolable.'" Adam Smith's Wealth of Nations, Book 1, c. 10. See also *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Boyd* v. *United States*, 116 U. S. 616, 635; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276; Mr. Webster's Argument in *Dartmouth College* v. *Woodward*, 4 Wheat. 517, 581, 582; *Millett* v. *People*, 117 Illinois, 294; *In re Jacobs*, 98 N. Y. 98, 105; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515; *Low* v. *Rees Printing Co.*, 41 Nebraska, 127, 136; *Ritchie* v. *People*, 155 Illinois, 98; *Frorer* v. *People*, 141 Illinois, 171; *Braceville Coal Co.* v. *People*, 155 Illinois, 98; *State* v. *Loomis*, 115 Missouri, 307; *Austen* v. *Murray*, 16 Pick. 121.

An examination of the cases cited will show that in Colorado, Nebraska, California and Illinois, laws substantially similar to that in question in the case at bar have been held

unconstitutional and void by the highest courts of those States, and that in Massachusetts, New York, Pennsylvania, Illinois, Ohio, Missouri, West Virginia, Maryland, Arkansas, Texas, Vermont and many of the remaining States of the Union, laws so nearly analogous in principle to this statute that we deem them conclusive of the question, have likewise been so held.

Indeed, the three essential and indispensable elements of that perfectly free and unrestricted right of the citizen to contract with reference to all lawful pursuits in which he may desire to engage, which is guaranteed and protected by the Constitution of the United States, and to which we have above pointed, namely, the right of the employer and the employé to agree upon (1) the character of the services to be performed, (2) the amount to be paid for such service, and (3) the number of hours per day during which the service is to continue, are constantly grouped together in the authorities, and are manifestly so inseparably connected with each other that the destruction or abridgment of one is a destruction or abridgment of the whole of said right of contract; and, therefore, any decision holding that such destruction or abridgment of one of these elements is unconstitutional must necessarily apply to and control all questions as to the constitutionality of the others.

We have nowhere found a decision of any court upholding such a law as the one here involved, or any law analogous thereto, except in the cases we have enumerated, and which we contend are clearly distinguishable from the present case, namely, (*a*) cases where the law was enacted for the purpose of limiting the hours of employment of public employés, in which case this court has held that such a law is valid because merely in the nature of a direction from a principal to his agent, (*b*) cases where such laws are enacted with regard to employments affected with a public interest, and (*c*) in the case of statutes which, although limiting the hours of employment, are enacted for the protection of the health or safety of women, children, insane persons and the like, which last are generally, though not universally, regarded as a valid

exercise of the police power for the reasons we have already stated.

Relying, therefore, upon these authorities, and upon the indication of the opinion of this court above quoted from the case of the *United States* v. *Martin*, 94 U. S. 400, we respectfully submit that the judgment and order of the court below remanding plaintiff in error to the custody of the defendant, and denying his discharge from such custody, should be reversed.

Mr. Charles J. Pence for defendant in error. *Mr. John H. Murphy* was on his brief.

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

This case involves the constitutionality of an act of the legislature of Utah, of March 30, 1896, c. 72, entitled "An act regulating the hours of employment in underground mines and in smelters and ore reduction works." Session Laws of Utah, 1896, p. 219. The following are the material provisions:

"Sec. 1. The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of workingmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of sections one and two of this act, shall be guilty of a misdemeanor."

The Supreme Court of Utah was of opinion that if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the constitution of the State, which declared that "the legislature shall

pass laws to provide for the health and safety of employés in factories, smelters and mines." As the article deals exclusively with the rights of labor, it is here reproduced in full as exhibiting the authority under which the legislature acted, and as throwing light upon its intention in enacting the statute in question.

"SEC. 1. The rights of labor shall have just protection through laws calculated to promote the industrial welfare of the State.

"SEC. 2. The legislature shall provide by law for a board of labor, conciliation and arbitration which shall fairly represent the interests of both capital and labor. The board shall perform duties and receive compensation as prescribed by law.

"SEC. 3. The legislature shall prohibit:

"1. The employment of women, or of children under the age of fourteen years, in underground mines.

"2. The contracting of convict labor.

"3. The labor of convicts outside prison grounds, except on public works under the direct control of the State.

"4. The political and commercial control of employés.

"SEC. 4. The exchange of blacklists by railroad companies, or other corporations, associations or persons is prohibited.

"SEC. 5. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

"SEC. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the State, county or municipal governments; and the legislature shall pass laws to provide for the health and safety of employés in factories, smelters and mines.

"SEC. 7. The legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article."

The validity of the statute in question is, however, challenged upon the ground of an alleged violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States; deprives both the employer and the

laborer of his property without due process of law, and denies to them the equal protection of the laws. As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together.

Prior to the adoption of the Fourteenth Amendment there was a similar provision against deprivation of life, liberty or property without due process of law incorporated in the Fifth Amendment; but as the first eight amendments to the Constitution were obligatory only upon Congress, the decisions of this court under this amendment have but a partial application to the Fourteenth Amendment, which operates only upon the action of the several States. The Fourteenth Amendment, which was finally adopted July 28, 1868, largely expanded the power of the Federal courts and Congress, and for the first time authorized the former to declare invalid all laws and judicial decisions of the States abridging the rights of citizens or denying them the benefit of due process of law.

This amendment was first called to the attention of this court in 1872, in an attack upon the constitutionality of a law of the State of Louisiana, passed in 1869, vesting in a slaughter-house company therein named the sole and exclusive privilege of conducting and carrying on a live-stock landing and slaughter-house business, within certain limits specified in the act, and requiring all animals intended for sale and slaughter to be landed at their wharves or landing places. *Slaughter-house cases*, 16 Wall. 36. While the court in that case recognized the fact that the primary object of this amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom, the further fact that it was not restricted to that purpose was admitted both in the prevailing and dissenting opinions, and the validity of the act was sustained as a proper police regulation for the health and comfort of the people. A majority of the cases which have since arisen have turned not upon a denial to the colored race of rights therein secured to them, but upon alleged discrimina-

tions in matters entirely outside of the political relations of the parties aggrieved.

These cases may be divided, generally, into two classes: First, where a state legislature, or a state court, is alleged to have unjustly discriminated in favor of or against a particular individual or class of individuals, as distinguished from the rest of the community, or denied them the benefit of due process of law; second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, or the protection of the individual.

Among those of the first class, which, for the sake of brevity, may be termed unjust discriminations, are those wherein the colored race was alleged to have been denied the right of representation upon juries, *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; as well as those wherein the State was charged with oppressing and unduly discriminating against persons of the Chinese race, *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Yick Wo* v. *Hopkins*, 118 U. S. 356, and *Chy Lung* v. *Freeman*, 92 U. S. 275; and those wherein it was sought under this amendment to enforce the right of women to suffrage and to admission to the learned professions, *Minor* v. *Happersett*, 21 Wall. 162; *Bradwell* v. *The State*, 16 Wall. 130.

To this class are also referable all those cases wherein the state courts were alleged to have denied to particular individuals the benefit of due process of law secured to them by the statutes of the State, *In re Converse*, 137 U. S. 624; *Arrowsmith* v. *Harmoning*, 118 U. S. 194, as well as that other large class, to be more specifically mentioned hereafter, wherein the state legislature was charged with having transcended its proper police power in assuming to legislate for the health or morals of the community.

Cases arising under the second class, wherein a State has chosen to change its methods of trial to meet a popular de-

mand for simpler and more expeditious forms of administering justice, are much less numerous, though of even greater importance, than the others. A reference to a few of these cases may not be inappropriate in this connection. Thus, in *Walker* v. *Sauvinet*, 92 U. S. 90, which was an action brought by a colored man against the keeper of a coffee-house in New Orleans for refusing him refreshments in violation of the constitution of the State securing to the colored race equal rights and privileges in such cases, a statute of the State provided that such cases should be tried by jury, if either party demanded it, but if the jury failed to agree the case should be submitted to the judge, who should decide the same. It was held that a trial by jury was not a privilege or immunity of citizenship which the States were forbidden to abridge, but the requirement of due process of law was met if the trial was had according to the settled course of judicial proceedings. "Due process of law," said Chief Justice Waite, "is process due according to the law of the land. This process in the States is regulated by the law of the State." This law was held not to be in conflict with the Constitution of the United States.

Similar rulings with regard to the necessity of a jury, or of a judicial trial in special proceedings, were made in *Kennard* v. *Louisiana*, 92 U. S. 480; *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Walston* v. *Nevin*, 128 U. S. 578; *Ex parte Wall*, 107 U. S. 265.

In *Hurtado* v. *California*, 110 U. S. 516, it was held that due process of law did not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The constitution of California authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without an indictment by a grand jury, in the discretion of the legislature. It was held that conviction upon such an information, followed by sentence of death, was not illegal under the Fourteenth Amendment.

In *Hayes* v. *Missouri*, 120 U. S. 68, it was held that a statute of a State which provided that, in capital cases, in cities having a population of over 100,000 inhabitants, the State

shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the State it was allowed only eight peremptory challenges, did not deny to a person tried for murder, in a city containing over 100,000 inhabitants, the equal protection of the laws enjoined by the Fourteenth Amendment, and that there was no error in refusing to limit the State's peremptory challenges to eight.

In *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205, it was said that a statute in Kansas abolishing the fellow-servant doctrine as applied to railway accidents, did not deny to railroads the equal protection of the laws, and was not in conflict with the Fourteenth Amendment. The same ruling was made with reference to statutes requiring railways to erect and maintain fences and cattle-guards, and make them liable in double the amount of damages claimed for the want of them.

In *Hallinger* v. *Davis*, 146 U. S. 314, it was held that a state statute conferring upon an accused person the right to waive a trial by jury and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, was not a violation of the due process clause of the Fourteenth Amendment.

So, in *In re Kemmler*, 136 U. S. 436, it was held that the law providing for capital punishment by electricity was not repugnant to this amendment. And in *Duncan* v. *Missouri*, 152 U. S. 377, it was said that the prescribing of different modes of procedure and the abolition of courts, and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds persons accused of crime, are not considered within the constitutional inhibition. See also *Medley, Petitioner*, 134 U. S. 160, and *Holden* v. *Minnesota*, 137 U. S. 483.

An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitu-

tion was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.

The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the States homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the States grand

juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado* v. *California*, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employés, as they arise.

Similar views have been heretofore expressed by this court. Thus in the case of *Missouri* v. *Lewis*, 101 U. S. 22, 31, it was said by Mr. Justice Bradley: "We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the

State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. . . . The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

The same subject was also elaborately discussed by Mr. Justice Matthews in delivering the opinion of this court in *Hurtado* v. *California*, 110 U. S. 516, 530: "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . . The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice — *suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we

are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." We have seen no reason to doubt the soundness of these views. In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy.

We do not wish, however, to be understood as holding that this power is unlimited. While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,

as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees* v. *Hoboken Land Co.*, 18 How. 272, 276, as anywhere. He said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

It was said by Mr. Justice Miller, in delivering the opinion of this court in *Davidson* v. *New Orleans*, 96 U. S. 97, that the words "law of the land," as used in Magna Charta, implied a conformity with the "ancient and customary laws of the English people," and that it was wiser to ascertain their intent and application by the "gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Recognizing the difficulty in defining, with exactness, the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that

no one shall be condemned in his person or property without an opportunity of being heard in his own defence.

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.

The latest utterance of this court upon this subject is contained in the case of *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591, in which it was held that an act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York, was a violation of the Fourteenth Amendment. In delivering the opinion of the court, Mr. Justice Peckham remarked: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto, and, although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employés as to demand

special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases *Davidson* v. *New Orleans*, 96 U. S. 97, and *Yick Wo* v. *Hopkins*, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton* v. *Steele*, 152 U. S. 133, 136.

The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in *Commonwealth* v. *Alger*, 7 Cush. 53, 84:

"We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the Government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

This power legitimately exercised can neither be limited by contract nor bartered away by legislation.

While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost

purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations. The power to do this has been repeatedly affirmed by this court. *Stone* v. *Mississippi*, 101 U. S. 814; *Douglas* v. *Kentucky*, 168 U. S. 488; *Giozza* v. *Tiernan*, 148 U. S. 657; *Kidd* v. *Pearson*, 128 U. S. 1; *Crowley* v. *Christensen*, 137 U. S. 86.

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the States designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theatres, factories and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In States where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signalling the surface, for

the supply of fresh air and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. Digest of Stats. of Arkansas, 1149; California, Stats. March 16, 1872, c. 305; March 27, 1874, c. 498; March 14, 1881, c. 72; March 8, 1893, c. 74; Colorado, Mills' Anno. Stats. v. 3 Sup. c. 85; Gen. Stats. of Conn. 1888, secs. 2645 to 2647, 2263 to 2272; Rev. Stats. Illinois, 1889, p. 980; Thornton's Indiana Stats. 1897, c. 98, p. 1652; Gen. Stats. of Kansas, 1897, vol. 2, pp. 813 to 824; Kentucky Stats. (Barbour & Carroll) c. 88, p. 951; Mass. Acts May 21, 1891, c. 350; March 19, 1892, c. 83; April 25, 1892, c. 210; June 8, 1892, c. 352; June 11, 1892, c. 357; June 3, 1893, c. 406; June 22, 1894, c. 508; March 16, 1895, c. 129; Michigan (Howells' Anno. Stats.), secs. 9209*b et seq.*; Gen. Stats. of New Jersey, v. 2, pp. 1900 *et seq.*; Rev. Stat. Code and Gen. Laws of New York, vol. 2, p. 2069; Brightley's Purdon's Digest, Sup. Pennsylvania, 1885–1887, pp. 2241 *et seq.*

These statutes have been repeatedly enforced by the courts of the several States; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional.

In *Daniels* v. *Hilgard*, 77 Illinois, 640, it was held that the legislature had power under the Constitution to establish reasonable police regulations for the operating of mines and collieries, and that an act providing for the health and safety of persons employed in coal mines, which required the owner or agent of every coal mine or colliery employing ten men or more, to make or cause to be made an accurate map or plan of the workings of such coal mine or colliery, was not unconstitutional; and that the question whether certain requirements are a part of a system of police regulations adopted to aid in the protection of life and health, was properly one of legislative determination, and that a court should not lightly interfere with such determination unless the legislature had manifestly transcended its province. See also *Litchfield Coal Co.* v. *Taylor*, 81 Illinois, 590.

In *Commonwealth* v. *Bonnell et al.*, 8 Phila. 534, a law,

providing for the ventilation of coal mines, for speaking tubes and the protection of cages, was held to be constitutional and subject to strict enforcement. *Commonwealth* v. *Conyngham*, 66 Penn. St. 99; *Durant* v. *Lexington Coal Mining Co.*, 97 Missouri, 62.

But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public hospitals and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags and decayed fruit. In other States laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the States, they have been generally upheld. Thus, in the case of *Commonwealth* v. *Hamilton Manufacturing Co.*, 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under the age of eighteen, and of all women laboring in any manufacturing establishment more than sixty hours per week, violates no contract of the Commonwealth implied in the granting of a charter to a manufacturing company nor any right reserved under the Constitution to any individual citizen, and may be maintained as a health or police regulation.

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

We concur in the following observations of the Supreme Court of Utah in this connection in its opinion in No. 2:

"The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface. Unquestionably the atmosphere and other conditions in mines and reduction works differ. Poisonous gases, dust and impalpable substances arise and float in the air in stamp mills, smelters and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced and refined, and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve and eight than ten. The legislature has named eight. Such a period was deemed reasonable. . . . The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor

in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government."

The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employés, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

We have no disposition to criticise the many authorities

which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them, that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employés, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class. The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinions in *Barbier* v. *Connolly*, 113 U. S. 27, and *Soon Hing* v. *Crowley*, 113 U. S. 703, with those later expressed in *Yick Wo* v. *Hopkins*, 118 U. S. 356.

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore,

Affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

SMITHSONIAN INSTITUTION *v.* MEECH.

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

No. 191. Argued January 12, 1898. — Decided February 23, 1898.

In the District of Columbia it is the rule that when, upon a purchase of real estate the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust arises, which may be shown by parol proof; and the grantee in the conveyance will be held, on such evidence, as trustee for the party from whom the consideration proceeds, whose rights will be enforced as against those claiming under the record title.

Statement of the Case.

This case comes within that rule, the evidence being clear and satisfactory that the oral agreement made between Mr. and Mrs. Avery, at the time when the property was conveyed to the latter, was made as asserted by the Smithsonian Institution.

Such being established as the fact, it is the duty of a court of equity to recognize that agreement as against the legal effect of the conveyance to Mrs. Avery.

The presumption that when the consideration for a deed is paid by a husband, and the conveyance is made to his wife, the conveyance is intended for her benefit, is one of fact which can be overthrown by proof of the real intent of the parties.

When a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, no legatee can, without compliance with that condition, receive his bounty, or be put in a position to use it in an effort to thwart his expressed purposes.

On June 4, 1895, the appellant, as plaintiff, filed its bill in the Supreme Court of the District of Columbia to enforce certain rights claimed under a will made by Robert S. Avery, on July 22, 1893. In this will, after sundry bequests to his own relatives, is the following:

"I bequeath to the sister and brothers of my late wife one thousand dollars (1000) to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

"All the rest and residue of my estate, of whatsoever nature, real, personal or mixed and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institute, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that

the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire, but do not require, that the income derived by the Smithsonian Institution from this gift may be applied, so far as it may determine, to promoting publications in such type of scientific publication, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require, that such part of said income as the said institution shall determine shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing an ethereal medium which are treated of in atomic chemistry, and which are supposed to govern phenomena of electricity, magnetism, light and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like, however, to have published first the multiplying table and also IV-plate logarithms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences,' and all publications made from the fund shall bear this inscription.

"The property known as part of lot 2 (two) in square 787 in the city of Washington, D.C., being premises No. 326 A street S.E., is my property, although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The testator died childless on September 12, 1894. The will was probated February 2, 1895. He and his wife had lived for many years in Washington, he being in the employ of the Government in the Coast Survey Office. During these years he lived a quiet and retired life, devoting himself to scientific research, and experimenting chiefly in the matter of phonetic type. His wife was younger than he, and was, until shortly before her death, on November 18, 1890, in apparently

good health. While they were both living, and on April 20, 1885, the real estate described in the last paragraph quoted from the will was purchased, the title being conveyed to Mrs. Avery.

The bill alleged that the lot was paid for with the money of Robert Avery; that the title was taken in the name of Mrs. Avery because it was supposed that she would outlive her husband and upon an understanding and agreement that the property should, after their deaths, pass to the Smithsonian Institution in pursuance of a mutual desire to make their gift to this institution as large as possible; that notwithstanding these facts the defendants, other than the executrix, claimed title to the property as the heirs of Mrs. Avery, and had demanded possession. The prayer was for a finding and decree that the equitable title was in Robert Avery, and passed to the plaintiff by his last will; that the defendants be enjoined from claiming any title thereto, and that the executrix be directed to treat the thousand dollars bequeathed to the sister and brothers as forfeited for breach of condition annexed to said legacy, and as having fallen into the residuum. After answer, testimony was taken and the case was heard before Justice Hagner of the Supreme Court, who rendered a decree in accordance with the prayer of the bill, so far as respects the lot, but denying the relief sought as to the legacy on condition of the defendants executing a release of all claims to the realty. On appeal by all of the defendants, except the executrix, the Court of Appeals reversed the decree of the Supreme Court and remanded the case with directions to dismiss the bill. 8 App. D. C. 490. Whereupon the plaintiff appealed to this court.

Mr. Frank W. Hackett for appellant.

Mr. Franklin H. Mackey for appellees.

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

The legal title to this property passed by the conveyance

in 1885 to Mrs. Avery. She died without will. *Prima facie*, therefore, the title then passed to her heirs, the appellees. The plaintiff insists that in fact the purchase price was paid by Mr. Avery and paid under an oral agreement, whereby a resulting trust was created which changed the course of the title, and the first questions are, whose money paid for the lot, and was there such an agreement, and, if so, what were its terms?

That the money which was used in making payment for the lot was the money of Mr. Avery, is not seriously questioned. Both Mr. and Mrs. Avery lived very economically, and this money was accumulated out of savings from the salary he received from the Government. At the time of their marriage Mrs. Avery had a small amount of money on deposit in a savings bank in Connecticut, and the books of the bank showed that no part of that amount was drawn out at or near the time of this conveyance. Her repeated declarations were to the same effect, and that Mr. Avery's money had paid for the property.

The trial court also found that there was an oral agreement — an agreement made at the time the property was conveyed to Mrs. Avery, that she should hold the property during her lifetime, and that she should make a will by which it should pass at her death to the Smithsonian Institution. The Court of Appeals held that the testimony did not establish the alleged agreement so clearly as to justify a court of equity in recognizing it as against the legal effect of the conveyance. We are constrained to differ with the Court of Appeals and to agree with the justice of the Supreme Court. In a careful and exhaustive opinion Justice Hagner reviewed the evidence, and his conclusions therefrom commend themselves to our judgment. In view of this opinion it seems unnecessary to recapitulate all the testimony, and we shall content ourselves with stating the salient features thereof.

Mr. Avery was for some thirty-two years in the employ of the Government, and was an enthusiast in the scientific studies which he was pursuing in connection with such service. Prior to the purchase of the lot in controversy, and on Sep-

tember 13, 1882, he had made a will, in which, after giving to his "wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property . . . to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition," he declared:

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safekeeping and to use the income from it in extending the sciences by publishing," etc.

And again:

"This fund may be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences,' and all publications made with this fund must have a note thereon stating that they have been thus published.

"After the death of my wife, the Board of Regents of the Smithsonian Institution will be expected to select an executor of this will and provide for making the fund as useful as possible, limiting its use as much as they can to the objects specified."

His wife was fifteen or twenty years younger than he, and the expectation of both was that she would outlive him, though in fact she died some four years before he did, he living to be 86 years of age. After her death, on December 20, 1892, he prepared a codicil to the will of 1882, in which he recited that the conveyance of the property in question was made to his wife with his consent and upon the express understanding and condition that she should make a will in his favor, and that he had as evidence of this filed several affidavits of her statements in respect to the matter. Subsequently he executed the will of July 22, 1893, under which this suit was brought. The wills and codicil above referred to furnish indisputable evidence that prior to the purchase of

the real estate in controversy Mr. Avery intended that all his property, after certain legacies were paid, should go to the Smithsonian Institution, and that he understood that when the deed of this property was made to his wife it was upon the agreement described. That the agreement was made is clearly and positively testified to by one witness, Leland P. Shidy, who was associated in the government service with Mr. Avery, was the intimate friend of both Mr. and Mrs. Avery, living in the house with them from time to time during the years from 1873 to her death. We quote from his testimony:

"Q. Do you recollect the circumstance of the purchase by Mr. Avery of the property No. 326 A street southeast, in this city?

"A. Yes; I do. I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all, and after that was decided they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so and had the deed made out in her name.

"Q. Did Mrs. Avery state any reason why the deed should be made out in her name?

"A. Yes. She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name.

"Q. State what final disposition, if any, was agreed upon by these two persons in your presence.

"A. It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute.

"Q. I understand that this conversation which you are now testifying to took place at or about the time of the actual pur-

chase and the making of the deed. Was any reference made to the ownership of this property that you can now recollect subsequent to the date when it was bought?

"A. After that they referred to it in a number of interviews while I was present, and every time they alluded to it with the same understanding — that is, that the property was to be hers during her lifetime and was to be disposed of at her death, in accordance with the will of Mr. Avery, with the rest of his property."

In addition there was the testimony of several witnesses of repeated conversations with Mrs. Avery, in which she made statements to the same effect. In a lease of the property made in 1887 Mr. Avery was named as the lessor. The receipts for rent given monthly for several years were signed by him alone, and so signed in her presence. There is nothing to contradict or discredit this evidence. While it may be true that no witness but the one was present at the time the agreement was entered into between Mr. and Mrs. Avery, yet his testimony is corroborated in the various ways to which we have referred. There is no arbitrary rule requiring the direct testimony of any particular number of witnesses to the ultimate fact. It is enough that there be a certainty in respect to it, and that certainty may result from an accumulation of direct and indirect evidences. The law is content if from a perusal of the entire record the mind is sure that there was a distinct agreement as claimed. That Mr. Avery understood that the agreement was made as stated the documentary evidence places beyond doubt; that it was in fact made, Mr. Shidy's testimony attests; and that Mrs. Avery understood that it was so made is evident not merely from Mr. Shidy's testimony but from her statements to many others. The will executed in 1882, and before the purchase of this lot, discloses his intent that all his property, save a few specific bequests, should go to the Smithsonian, and that the fund created thereby should bear his wife's as well as his own name, and the evidence makes it clear that she shared in his desire to make this fund as large as possible. While we agree to the proposition that parol testimony to overthrow the legal effect

of conveyances must be clear and satisfactory, yet we think this case comes within the scope of that rule, and that it is certain that just such an agreement was made between husband and wife as the appellant asserts. Even if it were a criminal case, we should not hesitate to hold that the evidence was sufficient to establish the fact beyond a reasonable doubt. It is true Mr. Avery in the codicil speaks of the agreement on the part of Mrs. Avery as one to make a will in his favor, while Mr. Shidy says that the agreement was that she should make a will transferring the property after her death to the Smithsonian, but this slight difference is immaterial and does not discredit the testimony. The Smithsonian was to be the ultimate beneficiary, and the manner in which this should be accomplished was merely a matter of detail, in respect to which the memory of the witnesses might differ. Indeed, Mr. Shidy does not purport to give the exact language used, but merely states the substance of the agreement.

We pass, therefore, to the further question: If it is true that the purchase price was paid by Mr. Avery, and the title conveyed to Mrs. Avery under an oral agreement, such as is described, will equity enforce this as against those claiming the record title?

The Court of Appeals was of the opinion that the agreement on the part of Mrs. Avery created an express trust, which, resting only in parol was invalid under the statute of frauds. It recognized the doctrine that an implied or resulting trust arises by operation of law, whenever one person buying and paying for an estate has the title placed in the name of another; but held that where the title is conveyed to a wife or child, or other person for whom the one paying the purchase money is under an obligation, legal or moral, to provide, no presumption of a trust arises, and that it is incumbent on one who claims the existence of such a trust to establish it by clear, positive and unequivocal proof, and that this had not been done in the present case. It did not substantially disagree with Mr. Justice Hagner on the propositions of law laid down by him, but differed mainly as to the strength and effect of the evidence.

The general proposition is unquestioned that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.

"This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind." 1 Perry on Trusts, (4th ed.) § 126.

The nature of this trust may be shown by parol evidence. This is in express accord with the provisions of the statute of frauds. Comp. Stat. D. C. 231, §§ 8, 9. The first of these sections requires that all declarations or creations of trust or confidence in respect to real estate shall be manifested and proved by some writing. Section 9 reads:

"*Provided, always*, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

There is no statute in force in this District, such as is found in some States, putting an end to implied and resulting trusts. It is true that when the consideration is paid by a husband and the conveyance made to his wife there is a presumption that such a conveyance was intended for her benefit; but this is not a presumption of law but of fact, and can be overthrown by proof of the real intent of the parties.

"Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settle-

ment; therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time." 1 Perry on Trusts, (4th ed.) § 147; see also 2 Pomeroy's Eq. Juris. § 1041, and cases cited in notes.

This is in accord with the general proposition so often enunciated, that the statute of frauds was designed to prevent frauds, and that courts of equity will not permit it to be used to accomplish that which it was designed to prevent. As said in *Wood* v. *Rabe*, 96 N. Y. 414, 425:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. . . . One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief."

And in *Haigh* v. *Kaye*, L. R. 7 Ch. App. 469, 474:

"The words of Lord Justice Turner, in the case of *Lincoln* v. *Wright*, 4 De G. & J. 16, where he said, 'The principle of this court is that the statute of frauds was not made to cover fraud,' express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the statute of frauds to keep another man's property which he has obtained through fraud."

If Mrs. Avery had during her lifetime conveyed this property to her sister and brothers it would have been a fraudulent breach of trust, and the like result follows if, now that she has died without executing a will, her heirs are permitted to take the property which was conveyed to her, not

as an advancement, but on an agreement that it should subsequently pass to this plaintiff.

The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title — an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement and to indicate the disposition which the real owner intended should be made of the property.

In *Robinson* v. *Leflore*, 59 Mississippi, 148, 151, it was said: "If the facts make out a case of resulting trust independently of the agreement, relief will not be denied because of the agreement; it being well settled that an invalid agreement cannot destroy an otherwise good cause of action, and this is no less true of resulting trusts than of other legal rights." *Keller* v. *Kunkel*, 46 Maryland, 565.

It may not be amiss to notice a few of the authorities. *Sherman* v. *Sherman*, 20 D. C. Rep. 330, is in point. In that case the husband made an agreement with his wife to buy real estate in her name, and that she should execute a will devising it to him. He bought one piece of real estate in her name, and she made a will so devising it. Subsequently he, in like manner, bought another piece, and, under the supposition that the will covered this after-acquired property, she made no new will, but died intestate as to that property, and it was ruled that a minor daughter, who inherited the title, held it in trust for him. In *Livingston* v. *Livingston*, 2 Johns. Ch. 537, it appeared that husband and wife agreed orally that he should purchase a lot in her name and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seized, which should be sold for that purpose. The husband having executed the agreement upon his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; and

it was held that the agreement should be carried into effect, and the lot which originally belonged to the wife was ordered to be sold and the husband reimbursed out of the proceeds. In his opinion the Chancellor said (p. 539):

"The presumption would undoubtedly be, in the first instance, that the conveyance to the wife was intended as an advancement and provision for her. This presumption was admitted in the case of *Kingdon* v. *Bridges*, 2 Vern. 67, but I do not see why it may not be rebutted, as has been done in this case, by parol proof. In *Finch* v. *Finch*, 15 Vesey, 43, it was held, that though when a purchase is made in the name of a person who does not pay the purchase money, the party paying it is considered in equity as entitled, yet if the person whose name is used be a child of the purchaser, it is, *prima facie*, an advancement, but that it was competent for the father to show, by proof, that he did not intend advancement, but used the name of his child only as a trustee."

Cotton v. *Wood*, 25 Iowa, 43. Here the facts were that the husband purchased a lot and had the same conveyed to his wife under an agreement that she would convey it to him, or to whomsoever he might assign his interest therein, upon his request. The wife died without making any conveyance, and it was held that the husband might maintain a suit to compel a conveyance to him by her heirs, the court saying:

"Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration. See Hill on Trustees, 91, and authorities cited in notes; 2 Story's Eq. Juris. § 1201. But if the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded *prima facie* as an advancement, and the burden will rest on the one who seeks to establish the trust for the benefit of the payee of the consideration, to overcome the presumption in favor of the legal title by sufficient evidence.

"This presumption, though strong, is not conclusive. Hill

on Trustees, 97, and notes; *Sunderland* v. *Sunderland*, 19 Iowa, 328; *Livingston* v. *Livingston*, 2 Johns. Ch. 540; 2 Story's Eq. Juris. § 1203; 2 Washburn, Real Property, 173, 174, 204; *Welton* v. *Devine*, 20 Barb. 9; *Guthrie* v. *Gardner*, 19 Wend. 414; *Harder* v. *Harder*, 2 Sandf. Ch. 17." See also *Gray* v. *Jordan*, 87 Maine, 140; *Milner* v. *Freeman*, 40 Arkansas, 62; *Hudson* v. *White*, 17 R. I. 519; *Persons* v. *Persons*, 25 N. J. Eq. 250.

Somewhat analogous is *In re Duke of Marlborough*, L. R. 2 Ch. Div. 1894, 133, in which it appeared that the Duchess of Marlborough conveyed certain property to her husband, that he mortgaged the property for the purpose of raising money with which to pay his debts, she joining in the mortgage. Upon his death the Duchess claimed to be entitled to the property, subject to the mortgage, on the ground that it was part of the arrangement between them that he should reconvey to her, and it was held that she was entitled to such reconveyance.

We think it clear from these authorities, and many others that might be cited, (see White and Tudor's Leading Cases in Equity, (4th ed.) vol. 1, part 1, p. 314 and following, where the authorities are collated and the question discussed at length,) that the doctrine of an implied and resulting trust applies to a case in which the husband advances the purchase price for property which is conveyed to his wife, and that though it be true there is a presumption that the conveyance was intended as an advancement for her benefit, yet such presumption is subject to overthrow by proof of an agreement that such was not the purpose of the conveyance. And so the case comes back to the question of fact in respect to which we have already expressed our conclusions, whether there was sufficiently clear and positive evidence that this conveyance to Mrs. Avery was not intended as an advancement, but was made simply for the purposes of convenience and upon the agreement that this lot, together with other property belonging to Mr. Avery, should pass after both were dead to the Smithsonian Institution.

The remaining question arises upon the condition named in

the will, and its effect upon the legacy to the sister and brothers of Mrs. Avery. That these legatees did not acquiesce in the will is clear, not alone from the fact that prior to any suit they made demand for the possession of the realty, but also from the further fact that after the decree in the trial court, which, while denying any right to the real estate, at the same time provided for their receipt of the legacy upon filing a written relinquishment of all claims to the real estate, they persisted in carrying on the litigation by appeal to the Court of Appeals, insisting there as here upon their right to the property. It is obvious that in inserting this condition the testator had in mind the specific property hereinbefore considered. In the first will, made prior to the purchase of the property, no such provision is found. He was under no apprehension of any dispute as to the proposed disposition of his entire estate. But in a second codicil thereto executed after the death of his wife, and when, by her failing to execute a will as agreed upon, it became apparent that some question might be made concerning the ownership of this property, he did incorporate a somewhat similar provision. There is, however, a marked difference between the language there used and that here found. That language was, "these gifts are made on the condition that no attempt be made to break this will, and that if such an attempt be made, those who engage in it are to lose their claims to the gifts here made to them." That might be construed to forbid, under the penalty of losing the bequests, a contest of the will, any "disputing of the will," in the ordinary and natural meaning of those words, by denying that it was a lawful will, duly executed and attested by a testator of sound mind and not acting under undue influence. The language here used is that "these bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named." In other words, acquiescence in the will as a will, and in all its provisions, is the condition upon which the legatees can take their bequests. It is not confined to mere acquiescence in his selection of the residuary

legatee, but in his declaration as to the title to any named property and his devise of that property. No legatee is to receive a bequest who shall controvert that which he has stated to be a fact, or attempt to prevent that specific disposition of any property which he has made. And in case of a failure to comply with this condition the bequest is given over to the residuary legatee. The authorities fully warrant this conclusion.

"When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi*, the non-observance of the conditions will not be forfeitures. *Powell* v. *Morgan*, 2 Vern. 90; *Morris* v. *Burroughs*, 1 Atk. 404; *Loyd* v. *Spillet*, 3 P. Wms. 344. The reason seems to be this: A court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation.

"But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to determine upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a conditional limitation. The bequest is only *quousque*, the legatee shall refrain from disturbing the will; and, if he controvert it, his interest will cease and pass to the other legatee." 1 Roper on Legacies, 2d Am. Ed. 795; 4th Lond. Ed.

In *Cooke* v. *Turner*, 14 Sim. 493, the testator after giving to his daughter certain benefits out of his real estate revoked them and gave the estates over in case his daughter should dispute his will, or his competency to make it, or should refuse to confirm it when required by his executors. The daughter refused to confirm the will, and a suit having been instituted to establish it the daughter disputed its validity and the compe-

tency of her father to make it. It was held that the clause of revocation was valid; that the gift over took effect, and that the benefits given by the will to the daughter were forfeited by that which had taken place.

It is said in 2 Redfield on Wills, p. 298, in treating of the rule as to conditions against disputing the will, that "acceptance of the legacy renders the condition binding upon the legatee, upon the well-known doctrine of election." Election is thus defined by Sir William Grant, Master of the Rolls, in *Andrew* v. *Trinity Hall*, 9 Ves. 525, 533: "Where one legatee under a will insists upon something, by which he would deprive another legatee under the same will of the benefit, to which he would be entitled, if the first legatee permitted the whole will to operate."

This thought finds apt illustration in the case at bar. These legatees insist that the devise of this particular real estate to the plaintiff shall not stand; that it was not the property of the testator, and could not lawfully be devised by him, and therefore that the plaintiff shall not take the property which the testator proposed to give it. If, however, they had accepted this legacy burdened with the condition named, might it not fairly be said that they elected to acquiesce in the will and in the disposition specifically made by the testator of this property? Redfield in the same volume on page 370, after citing *Morrison* v. *Bowman*, 29 California, 337, in which this subject was considerably discussed, states as one of the propositions therein established:

"Although the testator has no legal power to dispose of the property of another, yet if he assumes to do so by his will, and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator."

In *Beall* v. *Schley*, 2 Gill, 181, 200, the court said:

"It is only carrying out a plain intent of the testator, and giving to the residuary devisee that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject, the rule is, that a man shall not take a benefit under a will, and

at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and, at the same time, what is devised to another; although, but for the will, it would be his; hence he is driven to his election to say, which he will take." See also 1 Jarman on Wills, 415 ; 2 Story's Eq. Juris. § 1076.

The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.

The decree of the Court of Appeals will be reversed, and the case remanded to that court with instructions to enter a decree in conformity with this opinion.

The Chief Justice did not sit in this case, and took no part in its consideration and judgment.

Counsel for Plaintiff in Error.

BROWN *v.* MARION NATIONAL BANK.

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

No. 201. Submitted January 21, 1898. — Decided February 21, 1898.

Section 5198 of the Revised Statutes of the United States prescribing what rate of interest may be taken, received, reserved or charged by a national banking association, makes a difference between interest which a note, bill or other evidence of debt "carries with it, or which has been agreed to be paid thereon," and interest which has been "paid."

Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198.

If a national bank sues upon a note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit.

The forfeiture declared by the statute is not waived by giving a renewal note, in which is included the usurious interest. No matter how many renewals may be made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid.

If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five years, without any money being in fact paid by the borrower, — each renewal note including past interest, legal and usurious, — the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid.

If the note when sued on includes usurious interest, or interest upon usurious interest, agreed to be paid, the holder may elect to remit such interest, and it cannot then be said that usurious interest was paid to him.

If the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter.

THE case is stated in the opinion.

Mr. E. J. McDermott and *Mr. H. W. Rives* for plaintiff in error.

Mr. W. J. Lisle for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This case was twice before the Court of Appeals of Kentucky. The first judgment of the court of original jurisdiction was reversed in that court, and the cause was remanded for further proceedings. 92 Kentucky, 607.

The present appeal brings up for review the final judgment rendered by the Court of Appeals of Kentucky on a second appeal to that court.

The case requires the construction of certain provisions of the Revised Statutes of the United States relating to national banking associations.

Section 5197 authorizes a national banking association to take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State. When no rate is fixed by the laws of the State, Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run.

Section 5198 provides: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; pro-

vided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The last section clearly makes a difference between interest which a note, bill or other evidence of debt held by a national bank, "carries with it or which has been agreed to be paid thereon," and interest which has been "paid." Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198 and become principal.

If a bank, which violates that section, sues upon the note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. We say "entire interest," because such are the words of the statute, based on the act of June 8, 1864, c. 106, § 30, 13 Stat. 99, 108, whereas the prior statute of February 25, 1863, c. 58, § 46, 12 Stat. 665, 678, declared that the knowingly taking, reserving or charging a greater rate of interest than was allowed, should be held and adjudged a forfeiture of "the debt or demand" on which usurious interest was taken, reserved or charged.

The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which

has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest, which the note, bill or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid.

It is said that, within the meaning of the statute, interest is "paid" when included in a renewal note, and when suit is brought upon the last note, calling for interest from its date, only the interest accruing on the apparent principal of *that* note is subject to forfeiture. We think that the statute cannot be so construed. If, within the meaning of the statute, interest is "paid" simply by including it in a renewal note, it would follow that as soon as the usurious interest is included in a renewal note, the borrower or obligor could sue the lender or obligee and "recover back . . . twice the amount of the interest thus paid," when he had not, in fact, *paid* the debt nor any part of the interest as such. This cannot be a sound interpretation of the statute. The words "in case the greater rate of interest has been *paid*," in section 5198, refer to interest actually paid, as distinguished from interest included in the note and only "agreed to be paid." If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower — each renewal note including past interest, legal and usurious — the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid.

It is difficult to tell from the record when there were actual payments of usurious interest as such. Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that, as we have said, was not *payment* within the meaning of the statute. *Driesbach* v. *National Bank*, 104 U. S. 52. If the note when sued on includes usurious interest, or interest upon usurious interest,

agreed to be paid, the holder may, in due time, elect to remit such interest, and it cannot then be said that usurious interest was paid to him. *McBroom* v. *Scottish Mortgage & Land Investment Co.*, 153 U. S. 318, 328; *Stevens* v. *Lincoln*, 7 Met. 525, 528; *Saunders* v. *Lambert*, 7 Gray, 484, 486; *Stedman* v. *Bland*, 4 Iredell, Law, 296, 299. If at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter.

It is proper to state that the judgment before us for review was not in accordance with the views of the Court of Appeals of Kentucky as expressed when the case was first before that court on appeal. 92 Kentucky, 607. The ruling then made by that court was not followed in the subsequent case of *Snyder* v. *Mount Sterling National Bank*, 94 Kentucky, 231, in which the language of Judge Acheson in *Farmers & Mechanics' Bank* v. *Hoagland*, 7 Fed. Rep. 159, 161, was approved, as follows: "By the terms of the act of Congress [the national bank act] the charging of such rates of interest [in excess of the legal rate] worked a forfeiture of the entire interest which the several notes carried with them. Now such forfeiture was not waived by the giving of subsequent notes, although, as respects them, the agreed rate of interest was a legal rate. They were mere renewals, and given without any new consideration. Nor did the new notes operate as payment of the debts for which they were given. In so far, then, as the notes in suit embraced the forfeited interest, they are without consideration. Moreover, it is an established principle that if there be usury in the original transaction, it affects all consecutive securities, however remote, growing out of it; and neither the renewal of the old, nor the substitution of a new security, between the same parties, can efface the usury. The bank incorporated in the new notes usurious interest, previously charged, as a part of the new principal, and this illegal consideration pervaded the whole subsequent series of notes. Upon each fresh renewal interest was charged upon usurious interest, which had entered into the prior notes as principal."

Counsel for Parties.

It was contended in the Court of Appeals of Kentucky in the present case that its ruling, when the case was first before it, was different from its subsequent ruling in *Snyder* v. *Mount Sterling National Bank*. That court conceded that the two cases were not in harmony on the question whether the bank could recover the usurious interest embraced in the renewal notes. "Nevertheless," the court said, "we hold that the judgment on the former appeal is the law of this case." It was the latter view which made it necessary for the appellants to prosecute the present appeal.

As the judgment in this case did not proceed upon the principles herein stated, but rested upon an erroneous interpretation of the statute, it must be reversed. The necessary calculations can be made in the state court.

For the reasons stated the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

SAVINGS AND LOAN SOCIETY *v.* MULTNOMAH COUNTY.

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

No. 69. Argued October 29, 1897. — Decided March 7, 1898.

The statute of Oregon of October 26, 1882, taxing mortgages of lands in that State to the mortgagees in the county where the land lies, does not, as applied to mortgages owned by citizens of other States and in their possession outside of the State of Oregon, contravene the Fourteenth Amendment of the Constitution of the United States.

THE case is stated in the opinion.

Mr. Milton W. Smith for appellant. *Mr. Walter S. Perry* was with him on the brief.

Mr. John H. Hall for appellee. *Mr. W. T. Hume* was with him on the brief

Opinion of the Court.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity, filed in the Circuit Court of the United States for the District of Oregon, by the Savings and Loan Society, a corporation and citizen of the State of California, against Multnomah County, a public corporation in the State of Oregon, and one Kelly, the sheriff and *ex officio* the tax collector of that county, and a citizen of that State, showing that in 1891 and 1892 various persons, all citizens of Oregon, severally made their promissory notes to secure the payment of various sums of money, with interest, to the plaintiff at its office in the city of San Francisco and State of California, amounting in all to the sum of $531,000; and, to further secure the same debts, executed to the plaintiff mortgages of divers parcels of land owned by them in Multnomah County; that the mortgages were duly recorded in the office of the recorder of conveyances of that county; that the notes and mortgages were immediately delivered to the plaintiff, and had ever since been without the State of Oregon, and in the possession of the plaintiff at San Francisco; that afterwards, in accordance with the statute of Oregon of October 26, 1882, taxes were imposed upon all the taxable property in Multnomah County, including the debts and mortgages aforesaid; that, the taxes upon these debts and mortgages not having been paid, a list thereof was placed in the hands of the sheriff, with a warrant directing him to collect the same as upon execution, and he advertised for sale all the debts and mortgages aforesaid; and that the statute was in violation of the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws. The bill prayed for an injunction against the sale; and for a decree declaring that the statute was contrary to the provisions of the Constitution of the United States and therefore of no effect, and that all the proceedings before set out were null and void; and for further relief.

The defendants demurred generally; and the court sus-

tained the demurrer, and dismissed the bill. 60 Fed. Rep. 31. The plaintiff appealed to this court.

The ground upon which the plaintiff seeks to maintain this suit is that the tax act of the State of Oregon of 1882, as applied to the mortgages, owned and held by the plaintiff in California, of lands in Oregon, is contrary to the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws.

The statute in question makes the following provisions for the taxation of mortgages: By § 1, "a mortgage, deed of trust, contract or other obligation whereby land or real property, situated in no more than one county in this State, is made security for the payment of a debt, together with such debt, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property." By § 2, the mortgage, "together with such debt, shall be assessed and taxed to the owner of such security and debt in the county, city or district in which the land or real property affected by such security is situated;" and may be sold, like other real property, for the payment of taxes due thereon. By § 3, that person is to be deemed the owner, who appears to be such on the record of the mortgage, either as the original mortgagee, or as an assignee by transfer made in writing upon the margin of the record. By § 4, no payment on the debt so secured is to be taken into consideration in assessing the tax, unless likewise stated upon the record; and the debt and mortgage are to be assessed for the full amount appearing by the record to be owing, unless in the judgment of the assessor the land is not worth so much, in which case they are to be assessed at their real cash value. By §§ 5, 6, 7, it is made the duty of each county clerk to record, in the margin of the record of any mortgage, when requested so to do by the mortgagee or owner of the mortgage, all assignments thereof and payments thereon; and to deliver annually to the assessor abstracts containing the requisite information as to unsatisfied mortgages recorded in his office. By § 8, a debt secured by mortgage of land in a county of this State "shall,

for the purposes of taxation, be deemed and considered as indebtedness within this State, and the person or persons owing such debt shall be entitled to deduct the same from his or their assessments in the same manner that other indebtedness within the State is deducted." And by § 9, "no promissory note, or other instrument of writing, which is the evidence of a debt that is wholly or partly secured by land or real property situated in no more than one county in this State, shall be taxed for any purpose in this State; but the debt evidenced thereby, and the instrument by which it is secured shall, for the purpose of assessment and taxation, be deemed and considered as land or real property, and together be assessed and taxed as hereinbefore provided." Oregon Laws of 1882, p. 64. All these sections are embodied in Hill's Annotated Code of Oregon, §§ 2730, 2735–2738, 2753–2756.

The statute applies only to mortgages of land in not more than one county. By the last clause of § 3, all mortgages, "hereafter executed, whereby land situated in more than one county in this State is made security for the payment of a debt, shall be void." The mortgages now in question were all made since the statute, and were of land in a single county; and it is not suggested in the bill that there existed any untaxed mortgage of lands in more than one county.

The statute, in terms, provides that "no promissory note or other instrument in writing, which is the evidence of" the debt secured by the mortgage, "shall be taxed for any purpose within this State;" but that the debt and mortgage "shall, for the purposes of assessment and taxation, be deemed and treated as land or real property" in the county in which the land is situated, and be there taxed, not beyond their real cash value, to the person appearing of record to be the owner of the mortgage.

The statute authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgagor; and does not provide for both taxing to the mortgagee the money secured by the mortgage, and also taxing to the mortgagor the whole mortgaged property, as did the statutes of other

States, the validity of which was affirmed in *Augusta Bank* v. *Augusta*, 36 Maine, 255, 259; *Alabama Ins. Co.* v. *Lott*, 54 Alabama, 499; *Appeal Tax Court* v. *Rice*, 50 Maryland, 302; and *Goldgart* v. *People*, 106 Illinois, 25.

The right to deduct from his assessment any debts due from him within the State is secured as well to the mortgagee, as to the mortgagor, by a provision of the statute of Oregon of October 25, 1880, (unrepealed by the statute of 1882, and evidently assumed by § 8 of this statute to be in force,) by which "it shall be the duty of the assessor to deduct the amount of indebtedness, within the State, of any person assessed, from the amount of his or her taxable property." Oregon Laws of 1880, p. 52; Hill's Code, § 2752.

Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as indebtedness within the State for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the State is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the State.

The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws.

No question between the mortgagee and the mortgagor, arising out of the contract between them, in regard to the payment of taxes, or otherwise, is presented or can be decided upon this record.

The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of other States and in their possession outside of the State of Oregon, deprives them of their property without due process of law.

By the law of Oregon, indeed, as of some other States of the Union, a mortgage of real property does not convey the legal title to the mortgagee, but creates only a lien or incumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure. Oregon General Laws of 1843–1872, § 323; Hill's Code, § 326; *Anderson* v. *Baxter*, 4 Oregon, 105, 110; *Semple* v. *Bank of British Columbia*, 5 Sawyer, 88, 394; *Teal* v. *Walker*, 111 U. S. 242; *Sellwood* v. *Gray*, 11 Oregon, 534; *Watson* v. *Dundee Mortgage Co.*, 12 Oregon, 474; *Thompson* v. *Marshall*, 21 Oregon, 171; *Adair* v. *Adair*, 22 Oregon, 115.

Notwithstanding this, it has been held, both by the Supreme Court of the State, and by the Circuit Court of the United States for the District of Oregon, that the State has the power to tax mortgages, though owned and held by citizens and residents of other States, of lands in Oregon. *Mumford* v. *Sewell*, 11 Oregon, 67; *Dundee Mortgage Co.* v. *School District*, 10 Sawyer, 52; *Crawford* v. *Linn County*, 11 Oregon, 482; *Dundee Mortgage Co.* v. *Parrish*, 11 Sawyer, 92; *Poppleton* v. *Yamhill County*, 18 Oregon, 377, 383; *Savings & Loan Society* v. *Multnomah County*, 60 Fed. Rep. 31.

In *Mumford* v. *Sewell*, Judge Waldo, delivering the opinion of the court, said: "All subjects, things as well as persons, over which the power of the State extends, may be taxed." "A mortgage, as such, is incorporeal property. It may be the subject of taxation." "Concede that the debt accompanies the respondent's person and is without the jurisdiction of the State. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds." "Since the power of the State over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to

taxation by the State, unless there is constitutional limitation to the contrary." 11 Oregon, 68, 69.

"In *Mumford* v. *Sewell*," said Judge Deady, in *Dundee Mortgage Co.* v. *School District*, "the court held that a mortgage upon real property in this State is taxable by the State, without reference to the domicil of the owner, or the *situs* of the debt or note secured thereby. And this conclusion is accepted by this court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision. A mortgage upon real property in this State, whether considered as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a contract giving him a lien thereon for his debt and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the State, and dependent for its existence, maintenance and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the instrument has been sent out of the State for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial." 10 Sawyer, 63, 64.

The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. Personal property, as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax. *Tappan* v. *Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax cases*, 92 U. S. 575, 607; *Coe* v. *Errol*, 116 U. S. 517, 524; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22, 27. The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in

action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its *situs*. *Firemen's Ins. Co.* v. *Commonwealth*, 137 Mass. 80, 81; *State* v. *Runyon*, 12 Vroom, (41 N. J. Law,) 98, 105; *Darcy* v. *Darcy*, 22 Vroom, (51 N. J. Law,) 140, 145; *People* v. *Smith*, 88 N. Y. 576, 585; *Common Council* v. *Assessors*, 91 Michigan, 78, 92.

The plaintiff much relied on the opinion delivered by Mr. Justice Field in *Cleveland, Painesville & Ashtabula Railroad* v. *Pennsylvania*, reported under the name of *Case of the State Tax on Foreign-held Bonds*, 15 Wall. 300, 323. It becomes important therefore to notice exactly what was there decided. In that case, a railroad company, incorporated both in Ohio and in Pennsylvania, had issued bonds secured by a mortgage of its entire road in both States; and the tax imposed by the State of Pennsylvania, which was held by a majority of this court to be invalid, was a tax upon the interest due to the bondholders upon the bonds, and was not a tax upon the railroad, or upon the mortgage thereof, or upon the bondholders solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the Supreme Court of Pennsylvania.

This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate. *United States* v. *Hooe*, 3 Cranch, 73; *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 441.

In *Hutchins* v. *King*, 1 Wall. 53, 58, Mr. Justice Field, delivering the opinion of the court, said that "the interest of

the mortgagee is now generally treated by the courts of law as real estate, only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security." See also *Waterman* v. *Mackenzie*, 138 U. S. 252, 258. If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation.

The leading quotation, in 15 Wall. 323, from the Pennsylvania Reports, is this general statement of Mr. Justice Woodward: "The mortgagee has no estate in the land, more than the judgment creditor. Both have liens upon it, and no more than liens." *Witmer's Appeal*, 45 Penn. St. 455, 463. Yet the same judge, three years later, treated it as unquestionable that a mortgage of real estate in Pennsylvania was taxable there, without regard to the domicil of the mortgagee. *Maltby* v. *Reading & Columbia Railroad*, 52 Penn. St. 140, 147.

The effect of a mortgage as a conveyance of an interest in real estate in Pennsylvania has been clearly brought out in two judgments delivered by Mr. Justice Strong, the one in the Supreme Court of Pennsylvania, and the other in this court.

Speaking for the same judges who decided *Witmer's Appeal*, above cited, and in a case decided less than two months previously, reported in the same volume, and directly presenting the question for adjudication, Mr. Justice Strong said, of mortgages of real estate: "They are in form defeasible sales, and in substance grants of specific security, or interests in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, and with all its incidents. And though it is often decided to be a security or lien, yet, so far as it is necessary to render it effective as a security, there is always a recognition of the fact that it is a transfer of the title." *Britton's Appeal*, 45 Penn. St. 172, 177, 178. It should be remembered that in the courts of the State of Pennsylvania, for want of a court of chancery, an equitable title was always held suffi-

cient to sustain an action of ejectment. *Simpson* v. *Ammons*, 1 Binney, 175; *Youngman* v. *Elmira & Williamsport Railroad*, 65 Penn. St. 278, 285, and cases there cited.

Again, in an action of ejectment, commenced in the Circuit Court of the United States for the District of Pennsylvania, Mr. Justice Strong, delivering the unanimous opinion of this court, said: "It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem." "Courts of equity," he went on to say, "as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land." Applying these principles, it was held that one claiming under the mortgagor, having only an equitable title, could not maintain an action of ejectment against one in possession under the mortgagee, while the mortgage remained in existence, or until there had been a redemption; because an equitable title would not sustain an action of ejectment in the courts of the United States. *Brobst* v. *Brock*, 10 Wall. 519, 529, 530.

In a later case in Pennsylvania, Chief Justice Agnew, upon a full review of the authorities in that State, said: "Ownership of the debt carries with it that of the mortgage; and its assignment, or succession in the event of death, vests the right to the mortgage in the assignee or the personal representative of the deceased owner. But there is a manifest difference between the debt, which is a mere chose in action, and the land which secures its payment. Of the former there can be no possession, except that of the writing, which evidences the

obligation to pay; but of the latter, the land or pledge, there may be. The debt is intangible, the land tangible. The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made." *Tryon* v. *Munson*, 77 Penn. St. 250, 262.

In *Kirtland* v. *Hotchkiss*, 42 Conn. 426, affirmed by this court in 100 U. S. 491, the point adjudged was that debts to persons residing in one State, secured by mortgage of land in another State, might, for the purposes of taxation, be regarded as situated at the domicil of the creditor. But the question, whether the mortgage could be taxed there only, was not involved in the case, and was not decided, either by the Supreme Court of Connecticut or by this court.

In many other cases cited by the appellant, there was no statute expressly taxing mortgages at the *situs* of the land; and, although the opinions in some of them took a wider range, the only question in judgment in any of them was one of the construction, not of the constitutionality, of a statute — of the intention, not of the power, of the legislature. Such were: *Davenport* v. *Mississippi & Missouri Railroad*, 12 Iowa, 539; *Latrobe* v. *Baltimore*, 19 Maryland, 13; *People* v. *Eastman*, 25 California, 601; *State* v. *Earl*, 1 Nevada, 394; *Arapahoe* v. *Cutter*, 3 Colorado, 349; *People* v. *Smith*, 88 N. Y. 576; *Grant* v. *Jones*, 39 Ohio St. 506; *State* v. *Smith*, 68 Mississippi, 79; *Holland* v. *Silver Bow Commissioners*, 15 Montana, 460.

The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State

where the land is situated, without contravening any provision of the Constitution of the United States.

Decree affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

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

CENTRAL NATIONAL BANK *v.* STEVENS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 38. Argued October 15, 1897. — Decided March 7, 1898.

In August, 1880, Sackett brought suit in the Supreme Court of the State of New York, on behalf of himself and all other holders and owners of bonds of certain railroad companies against Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and David Butterfield, receiver of said company, praying for the appointment of a receiver and for a sale of the railroad and franchises for the benefit of the bondholders. On October 11, 1880, a receiver was appointed and qualified. On April 2, 1881, on petition of the receiver, and after a report by an expert disclosing the necessity for expenditure to make the road safe and to enable trains to be run, an order was made by the court authorizing the receiver to issue and negotiate $350,000 in certificates, the same to be a first lien. The certificates were sold, and the proceeds expended under the approval of the court. On June 12, 1885, sale was made of the road and deed delivered to Foster and Hazard for $155,000, subject to the payment of the unpaid portion of the principal and interest of the certificates. On April 9, 1886, the Central National Bank of Boston brought suit in the Supreme Court of New York, on its own behalf and that of others as owners of the certificates, against Foster, Hazard, the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company. On March 24, 1887, the suit having been transferred on the petition of the defendants to the Circuit Court of the United States, after full hearing and argument the latter court rendered a final decree, establishing the rights of the Central National Bank of Boston and of others as owners of said certificates, declaring the latter to be a first lien, decreeing that Foster and Hazard were liable for any deficiency if the sale should fail to realize enough to

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pay certificates. On March 23, 1892, sale under said decree to Foster for $7500, and on April 25, 1892, deed of conveyance by referee to Foster, were made. On December 8, 1890, Stevens and others brought their suit in the Supreme Court of New York against the Central National Bank of Boston, the other holders of certificates, Foster, Hazard and others, to set aside the decree in Sackett's case and to enjoin proceedings in the Circuit Court of the United States. November 11, 1891, judgment setting aside the sale in Sackett's case and finally enjoining the Central National Bank and others, plaintiffs in the Circuit Court of the United States, from selling under the decree of the Federal court. On May 16, 1892, sale and conveyance were made by referee under the decree in the present suit to Foster. On May 9, 1893, judgment of the general term was rendered, and November 27, 1894, judgment of the Court of Appeals, each affirming the judgment of the Supreme Court, *Held* that the judgment of the Supreme Court of New York and of the Court of Appeals affirming the same are erroneous in so far as they command the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company and other holders of the receiver's certificates whose rights, as such holders, were adjudged by the Circuit Court of the United States, to appear before the referee appointed by the Supreme Court in the present case, and which enjoin the Central National Bank of Boston and others, whose rights have been adjudged by the Circuit Court of the United States for the Northern District of New York, from proceeding with the sale under the decree of that Court.

The Lebanon Springs Railroad Company was organized in the year 1852, and, by virtue of various acts of the legislatures of New York and Vermont, was authorized to construct and maintain a railroad extending from Chatham, New York, to Bennington, Vermont. On the 1st day of July, 1867, the said company duly executed and delivered to the Union Trust Company of New York a mortgage of that date on all its property, rights and franchises, to secure the payment of bonds to the amount of two million of dollars, which bonds were then or soon after sold to a great number of persons. In January, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington and Rutland Railroad Company, under the name and style of the Harlem Extension Railroad Company. The new company, on April 1, 1870, executed and delivered to the said Union Trust Company a mortgage on its road and franchises to secure bonds to the amount of four million dollars. Of these bonds there were sold to outside parties to the amount of one million five hundred thousand dollars. The

remaining two million five hundred thousand dollars of bonds were reserved to take up and be exchanged for the two million dollars of bonds of the Lebanon Springs Railroad Company and for five hundred thousand dollars of bonds which had been issued by the Bennington and Rutland Railroad Company, but such exchange never took place, and accordingly only one million five hundred thousand dollars of the said bonds of the Harlem Extension Railroad Company were ever issued. Both said mortgages were duly recorded in the proper counties in the States of New York and Vermont.

On February 22, 1872, the interest upon the said bonds of the Lebanon Springs Railroad Company falling due after January, 1869 not having been paid, the Union Trust Company of New York began an action in the Supreme Court of New York to foreclose the mortgage of that company, in which action the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants.

On November 15, 1872, the Union Trust Company of New York filed bills in the Court of Chancery in the State of Vermont to foreclose both of said mortgages, in which actions the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants, and said defendants duly appeared in that court prior to December 1, 1872.

While the above-mentioned actions were pending, and on December 18, 1872, the Harlem Extension Railroad Company and the Pine Plains and Albany Railroad Company, a corporation of the State of New York, consolidated their roads, property and capital stock, under the name of the Harlem Extension Railroad Company; and on December 19, 1872, the New York, Boston and Northern Railroad Company and the said last named the Harlem Extension Railroad Company duly consolidated their roads, property and capital stock, and thus formed one company under the name of the New York, Boston and Montreal Railway Company.

The above-mentioned foreclosure suits were so proceeded with that, in the said action in the Supreme Court of New York, a judgment of foreclosure of the said mortgage given by the Lebanon Springs Railroad Company, and for a sale of

its road, property and franchises within the State of New York, and of all its right, title and interest to the railroad and franchises within the State of Vermont, was rendered on December 10, 1872; and on January 25, 1873, the property and franchises mentioned were sold to one William Butler Duncan for the price of one hundred thousand dollars, and on said day, Charles S. Fairchild, the referee appointed by the court to effect the sale, executed and delivered to one James C. Hull his deed of conveyance of the said road, property and franchises, bearing date the said 25th January, 1873, and said deed was duly recorded in the clerks' offices for the counties of Rensselaer and Columbia.

On the 7th day of December, 1872, decrees of foreclosure of the mortgage of the Lebanon Springs Railroad Company and of the Harlem Extension Railroad Company's mortgage, and directing a sale, were rendered; and in pursuance of such decrees the said road, property and franchises within the State of Vermont were, by Daniel McEwen, a special master in chancery, appointed by the court for that purpose, sold on January 20, 1873, to one Charles G. Lincoln, for the sum of fifty thousand dollars, and deeds of conveyance of that date were made and delivered to said Lincoln by the said master in chancery.

On January 28, 1873, Hull and Lincoln, the respective purchasers at the said foreclosure sales, executed and delivered to the said William Butler Duncan and to one Trenor W. Park a bond in the sum of five million dollars, and a mortgage to secure the same on all the roads, property and franchises of the Harlem Extension Railroad Company, including those of the Lebanon Springs Railroad Company and of the New York and Vermont Railroad Company.

On January 30, 1873, Hull and wife, by their deed executed and delivered that day, conveyed all said roads, property and franchises, situated in the State of New York, to the said the New York, Boston and Montreal Railway Company, subject, however, to said mortgage to Duncan and Park; and, on the same day, Lincoln, by a deed executed and delivered by him, conveyed said roads, property and franchises, situated in the

State of Vermont, to the said the New York, Boston and Montreal Railway Company, subject to the said mortgage to Duncan and Park, and to the said five hundred thousand dollar mortgage on the old Bennington and Rutland Railroad.

The New York, Boston and Montreal Railway Company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which had become wholly due and payable on or before February 1, 1875, but has never paid the remainder of the money due on said bond and mortgage.

On March 15, 1873, the New York, Boston and Montreal Railway Company executed and delivered a certain other mortgage in the amount of twelve million two hundred and fifty thousand dollars to Seligman, Sherman and Brown as trustees. This mortgage covered the above-mentioned railroad and other properties. On the 1st day of April, 1873, the New York, Boston and Montreal Railway Company executed and delivered still another mortgage on the said railroad and other things in the amount of twelve million seven hundred and fifty thousand dollars, in which the New York Loan and Indemnity Company was named as trustee. Enough of the bonds of the said last two mortgages were sold to realize six millions of dollars, which were received and disbursed by Seligman and Brown. The said railroad was operated by and on behalf of the New York, Boston and Montreal Railway Company until some time in November, 1873, when said company leased the road to the Central Vermont Railroad Company, by which it was operated until August 20, 1877, when said last-mentioned company withdrew from the possession of and abandoned the road. In the meantime the New York, Boston and Montreal Railway Company had failed to fulfil its obligations and had become wholly insolvent, and said railroad, when surrendered and abandoned by its lessee, lay unoccupied and unoperated until some time in September, 1877, when it was taken possession of by one Russell C. Root, who subsequently, in November, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company, a corporation of the State of New York, and of which said Root was president,

and which continued to operate said railroad until it came into the possession of John W. Van Valkenburgh as hereinafter stated.

On September 7, 1889, one Marvin Sackett, claiming to be the owner of bonds to the amount of $8700, issued, as before mentioned, by the Lebanon Springs Railroad Company, brought an action in the Supreme Court of New York against the said Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver of the said last-mentioned company, praying for the sale of the whole of the said railroad property and franchises. He claimed to bring the action in behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who held any of the two million of dollars of the bonds of said company. He alleged in his complaint the fact of the mortgage, to secure his bonds, among others, to the Union Trust Company of New York, its actions to foreclose the sales under them, the aforesaid sales to Hull and Lincoln, and their mortgage to Park and Duncan, and the conveyance by the latter to the New York, Boston and Montreal Railway Company, and that Hull and Lincoln, and Park and Duncan, acted throughout all those matters as the agents and representatives, and for the use and benefit of the bondholders of the Lebanon Springs Railroad Company.

The summons and complaints were served upon the New York, Boston and Montreal Railway Company and upon Butterfield as receiver, but they did not appear. Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company were also served, and they put in joint answers on September 25, 1880. On October 1, 1880, the complainant Sackett moved for the appointment of a receiver, and on October 7, John W. Van Valkenburgh was appointed and filed his bond as receiver.

On November 12, 1880, one Bloodgood and six others, claiming to own a majority of the bonds of the Lebanon Springs Railroad Company, moved for leave to be made

parties to the action. This motion was, on January 10, 1881, denied, but the plaintiff was directed to serve papers and notices of every kind on one F. L. Westbrook, who was by the order authorized to appear as counsel of the said Bloodgood and the other six bondholders, upon all trials, hearings and motions. On November 6, 1880, Park and Duncan made an application to the court to be made parties to the action, alleging that they were the owners of over $300,000 of bonds of the Lebanon Springs Railroad Company, and of over $600,000 of bonds of the Harlem Extension Railroad Company, and that they were the mortgagees under the mortgage made by Hull and Lincoln. This application was not granted. One Henry A. Tilden, who claimed to own thirty of the bonds of the Lebanon Springs Railroad Company, was associated with Sackett in the bringing of said action, and appeared by counsel. On October 11, 1880, the receiver filed a petition, setting forth that he had no funds with which to equip or operate the road, and asking that he might be allowed to borrow $25,000 on certificates for that purpose, and on October 25, 1880, the court made an order authorizing the receiver to borrow $25,000 on certificates, which were declared to be a first lien on the net profits of the railroad company. On February 23, 1881, the receiver filed a petition setting forth that there were large arrears of taxes, for which sales had taken place of portions of the road, that there was a necessity for the purchase of rails and superstructures, and praying that he might be authorized to issue certificates to raise the necessary moneys to redeem such portions of the road as has been sold for taxes, and to purchase rails and make other necessary repairs. Notice of this petition was filed on Hamilton Ward, attorney general of the State of New York; on McClellan and Brown, attorneys for Sackett, the plaintiff; on P. W. Ostremder, attorney for R. C. Root, defendant, and on F. W. Westbrook, attorney designated to receive notices on behalf of Bloodgood and others.

On March 5, 1881, the court, after hearing Edward Newcomb, of counsel for said receiver, and F. L. Westbrook, of counsel in opposition thereto, appointed James H. Jones, an

expert, to examine the rails, ties, bridges, roadbed, trestles, telegraph poles and all matters pertaining to the running of the Lebanon Springs Railroad, to the end that he should make a report to the court of the true condition of the Lebanon Springs Railroad, with his opinion thereon as to what was necessary and requisite for the protection of said property and the safety and successful running of said railroad; that said report be made to said receiver, and that said receiver should return said report, together with a detailed statement of moneys received and expended by him, with such other information as he should have in relation to said railroad; and further directing that said reports and papers should be served on F. L. Westbrook ten days prior to the hearing on said report before the court.

On March 19, 1881, James H. Jones made an elaborate report to the receiver, stating that he had, in pursuance of his appointment, made a careful examination of the said railroad, its rails, ties, bridges, roadbed, trestles, telegraph poles and all matters appertaining to the running and management thereof; that he found the rails of iron worn to such an extent as to render the running of trains, even at an ordinary rate of speed, extremely dangerous; that to render the track safe for ordinary use would require from 2500 to 3000 tons of new rails to replace the poorer conditioned of the old ones; that the ties were badly decayed, to replace which would require about 87,000 new ties; that the road required new ballasting; that the bridges and trestles were in an unsafe condition, all needing repair; that to repair the bridges and trestles and abutments would require an expenditure of some $19,000; that new telegraph poles to the number of 2030 were required; that, in fine, to put said road in a condition to render its operation safe and successful would require about $320,000. This report was returned to court by the receiver, with a statement of his receipts and expenditures to date, and on April 4, 1881, the court, after considering said reports and hearing counsel for the receiver, and no one appearing in opposition thereto, ordered the receiver to put said road in repair as recommended by the report of James H. Jones, and

authorized him to issue receiver's certificates, dated April 2, 1881, with interest at six per cent, for the aggregate amount of $350,000, the same to be signed by said John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, and a certificate on each thereof duly to be signed by an officer of the Farmers' Loan and Trust Company of New York City. It was further ordered that the said receiver should negotiate said certificates, and with the money arising therefrom pay and discharge the $25,000 of certificates theretofore authorized by the order of October 25, 1880, and to purchase all necessary materials for the repairs of said road, and pay and discharge all necessary expenses incident to said repairs. It was further ordered that said receiver's certificates of indebtedness should be declared to be a debt of the receiver incurred for the benefit and protection of said Lebanon Springs Railroad and its owners and the bondholders thereof, and said certificates were declared and decreed to be a first lien on the railroad and every kind of property owned by the company, to be recognized as such in any reorganization of the company or in its consolidation with any other company; and in case of any sale of the said railroad, the property in the hands of the receiver, and the franchises, under any decree of the Supreme Court, the said certificates are to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and cancelled by him from the earnings of the railroad; but in case said railroad and property in the hands of the receiver and franchises, on any sale thereof, does not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates, then such unpaid amount shall remain as a first lien on the road, property and franchises in the hands of the purchaser.

On January 12, 1885, a final decree of sale was made, appointing George McClellan as referee to make such sale, and providing, among other things, that sale should be made subject to the payment of the undue principal and interest of the receiver's certificates, and that the purchaser of the railroad and franchises should take said railroad, property and franchises, subject to the unpaid portion of said certificates,

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which should be assumed by such purchaser as part of the consideration of the purchase.

On June 29, 1885, George McClellan, the referee, reported to the court that he had effected sale, in accordance with the terms of the decree of sale, to one William Foster, Jr., trustee, for the sum of $155,000, and that, among the terms of the sale, it was stipulated that William Foster, Jr., trustee, should take the property and assets, subject to the payment of the undue principal and interest of the receiver's certificates.

Subsequently, the referee executed and delivered to William Foster, Jr., and Rowland N. Hazard, as purchasers, a deed of conveyance, and received from them $155,000, the amount of their bid; and it appears that, out of the amount of said purchase money, there was then paid about $60,000, the interest then due on said certificates. Afterwards, it appears by the record, that Foster and Hazard conveyed the railroad, property and franchises to the New York, Rutland and Montreal Railway Company, to which company Reynolds, who had succeeded Van Valkenburgh as receiver, surrendered possession of the railroad. The balance of the purchase money was used and applied as directed by the judgment in the said Sackett suit.

The principal of said certificates became due on the 1st day of April, 1886, and was not paid. Thereupon, in the month of April, 1866, the Central National Bank of Boston brought an action in the Supreme Court of New York in behalf of itself as well as other holders of receiver's certificates, against William Foster, Jr., Rowland N. Hazard, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company of New York. All of the defendants in said action appeared and answered. After issue was joined, the said action was, on the petition of the defendants, duly removed into the Circuit Court of the United States for the Northern District of New York.

The complaint alleged in substance that the plaintiff is a banking association duly organized and incorporated under the laws of the United States, located and doing business in the city of Boston, in the Commonwealth of Massachusetts.

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It alleged the making of an order on or about April 2, 1881, by the New York Supreme Court in the Sackett suit, whereby one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, was authorized and directed to issue under his hand receiver's certificates of indebtedness, dated April 2, 1881, with interest at six per cent, of $500 each, payable in five years, interest payable January 1 and July 1 in each year, to the aggregate amount of $350,000, such certificates and the interest coupons thereto attached made payable at the Farmers' Loan and Trust Company in the city of New York, and whereby it was further ordered that the receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon pay and discharge certain previous certificates theretofore authorized by an order of the same court, and from the moneys arising from said certificates, that said receiver purchase all necessary materials for the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found due to claimants by the referee named in said order; that it was further provided in said order that the said receiver's certificates of indebtedness to the amount therein directed to be issued, be and the same were thereby declared to be a debt of the said receiver, incurred for the benefit and protection of the said Lebanon Springs Railroad and its owners and bondholders, and said certificates to the amount of $350,000 were by said order declared to be a first lien on the railroad and all and every kind of property owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any reorganization of the company, and that in case of any sale of the railroad, the property in the hands of the receiver, and franchises under any decree of the Supreme Court, said certificates were to be first paid from the first moneys realized therefrom by said receiver, unless sooner paid and cancelled by him from the earnings of said railroad. It was further provided in said order that in case said railroad property in the hands of

the receiver and franchises on any sale thereof should not bring sufficient to pay the full amount of principal and interest then due on the outstanding negotiated certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver, and franchises, should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid with interest thereon, referring to the original order or the record thereof.

The complaint further alleged that the said Van Valkenburgh, as receiver, under and in pursuance of said order, did issue and negotiate such certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from said certificates to the uses and purposes mentioned and in said order authorized; that the plaintiff is now and has for several years last past been the owner and holder of said certificates, amounting in the aggregate to $250,000 of principal thereof, and that the certificates issued and negotiated by the receiver which are not held by plaintiff, are held by divers persons and corporations, many of whose names are unknown to the plaintiff.

The complaint further alleged that in the said Sackett suit the plaintiff appeared by its attorneys on the trial of the issues and made proof in regard to the issuing of said certificates and its title thereto, and that such proceedings were had therein that a judgment was rendered on or about January 12, 1885, by which it was, among other things, adjudged and decreed that the said certificates, amounting in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the railroad and its property, as provided in the said order, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in said judgment provided for, and whereby it was further adjudged and decreed that the property, franchises and rights of the said railroad company as described in a certain mortgage therein referred to, and in the judgment in said Sackett suit, and all the right, title and interest of any and of

all the parties to the said action, including all property and assets in the hands of said receiver, be sold at public auction under the direction of a referee therein named, for the benefit of the first mortgage bondholders of said railroad company issued July 1, 1867, for the amount of $2,000,000, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and should assume, as part of the consideration of the purchase, the payment thereof, and from the avails of said sale, after the payment of certain expenses therein provided for, the said referee should pay the amount of interest due on said receiver's certificates; that under and in pursuance of said judgment, the referee named therein did advertise for sale on the 12th day of June, 1885, and did sell at public auction, the premises, rights, franchises and property in said judgment mentioned and described, to the defendants, William Foster, Jr., and Rowland N. Hazard, who became the purchasers thereof for the price of $155,000, and that the said William Foster, Jr., acting on behalf of himself and said Hazard, did pay the referee five per cent of the purchase price and did subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did, for himself and said Hazard, assume and agree to pay the amount of said principal and interest on said certificates of indebtedness as part of the consideration of said purchase; that the balance of said $155,000 was thereafter paid by the purchasers to the referee, and that the referee did thereafter duly execute and deliver to the defendants Foster and Hazard a deed of said premises and property in said judgment described, and paid from the said $155,000 the interest then due on said certificates, amounting to about $60,000.

Plaintiff further alleged in said complaint that said referee's deed was duly accepted by the defendants Foster and Hazard, and that in and by the deed, the grantees therein, the defendants Hazard and Foster, took said premises and property

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subject to the unpaid principal and interest on the receiver's certificates, as required by the judgment aforesaid; that the principal of said certificates with interest from January 1, 1886, became due and payable on the 2d day of April, 1886, and that on that day the said certificates, amounting to $250,000, held by the plaintiff, were duly presented to the Farmers' Loan and Trust Company of the city of New York, where the same were payable, and payment thereof was demanded, but the same was refused, and that the whole of said principal with interest from the 1st day of January, 1886, is now due and unpaid. The complaint then gives a description of the railroad premises mentioned in the judgment in the Sackett suit and in the referee's deed; alleges that the defendants or some of them are now in possession of the property above described, and are using and operating the same for railroad purposes, and that all the defendants have or claim to have some interest in or lien upon said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said certificates, and that there is now justly due the plaintiff upon said certificates held by it the sum of $250,000, with interest from January 1, 1886.

The complaint then prays that the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon said premises; asks for the usual judgment of foreclosure, for a receiver and for a sale, and that out of the moneys arising from the sale of said premises, plaintiff and other holders of said certificates who may come in and prove their title thereto and the amount due thereon may be paid the amount due on said certificates with interest and costs, so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Hazard and Foster may be adjudged to pay any deficiency that may remain after applying said moneys so applicable thereto, and for general relief.

The defendants all appeared and answered. Hazard and Foster answered separately, admitting their purchase substantially as alleged in the complaint, controverting some of the other allegations, and setting up as a distinct defence that

they acquired the property mentioned in the plaintiff's complaint with notice that the receiver's certificates were outstanding and of the sum justly due therefor, and that they have ever since been and now are ready and willing to pay the sum justly due on account of said receiver's certificates, but that they are advised and believe that the plaintiff is not entitled to receive payment thereof; that when the said property came into the hands of these defendants, it was subject to a lien for the amount actually due from the receiver and his successor in the trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants when they acquired the property succeeded to all the rights of the prior owners of the property as well as to their obligations; that in accepting the deed of the premises, they intended only to obligate themselves to pay the amount actually due from the receiver on account of such certificates, with proper interest, and no other or greater sum by way of profit, and defendants aver that they incurred no greater or other obligations in the premises.

The defendant the New York, Rutland and Montreal Railway Company also put in a separate answer. It alleged, among other things, that defendants Foster and Hazard had conveyed and transferred to it all the property and franchises conveyed to them by the referee in the Sackett suit subject to the payment of the sum justly due by said receiver, but not subject to any greater sum, and it controverts the allegations as to the amounts due on the receiver's certificates.

The American Loan and Trust Company also answered separately, setting up that it was the holder of a mortgage executed to it by the New York, Rutland and Montreal Railway Company, and denying knowledge or information as to the matters charged in the bill.

The case came on for a hearing on pleadings and proofs, and after full argument, on March 24, 1887, a decree was passed of which the following is a copy (omitting the description of the property, which is the same as that contained in the complaint in *this* action):

"It was ordered, adjudged and decreed as follows:

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"That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2d day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000 of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent per annum thereon from the first day of January, 1886.

"That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said district, requiring the holders of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

"That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part

thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said district, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid, together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys, after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to

them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution thereof; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

"And it is further ordered, adjudged and decreed that the defendants and all persons claiming under them, or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and thereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein.

[Description.]

"Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases."

Subsequently, in pursuance of the decree, the holders of the

certificates appeared before the special master and made proof of their ownership thereof, and said master, on February 7, 1888, made a report accordingly, finding the names of the holders thereof and the amounts due them respectively.

On March 23, 1892, in pursuance of an order of sale made by the said Circuit Court of the United States, Worthington Frothingham, as referee, sold the said premises and property described in the complaint (and described in the deed of George McClellan, referee, to Foster and Hazard) to William Foster, Jr., for the sum of seventy-five hundred dollars, and on April 25, 1892, executed and delivered a deed therefor to the said William Foster, Jr.

On December 8, 1890, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the will of W. H. Douglas, deceased, and Ida S. Harrison, for themselves and other holders and owners of bonds issued by the Lebanon Springs Company and the Harlem Extension Railroad Company, filed a petition or bill of complaint in the Supreme Court of New York against the Union Trust Company of New York, James C. Hull, William Butler Duncan, John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased; the New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as receiver of the property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; the Massachusetts Mutual Life Insurance Company, and others.

In this petition there is a history of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and of the several legal proceedings whereby the roads, property and franchises of these companies became vested in the New York, Rutland and Montreal Railway Company, which is substantially the same with that heretofore made in this statement. But the petition assailed the action brought

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by Sackett in 1880, and which resulted in the sale to Foster and Hazard in 1885, as fraudulent and collusive, and alleged that "the suit by Sackett was brought and conducted, not with the intention of realizing the said property for the benefit of the bondholders or any of them, or of himself as bondholder, but collusively and with the intent that he and others should receive large sums of money from the said property under color of the payment of claims, which, even if valid, were subordinate to said mortgages, and with the intent that said railroad and property should be acquired by others free from the lien of said mortgages, and without realizing anything to the holders of said bonds."

The petition further alleged that "afterwards the defendant, the Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated at par of the principal of the same, brought an action in this court against the defendants Foster and Hazard, the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company; that in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates; that said action was removed into the Circuit Court of the United States, and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates."

The prayers for relief were as follows:

"1. That it may be adjudged that the owners of the bonds issued by the Lebanon Springs Railroad Company have a first lien upon the said railroad and property, and the owners of the bonds issued by the Harlem Extension Railroad Company a second lien thereon, in preference of all others. That the bond and mortgage executed by the defendants Hull and Lincoln to the defendant Duncan and the said Park is held for the benefit of the owners of said bonds and represents their interest solely, and that defendants Brown and Seligman redeliver the same.

"2. That the judgment in the action brought in this court

by the defendant the Union Trust Company, and the decrees in the two actions brought by that company in the Court of Chancery of Vermont, be now specifically enforced, and the mortgage by the said Hull and Lincoln be now foreclosed, and that the said railroad and property be sold under said judgments and decrees, and said mortgage of Hull and Lincoln, for the benefit of this plaintiff and all other of the owners of the Lebanon Springs and Harlem extension bonds, and that all of the defendants in this action be barred and foreclosed of all right, title, interest and equity of redemption, of, in and to the said railroad and property and any part of the same.

"3. That it may be adjudged that the certificates issued by the said Van Valkenburgh were beyond the power of this court to issue and are of no validity except to bind the interest represented by the eight bonds of the said Marvin Sackett, and the interests of the defendants in the action brought by said Sackett.

"4. That all of the defendants in this action and all other persons be enjoined, as well temporarily by order as permanently by judgment, from interfering with any part of the said railroad or property.

"5. That a receiver be appointed, with the usual powers of receivers, to take possession of, preserve and operate said railroad and property until further order of the court.

"6. That the plaintiffs have such other and further relief as to the court shall seem just, besides costs."

To this petition the Central National Bank of Boston filed its separate answer, in which, after admitting certain allegations in the petition, relative to the history of the railroad companies, the said defendant set forth the proceedings in the suit of Sackett, including the appointment of Van Valkenburgh as receiver, the authority given such receiver by the court to issue and negotiate the said certificates, and the purchase by the defendant of $250,000 of said certificates for full value. The answer further alleged, in response to the petition, that the suit was brought by Sackett for himself as bondholder and on behalf of all other bondholders; that other

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bondholders, representing all, or nearly all, the bonds issued by the Lebanon Springs Railroad Company, had knowledge of the pendency of said suit by Sackett, and were represented by attorneys and counsel, although not nominally made parties to the action; that Foster and Hazard became purchasers at the sale, and that, by the terms of the sale, they had assumed the payment of the unpaid portion of said certificates as part of the consideration of the purchase; and further alleged that said judgment of the Supreme Court of New York had never been appealed from, reversed or in any way vacated or modified, and was binding and conclusive, not only upon the parties to said action, but upon the other holders of said bonds issued by the Lebanon Springs Railroad Company. The answer then proceeded to set forth proceedings in the Circuit Court of the United States, including the decree of March 24, 1887, and to pray, among other things, that the petition should be dismissed upon the merits, and that a decree may be rendered recognizing the rights of the defendant the Central National Bank of Boston as a holder of said certificates as such rights had been theretofore established by the decree of the Circuit Court of the United States.

The American Loan and Trust Company filed its separate answer, admitting some and denying other allegations of the petition. Hazard and Foster also filed a separate answer on their own behalf, in which they allege that the Sackett suit was brought and pursued in behalf of all the bondholders; that they, Foster and Hazard, had purchased the railroad property and franchises in good faith, and that by the judgment, decree and sale in said suit all the rights of said bondholders, plaintiffs in this suit, were cut off and barred, and that they, Foster and Hazard, had thereby acquired a good and valid title to said property and franchises, and thereupon they prayed that the complaint be dismissed and that a decree be rendered establishing their rights as purchasers of said road under said judgment and decree.

The New York, Rutland and Montreal Railway Company likewise filed a separate answer, denying the principal allegations of the petition, and praying that the rights of said com-

pany as purchaser of said road from Foster and Hazard should be confirmed, and that the complaint be dismissed.

Certain other individual defendants, holders of receiver's certificates, likewise answered, denying these allegations of the petition which assailed the validity of the proceedings in the Sackett suit, and praying that the said petition should be dismissed. Separate answers were likewise filed by Seligman and Brown, and by William B. Duncan substantially to the same effect.

Upon the first trial of this action judgment was rendered in favor of the defendants, dismissing it on the merits. On appeal that judgment was reversed by the general term and a new trial ordered. *Stevens* v. *Union Trust Co.*, 57 Hun, 498.

At the new trial judgment was rendered in favor of the plaintiffs on November 10, 1891, and this judgment, having been affirmed by the general term, was taken on appeal to the Court of Appeals, whose judgment, rendered November 27, 1894, affirmed that of the court below. *Stevens* v. *Central Nat. Bank*, 144 N. Y. 50. This writ of error was then sued out.

Upon sale made by John L. Henning, as referee, under the judgment of the Supreme Court in this case, pending the appeals, there was executed and delivered to said William Foster, Jr., by said referee a deed of conveyance of the railroad, property and franchises, dated May 16, 1892; and, as already stated, on March 23, 1892, the railroad was sold and conveyed to William Foster, Jr., by the referee appointed by the decree of the United States court.

After the judgment of November 10, 1891, William Foster, Jr., brought an action in the Supreme Court of New York against the Central National Bank and other holders of certificates, seeking to set aside that portion of the decree of the United States Circuit Court of March 24, 1887, which adjudged that Foster, either alone or with Hazard, pay the Central Bank and other certificate holders the deficiency that might exist in the payment of the certificates after the application of the proceeds of the sale of the road, and to annul and enjoin the decree that execution issue for such deficiency; and that this action, so brought by Foster, has been removed, on

the petition of the Central National Bank, to the Circuit Court of the United States for the Northern District of New York, where it is now pending.

Mr. Charles E. Patterson and *Mr. W. S. B. Hopkins* for plaintiffs in error. *Mr. Alpheus T. Bulkeley* was on *Mr. Patterson's* brief, and *Mr. William A. Sargent* was on *Mr. Hopkins'* brief. *Mr. Matthew Hale* and *Mr. Henry D. Hyde* filed a brief for plaintiffs in error.

Mr. Edward Winslow Paige for defendants in error.

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

The plaintiffs in error ask us to reverse the decree of the Court of Appeals, affirming that of the Supreme Court of New York, because the action of Stevens and others as a bill of review, or a bill in the nature of a bill of review, was not brought within the time limited by the practice of the courts for entertaining such bills; that, under the Code of Civil Procedure of the State of New York, bills for review have no place for errors appearing upon the face of the record; that the only remedy for such errors is by appeal; that, in so far as it is contended that the decree in the *Sackett case* was obtained by a fraudulent assertion or suppression of facts, the party aggrieved must move promptly upon the discovery of the fraud or of new facts; that the bill and the evidence adduced to sustain it do not disclose such a case of fraud or of newly discovered evidence, but do show a case free from actual fraud, and only, at the most, irregular by reason of a failure to include all the proper parties; that the parties complainant are to be visited with a knowledge of the proceedings in the Sackett suit by reason of the protracted and notorious character of the proceedings, and because knowledge of the proceedings in the Sackett suit must further be imputed to them, because they are represented in the effort to impugn the validity of that decree by counsel who had appeared for Sackett in his suit; and that hence the present suit should, on the well-estab-

lished rules regulating bills of review and bills to impeach decrees on the ground of after-discovered evidence, have been dismissed.

Without expressing any opinion on such allegations of error, it is sufficient to say that they raised questions for the consideration of the Court of Appeals of the State of New York, and that the disposition made of them by that court is binding upon us.

But those assignments of error which allege that the judgment of the Supreme Court of the State of New York, and of the Court of Appeals in affirming it erred in failing to give proper effect to the decree of the Circuit Court of the United States, and in granting a final injunction restraining the appellants from availing themselves of the provisions of such decree, certainly do present questions which are within our jurisdiction to consider.

Referring to the previous somewhat extended statement of the facts, we may briefly recapitulate a few of the principal dates. In August, 1880, Marvin Sackett brought his suit in the Supreme Court of the State of New York, on behalf of himself and all other holders and owners of bonds of certain railroad companies against Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and David Butterfield, receiver of said company, praying for the appointment of a receiver and for a sale of the railroad and franchises for the benefit of the bondholders. On October 11, 1880, a receiver was appointed and qualified.

On April 2, 1881, on petition of the receiver, and after a report by an expert disclosing the necessity for expenditure to make the road safe and to enable trains to be run, an order was made by the court authorizing the receiver to issue and negotiate $350,000 in certificates, the same to be a first lien. The certificates were sold, and the proceeds expended under the approval of the court. On June 12, 1885, sale was made of the road and deed delivered to Foster and Hazard for $155,000, subject to the payment of the unpaid portion of the principal and interest of the certificates.

Opinion of the Court.

On April 9, 1886, the Central National Bank of Boston brought suit in the Supreme Court of New York, on its own behalf and that of others as owners of the certificates, against Foster, Hazard, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company. On March 24, 1887, the suit having been transferred on the petition of the defendants to the Circuit Court of the United States, after full hearing and argument the latter court rendered a final decree, establishing the rights of the Central National Bank of Boston and of others as owners of said certificates, declaring the latter to be a first lien, decreeing that Foster and Hazard were liable for any deficiency if sale should fail to realize enough to pay certificates. On March 23, 1892, sale under said decree to Foster for $7500, and on April 25, 1892, deed of conveyance by referee to Foster. On December 8, 1890, Stevens and others brought their suit in the Supreme Court of New York against the Central National Bank of Boston, the other holders of certificates, Foster, Hazard and others, to set aside decree in case of Sackett and to enjoin proceedings in the Circuit Court of the United States. On November 11, 1891, judgment setting aside sale in the case of Sackett and finally enjoining the Central National Bank of Boston and others, plaintiffs in the Circuit Court of the United States, from selling under the decree of the Federal court.

On May 16, 1892, sale and conveyance were made by referee under the decree in the present suit to Foster. On May 9, 1893, judgment of the general term, and November 27, 1894, judgment of the Court of Appeals was rendered, affirming the judgment of the Supreme Court.

It will be perceived, on an inspection of these dates, that when the present suit was brought a final judgment had been rendered in the Circuit Court of the United States, establishing the title and rights of the holders of the certificates, directing a sale by a referee, and adjudging the personal liability of Foster and Hazard for an unpaid portion of said certificates after the application of the proceeds of sale; that when the judgment of the Supreme Court was entered in the present

case, and without awaiting the result of the appeal to the Court of Appeals, a sale was had in which Foster became the purchaser on a bid of $7500; and that Foster was likewise the purchaser at the sale on the decree of the Circuit Court.

The record does not disclose what application was made of the purchase money paid by Foster on his respective purchases at the two sales, but it may be easily conjectured that, after the payment of the costs and of the expenses of the sales, little or nothing would be left applicable to the bonds and certificates. Thus the singular result, thus far reached, of this protracted and expensive litigation, is that Foster, who had with Hazard been the purchaser at the Sackett sale, has become the owner of the railroad upon the payment of a merely nominal sum, and that the bondholders and the owners of the certificates have realized nothing. And it further thus appears that ever since May 16, 1892, the controversy has really been between the holders of the receiver's certificates and Foster who has, for a trifling sum, become the owner of the railroad as improved by money procured by the sale of the certificates.

It may be that Foster, when he bought under the decree of sale in the present suit, did so in pursuance of some arrangement with the bondholders and as their trustee. But whether Foster, when he bought under the decree of the Circuit Court of the United States, subjected himself to that feature of the decree that made him personally liable for the unpaid portion of the certificates, and precluded himself from relying on the decree of the Supreme Court of New York setting aside the Sackett sale, and whether the setting aside the sale in the Sackett suit would invalidate receiver's certificates issued years before and whose proceeds had gone into the improvement of the property, and whether, in case of Foster's inability to respond to his personal obligation, the unpaid portion of the certificates would be a lien on the railroad in his hands and those of his vendees, are questions for the Circuit Court of the United States, which cannot be withdrawn from its determination by the subsequent proceedings in the Supreme Court of New York. Any confusion that might otherwise have arisen by reason of conflicting views between the Federal and state

courts has been prevented by the fact that Foster, who himself originally invoked the jurisdiction of the Circuit Court of the United States, has become the purchaser of the railroad under the decrees of both courts, whereby the only substantial controversy that remains is between him, as such purchaser, and the holders of the certificates.

Those portions of the decree of the Supreme Court of New York and of the Court of Appeals which sought to compel the complainants in the suit pending in the Circuit Court of the United States to come into the state court and to there relitigate their titles to the certificates and the amounts thereof, and which sought to restrain them by injunction from proceeding under the final decree of sale of the Circuit Court, and from enforcing the other remedies adjudged to them by that decree, were, in our opinion, erroneous. Due effect was not thereby given to the judgment or decree of the Circuit Court, at least in so far as that decree had established the ownership and amounts of the certificates, and the injunction was a plain interference with the proceedings in another court which had full and complete jurisdiction over the parties and the subject-matter of the suit, and which jurisdiction had attached long before the suit in the Supreme Court had been begun.

It will suffice to cite a few of the cases:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely em-

barrassing to the administration of justice. In the case of *Kennedy* v. *The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." *Peck* v. *Jenness*, per Mr. Justice Grier, 7 How. 612, 624.

"State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the Circuit Courts. Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action Circuit Courts are wholly independent of the state tribunals." *Riggs* v. *Johnson County*, 6 Wall. 166.

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court, on a writ of error to the Supreme Court of the State. *Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141.

The exemption of the authority of the courts of the United

States from interference by legislative or judicial action of the States is essential to their independence and efficiency. *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Rio Grande Railroad* v. *Gomila*, 132 U. S. 478.

In Story's Equity Jurisprudence, vol. 2, § 900, it is said, referring to the power sometimes exercised by courts of equity, to restrain parties within their jurisdiction from proceeding in foreign courts: "There is one exception to this doctrine which has been long recognized in America, and that is, that state courts cannot enjoin proceedings in the courts of the United States; nor the latter in the former courts."

It is contended by the counsel for the defendants in error, in a supplemental brief that these principles, so long and so well settled, have been modified by some recent decisions of this court and the case of *Moran* v. *Sturges*, 154 U. S. 256, and of *Shields* v. *Coleman*, 157 U. S. 168, are cited in support of that contention. Such a conception of the import of those cases must have been formed from a hasty reading, for they are in perfect harmony with the previous cases, and, indeed, may properly be cited to sustain the reasoning upon which those cases proceeded.

In *Moran* v. *Sturges*, the Chief Justice, delivering the opinion of the court, cited the cases hereinbefore referred to and others, and stated the general rule to be that state courts cannot enjoin proceedings in the courts of the United States. In that case the Supreme Court of the State of New York had issued process against certain libellants in the District Court of the United States, and had, after hearing, enjoined them from taking any further proceedings on their libels. This judgment of the Supreme Court being affirmed by the Court of Appeals, and the judgment of the latter court being remitted to the Supreme Court and entered there as its judgment, the libellants sued out a writ of error to this court, and it was here held that the state court had no jurisdiction *in personam* over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was one for the District Court to decide in the first instance; that the District Court had jurisdiction; and that the judgment under

review was in effect an unlawful interference with the proceedings in that court.

It is true, as the report of the case shows, that two of the judges dissented, but not because of any disapproval of the principles laid down by the court, but because it was thought that the possession of the vessels in question had vested in the state court before the libels were filed in the District Court.

In *Shields* v. *Coleman* there was a controversy for possession of certain railroad property, and it was held that a Circuit Court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court. Such a decision, it is scarcely necessary to say, gives no support to the contention of the appellees.

The reasoning of the Court of Appeals, affirming the judgment of the Supreme Court of New York, does not seem to us to comport with the law as established by the decisions of this court. It is claimed by the learned judge, who delivered the opinion of that court, that the rule is that "although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties and direct them, by injunction, to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities and enforce obedience to their decrees by process *in personam*."

This language is quoted from Story's Eq. Jur. § 899; but

the learned judge overlooked the passage immediately following, and hereinbefore quoted: "There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein." Nor did the decision of this court in *Peck* v. *Jenness*, already cited, receive attention, wherein it was said, after adverting to the proposed distinction between enjoining a court and enjoining suitors therein, "The fact that an injunction issues only to the parties before the court and not to the court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Nor are we able to acquiesce in the reasoning of the learned judge when he says that "the setting aside of the judgment in the Sackett suit upon which the suit in the United States Circuit Court was founded, for fraud, was a *new fact*, occurring since the decree in that court, which gave jurisdiction in this action to enjoin proceedings thereon." Doubtless there may be facts occurring after the rendition of a judgment which would render its enforcement inequitable; such, for instance, as payment, or a reversal thereof on appeal by a superior court. But surely a judgment and injunction rendered subsequently in another and independent forum cannot constitute such new facts unless we are prepared to concede that, as between two courts of concurrent jurisdiction, it is the judgment of the court whose jurisdiction is *last* invoked which shall be entitled to prevail. This view does not overlook the decision of this court in *Marshall* v. *Holmes*, 141 U. S. 589, where it was held that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a Federal court if the judgment had been rendered

by it and not by a state court. There the suit to restrain the owner of the judgment from enforcing it was brought in the state court that had rendered the judgment, and was removed into the Federal court on the ground of diverse citizenship, and it was sought to impeach the judgment for the fraud of the party who procured it. In the present case, no fraud of any kind is imputed to the plaintiffs in the Circuit Court of the United States, nor is it alleged that the action or proceedings in that court were founded in any mistake of facts, or were influenced by any misrepresentation or fraud practised upon the court. But the purpose of this suit was to practically nullify the proceedings in the Circuit Court, and to enjoin the suitors therein from pursuing their remedy in that court, not for any fraud of theirs used in promoting their cause, but for the alleged fraud of other parties in another court, and in a case in which these appellants were not parties.

It is claimed in the brief for the defendants in error that whatever may be the rule in ordinary cases there is no necessity in the present case for modifying the decree of the state court, and we are pointed to the statement in the opinion of the Court of Appeals, that "there is nothing in the judgment at bar that attacks the jurisdiction of the United States Circuit Court or questions the legality of its decree." We must suppose this language to mean that to enjoin the plaintiffs from proceeding to enforce the decree did not affect the legality or efficacy of the decree. Such must have been the meaning of the learned judge, because he proceeds to assert that "it is clear, both upon principle and authority, that this power [to enjoin the certificate holders] did exist, and that the sale under the decree of the United States court was without force or effect as to the parties to that suit, as they proceeded in violation of the injunction contained in the judgment at bar."

But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. Thus it was said in *Riggs* v. *Johnson County*, 6 Wall. 166, that "process subsequent to judgment, is as essen-

tial to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." And in *Amy* v. *Supervisors*, 11 Wall, 136, it was said: "The two sets of tribunals — state and national — are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgment and decrees."

"An execution is the end of the law. It gives the successful party the fruits of his judgment." *United States* v. *Nourse*, 9 Pet. 8, 28. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. "*Juris effectus in executione consistit.*" Co. Litt. 289.

The conclusions we have reached are that the judgment of the Supreme Court of New York and of the Court of Appeals affirming the same are erroneous in so far as they command the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company and other holders of the receiver's certificates whose rights, as such holders, were adjudged by the Circuit Court of the United States, to appear before the referee appointed by the Supreme Court in the present case, and which enjoin the Central National Bank of Boston and others, whose rights have been adjudged by the Circuit Court of the United States for the Northern District of New York, from proceeding with the sale under the decree of that court.

The judgments of the Supreme Court of New York and of the Court of Appeals, in these particulars, are accordingly reversed, and the cause is remanded to that court for further proceedings not inconsistent with the opinion of this court.

Mr. Justice Peckham dissented.

Syllabus.

SMYTH *v.* AMES.

SMYTH *v.* SMITH.

SMYTH *v.* HIGGINSON.

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

Nos. 49, 50, 51. Argued April 5, 6, 7, 1897. — Decided March 7, 1898.

The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action.

A suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of the Eleventh Amendment.

Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of July 1, 1862, incorporating the Union Pacific Railroad Company, or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by that company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits.

It is settled that —

(1) A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment to the Constitution of the United States.

Syllabus.

(3) While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that State has reference to "reasonable" maximum rates, as the words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness; and as it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, and that the judiciary may not, when its jurisdiction is properly invoked, protect those rights.

The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions; as the duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.

The reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control; nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business.

A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is, therefore, under governmental control — subject, of course, to the constitutional guarantees for the protection of its property. It may not fix its rates with a view solely to its own interests, and ignore the rights of the public; but the rights of the public would be ignored if rates for the transportation of persons or property on a railroad were exacted without reference to the fair value of the property used for the public or of the services rendered, and in order simply that the corporation may meet operating

expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against the exaction of unreasonable charges for the services rendered by it: but it is equally true that the corporation performing such public services, and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property.

The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public; and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience; and on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

The effect of the Nebraska statute of 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act," is to deprive each of the companies involved in these suits of the just compensation secured to them by the Constitution of the United States, and therefore the decree below restraining its enforcement was correct.

If the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever

order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute.

The appellees in the first of the above cases were the plaintiffs below, and are citizens of Massachusetts and stockholders of the Union Pacific Railway Company. They sued on behalf of themselves and all others similarly situated. The defendants are the Union Pacific Railway Company, the St. Joseph and Grand Island Railroad Company, the Omaha and Republican Valley Railroad Company and the Kansas City and Omaha Railroad Company — corporations of Nebraska under the control of the Union Pacific Railway Company; certain persons, citizens of Nebraska, who hold the offices, respectively, of Attorney General, Secretary of State, Auditor of Public Accounts, State Treasurer, and Commissioner of Public Lands and Buildings, and constitute the State Board of Transportation; and James C. Dahlman, Joseph W. Edgerton and Gilbert L. Laws, citizens of Nebraska and Secretaries of that Board. By a supplemental bill in the same suit, certain persons, receivers of the Union Pacific Railway Company, were made defendants.

In the second case, some of the plaintiffs, appellees here, are subjects of Queen Victoria, while the others are citizens of Massachusetts. They are all stockholders of the Chicago and Northwestern Railroad Company, a corporation organized and existing under the laws of Illinois, Wisconsin and Iowa, and have sued in that capacity on behalf of themselves and all others similarly situated. The defendants are the Chicago and Northwestern Railroad Company, the Fremont, Elkhorn and Missouri Valley Railroad Company, a Nebraska corporation, and the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation organized under the laws of Minnesota and Nebraska, both under the control of the Chicago and Northwestern Railroad Company; and the above officers constituting the State Board of Transportation, as well as those holding the positions of Secretaries of that Board.

In the third case, the appellees Henry L. Higginson and others, citizens of Massachusetts, were the plaintiffs below. They sued on behalf of themselves and all other stockholders

of the Chicago, Burlington and Quincy Railroad Company, a corporation organized and existing under the laws of Illinois and Iowa, and whose lines west of the Missouri River are known as the Burlington and Missouri Road. The defendants are the Chicago, Burlington and Quincy Railroad Company, the persons composing the Nebraska State Board of Transportation and the Secretaries of that Board.

For the sake of brevity, the Union Pacific Railway Company will be called the Union Pacific Company; the St. Joseph and Grand Island Railroad Company, the St. Joseph Company; the Omaha and Republican Valley Railroad Company, the Omaha Company; the Kansas City and Omaha Railroad Company, the Kansas City Company; the Fremont, Elkhorn and Missouri Valley Railroad Company, the Fremont Company; the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the St. Paul Company; and the Chicago, Burlington and Quincy Railroad Company, the Burlington Company.

Each of these suits was brought July 28, 1893, and involves the constitutionality of an act of the legislature of Nebraska, approved by the Governor April 12, 1893, and which took effect August 1, 1893. It was an act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." Acts of Nebraska, 1893, c. 24; Compiled Statutes of Nebraska, 1893, c. 72, Art. 12. The act is referred to in the record as House Roll 33.

Prior to the enactment of that statute, the legislature passed an act to regulate railroads, prevent unjust discrimination, provide for a Board of Transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled "Railroads," of the Revised Statutes of Nebraska, and all acts and parts of acts in conflict therewith — the same being chapter 60 of the Session Laws of 1887, and now article 8 of chapter 72 of the Compiled Statutes of Nebraska of 1893. By that act the Attorney General, Secretary of State, Auditor of Public Accounts, State Treasurer and Commissioner of Public Lands

and Buildings were constituted a Board of Transportation, with power to appoint three secretaries to assist in the performance of its duties, and with authority to inquire into the management of the business of all common carriers subject to its provisions and obtain from them the full and complete information necessary to enable the Board to perform its duties and carry out the objects for which it was created. It was also provided that, for the purposes of the act, the Board should have power to require the attendance and testimony of witnesses and the production of all books, papers, contracts, agreements and documents relating to any matter under investigation, and to that end could invoke the aid of any of the District Courts or of the Supreme Court of the State; and that any court of competent jurisdiction in which such inquiry was carried on could, in case of contumacy or refusal to obey a subpœna issued to any common carrier or person subject to the provisions of the act, issue an order requiring such carrier or other person to appear before the Board, (and produce books and papers if ordered,) and give evidence touching the matter in question; and any failure to obey the order was punishable by the court as for contempt. The claim that any testimony or evidence might tend to criminate the person giving evidence would not excuse the witness from testifying, but such evidence or testimony could not be used against him on the trial of any criminal proceeding.

The power to enact the statute whose validity is now assailed, that is, the above statute of August 1, 1893, regulating railroads, classifying freights, fixing reasonable maximum rates, etc., in Nebraska, was referred by counsel to the general legislative power of the State as well as to the fourth section of Article XI of the state constitution which provides: "Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on

the different railroads in this State. The liability of railroad corporations as common carriers shall never be limited."

By the first section of that statute it is declared that, except as therein otherwise provided, its provisions shall apply to all railroad corporations, railroad companies and common carriers engaged in Nebraska in the transportation of freight by railroad therein, and also to shipments of property made from any point within the State to any other point within its limits. That section provides: "The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee or other person operating a railroad whether owned or operated under contract, agreement, lease or otherwise, and the term 'transportation' shall include all instrumentalities of shipment or carriage, and the term 'railroad corporation' contained in this act shall be deemed and taken to mean all corporations, companies or individuals, now owning or operating, or which may hereafter own or operate, any railroad, in whole or in part, in this State, and the provisions of this act, except as in this act otherwise provided, shall apply to all persons, firms and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers of freight upon any of the lines of railway in this State, the same as to railroad corporations herein mentioned." § 1.

The second section provides that all freight or property to be transported by any railroad company or companies mentioned in the first section, "from any point in the State of Nebraska to any other point in said State, shall be classified as hereinafter in this section provided, and any other or different classification of freight, which would raise the rates on class or commodity of freights above the rates prescribed in this act, except as hereinafter otherwise provided, is prohibited and declared to be unlawful. The classification established by this act shall be known as the 'Nebraska Classification.' Freights shall be billed at the actual weight unless otherwise directed in the classification — twenty thousand pounds shall

be a carload, and all excessive weights shall be at the same rate per hundred pounds, except in carloads of light and bulky articles, and unless otherwise specified in the classification. When the classification makes an article 'released' or 'owner's risk,' the same at carrier's risk will be the next rate higher, unless otherwise provided in the classification. Articles rated first class, 'released' or owner's risk, if taken at 'carrier's risk,' will be 1½ times first class, unless otherwise provided in the classification. All articles carried according to this classification at 'owner's risk' of fire, leakage, damage or breakage, must be so receipted for by agents of the railroad, and so considered by owners and shippers. Signing a release contract by a shipper shall not release the railroad company for loss or damages caused by carelessness or negligence of its employés." § 2.

Following this section, in the body of the statute, are tables of the classification of freights.

The third section is in these words: "That each of the railroads in the State of Nebraska shall charge for the transportation of freight from any point in said State, to any other point in said State, no higher or greater rate of charge than is by this act fixed as the reasonable maximum rate for the distance hauled, and the reasonable maximum rates for the transportation of freight by railroad from any point in the State of Nebraska to any other point in said State are declared and established to be as hereinafter in this section fixed for the distance named, and any higher or greater rate for the distance hauled than that herein fixed and established, is prohibited and declared to be unlawful; and the reasonable maximum rate herein fixed and established shall be known as the Nebraska Schedule of Reasonable Maximum Rates." § 3.

Here follow tables of the rates prescribed by the statute.

That the full scope of the act may appear, its remaining sections are given as follows:

"§ 4. All railroads or parts thereof which have been built in this State since the 1st day of January, 1889, or may be built before the 31st day of December, 1899, shall be exempt

from the provisions of this act until the 31st day of December, 1899.

"§ 5. Whenever any railroad company or companies in this State shall, in a proper action, show by competent testimony that the schedule of rates prescribed by the act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom as hereinafter provided. All such actions shall be brought before the Supreme Court, in the name of the railroad company or companies bringing the same, and against the State of Nebraska, and upon the hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, [it] may issue their [its] order directing the Board of Transportation to permit such railroad to raise its rates to any sum in the discretion of the Board: *Provided*, That in no case shall the rates so raised be fixed at a higher sum than that charged by such railroad on the first day of January, 1893. Whenever any railroad company in this State shall claim the benefit of the provisions of this section, it shall be the duty of such railroad company to show to the court all matters pertaining to the management thereof, and if it shall appear that said railroad company is operating branch lines of railroad in connection with its main line, and all included in one system, then, and in that case, it shall be the duty of the railroad company to show to the court upon which branch or branches, or upon which portion of such system the schedule of rates prescribed in this act is unjust and unreasonable, and only such portions shall be exempted from the provisions thereof: *Provided*, That in no case shall a railroad company be allowed to pool the earnings of all the lines operated under one management, where more than one line is so operated, for the purpose of lowering the general average.

"§ 6. That the Board of Transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said Board so to reduce any rate; and said Board of Transportation is hereby empowered and directed to revise said classification of

freight as hereinbefore in this act established, whenever it shall appear to a majority of said Board just and reasonable to revise said classification. *Provided:* That said Board of Transportation shall never change the classification in the act established, so that by such change or classification the rates on any freight will become higher or greater than in this act fixed. When any reduction of rates or revision of classification shall be made by said Board, it shall be the duty of said Board to cause notice thereof to be published two successive weeks in some public newspaper, published in the city of Lincoln, in this State, which notice shall state the date of the taking effect of such change of rate or classification, and said change of rate or classification so made by the said Board and published in said notice, shall take effect at the time so stated in said notice.

"§ 7. That articles not enumerated in said classification in section two of this act established, not rated in said schedule of rates in section three of this act, shall be classed with analogous articles in said classification, and where there is any conflict between said classification and said schedule of maximum rates, said rates shall govern.

"§ 8. That in case any common carrier subject to the provisions of this act shall do, or cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for all damages sustained in consequence of any such violation of the provisions of this act together with cost of suit and a reasonable counsel or attorney's fee, to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case: *Provided*, That in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand.

"§ 9. That in case any common carrier subject to the pro-

visions of this act shall do, or cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall, upon conviction thereof, be fined in any sum not less than one thousand dollars, nor more than five thousand dollars for the first offence; and for the second offence not less than five thousand dollars, nor more than ten thousand dollars; and for the third offence, not less than ten thousand dollars, nor more than twenty thousand dollars; and for every subsequent offence and conviction thereof, shall be liable to a fine of twenty-five thousand dollars: *Provided*, That in all cases under this act either party shall have the right of trial by jury.

"§ 10. All acts and parts of acts inconsistent herewith are repealed."

These cases were heard at the same time, and in the one in which the Union Pacific Company, the St. Joseph Company, the Omaha Company and the Kansas City Company were defendants, it was adjudged in the Circuit Court — Mr. Justice Brewer presiding — as follows: "That the said railroad companies and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any or either of them for the transportation of freight on and over their respective roads in this State from one point to another therein, whereby such rate shall be reduced to those prescribed by the act of the legislature of this State, called in the bill filed therein, 'House Roll 33,' and entitled 'An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act,' approved April 12, 1893, and below those now charged by said companies or either of them or their receivers, or in anywise obeying, observing or conforming to the provisions, commands, injunctions and prohibitions of said alleged act; and that the Board of Transportation of said State and the members and secretaries

of said Board be in like manner perpetually enjoined and restrained from entertaining, hearing or determining any complaint to it against said railroad companies or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants or employés, done, suffered or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the Attorney General of this State be in like manner enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof, directed to the said defendants, commanding, enjoining and restraining them as hereinbefore set forth, which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad companies may not exact for the transportation of freight from one point to another within this State, charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged and decreed that the defendants, members of the Board of Transportation of said State, may hereafter when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It is further ordered, adjudged and

decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The above decree was in accordance with the prayer for relief. A similar decree was rendered in each of the other cases.

The present appeals were prosecuted by the defendants constituting the State Board of Transportation, as well as by the defendants who are Secretaries of that Board.

Mr. John L. Webster for appellants. *Mr. A. S. Churchill*, attorney general of the State of Nebraska, was on his brief.

Before taking up the question as to the validity of the act in question, we desire to call the attention of the court to some of the propositions stated by Mr. Justice Brewer in his opinion, filed herein; for we conceive that these propositions, thus stated, contributed largely to what we believe to be an erroneous conclusion.

In that opinion it is stated: "Property invested in railroads is as much protected from public appropriation as any other. If taken for public use, its value must be paid for. . . . He may have made his fortune dealing in slaves, or as a lobbyist, or in any other way obnoxious to the public; but, if he has acquired the legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received gifts from the State, or individuals, or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property; has the legal title; and so owning, he must be paid the actual value of that property. . . . These propositions, in respect to condemnation proceedings, are so well settled that no one ever questions them."

We take no exception to this proposition. But it is equally well settled that, where such property is incumbered, that the incumbrance cuts no figure in ascertaining the cash value of

the property in such condemnation proceedings. The party holding such incumbrance would be entitled to the proceeds to the extent of such incumbrance: provided, it did not exceed the actual cash value so ascertained; but where it did, the property would be discharged of the lien, and the party holding such incumbrance would have to look to the personal liability of the obligor.

Again, it is said in the opinion of the court: "If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property — injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These, and many other things, as is well known, are factors which have largely entered into the investment with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which it would have to pay." Then, indeed, would the loss arising from "injudicious contracts, poor engineering, unusually high cost of material" and the "rascality on the part of those engaged in the construction or management of the property" fall upon those who made the "injudicious contracts" or employed "poor engineering" to be done, or paid "unusually high cost for material," or engaged the rascals in the construction or management of the property. And why should they not? Did not the investor, in either the stock of the company, or in its bonds, take his chances in these respects, just the same as the investor in the stock of any other business corporation, or in the bonds or mortgages upon any other property? Why, may we not ask, should the public bear the burden imposed by "injudicious contracts," or "poor engineering," or the "unusually high price paid for material," or the "rascality on the part of those engaged in the construction or management of the property"? The public had nothing to do with any of these. The public did not invest upon such

chances. The public can justly be called upon to pay such reasonable rates as will yield a reasonable compensation for the use of the fair and reasonable value of the property, and not more. If investors put their money into the hands of those who thus manage the property, or in securities upon properties thus constructed, or managed, it was either their misfortune or their folly; but it affords no excuse for burdening the public with high rates, to the profit either of the rascals or of those who trusted in them.

His honor further added in the opinion: "Nevertheless, the amount of money that has gone into the railroad property as the actual investment, as expressed, theoretically at least, by the amount of stock and bonds, is not to be ignored, even though such sum is far in excess of the present value."

Is it possible that the patrons of a railroad, who had nothing to do with the injudicious contract, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management, must bear all the burden of these injudicious contracts, poor engineering and rascality in the construction or management, in order that the poor engineers and rascals or those who employed them may reap the benefit? If this be so, then, indeed, the time has actually come when the railroad lord can say to the public: "Ye know I reap where I had sown not, and that I gathered where I had not strewn."

Again, his honor tells us that: "The transportation of persons and property by private individuals and corporations has become a business and not a system."

Then he further says: "Now in the carrying on of any private enterprise, increase of business, with increase of profits, is a stimulating thought, and for this every variety of action is taken. Advancement, solicitation, inducement, favors are all freely resorted to, but with the single purpose of larger business and greater gain. It is not strange that in carrying on of transportation all the characteristics of other kinds of business are found."

There can be no doubt about the correctness of either of these propositions. We admit their truth, and insist that

there shall be applied to this business and to these inducements the same rules of law which are applied under similar circumstances to other business and to like inducements in the management of other business enterprises.

Without any statute regulating rates, a common carrier of persons or property, in the absence of a specific contract, is, at common law, bound to carry either persons or property for a reasonable compensation.

So, in the absence of a specific contract, a tenant is bound to pay a reasonable rental for the use of the leased premises.

Thus, a large number of instances might be cited where the law would imply a reasonable compensation for the use of property or persons, or both; yet, we know of no instance where, in arriving at what is a just or reasonable compensation, either the incumbrance upon the property, or the unusually high price paid for material, or the lack of skill in the mechanic who constructed the property, or the rascality of those in charge of the construction or management was taken into consideration by any court in determining what was a reasonable compensation. These propositions are elementary. It needs no citation of authorities to support them.

Then, if railroading is a business, and no one would dispute it, we can see no reason why it should not be governed by the same rules of law as any other business is in determining what is and what is not a reasonable compensation.

Every presumption is in favor of the validity of the act in question. The act will not be presumed to be repugnant to the Constitution of the United States, or of the State; and it must be made to appear affirmatively that it is so repugnant to the Constitution.

In *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362-395, it is said: "It is not to be supposed that the legislature of any State, or a commission appointed under the authority of any State, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

This being so, then it must be made clearly to appear from the pleadings and the evidence that the legislature, in passing the act in question, did not, in fact, do justice to the several railroads affected by the act; and that by reason thereof the plaintiffs below were injured in their property rights as stockholders in such company or companies. It must follow that, before the decree below can be sustained, the following propositions of fact must have been established by competent evidence: (*a*) That the plaintiffs below were stockholders in the respective corporations, as alleged; (*b*) That each of the railroads is operated in a prudent and economical manner; (*c*) That, when so managed, the reduction of rates provided for in the act, when taken in connection with all the other earnings of the several companies, will deprive such company of a just or reasonable compensation for the services so performed; (*d*) The plaintiffs below attacked the constitutionality of the act; the burden, therefore, was upon them to establish every essential element of fact necessary to show the invalidity of the act.

The answer of appellants puts in issue every one of the above questions of fact, save the one as to the plaintiffs below being stockholders, which is admitted. We call the court's attention, then, to the fact that there is wanting any competent evidence tending to show that either of these railroads is prudently or economically managed; and to the further fact that there is not any evidence tending to show the income from all the business of the several companies from all sources.

After paying expenses of operation, who is to determine what are reasonable rates?

Lord Ellenborough, in *Aldnut* v. *Inglis*, 12 East, 527, 537, said: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty at-

tached to it on reasonable terms." This is cited with approval in *Munn* v. *Illinois*, 94 U. S. 127; and it is said in the latter case, page 132: "Certainly, if any business can be clothed 'with a public interest and cease to be *juris privati* only,' this has been."

If it be true that railroad property ceases to be *juris privati*, and is clothed with a quasi-public use, whenever the operation of such railroad is undertaken, then it must follow as a corollary thereto that all parties dealing with such property, or taking security upon such property, must take such property or security thereon with notice of such quasi-public use. In *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, 416, in the opinion it is said: "By the act of incorporation, Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State; and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have known that, in the nature of things, the control of that business would be exercised by the State."

If this presumption of knowledge is true of Congress and as to the holders of the bonds of the Union Pacific Company, it must be equally true of the holders of bonds of each of the other companies to these actions. It follows then:

(1) The right of the State to fix a reasonable maximum freight rate upon all freight shipped from one point in the State to another point in the State is paramount to any right which is or may be acquired by any bondholder, whether that bondholder be the Government or a private individual.

(2) The right of the State being a superior right, in determining what is a reasonable rate, the interest of such bondholder cannot be set up or considered as against the interest of the State.

(3) In determining the reasonableness of the rates it cannot be other than such a rate as will pay the expense of operation, when prudently and economically managed, and something more, at least, for the use of the company.

The next question which naturally arises is, who is to determine what such excess above operating expenses shall be? Is it a question for the courts, or is it a question of public policy, and therefore a question for the legislature?

It is stated in the opinion in the *Railroad Commission case*, 116 U. S. 307, that: "The power to regulate is not a power to destroy, and the limitation is not the equivalent to confiscation. Under the pretext of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law." This quotation is cited by Justice Brewer in the *Reagan case*, 154 U. S. 362, 398, with approval.

A careful review of all the cases, both state and Federal, we think, will show the true rule to be that, so long as the legislation itself does not operate to deprive the individual or corporation of his or its property, nor require the actual use of the property of the individual or corporation without compensation, then such legislation cannot be said to be in conflict with either the state or Federal Constitution. What such compensation shall be, after paying operating expenses, is purely a question of public policy to be determined by the legislature and not by the courts. If this be true, certainly there was error in the Circuit Court, decreeing a perpetual injunction against the law in question. The evidence establishes beyond question that the rates fixed under this law will produce an income considerably more than sufficient to pay operating expenses.

So long as an act is constitutional in all other respects and provides a rate sufficient to more than pay operating expenses, it is a question of legislative policy and one which the courts cannot inquire into. It cannot be successfully contended that so long as the rate fixed pays something above operating expenses to the corporation for the carrying of property, it amounts to the taking either of the use or of the property. It may be said that just compensation is equivalent to reasonable compensation. Then the question is, who is to determine

the question of reasonableness? Is it the courts, or is it the legislature? It seems to us, that if the legislation does not actually deprive the corporation of its property, nor require it to carry persons or property without reward, sufficient to more than pay operating expenses economically administrated, it is purely a question of public policy into which the courts cannot inquire.

The Constitution itself contains no provision restricting the power of the States as to such legislation. It has, indeed, been contended that, where such legislation was applied to a corporation, it constituted a violation of a contract with the State embodied in the charter, and was thus brought within the provisions of article 1, section 10. But this argument has been rejected by the Supreme Court, even when the charter contained no express power of amendment and repeal. See *Ruggles* v. *Illinois*, 108 U. S. 526. It was early decided that the first eight amendments did not limit the power of the States, *Barron* v. *Baltimore*, 7 Pet. 243; and it may now be assumed that the power of the states in this respect is unlimited, so far as the Federal Constitution is concerned, unless restricted by the provision of the Fourteenth Amendment, that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The question is, in fact, therefore purely of the construction and scope of that amendment.

In *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649, Mr. Justice Shiras sums up what has been determined: "This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." We take it, then, that this is

as far as the courts have gone. Such legislation, then, must be shown to be such as to deprive the companies of their property without due process of law, or as to deprive them of the equal protection of the laws. But it is said in this same case, at page 663: "The opinion of this court on appeal was that, while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement, it was not within its power to establish rates itself, or to restrain the commission from again establishing rates." If it is not, then, within the power of the court to establish rates itself, it must exist within the legislative power, restricted only so far as not to fix such rates so low as to deny the companies the right of property or the equal protection of the law. It must follow, then, that so long as the rate fixed by the law will pay the operating expenses when economically administered, and something in addition thereto, the power of the court ends, and the extent to which rates must produce profits is one of political policy.

Mr. Webster closed by considering in detail the reports of earnings and expenses, as tabulated in the evidence, and by the counsel.

Mr. William J. Bryan for appellants.

I. The several States have the right to fix, either directly through an act of the legislature or indirectly through a commission, reasonable maximum freight and passenger rates upon traffic wholly within their borders. *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164; *Chicago, Milwaukee & St. Paul Railroad* v. *Ackley*, 94 U. S. 179; *Winona & St. Peter Railroad* v. *Blake*, 94 U. S. 180; *Illinois Central Railroad* v. *Illinois*, 108 U. S. 541; *Railway Commission cases*, 116 U. S. 307; *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557; *Dow* v. *Beidelman*, 125 U. S. 680; *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578.

Mr. Bryan's Argument for Appellants.

II. As a general rule, the power of the courts to suspend the enforcement of a schedule of rates fixed by a State legislature or by a railway commission can only be invoked when such rates yield an income so small as to leave absolutely nothing above operating expenses. *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649; *Covington &c. Turnpike* v. *Sandford*, 164 U. S. 578.

In *Chicago & Northwestern Railway* v. *Dey*, 35 Fed. Rep. 866, 878, Mr. Justice Brewer said: "Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 3 per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge."

Such was also the principle established in the *Granger cases* in 94 U. S., where the court said: "Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." This doctrine was reaffirmed in *Dow* v. *Beidelman*, 125 U. S. 680.

III. There may be special instances in which the courts will refuse to interfere, even though the rates fixed do not yield enough to pay operating expenses.

In *Chicago & Grand Trunk Railway* v. *Wellman*, Mr. Justice Brewer said: "It is agreed that the defendant's oper-

ating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries — fifty to one hundred thousand dollars to the president and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company, for if so advised it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries or in some other improper way, transfer its earnings into what it is pleased to call operating expenses." The above language was quoted with approval by Mr. Justice Shiras in delivering the opinion of the court in *St. Louis & San Francisco Railway* v. *Gill.*

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, Mr. Justice Brewer said:

"It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable; and yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time

when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road."

IV. The evidence in the cases at bar shows that the rates allowed by the Nebraska statute will yield to each and every railroad in the State a profit upon its investment over and above operating expenses.

V. Upon the foregoing propositions of law and fact the judgment of the court below should be reversed and the rates fixed by statute allowed to stand.

VI. But in case this court shall hold that it has the right to pass upon the reasonableness of the profit allowed to the railroads of Nebraska by the statute under consideration, then, in such case, appellants contend —

(*a*) That the present value of the roads, as measured by the cost of reproduction, is the basis upon which profit should be computed.

In endeavoring to establish a reasonable rule we are bound to consider the conditions which surround other occupations. Railroads are built, owned and operated by corporations; corporations are fictitious persons created by law; laws are made by the people through their representatives. It cannot be assumed that natural persons would intentionally create fictitious persons and endow them with rights and privileges greater than they themselves enjoy. Neither can it be assumed that the natural persons who make the laws desire to exempt corporations, the creatures of law, from the vicissitudes which surround themselves. The ordinary business man cannot avail himself of watered stock or fictitious capitalization, nor can he protect himself from falling prices. If his property rises in value, he profits thereby; so do the owners of a railroad under similar conditions. If his property falls in value, he loses thereby; so must the owners of a railroad under similar conditions, unless it can be shown that railroad property

deserves more protection than other forms of property. Can it be said that the railroad which carries the farmer's crop to market merits greater consideration than the farmer who raises the crop? Can it be said that the railroad which carries a manufactured product to market merits greater consideration than the manufacturer? Can it be said that the common carrier is deserving of greater consideration than the ordinary business man whose merchandise gives the railroad a reason for existence? Is the man who carries property from producer to consumer a more important factor in society than both producer and consumer?

Such a rule does not do injustice to stockholders and those who desire to purchase stock. If the owners of the road have bonded the road for enough money to cover its present value, their stock does not represent value. The owners of such a road stand in the same position as the owner of a farm who has incumbered it for all it is worth; his equity of redemption is a legal title without a market value. They stand in the same position as the owner of a business block or of a stock of merchandise who has obtained the entire value of his property from a mortgagee.

Such a rule does not do injustice to the holders of railroad bonds; if their bonds do not exceed the present value of the property, they can expect an interest; if their bonds exceed in amount the present value of the property, they stand in the position of any other mortgagee who loans upon insufficient security or whose security diminishes in value after the loan is made. The only recourse the mortgagee usually has if his security becomes insufficient is to take the title to the property. If the first mortgage bonds equal or exceed the value of the property, then the holders of subsequent liens stand in the same position as the man who invests in a second mortgage when the first mortgage covers the value of the property.

There can be no distinction made between bondholders and stockholders. If the States have a right to regulate rates, stockholders cannot resist the demand for reasonable rates by building the road with borrowed money. The stockholder

invests in railroad stock, knowing that the road can only charge a reasonable rate and earn a reasonable return. The man who loans money to a railroad stands upon an equal footing with the stockholder, and, as against the State or the patrons, can assert no greater right than that possessed by the stockholders. Bondholders may foreclose their lien and become owners of the road. As against the State or the patrons they can have no higher privileges as bondholders before becoming owners than they have later as owners if it becomes necessary to take the road to satisfy their lien.

In support of the proposition that railroads should be placed upon the same footing as an ordinary business enterprise, it may be suggested that it is against public policy to raise up in any community or country a few persons, natural or corporate, and exempt them from the dangers and liabilities which must be encountered by the people in general. Those who are in possession of a monopoly are apt to be indifferent, if not actually hostile, to the interests of those who are immediately affected by a change in the business conditions of the country. If, for instance, railroad owners can demand a return upon capital never actually invested in the construction of the road or upon the original cost when the property has decreased in value, they not only have an unfair advantage over those who are subjected to competition, but may actually profit by conditions which are disastrous to others. An unrestrained monopoly preys upon all those who are so situated that they cannot themselves enter into a monopoly.

An additional reason why the court should not enforce the demands of the railroads for returns upon inflated stocks and bonds is to be found in the fact that such action on the part of the courts would greatly embarrass, if not entirely defeat, the effort which is being made in various States to prevent the overcapitalization of railroads. The constitution of Nebraska, article XI, section 5, contains the following provision:

"No railroad corporation shall issue any stock or bonds

except for money, labor or property actually received and applied to the purposes for which such corporation was created, and all stock dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

No one will question the wisdom of this constitutional restriction, and yet it will be impotent to protect the people from watered stock if the courts establish a rule which will enable the railroad companies to collect an income upon over-capitalization.

In comparing the rights of the patrons of the road with the rights of the holders of stocks and bonds, it must be remembered that the patron relies upon the law which compels common carriers to offer their services for reasonable compensation, while the purchaser of railroad stocks or bonds only suffers from his own negligence if he fails to learn whether the money represented by those stocks and bonds actually went into the road or found its way into the pockets of railway promoters. If a person contemplates purchasing railroad bonds, he can inquire whether the railroad's indebtedness exceeds the cost of reproducing it; if he fails to make such inquiry he ought to have no standing in a court of equity. He may be an innocent purchaser of bonds in the sense that the railroads issuing the bonds cannot make a legal defence to his claim, but he is not an innocent purchaser in the sense that the court must give actual value to his investment. In like manner the purchaser of stock can inquire whether the stock represents actual value. If he fails to inquire, or buys with knowledge that the debts exceed the cost of reproducing the road, he has no equity which a court can enforce.

The evidence shows that the railroads of Nebraska can be reproduced complete for about twenty thousand dollars per mile.

The following table, taken from the brief of associate counsel, shows the amount of stock and bonds issued by the various railroads which are parties to this suit:

	Capital stock per mile.	Funded debt per mile.	Total per mile.
C., B. & Q.	$14,439	$22,034	$36,473
C., St. P., M. & O.	25,103	17,504	42,608
F., E. & M. V.	23,352	16,238	39,590
U. P. R'y	33,318	70,468	103,786
O. & R. V.	5,021	12,324	17,345
St. J. & G. I.	18,322	34,768	53,060
K. C. & O.	22,769	14,007	36,007
Mo. Pacific	44,746	48,462	93,208
Pacific R. R. in Neb.	15,010	15,000	30,010
K. & B. H.	14,175	13,496	27,625
C., R. I. & P.	16,822	19,545	36,368

This table shows upon how large an amount of fictitious capital the roads will collect an income if allowed to collect from patrons enough money to pay interest upon all bonds and dividends upon all stock issued.

(*b*) The rates fixed in the statute under consideration allow to the railroads of Nebraska a reasonable profit upon the present value of the roads. The evidence in support of this proposition has been discussed by associate counsel.

VII. Counsel for appellees insists that competition gives to the patrons of a railroad full and complete protection from extortionate rates. This argument is sufficiently answered by the decisions already rendered by this court, wherein it has repeatedly affirmed the right of the State to regulate railroad rates, but it may be added that a railroad is to a certain extent a monopoly; it is only because it is a monopoly that it can collect unreasonable rates. Competition can only act within certain limits. If a railroad is built between two points, no other road can be built between those points (unless it mortgages the future) until the first road is realizing an income practically double a reasonable return upon the value of the road, because a new road would require an investment equal to the value of the first road, and until transportation rates on business done would pay running expenses and a reasonable profit on both investments competition would be prohibited. When two roads are built they

must necessarily collect more in tolls than one road would be justified in collecting. The evidence in this case shows that the Union Pacific Railroad is capitalized (including both stock and bonds) at more than five times the cost of reproducing that portion of the road which lies within the State of Nebraska. If it should attempt to realize upon all of this capitalization it would probably encourage the building of a parallel line, but it can charge rates grossly excessive without fear of competition as to local traffic. The very existence of the road prevents the building of a new road capitalized at present cost, and, even if a new road should be built, commerce would be compelled to bear a higher burden than it would if this road were limited to a scale of charges which would produce a reasonable return upon its actual value. See opinion of the court in *Chicago, Rock Island & Pacific Railway* v. *Union Pacific Railway*, 47 Fed. Rep. 15.

VIII. Counsel for appellees insists that the rates fixed by railroad companies may be unreasonable and yet not unreasonable enough to give state legislatures a right to lower them; he divides rates into reasonable, not reasonable and unreasonable. Under the head of reasonable rates he includes what they should charge; under the head of not reasonable rates he includes those which the railroads may charge, but should not; under the head of unreasonable rates he includes those which the roads must not charge. This division is not supported by authority. The law which requires carriers to transport goods at a reasonable compensation is an absolute one and does not depend upon the motive of the carrier. There is no twilight period between reasonable rates and unreasonable rates; rates which are reasonable may be charged; rates which are not reasonable cannot be charged.

Mr. J. M. Woolworth for appellees.

I. These decrees were right because the rates of charge prescribed and limited in the act known as "House Roll 33" were insufficient to yield to the companies reasonable compensation for their services in transporting property from one point to another within the State.

Mr. Woolworth's Argument for Appellees.

(*a*) The doctrine has been firmly established by a long series of the judgments of this court, beginning with the *Granger cases* decided in the year 1876, that the legislature may prescribe and limit the charges which railroad companies may make for their services in transporting persons and goods for the public. But this doctrine has been qualified and restrained. It has been again and again declared by this court that the power of the legislature in this matter is not unlimited; that it cannot be carried so far as to require them to carry persons or property without reward, because the imposition of such charges would operate the taking of private property for public use without just compensation and without due process of law.

In the *Railroad Commission cases*, 116 U. S. 307, 331, Mr. Chief Justice Waite, speaking for the court, while sustaining the legislative power to fix rates to be charged by railroad companies, in order to guard against any unjust application of the doctrine, took the precaution to say:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In *Dow* v. *Beidelman*, 125 U. S. 680, 689, Mr. Justice Gray, speaking for the court, quoted this language with approval.

In *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 179, Mr. Justice Field, delivering the opinion of the court, said that the power of the legislature to prescribe the charges of a railroad company for the carriage of persons and merchandise is "subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation."

In the *Chicago & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 458, Mr. Justice Blatchford, speaking for the court, said:

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In the *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339, Mr. Justice Brewer delivering the opinion of the court, after reiterating the principle that an act of the legislature was not necessarily unconstitutional which fixed rates, said:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates;" that is, against unreasonable rates prescribed and limited by an act of the legislature.

In *Budd* v. *New York*, 143 U. S. 517, Mr. Justice Blatchford said that the legislative "power of limitation or regulation is not without limit, and is not a power to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law."

In *Reagan* v. *The Farmers' Loan & Trust Co.*, 154 U. S. 362, 399, Mr. Justice Brewer, again speaking for the court, said:

"In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government with all their reach and power, must in their

actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649, Mr. Justice Shiras, delivering the opinion of the court, said in the course of it: "That there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

And, in *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 594, Mr. Justice Harlan, delivering the opinion of the court, reviewed many of the cases above cited and said:

"A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight."

(*b*) The question of fact remains whether House Roll 33 limited the charges which railroad companies may make for the carriage of goods so that their earnings would not cover the cost of doing the business and some compensation therefor.

(1) One method of determining whether rates prescribed by the legislature are reasonable is to put them in force for one, two or three years, and at the end of a proper period ascertain from the accounts of the business what the companies earned or lost. This method, however, is open to an obvious objection: if after statutory rates have been in

operation a certain period it appears that the companies have not realized any compensation for their services, the loss sustained by them cannot in any way be made good.

(2) There is another method of testing the reasonableness of statutory rates: it is to take the business for one, two, three or more years immediately before the passage of the act and by applying the rates to it, ascertain what they would have yielded. For instance, suppose the case of a road with a paid-up capital of four million dollars, earning in the year just before the statutory rates were prescribed, one million dollars per annum, of which sixty per cent or six hundred thousand dollars went to cost of operation, and forty per cent or four hundred thousand dollars to dividends. Now suppose the rates charged by the company were reduced by statute so that had they been in force the year before, its earnings would have been only five hundred thousand dollars, while its operating expenses continued to be six hundred thousand dollars, so that not only would the stockholders receive no dividend, but the company would sustain an actual loss of one hundred thousand dollars. Let this process be applied not only to the business of one year immediately preceding the passage of the statute, but to the second and the third years and as far back as the inquiry could be carried, with the same result. This method would amount almost to a demonstration that the statutory rates will not in the future yield a reasonable return for the services rendered by the company. This method is just as legitimate as the other; in one, as well as the other, actual figures taken from the accounts of the company are dealt with, and no guesses or estimates or calculation of contingencies are indulged, while the process of computation is exactly the same.

(*c*) I shall begin the inquiry whether House Roll 33, had it been put in force during any one of three years immediately preceding its passage, would have yielded any compensation to the companies for their services; and I shall give figures about which there is no room for disagreement and which are least favorable to our contention. I propose to show not that the statutory rates would not have yielded to the

companies reasonable compensation for their services, but that they would not have yielded even cost of the business. I shall not complicate the inquiry by showing that these rates would have yielded nothing to apply on the interest of the debts of the companies, or on the cost or value of the road, or any returns, by way of dividends or otherwise, to the stockholders. I lay interest on bonds and mortgages and debts however evidenced and dividends to stockholders entirely out of view.

As the result of his examinations Mr. Woolworth presented two tables which he contended were established by the evidence.

Table 1, showing the percentage of expenses to earnings for 1891, 1892, 1893.

Name of Road.	Reductions by the bill.	Cost of doing all business.	Extra cost of local business.	Total.
1891—				
B. & M.	29.50	66.24	10	105.74
C., St. P., M. & O.	29.50	70.78	10	110.28
F., E. & M. V.	29.50	49.87	10	89.37
U. P. Ry.	29.50	68.94	10	108.44
O. & R. V.	29.50	120.26	10	159.76
St. J. & G. I.	29.50	96.44	10	135.94
K. C. & O.	29.50	99.54	10	139.04
1892—				
B. & M.	29.50	64.23	10	103.73
C., St. P., M. & O.	29.50	65.96	10	105.46
F., E. & M. V.	29.50	70.71	10	110.21
U. P. Ry.	29.50	56.44	10	95.94
O. & R. V.	29.50	93.12	10	132.62
St. J. & G. I.	29.50	74.23	10	113.73
K. C. & O.	29.50	75.19	10	114.69
1893—				
B. & M.	29.50	65.51	10	105.01
C., St. P., M. & O.	29.50	64.58	10	104.08
F., E. & M. V.	29.50	53.66	10	93.16
U. P. Ry.	29.50	58.51	10	98.01
O. & R. V.	29.50	94.14	10	133.64
St. J. & G. I.	29.50	62.05	10	101.55
K. C. & O.	29.50	76.50	10	116.00

Name of Road.	Total amount received for tons carried locally.	Total amount of reduction caused by H. R. 33.	Expenses of all business.	10% for extra cost of local business.	Total deductions.	Gain or loss.
1891—						
B. & M.	1,066,871	314,726	706,695	106,687	1,128,108	— 61.237
C., St. P., M. & O. . . .	110,933	37,725	78,518	11,093	127,336	— 16.403
F., E. & M. V.	348,408	102,780	173,751	34,840	311,371	+ 37.037
U. P.	278,211	82,072	191,798	27,821	301,691	— 23.480
O. & R. V.	75,581	22,296	90,893	7,558	120,747	— 45.166
St. J. & G. I.	21,817	6,436	21,040	2,181	29,657	— 7.840
K. C. & O.	6,732	1,985	6,751	673	9,359	— 2.627
1892—						
B. & M.	1,237,884	365,175	795,093	123,788	1,284,056	— 46.172
C., St. P., M. & O. . . .	123,033	36,294	81,152	12,303	129,749	— 6.716
F., E. & M. V.	336,714	99,310	238,090	33,671	371,071	— 34.357
U. P.	398,262	117,487	224,779	39,826	382,092	+ 16.170
O. & R. V.	88,335	26,043	82,257	8,833	117,133	— 28.798
St. J. & G. I.	31,004	8,836	23,014	3,100	34,950	— 3.946
K. C. & O.	6,630	1,889	4,985	663	7,537	— .907
1893—						
B. & M.	1,242,416	366,512	813,906	124,241	1,304,659	— 62.243
C., St. P., M. & O. . . .	142,542	42,049	92,053	14,254	148,356	— 5.814
F., E. & M. V.	424,437	125,208	227,752	42,443	395,403	+ 29.034
U. P.	413,714	122,045	242,064	41,371	405,480	+ 8.234
O. & R. V.	80,519	23,753	75,800	8,051	107,604	— 27.085
St. J. & G. I.	33,802	9,971	20,974	3,380	34,325	— .523
K. C. & O.	9,445	2,786	7,225	944	10,955	— 1.510

These tables show that not one of these roads would have realized the cost of its local business in the three years ending June 30, 1891, 1892 and 1893, had their rates been those fixed by the House Roll 33, except the Fremont, Elkhorn & Missouri Valley in 1891 and in 1893, and the Union Pacific in 1892 and 1893; the Fremont Company would have earned 10.63 per cent in 1891, and in 1893 6.84 per cent; and the Union Pacific 4.06 in 1892, and 1.99 in 1893.

Mr. Woolworth also submitted the following as the result of the evidence concerning the values of the properties.

The Burlington.

Mr. Taylor, the auditor of the company, who in one capacity or another has been in the accounting department ever since the construction of the road was begun, says that the same cost $74,616,523.02, including original construction, betterments, etc. He also says that the mileage of the Burlington is 2253.07, which would give about $33,000 per mile.

There is no suggestion in the record that the road was not honestly and economically built.

There is no direct proof of present value, but Mr. Taylor says that some of the properties are worth much more now than they were when acquired.

Union Pacific.

Mr. Morgan was an engineer, called to their assistance by the Paterson Commission, which was charged by Congress with the examination, among other things, of the condition and value of the road. From his report several extracts are made, and one is an estimate of the cost of reproducing the road, which shows the cost per mile to be $26,814. This does not include terminals.

Mr. House, who was one of the original corps of engineers, affirms that estimate.

Mr. Calvert, who had been at first resident and afterwards chief engineer of the Burlington, in Nebraska, and was superintendent of that road when he testified (1254), says that the cost and value of a road which had become mature by time

and expenditure was from 33⅓ to 50 per cent greater than one just built, which would increase the estimate of Mr. House and Mr. Morgan to from $35,752 to $40,221.

To this a large sum should be added for terminals, which Mr. Morgan estimates at $10,000,000 (1150). Mr. House estimates them at $3,973,912 (1643). Either sum swells the cost of reproduction very largely.

The Elk Horn & Omaha Roads.

The testimony is imperfect as to the present value and costs of these roads, as will be found on examination. It is definite enough for the Omaha terminals but can only be estimated for the rest of the property.

II. The provisions of the constitution of the State of Nebraska limit the competency of the legislature to fix railroad rates. Under those provisions, statutory rates must yield, not only cost and compensation the least possible, but in all contingencies cost and a fair profit.

III. House Roll 33 is unconstitutional because it attempts to fix and limit the rate which the Union Pacific Railway Company may charge for transportation of freight on its lines between points within the State. That company is within the language of the act, and the Board of Transportation so construes it.

The Union Pacific Railroad Company was incorporated by an act of Congress passed in 1862. An act amendatory of the charter was passed in 1864. This act authorized any or all of the companies mentioned therein to consolidate their organizations. (Sec. 16.) Under this authority the Union Pacific Railroad Company, the Kansas Pacific Railway Company, (at one time known as the Leavenworth, Pawnee & Western, and afterwards as the Union Pacific Railroad Company Eastern Division,) and the Denver Pacific Railway and Telegraph Company became consolidated under the name and style of the Union Pacific Railway Company.

The object of the incorporation of the company is stated in the original act to be "to secure the safe and speedy trans-

portation of the mails, troops, munitions of war and public stores" (Sec. 3), and "to promote the public interests and welfare by the construction of said railroad and telegraph and keeping the same in working order; and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal, military and other purposes." (Sec. 18.)

The service which the company was required to render to the Government was to "at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all purposes aforesaid."

It is too late in the day to take a moment's time to prove that the States cannot interfere with any of the operations of the General Government. And in administering its affairs that Government may act directly by its own officers, or it may make use of any appropriate agency. In proper cases Congress may create a corporation to render certain services to the Government. At one time it created a bank to be the fiscal agent of the Government, and this court held that such a corporation was a proper means to effect its legitimate objects. *McCullough* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738.

And such an instrumentality, when once adopted by Congress for such purposes, is in its operations as far beyond any interference by a State as the army or navy or the postoffice. Attempts were made by two several States to tax the operations of the bank, but this court held such attempts futile. In the Pacific Railroad acts of 1862 and 1864 Congress granted to the Central Pacific Company some of the franchises which we have seen it granted to the Union Pacific Company, and the State of California attempted to tax them. This court held that for the State to lay such a tax was "not only derogatory to the dignity of the Federal Government, but was repugnant to its paramount sovereignty." *California* v. *Pacific Railroad Co.*, 127 U. S. 1.

Mr. Carter's Argument for Appellees.

The provisions of House Roll 33 apply to all railroad corporations doing business within the State of Nebraska, and include the Union Pacific, the Chicago, Burlington & Quincy, the Chicago & Northwestern, the Missouri Pacific and the Elkhorn Companies. The Federal corporation not being subject to the jurisdiction of the State in this respect, the result is that the act is unconstitutional and void, not only in respect of that company but in its whole scope and reach. It was beyond the competency of the legislature to enact the law in the words of it, and therefore it must fall.

IV. This case is within the jurisdiction of the court, whether it be considered as a court of the United States or as a court of equity.

Mr. James C. Carter for appellees.

Some of the claims asserted in defence of the Nebraska act may be generally stated thus:

1. That railroads are allowed to be built for the public benefit, and must, therefore, be made to subserve the benefit of the people; and that any private interest which may be involved is of secondary importance.

2. That all people having occasion to need the services of a railroad are entitled to them; and that the compensation required of them must be made to depend, not upon what the railroad can afford to render the services for, but upon what they can afford to pay.

3. That while it may be impossible to ascertain what the cost is for any particular service, it is possible to ascertain the average cost of the whole service rendered by a road, and fair to treat this average as the cost of any particular service; and consequently to assume that the cost of each particular service is everywhere the same.

4. That all persons have an equal right to the services of a railroad upon the same terms, notwithstanding that the actual cost of the service demanded by one may be much greater than that of the same service demanded by another.

5. That in fixing rates the value of the service to the one who demands it is unimportant; but that the one who needs

it most, and who obtains the greatest benefit from it, should pay no more for it than he who needs it least and obtains the least benefit from it.

6. That the carriage of goods to and from large and compact communities which furnish large amounts of transportation and thus enable the service to be performed at much less cost are not entitled to the benefit of this natural advantage, but that all parts of the State must be put upon an equality.

There are many other claims upon which this legislation is defended, but the above are sufficient for the only purpose for which they are now stated, namely, to point out the first necessity of this discussion; namely, a clear understanding of what railroad business really is, and had become, under and in pursuance of the contracts between the public and the railroad companies at the time when this legislation assumed to deal with it.

The leading features of the railroad system of the United States, as it has thus grown up and been established under every sanction of law and public sentiment, are these:

(*a*) That the prices of carriage are everywhere fixed, not by the railroads nor by shippers, but by the same imperious power which fixes the price of all other articles or services, namely, the pressure of competition. Against this determination it is irrelevant to argue justice or injustice; or, to speak more correctly, the decision of this power is always just. We do not complain of the decision in the case of food and clothing. We have no more right to complain of it in the case of the carriage of goods.

(*b*) Railroads charge the highest price they can profitably get, as every one else does who has goods to sell; and in some instances, where they have no competitors other than teams, they may be under the temptation to charge an excessive price. This they could not do permanently, but they might do it temporarily, and before the forces of competition could be brought into play. An excessive price is that indisputably unusual charge for services rendered under similar conditions

which reasonable men would declare extortionate. Against this danger there are two sufficient protections:

(1) A plain regard for self-interest will and does prevent it. Moderate charges yield more profit by the greatly increased business they draw. No railroad could make money by the practice of extortion. A sound policy, perfectly well known to railroad managers, advises them that it is best to tempt and draw out a large traffic by low prices than to try to make a large profit on a small business.

(2) No one need pay an excessive charge. The service can be exacted at a reasonable price. It may indeed cost a lawsuit; but so do all other social and business wrongs. The wrong cannot be very great which does not provoke resistance. The extremely small number of actual contests on this point are good evidence of the fact that this abuse is not frequent or extensive.

(*c*) Railroad rates exhibit great diversity, and the reason of many of them is not apparent to the observer who does not think of the conditions which free competition works out, and of the way in which the railroad system has grown up.

The cost of the service in particular cases has little to do with the making of the charge. What necessarily determines the carrier's conclusion in any case, where he is called upon to say whether he will take new traffic offered at a certain price, is how much, if any, cost in addition to what he is then under he will incur if he takes it.

His final aim is to get such an average rate for all his traffic as will yield him a profit. The proportions in which all his customers contribute to that average are settled by causes absolutely beyond either his or their will. A grocer's customer, who uses much tea and little sugar, would not say to him that he is doing a great injustice by exacting from him a profit of twenty-five per cent on the tea he buys, and at the same time selling his neighbor sugar at a profit of only five per cent.

(*d*) There is a common phrase that railroad rates are arranged so as to "get all the traffic will bear;" and this is true, although not in the odious sense which imputes a design to take advantage of supposed necessities in order to

exact an excessive compensation. In its real meaning it simply indicates to railroad managers the stern necessity which limits them to low rates in order to gain or to save traffic. When, in ways already indicated, they seek to gain traffic by competition with water carriage, they ascertain the rate which it is necessary for them to meet in order to secure it. They must take this rate or give up the struggle for the business; for it is "all the traffic will bear." At points where there is no competition except with other forms of land carriage, and little traffic at that, they fix rates calculated to build up the country and increase business; for such rates are "all the traffic will bear." If the great agricultural products are so low that farmers can make nothing by raising them and sending them to a market, the railroad man is obliged to make his rates such that the farmer can make something, or he will cease to attempt to raise such products, and the railroad will lose its chief business. He may find it necessary for his own interest to carry the traffic at actual cost, and sometimes even for less, for this is "all the traffic will bear."

(*e*) In saying that railroad business is subject, like ordinary industries, to the stress of competition, we do not express the whole truth. They are peculiarly sensitive to it, and much more than most other industries. Resorting to the just analogy heretofore suggested, that a railroad company may be regarded as the manufacturer and seller of transportation, some peculiarities which distinguish this from other manufactures should be noted.

In the first place the expense of manufacturing as compared with the price of the product is much larger than in other industries. In other industries this expense depends very largely upon the amount of business done; but in this it goes on and cannot be greatly reduced when little business is transacted. Again, the commodity produced by railroads, cannot, for want of a sufficient demand, be stored away and kept for a better market. If it is not sold to-day, because no fair price can be obtained for it, it can never be sold, and yet a large percentage of its cost which has already been incurred and paid must be lost.

These conditions put the managers of railroads under the constant spur of a desire to sell what they have on hand so as not to lose the expense it has already cost. Sellers of other goods always have the alternative, when the price is thought too low, of holding on to them with little additional expense for a better market.

(*f*) The operation of the laws of free competition in railroad, as in other business, is not unattended with possible mischiefs, but they are infinitely less than would flow from any attempt to dispense with such laws. These mischiefs, so far as prices are concerned, are really reducible to two:

(1) There is a possibility that competing roads may combine in order to prevent or mitigate the effects of competition. This in the case of railroads is an imaginary danger only. The combination may, indeed, be made, and sometimes even be absolutely necessary to prevent self-destruction. But the combination must always find its real interest in an increase of traffic by low rates rather than making a large profit by high rates on a decreased traffic. And should an unwise policy (never followed in present times) tempt the imposition of high rates, it would speedily be baffled by the appearance in the field of new roads and new competitors supplied with capital attracted from other less profitable pursuits. That is to say, competition cannot be really escaped by combination in the large businesses which are open to all. Where nature has limited the supply of a commodity, as in the case of mines producing the necessaries of life, coal, etc., a combination among all the proprietors may be made effective in raising the price. This is the case of true monopolies, which railroads are not. Perhaps a practical unification of ownership of all great trunk lines of railway may be brought about and all existing competitions be thus destroyed, and there might not be boldness enough on the part of other capitalists to prompt them to arrange a struggle with the new giant; as is supposed to be true with the great unified interests of sugar and petroleum. But combination on such a scale is without mischief so far as prices are concerned. Self-interest in such cases can

be promoted only by tempting an increase of consumption by offering the lowest possible price.

(2) The other possible mischief is the conversion of open into secret competition; that is by secretly obtaining traffic by giving to some better terms than to others. This is exhibited in the paying of rebates, or making special private contracts, and thus giving to some advantages not shared by all. Sometimes this practice is entirely proper and hurts no one, indeed benefits all; as in the case where shippers of bulky articles like lumber may be induced to withhold shipments until the winter season, when other traffic is slack, and not send it when the roads are crowded. The case is different, however, when secret bargains are made merely to carry traffic for one shipper at lower rates than for others. This is an unqualified abuse and public and private outrage. It is the last resort in a desperate and deadly competition. All railroad managers abominate it; but there is no rectitude which will not submit to it rather than die.

In respect to both these possible mischiefs the law provides protection. Both practices are, when not justified by reasonable and fair purposes, crimes, and punishable as such. It may be said that they are often not easy to be discovered, and therefore, that the criminal law is not a sure safeguard; but this is, to a greater or less degree, the case with all crimes. The fear of punishment will be sufficient to restrain within moderate limits the commission of the offence. It can never become general; and so can never defeat the general beneficent operation of free competition.

The present general condition of the law on the questions involved in the present controversy is believed to be as follows:

1. That it is within the scope of the legislative power to establish maximum rates for railroad charges.

2. That this power is not unlimited; and that the ascertainment and declaration of its limits are within the province of the judicial power.

3. What these limits are is as yet an open question except

in one particular; namely, the regulations must be reasonable.

4. That they transcend this limit and become unreasonable, whenever they operate so as to take away the property of the railroad companies.

5. What rules or principles must be observed in the framing of maximum rates in order to make them reasonable, other than the one above mentioned, that they must not take away property, is as yet an open question.

6. In particular, the question whether they are not unreasonable, if they impair a contract between the railroad companies and the State, and take away rights resting in contract is an open question.

7. What rights, resting in contract, railroad companies have, as against the State, is an open question.

8. Whether the State can determine by legislation the reasonable value of railroad service as between railroad and shipper, so as to oust, or to cripple, the jurisdiction of the courts to determine, in some form, that reasonable value is an open question. *Reagan* v. *The Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649.

It is believed that the present legislation is clearly shown by the proofs in this case to be invalid within the principles already established by this court. The rates are unreasonable because they take away property without due process of law; and, therefore, it is not necessary to determine either of the points above mentioned as being still open. But, at the same time, it is true that those points are directly raised and involved, and a discussion of them is relevant, and cannot with propriety be passed.

I. The business of a common carrier of goods at all times before the introduction of railroads, and ever since, has been the carriage of goods for hire. The law attached to this business the duty on the part of the carrier to carry all goods which any one might require him to carry. It gave him a corresponding right to charge for his services a reasonable compensation. What was in fact a reasonable compensation

is, from its very nature, a judicial question, and has always been so treated.

The carrier had, in addition, the common right of all citizens, to agree with his customer concerning the amount of his reward. In cases of such agreement, the question of reasonableness would necessarily disappear.

II. One can become a carrier by railroad only by the permission of the State. What the rights of such a carrier are, as against the State, depend upon the terms of his contract with the State by which he acquires the right. Under our system, which allows all to construct and operate railroads upon the same terms, the contract is made by a public offer, and its acceptance, by performing the consideration.

III. The nature of the right gained by the acceptance of such offers is ascertained by the simple inquiry what the offer is. In the case of a railroad, where there are no special conditions or limitations modifying the substance of the offer, (and in general, and in our particular cases, there are none,) the offer is of the right to carry on (with the structure) the business of a common carrier as it is ordinarily carried on. And to whatever conditions, either by way of legislative regulation, or otherwise, that business is ordinarily subject, it becomes subject when acquired by a railroad carrier in the manner above pointed out; and it becomes subject, undoubtedly, to such further governmental regulation as the new instrumentality employed may, in the public interest, reasonably require.

IV. In the discussions, judicial as well as forensic, concerning the power of state legislatures to regulate railroad rates and other similar charges, while the existence of the power has been affirmed, the nature of the power, the place to which it is assignable in the just scheme of government, and the conditions under which it may properly be exercised, have not received the attention to which they are entitled. References have been made to certain employments, such as those of millers, bakers, ferrymen, innkeepers, etc., the charges in which have been made from time to time from an early period the subjects of legislative regulation, and it has been impliedly

accepted as law, that these employments are, under all circumstances, subject to the interference of government, while other employments and businesses are not; but the reasons why this should be so have not been fully sifted. It is time that this element, which has served as the foundation of the most momentous conclusions, should be scrutinized and measured. We affirm the moderate proposition that the governmental power upon which alone this class of regulations can be defended is the police power. *Munn* v. *Illinois*, 94 U. S. 113, 125.

V. This is not an exercise of the police power at all, and is therefore a nullity.

VI. This legislation is unconstitutional. First, because it takes away the contract rights granted to, and vested in, the railroad companies by the public contracts under which they expended their capital in the construction of their roads. Second, because it immediately takes away the property of those companies without compensation, and without due process of law. Third, because it denies to them the equal protection of the laws.

VII. This whole controversy may be made to turn upon another single proposition, based substantially upon the same grounds, but differing in form from those already asserted; namely, the rates established by the act are not maximum rates, such as the legislature had power to establish.

VIII. The Nebraska act is invalid and void within the principles now fully recognized by this court for the reason that while on its face it pretends to regulate rates on Nebraska business alone it necessarily affects the business done in other States, and the rates of that business. Rates so regulated are, in very absolute sense, unreasonable.

IX. The business of transportation by rail in Nebraska consists in the performance of innumerable distinct items of carriage service for an innumerable number of persons and under every diversity of circumstance affecting the question of reasonable price for the service. It is submitted that the legislature of that State cannot, in any single instance, impose a rate which would preclude the railroad from a recovery before a court and jury of what the court and jury might find

to be the reasonable value of that service. This act utterly denies that right.

X. No one can deny, in view of the uniform decisions of this court, and especially in view of the last one on this subject, that the power of a state legislature to establish rates is not unlimited, but is subject to some sort of review in the courts. Upon any view of the province of the courts this act is invalid.

XI. The present condition of the decisions of this court upon the question of the authority of a legislature to establish maximum rates, leaves open for discussion, to say the least, every proposition advanced by me. No judgment of this court is opposed to any of them; and the manifest tendency of the later decisions is to support them all.

XII. When the above questions are properly settled, our law in respect to maximum rates for railroad and other services will be brought into a more consistent form, which will at once secure individual rights and not unduly limit legislative powers; and then the propositions, which I have endeavored to support, will be found to be just.

XIII. But without solving any of the questions above asserted as open, and upon the law as now established, the Nebraska act is unconstitutional and invalid for the reason that the rates are so low as to leave no real compensation to the railroads, and amount, therefore, to a taking of property without due process of law, and to a denial to the railroads of the equal protection of the laws.

In conclusion *Mr. Carter*, after reviewing the cases, submitted the following as to the questions decided, and the questions left open.

A. *Points determined by the lines of decisions.*

1. That in the absence of provisions in the charters constituting contracts between the State and the company limiting the legislative power in respect to rates, the legislature has the power to fix maximum rates.

2. That this legislative power is not unlimited, and that it does not extend so far as to permit rates to be established

which will yield no return upon the investment and thus practically destroy the property.

3. That the question of what rates are reasonable, and what are unreasonable, is a judicial and not a legislative question.

B. *Points left open to discussion.*

1. What is the nature of the legitimate power which the legislature may exercise upon the subject of rates? It was in substance declared, in the opinion in *Munn* v. *Illinois*, that it was the police power, but the real character of this power and its limitations were not then, and have not since been, much considered.

2. Where there are no express provisions in the charters respecting the amount of rates or the power to fix them, is there any implied grant of a right to charge reasonable rates? Does not the right to take tolls necessarily imply a power to take tolls to some certain amount or to some amount capable of being made certain? Can we help saying that it is a right to take reasonable tolls?

3. Can the court, when declaring that rates cannot be fixed at so low a point as to yield no return, because that would be a taking of property, stop at that point? If taking all profit is a destruction of property, does that destruction begin there? Does it not begin when the profit is reduced to a very small amount? And, therefore, is it not necessary to fix a point at which destruction begins, and can it be fixed anywhere except at the point of reasonableness?

Tendency of this line of decision.

It is very plain that there has been a regular progress thus far, entirely in harmony with constitutional doctrine. It is clearly developed by limiting the decisions to the actual circumstances of the cases decided, and treating the language of opinions with the liberality which a true criticism enjoins. The progress is as follows:

1. The question first presented was whether the legislature had any power whatever to deal with rates. This was decided in the affirmative.

2. When the question was made whether provisions in charters not granting the right to specific rates, but permitting companies to fix reasonable rates, a decision was not compelled, because the proofs did not show the statutory rates to be unreasonable. Opinions differed.

3. When the suggestion was first pressed whether those judges who sanctioned the fullest exercise of legislative power would allow no limit to it, some of them, including Waite, C. J., himself, answered that the power did have its limitations; and when the question was first squarely made the majority held that it was limited.

4. When cases have been presented in which it was claimed that the rates were unreasonably low, but not clearly shown to be so, the court has declined to interfere.

5. When cases have been presented where the rates did not allow any substantial return on the capital, it has been unanimously held that the limit had been reached and passed, and the laws were held invalid.

6. The case seems not yet to have arisen where the rates were proved to reduce returns to a clearly unreasonable point, although not taking away all profit.

7. In recent cases the question has been mooted, and repeated in the very last decision, whether there is not an implied right under all charters to reasonable rates. Whenever this question presents itself in a manner not to be avoided, the affirmative will be found to be the only decision to which the foregoing tendencies lead, or which constitutional law can sanction.

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

The first question to be considered is one common to all the cases. While it was not objected at the argument that there had been any departure from the 94th Equity Rule, it was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. This objection is

based upon the fifth section of the Nebraska statute authorizing any railroad company to show, in a proper action brought in the Supreme Court of the State, that the rates therein prescribed are unreasonable and unjust and, if that court found such to be the fact, to obtain an order upon the Board of Transportation permitting the rates to be raised to any sum in the discretion of that Board, provided that in no case should they be fixed at a higher sum than was charged by the company on the first day of January, 1893. This section, it is contended, took from the Circuit Court of the United States its equity jurisdiction in respect of the rates prescribed and required the dismissal of the bills.

We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. *Case of Broderick's Will*, 21 Wall. 503, 520; *Holland* v. *Challen*, 110 U. S. 15, 24; *Dick* v. *Foraker*, 155 U. S. 404, 415; *Bardon* v. *Land & River Imp. Co.*, 157 U. S. 327, 330; *Rich* v. *Braxton*, 158 U. S. 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff — the required value being in dispute — may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne* v. *Hook*, 7 Wall. 425, 430; *McConihay* v. *Wright*, 121 U. S. 201, 205. A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he

might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis* v. *Gray*, 16 Wall. 203, 221; *Cowley* v. *Northern Pacific Railroad*, 159 U. S. 569, 583. So, "whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204; *Cowles* v. *Mercer Co.*, 7 Wall. 118; *Lincoln County* v. *Luning*, 133 U. S. 529; *Scott* v. *Neely*, 140 U. S. 106; *Chicot County* v. *Sherwood*, 148 U. S. 529; *Cates* v. *Allen*, 149 U. S. 451.

In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offence, from five thousand to ten thousand dollars for the second offence, from ten thousand to twenty thousand dollars for the third offence, and twenty-five thousand dollars for every subsequent offence. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity

of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained.

Another question of a preliminary character must be here noticed. The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction consistently with the Eleventh Amendment of the Constitution of the United States. This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State Board. It would therefore be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction not only upon the ground of the diverse citizenship or alienage of the parties, but upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that, within the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for

the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *In re Tyler*, 149 U. S. 164, 190; *Scott* v. *Donald*, 165 U. S. 58, 68; *Tindal* v. *Wesley*, 167 U. S. 204, 220.

An important question is presented that relates only to the Union Pacific Company. That company is a corporation formed by the consolidation of several companies under the authority of acts of Congress, one of the constituent companies being the Union Pacific Railroad Company incorporated by the act of July 1, 1862, c. 120, 12 Stat. 489. *United States* v. *Union Pacific Railway*, 160 U. S. 1, 6. Neither that company nor the Union Pacific Railroad Company is named in the Nebraska statute, but the statute is interpreted by the State Board of Transportation as embracing the present defendant corporation. It is contended that the State is without power to fix or limit the rates that the Union Pacific Company may charge for the transportation of freight on its lines between points within Nebraska. This contention rests: 1. Upon the provisions of the acts of Congress showing that the Union Pacific Railroad Company was created for the accomplishment of national objects, namely, to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores of the United States; 2. Upon the eighteenth section of the above act of July 1, 1862, 12 Stat. 489, 497, c. 120, providing that "whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." The argument is that Congress by this enactment has reserved to itself exclusive control of rates, interstate and local, to be charged on the Union Pacific Railroad. As this view, if maintained, would require

an affirmance of the decree so far as the Union Pacific Company is concerned, whether the Nebraska statute of 1893 be constitutional or not as to the other railroad corporations, it cannot properly be passed without examination.

In *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, 416, the question arose whether the Texas and Pacific Railway Company, a corporation organized under the laws of the United States, was subject to the laws of Texas with respect to rates for transportation wholly within that State. The ground upon which exemption from state control was there asserted by the company was that it received all its franchises from Congress, including the franchise to charge and collect tolls. This court, conceding, for the purposes of that case, that Congress had power to remove the corporation in all its operations from state control, held that the act creating it did not show an intention upon the part of Congress to exempt it from the duty to conform to such reasonable rates for local transportation as the State might prescribe, and that the enforcement by the State of reasonable rates for such transportation would not disable the corporation from performing the duties and exercising the powers imposed upon it by Congress. The court said: "By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control

exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates and other police regulations."

This conclusion, as may be observed from the opinion, was based in part upon the reasoning in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, and in *Railroad Company* v. *Peniston*, 18 Wall. 5, in which cases it was held that the property of certain railroad companies was not exempt from state taxation by reason alone of the fact that they were organized under acts of Congress for the accomplishment of national objects, and that the imposition of such taxes was not, in a constitutional sense, an obstruction to the exercise of the powers of the General Government, nor an interference with the discharge of the duties required of the companies by their charters.

In the present case the question is more difficult of solution by reason of the declaration in the above act of July 1, 1862 (no similar declaration being made in the act incorporating the Texas and Pacific Railway Company), that Congress may reduce the rates of fare on the Union Pacific Railroad if unreasonable in amount, and may fix and establish the same by law whenever the net earnings of the entire road and telegraph, ascertained upon a named basis, should exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States.

Undoubtedly Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the States through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits.

It cannot be doubted that the making of rates for transportation by railroad corporations along public highways,

between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits.

We are now to inquire whether the Nebraska statute is repugnant to the Constitution of the United States.

By the Fourteenth Amendment it is provided that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this Amendment is now settled. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, 396; *Charlotte, Columbia & Augusta Railroad* v. *Gibbes*, 142 U. S. 386, 391; *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, 154. What amounts to deprivation of property without due process of law or what is a denial of the equal

protection of the laws is often difficult to determine, especially where the question relates to the property of a *quasi* public corporation and the extent to which it may be subjected to public control. But this court, speaking by Chief Justice Waite, has said that, while a State has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that, "under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law." *Railroad Commission Cases*, 116 U. S. 307, 325, 331. This principle was recognized in *Dow* v. *Beidelman*, 125 U. S. 680, 689, and has been reaffirmed in other cases. In *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 179, it was said that the power of the State to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits — in the absence of any provision in the charter of the company constituting a contract vesting it with authority over those matters — was "subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce." In *Chicago, Milwaukee & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 458, it was said: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protec-

tion of the laws." In *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339, 344, the court, in answer to the suggestion that the legislature had no authority to prescribe maximum rates for railroad transportation, said that "the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." In *Budd* v. *New York*, 143 U. S. 517, 547, the court, while sustaining the power of New York by statute to regulate charges to be exacted at grain elevators and warehouses in that State, took care to state, as a result of former decisions, that such power was not one "to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law."

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 399, which involved the validity of certain rates for freights and passengers prescribed by a railroad commission established by an act of the legislature of Texas, this court, after referring to the above cases, said: "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the

public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission."

So, in *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649, 657, it was said that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." In *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 584, 594–5, 597, which involved the validity of a state enactment prescribing rates of toll on a turnpike road, the court said: "A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight." And in *Chicago, Burlington & Quincy Railroad* v. *Chicago*,

166 U. S. 226, 241, it was held 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 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."

In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The cases before us directly present the important question last stated.

Before entering upon its examination, it may be observed that the grant to the legislature in the constitution of Ne-

braska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that State has reference to "reasonable" maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights.

What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. Art. VI. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their

jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

We turn now to the evidence in the voluminous record before us for the purpose of ascertaining whether — looking at the cases in the light of the facts as they existed when the decrees were rendered — the Nebraska statute, if enforced, would, by its necessary operation, have deprived the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them.

The first and most important contention of the plaintiffs is that, if the statute had been in force during any one of the three years preceding its passage, the defendant companies would have been compelled to use their property for the public substantially without reward or without the just compensation to which it was entitled. We think this mode of calculation for ascertaining the probable effect of the Nebraska statute upon the railroad companies in question is one that may be properly used.

The conclusion reached by the Circuit Court was that the reduction made by the Nebraska statute in the rates for local freight was so unjust and unreasonable as to require a decree staying the enforcement of such rates against the companies named in the bill. *Ames* v. *Union Pacific Railway*, 64 Fed. Rep. 165, 189. That conclusion was based largely upon the figures presented by Mr. Dilworth, while he was a secretary of the State Board of Transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for that Board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the "commodities of local rates" was 29.50 per cent; and this

estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses on all business by at least ten per cent, and that it might go as high as twenty per cent or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called through business. Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another, that the cost of the short haul is "reasonably double the long haul." If due regard be had to the testimony — and we have no other basis for our judgment — we are not permitted to place the extra cost of local business at less than ten per cent greater than the percentage of the cost of all business.

In answer to questions propounded to him by the defendants constituting the State Board of Transportation, Mr. Dilworth stated that he had prepared himself with an estimate showing the number of tons of freight, commonly spoken of as local freight, hauled on the respective railways in Nebraska, and the amount received by the railway companies by way of tariff on tons of freight hauled, including through as well as local freight, and was qualified to speak as to the amount received by the companies for both passengers and freight within the State, and the reduction that would take place in rates under the statute in question. He presented various tables showing the results of his investigations. One is known as Exhibit 4, and is an "Estimate of local business, and the effect of House Roll 33" on the Burlington, St. Paul, Fremont, Union Pacific, Omaha, St. Joseph and Kansas City Companies for the year 1892. Another is called Exhibit 19, and is a like estimate in respect of the same companies for the years 1891 and 1893. Another is known as Exhibit 20, and shows "Tons carried, tonnage per mile and percentage of expenses for the years ending June 30, 1891, 1892 and 1893 (Nebraska)." These exhibits are as follows:

Exhibit "4."

Estimate of Local Business and the Effect of House Roll 33 on the Following-named Railroads:

1892.	Number of tons hauled locally.	Average amount received for each ton hauled.	Total amount received for tons hauled locally.	Total amount of reduction caused by H. R. 33.	Amount received from passenger business.	Amount received for freight hauled in Nebraska including through and local.	Total amount realized on all business done in the State.	Per cent of reduction on all business done in the State by H. R. 33.
Burlington Co. .	574,653	$2.15416	$1,237,884	$365,175	$2,369,714	$5,538,766	$7,908,242	.044
St. Paul Co. . .	65,762	1.87089	123,033	36,294	263,458	472,051	763,509	.047
Fremont Co. . .	158,350	2.12633	336,714	99,310	598,219	1,495,468	2,093,687	.047
Union Pacific Co.	192,865	2.06498	398,262	117,487	977,264	4,284,793	5,262,057	.022
Omaha Co. . .	63,999	1.38026	88,335	26,043	305,668	955,626	1,261,294	.022
St. Joseph Co. .	39,657	.63051	31,004	8,836	71,083	216,395	287,478	.030
Kansas City Co.	10,823	.61261	6,630	1,889	41,123	125,530	166,653	.011

Exhibit "19."

Estimate of Local Business and the Effect of House Roll 33 on the Following-named Railroads for the Years ending June 30, 1891 and 1893.

	Number of tons hauled locally.	Average amount received per each ton hauled.	Total amount received per ton [for tons] carried locally.	Total amount of reduction caused by H. R. 33.	Amount received from passenger business.	Amount received from freight carried in Nebraska including local and through.	Total amount received on all business done in the State.	Per cent of reduction on all business done in the State by H. R. 33.
1891.								
Burlington Co. .	538,824	$1.98	$1,066,871	$314,726	$2,321,983	$3,942,078	$6,264,061	.05
St. Paul Co. . .	64,496	1.72	110,933	37,725	225,264	506,470	731,734	.044
Fremont Co.. .	141,056	2.47	348,408	102,780	876,583	1,969,242	2,845,825	.036
Union Pacific Co.	152,028	1.83	278,211	82,072	1,509,331	3,791,849	5,301,108	.015
Omaha Co. . .	61,448	1.23	75,581	22,296	311,130	580,834	891,964	.025
St. Joseph Co. .	25,078	.87	21,817	6,245	86,036	178,529	264,565	.024
Kansas City Co.	8,743	.77	6,732	1,985	41,837	67,946	109,783	.018
1893.								
Burlington Co. .	583,294	2.13	1,242,416	366,512	2,581,564	5,973,356	8,554,920	.042
St. Paul Co. . .	78,753	1.81	142,542	42,049	267,535	650,109	917,644	.045
Fremont Co.. .	177,804	2.26	424,437	125,208	816,239	2,237,044	3,053,283	.041
Union Pacific Co.	220,061	1.88	413,714	122,045	1,551,877	4,313,204	5,865,081	.020
Omaha Co. . .	68,237	1.18	80,519	23,753	332,497	887,616	1,220,113	.019
St. Joseph Co. .	50,452	.67	33,802	9,971	99,396	263,516	362,912	.027
Kansas City Co.	15,485	.61	9,445	2,786	41,667	135,824	177,491	.015

Exhibit "20."

Tons carried, Tonnage per Mile and Percentage of Expenses for Years ending June 30, 1891, 1892 and 1893 (Nebraska).

Name of Road.	Number of tons carried locally.	Number of tons of interstate freight carried.	Number of tons of local freight carried 1 mile.	Number of tons of interstate freight carried 1 mile.	Total number of tons, local and interstate, carried 1 mile.	Total number of passengers, local and interstate, carried 1 mile.	Percentage of expenses to earnings.
1891.							
Burlington Co.	538,824	1,448,229	73,075,310	106,415,962	269,491,272	69,594,747	66.24
St. Paul Co.	64,496	228,671	10,267,118	36,397,629	46,664,747	7,403,263	70.78
Fremont Co.	141,056	654,400	21,863,680	101,644,999	123,508,679	24,898,729	49.87
Union Pacific Co.	152,028	1,908,045	28,908,124	362,966,694	391,874,818	66,072,597	68.94
Omaha Co.	61,448	409,270	4,579,104	30,499,041	35,078,145	10,295,137	120.26
St. Joseph Co.	25,078	178,169	1,497,658	10,640,979	12,138,637	2,308,918	96.44
Kansas City Co.	8,743	78,694	403,751	3,634,082	4,037,833	912,210	99.54
1892.							
Burlington Co.	574,653	1,996,437	91,139,965	316,552,193	407,692,158	70,038,243	64.23
St. Paul Co.	65,762	264,403	11,028,287	44,321,384	55,349,671	8,833,405	65.96
Fremont Co.	158,350	846,312	24,069,200	128,425,903	152,495,103	21,874,987	70.71
Union Pacific Co.	192,865	1,882,112	42,970,322	419,300,773	462,271,095	56,926,269	56.44
Omaha Co.	63,999	628,351	4,659,127	45,745,647	50,404,774	10,058,442	93.12
St. Joseph Co.	39,657	303,550	2,005,851	15,355,015	17,360,866	2,472,538	74.23
Kansas City Co.	10,823	194,089	481,515	8,635,016	9,116,531	864,030	75.19
1893.							
Burlington Co.	583,294	2,221,005	93,703,675	357,131,753	450,925,428	83,091,418	65.51
St. Paul Co.	78,753	279,218	12,848,551	45,554,417	58,402,968	9,074,093	64.58
Fremont Co.	187,804	800,158	26,855,972	114,511,328	141,367,300	23,209,212	53.66
Union Pacific Co.	220,061	2,068,568	45,948,736	431,949,561	477,898,297	63,422,117	58.51
Omaha Co.	68,237	683,868	4,257,988	42,706,297	46,964,285	11,028,131	94.14
St. Joseph Co.	50,452	337,647	2,774,860	18,576,845	21,351,705	2,834,169	62.05
Kansas City Co.	15,484	205,725	658,534	8,750,126	9,408,660	875,415	76.50

It may be here stated that the words in these exhibits, "number of tons hauled locally," refer to freight that started and ended in the State; the words in Exhibit 4, "amount received for freight hauled in Nebraska, including through and local," and the like words in Exhibit 19, refer not only to freight starting and ending in the State, but to all freight hauled by the railroad company in Nebraska, regardless of its destination or origin — that is, "freight that begins in the State and goes out of the State, freight that begins out of the State and comes into the State and freight which begins and ends in the State." The words, "per cent of reduction on all the business done in the State by House Roll 33," in Exhibits 4 and 19, mean the percentage of the total amount of all business, passenger and freight, done in the State, whatever its origin or destination, and do not indicate the percentage of reduction on local business when considered alone. It should be stated also that the words, "percentage of expenses to earnings," in Exhibit 20, refer to all business, through and local, done by the railroad company within the State. Mr. Dilworth, as we have seen, testified that if the local business alone were considered, the percentage of expenses to earnings upon such business would be at least ten per cent more than the general percentage of expenses to earnings on all business, both through and local. It is important here to note that his estimates are of business from July 1st to the succeeding June 30th. So that when allusion is made presently to his estimates for 1891, 1892 and 1893, it will be understood to refer to the years *ending* the 30th days of June, 1891, 1892 and 1893, respectively.

From July 1, 1890, to June 30, 1891, as shown by Exhibit 20, the percentage of expenses to earnings on all business on the Burlington road was 66.24; on the St. Paul road, 70.78; on the Fremont road, 49.87; on the Union Pacific road, 68.94; on the Omaha road, 120.26; on the St. Joseph road, 96.44; and on the Kansas City road, 99.54;

From July 1, 1891, to June 30, 1892, as shown by the same Exhibit, the percentage of expenses to earnings on all business on the Burlington road was 64.23; on the St. Paul

road, 65.96; on the Fremont road, 70.71; on the Union Pacific road, 56.44; on the Omaha road, 93.12; on the St. Joseph road, 74.23; and on the Kansas City road, 75.19; and,

From July 1, 1892, to June 30, 1893, as shown by the same Exhibit, the percentage of expenses to earnings on all business on the Burlington road was 65.51; on the St. Paul road, 64.58; on the Fremont road, 53.66; on the Union Pacific road, 58.51; on the Omaha road, 94.14; on the St. Joseph road, 62.05; and on the Kansas City road, 76.50.

In view of the reduction of 29.50 in rates prescribed by the statute and of the extra cost of doing local business, as compared with other business, what do these facts show?

Take the case of the Burlington road from July 1, 1890, to June 30, 1891. Looking at the entire business done on it during that period within the limits of the State, we find that the percentage of operating expenses to earnings on all business — which, as stated, does not include the extra cost of local business — was 66.24. Add to this the extra cost of local business, estimated at at least ten per cent, and the result is that, under the rates charged during the period stated, the cost to the Burlington Company of earning $100 would have been $76.24. Now, if the reduction of 29½ per cent made by the act of 1893 had been in force prior to July 1, 1891, the company would have received $70.50 as against $100 for the same service, showing that in that year the operating expenses would have exceeded the earnings by $5.74 in every $100 of the amount actually received by it.

By like calculations, it will appear that each of the railroad companies would have conducted its local business at a loss during the periods stated, except that in the year ending June 30, 1891, and in the year ending June 30, 1893, the earnings of the Fremont Company, and in the years ending the 30th days of June, 1892 and 1893, respectively, the earnings of the Union Pacific Company, would have slightly exceeded their operating expenses.

Under the rates prescribed by the act of 1893 the cost to the respective companies of local business in Nebraska would have exceeded the earnings for the years ending June 30,

1891, 1892 and 1893, respectively, in every one hundred dollars of the amount actually received, as follows: To the Burlington Company, by $5.74, $3.73 and $5.01; to the St. Paul Company, by $10.28, $5.46 and $4.08; to the Omaha Company, by $59.76, $32.62 and $33.64; to the St. Joseph Company, by $35.94, $13.73 and $1.55; and to the Kansas City Company, by $39.04, $14.69 and $16. The cost to the Union Pacific Company for the year ending June 30, 1891, of its local business, under the rates prescribed by the statute of 1893, would have caused a loss of $8.44 in every one hundred dollars of the amount actually received.

In order to show these results at a glance, the table on page 536 is inserted upon the basis of one hundred as representing the amounts actually charged and received by the respective railroad companies for the years given.

There are other views of the case suggested by the above exhibits and table which show the same results.

In the year ending June 30, 1891, under the rates then in force, the Burlington Company received $1,066,871 for tons carried locally. If the business had been done under the rates prescribed by the act of 1893, it would have received 29½ per cent less, that is, only $752,145 or $314,726 less than it did receive. The percentage of expenses to earnings, including the extra cost of local business, was 76.24; that is, it cost $813,382 to earn $1,066,871. So that the difference between $813,382 and $752,145 shows that, if the rates prescribed by the statute of 1893 had been in force during the year ending June 30, 1891, the amount received would have been less than the operating expenses of the Burlington Company by $61,237.

During the year ending June 30, 1892, the same company received for tons carried locally $1,237,884. If the act of 1893 had been in force, it would have received, because of the reduced rates prescribed by that act, only $872,709 — less by $365,175 than it did receive. The percentage of expenses to earnings, including the extra cost of local business, was 74.23; that is, the $872,709 would have been earned at a cost of $918,881. So that under the rates prescribed by the act

Name.	Cost by percentage of all business.	Extra cost of local business.	Total cost of local business.	Earnings as reduced by act of 1893.	Loss.	Gain.
1891.						
Burlington Company .	66.24	10	76.24	70.50	5.74	
St. Paul Company . .	70.78	10	80.78	70.50	10.28	
Fremont Company . .	49.87	10	59.87	70.50	. . .	10.63
Union Pacific Company.	68.94	10	78.94	70.50	8.44	
Omaha Company. . .	120.26	10	130.26	70.50	59.76	
St. Joseph Company .	96.44	10	106.44	70.50	35.94	
Kansas City Company .	99.54	10	109.54	70.50	39.04	
1892.						
Burlington Company .	64.23	10	74.23	70.50	3.73	
St. Paul Company . .	65.96	10	75.96	70.50	5.46	
Fremont Company . .	70.71	10	80.71	70.50	10.21	
Union Pacific Company.	56.44	10	66.44	70.50	. . .	4.06
Omaha Company. . .	93.12	10	103.12	70.50	32.62	
St. Joseph Company .	74.23	10	84.23	70.50	13.73	
Kansas City Company .	75.19	10	85.19	70.50	14.69	
1893.						
Burlington Company .	65.51	10	75.51	70.50	5.01	
St. Paul Company . .	64.58	10	74.58	70.50	4.08	
Fremont Company . .	53.66	10	63.66	70.50	. . .	6.84
Union Pacific Company.	58.51	10	68.51	70.50	. . .	1.99
Omaha Company. . .	94.14	10	104.14	70.50	33.64	
St. Joseph Company .	62.05	10	72.05	70.50	1.55	
Kansas City Company .	76.50	10	86.50	70.50	16.00	

of 1893 the loss during the period named would have been $46,172.

During the year ending June 30, 1893, that company received $1,242,416 for tons carried locally; whereas, under the 29½ per cent reduction prescribed by the statute of that year, it would have received only $875,905, that is, less by $366,512 than it did receive. The percentage of its expenses to earnings in that year, including the extra cost of local business, was 75.51; that is, under the statutory rates $875,905 would have been earned at a cost of $938,147; which would have been a loss of $62,243.

Opinion of the Court.

By the same mode of calculation, it will be found that, if the statute of 1893 had been enforced during the years ending the 30th days of June, 1891, 1892 and 1893, respectively, the other companies would have lost, that is, their expenses would have exceeded their earnings during those years by the following amounts: The St. Paul Company, $11,403, $6716 and $5814; the Fremont Company, $34,377 for the year ending June 30, 1892; the Union Pacific Company, $23,480, for the year ending June 30, 1891; the Omaha Company, $45,166, $28,813 and $27,085; the St. Joseph Company, $7840, $4256 and $523; and the Kansas City Company, $2627, $974 and $1510; while the earnings of the Union Pacific Company would have exceeded its expenses for the years ending the 30th days of June, 1892 and 1893, respectively, by $16,170 and $8234; and those of the Fremont Company by $37,037 and $29,036 for the years ending the 30th days of June, 1891 and 1893, respectively.

These results will be seen in the table on page 538, based upon the above exhibits, and assuming that 10 per cent was the very lowest amount of the extra cost of business beginning and ending in the State.

Counsel for the appellants contend that the railroad companies in Nebraska derived a profit from their local tonnage of nearly 100 per cent over and above operating expenses. This contention is based upon the evidence given by William Randall, freight and ticket agent as well as auditor of the Burlington road in Nebraska, on his first examination as a witness. He then stated that the earnings of the company for the year 1892 — meaning for the year beginning January 1, 1892 — upon freight starting and ending within the State were $1,853,036.59, and that the operating expenses, including taxes, on that business were $972,183.70. These figures, counsel say, show that "there was a clear profit over operating expenses, including taxes, of nearly one hundred per cent on the local business of the Burlington Company in 1892." But counsel overlook the fact that, upon his second examination, Mr. Randall stated that his first figures were not correct, and that the operating expenses on local business in 1892 were

Name of Road.	Total amount received for tons carried locally.	Total amount of reduction by act of 1893, 29½ per cent.	What would have been received under rates fixed by act of 1893.	Amount to be deducted to pay expenses (reckoned by per cent of cost of all business).	Amount to be taken out of earnings to pay 10 per cent extra cost of local business.	Total expense of local business.	Gain.	Loss.
1891.								
Burlington Co. .	$1,066,871	$314,726	$752,145	$706,695	$106,687	$813,382	. . .	$61,237
St. Paul Co. . .	110,933	32,725	78,208	78,518	11,093	89,611	. . .	11,403
Fremont Co. . .	348,408	102,780	245,628	173,751	34,840	208,591	$37,037	. . .
Union Pacific Co.	278,211	82,072	196,139	191,798	27,821	219,619	. . .	23,480
Omaha Co. . .	75,581	22,296	53,285	90,893	7,558	98,451	. . .	45,166
St. Joseph Co. .	21,817	6,436	15,381	21,040	2,181	23,221	. . .	7,840
Kansas City Co.	6,732	1,985	4,747	6,701	673	7,374	. . .	2,627
1892.								
Burlington Co. .	1,237,884	365,175	872,709	795,093	123,788	918,881	. . .	46,172
St. Paul Co. . .	123,033	36,294	86,739	81,152	12,303	93,455	. . .	6,716
Fremont Co. . .	336,714	99,330	237,384	238,090	33,671	271,761	. . .	34,377
Union Pacific Co.	398,262	117,487	280,775	224,779	39,826	264,605	16,170	. . .
Omaha Co. . .	88,335	26,058	62,277	82,257	8,833	91,090	. . .	28,813
St. Joseph Co. .	31,004	9,146	21,858	23,014	3,100	26,114	. . .	4,256
Kansas City Co.	6,630	1,955	4,674	4,985	663	5,648	. . .	974
1893.								
Burlington Co. .	1,242,416	366,512	875,904	813,906	124,241	938,147	. . .	62,243
St. Paul Co. . .	142,542	42,049	100,493	92,053	14,254	106,307	. . .	5,814
Fremont Co. . .	424,437	125,208	299,229	227,750	42,443	270,193	29,036	. . .
Union Pacific Co.	413,714	122,045	291,669	242,064	41,371	283,435	8,234	. . .
Omaha Co. . .	80,519	23,753	56,766	75,800	8,051	83,851	. . .	27,085
St. Joseph Co. .	33,802	9,971	23,831	20,974	3,380	24,354	. . .	523
Kansas City Co.	9,445	2,786	6,659	7,225	944	8,169	. . .	1,510

$1,221,742.84, and not $972,183.70. This agrees with the figures given by Mr. Taylor, another auditor of the Burlington Company. Now, if the act of 1893 had been in force during 1892, the earnings in the latter year, $1,853,036.59, would have been reduced by 29½ per cent, that is, by $546,645.79, leaving $1,306,390.80 as the total receipts on local business, which, after deducting operating expenses, $1,221,742.84, would leave a profit of $84,567.97. If, as counsel for appellees contend, 10 per cent be added as the extra cost of local business, the result would show an actual loss on that business during the whole of 1892. But if that mode of calculation be not adopted, the utmost that can be said to be established by the evidence of Taylor and Randall would be that if the rates fixed by the act of 1893 had been in force during 1892, the company would have received on local business, in the latter year, $84,647.96 over and above operating expenses, or a little over 6 per cent of the amount of those expenses. The difference between the figures of Dilworth and Taylor and Randall, as to the earnings of the Burlington Company, arises, so far as we can perceive, from the fact that their calculations cover different periods. Dilworth gave the earnings from July 1, 1891, to June 30, 1892, and speaks of them as the earnings for 1892, while Taylor and Randall gave the earnings from January 1, 1892, to December 31, 1892. There may have been an unusual amount of business during the last six months of 1892 embraced in the estimates of Taylor and Randall, and not embraced by Dilworth's estimates. We cannot, therefore, say that the testimony of Taylor and Randall overthrows the estimates of Dilworth.

It is said by the appellants that the local rates established by the Nebraska statute are much higher than in the State of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the Circuit Court: "It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining States, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through

which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance." 64 Fed. Rep. 165. In these views we concur, and it is unnecessary to add anything to what was said by the Circuit Court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic

business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and with-

out the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.

Touching the suggestion that the reduction on rates made by the state law was reasonable, if regard be had to all the business, through and local, done in the State by the railroad companies, the Circuit Court said:

"But again, as Mr. Dilworth testified, the average reduction on local rates caused by House Roll 33 is 29½ per cent. The tariff which was in force at the time of the passage of this act had been, for some three or more years, fixed by the voluntary action of the railroad companies, and the reduction of 29½ per cent was from their rates. It must be remembered that these roads are competing roads; that competition tends to a reduction of rates — sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of 29½ per cent in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent? The effect of this testimony is not destroyed by the table offered of the percentage of reduction on the total amount of business done by these companies in the State as follows:

"B. & M. R.	4.2 per cent.
"C., St. P., M. & O.	4.5 per cent.
"F., E. &. M. B.	4.1 per cent.
"Union Pacific	2.0 per cent.
"O. & R. V.	1.9 per cent.
"St. J. & G. I.	2.7 per cent.
"K. C. & O.	1.5 per cent.

"For such a table only indicates, as is further shown by Defendants' Exhibit 4, how small a proportion of the total amount of business done in the State comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts from all business.

It may be, as stated by counsel, that the annual earnings of the Chicago, Burlington and Quincy Company are $27,916,128, and that the total amount of reduction caused by this House Roll 33 is only $365,175. It may be that the capital stock of the company is $76,407,500, and that $365,175 distributed among the stockholders may not be for any of them a great sum; but the entire earnings of the C., B. & Q. are more than twenty times the receipts from local freight in Nebraska; and to reduce such earnings by twenty times $365,175 would make a startling difference in their amount. The fact that the State of Nebraska can reach only one twentieth of the total earnings, gives it no greater right to make a reduction in respect to that one twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent, it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earnings."

It appears, from what has been said, that if the rates prescribed by the act of 1893 had been in force during the years ending June 30, 1891, 1892 and 1893, the Fremont Company, in the years ending June 30, 1891, and June 30, 1893, and the Union Pacific Company, in the years ending June 30, 1892, and June 30, 1893, would each have received more than enough to pay operating expenses. Do those facts affect the general conclusion as to the probable effect of the act of 1893? In the discussion of this question, the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion; and, as it bears upon each case in its important aspects, it should not be passed without examination.

In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is, under governmental control though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. *Olcott* v. *The Supervisors*, 16 Wall. 678, 694; *Sinking Fund cases*, 99 U. S. 700, 719; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, 657. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its

stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 596–7, is pertinent to the question under consideration. It was there observed: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreason-

able charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the

original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

In concluding this opinion, it may not be inappropriate to say that the conclusions reached by us as to the effect of the Nebraska statute find some support in the report of the Board of Secretaries of the Nebraska Board of Transportation made in September, 1891, to the Board itself, and signed by Mr. Dil-

worth and his colleagues. That report was made pursuant to a resolution of the Board requiring the Secretaries to prepare a statement of facts in reference to the rates of transportation in Nebraska. It contains a brief history of what it characterizes as "the controversy on the question of freight rates between the people and the railroads of the State," and embodies such facts, figures and arguments as the Secretaries gathered from both sides. The report says: "The present controversy between the people and the railroads of this State originally grew out of the question, not of rates or reduction of rates, but of control. The people, recognizing the railroads as common carriers, not entitled under the state constitution to the same broad liberty of action in business that the individual citizen has, wanted to control the roads. The roads, impatient of interference, wanted to control themselves and manage their business in their own way." It further states: "We have given you in the foregoing a brief history of the rate matter as we have found it, and from that history and from the evidence and reports on file in our office we beg leave to submit in conclusion the following findings of fact: First. We find from the evidence and sworn statements and reports, on file in our office, and from personal inspection, that the railroads in this State could not be duplicated for a less sum than $30,000 per mile, taking into consideration their equipments and depot and terminal facilities." Here follow a mass of figures and calculations, and the report concludes: "We further find that the railroads are not in a condition to stand, nor do their earnings, figured on a basis cost of $30,000 per mile and not what they claim they cost, justify any cut in local rates of this State at the present time; and further, that a reduction in the local rates in this State would increase the through rates to market for our grain and would be a blow at the industry of the State. This last finding is fully established by the fact that the Board of Transportation reduced the local rates on hard coal 60 per cent, and yet the price to the consumer was not lowered nor the price at the mines raised, which shows conclusively that the through rates must have been raised. In submitting this report we have presented the facts

and figures as we find them from evidence obtainable, from sworn reports now on file in our office. And we would respectfully recommend that no action be taken that will in any way jeopardize the interests of the producers of Nebraska, but that all interests be protected in the fullest manner possible, as provided by the foregoing findings."

To this report of the Secretaries is appended the "Findings of the Board," from which we make this extract: "After a careful and quite thorough investigation of the question of freight rates in Nebraska, which has occupied much time, and has taken a wide range, the state Board of Transportation has arrived at the conclusion that the rates now in force in this State cannot be generally reduced without doing violence to the business interests of the State, and at the same time injuring the shipping and producing classes. We have come to this conclusion, not by taking the cost of construction and equipments, nor the amount of stock and bonds issued per mile, but by making our computations upon the basis of what it would cost to duplicate the property at the present time. It has been our endeavor to deal fairly and justly with the question, and in arriving at a conclusion we have been governed only by the evidence, statements and facts produced for our consideration. A candid examination and comparison of the figures presented to us in the unanimous report of the Board of Secretaries, in the opinion of this Board, fully justifies the conclusion reached: That a general reduction of rates, as now in force over the State, is not practical at this time."

So that we have the judgment of the state Board of Transportation, as constituted in 1891, that a general reduction of rates could not then have been made without injury to the business of the State, to say nothing of the interests of those whose means were invested in railroad property. We are unable to find from the record before us that the situation in Nebraska had so changed in 1893 as to justify that being done in that year which it was not safe or just to do in 1891.

But it may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed

for the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. In anticipation, perhaps, of such a change of circumstances, and the exceptional character of the litigation, the Circuit Court wisely provided in its final decree that the defendants, members of the Board of Transportation, might, "when the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid," apply to the court, by bill or otherwise as they might be advised, for a further order in that behalf. Of this provision of the final decree the state Board of Transportation, if so advised, can avail itself. In that event, if the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute.

Perceiving no error on the record in the light of the facts presented to the Circuit Court,

The decree in each case must be affirmed.

The Chief Justice took no part in the consideration or decision of these cases.

Mr. Justice McKenna was not a member of the court when they were argued and submitted, and took no part in their decision.

MERRITT *v.* BOWDOIN COLLEGE.

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

No. 505. Submitted January 31, 1898. — Decided March 14, 1898.

An appeal does not lie to this court from the decision of a Circuit Court in which, after overruling, on the facts, a plea by the defendant that the action was not in truth a controversy between citizens of different States, but solely between citizens of one State, to whom other parties were collusively added for the purpose of giving the Circuit Court jurisdiction, the court then rendered a final judgment in favor of the plaintiffs on the merits.

While such an issue involves the jurisdiction of the Circuit Court, it does not involve or require, within the meaning of the act of March 3, 1891, c. 517, either the construction or application of the Constitution.

THE plaintiffs in this suit, appellees here, are the President and Trustees of Bowdoin College, a corporation of Maine, and a large number of individuals who are citizens of States other than California. They sued on behalf of themselves and of all other beneficiaries under a certain deed of trust made and entered into between Catharine M. Garcelon, of the first part, and John A. Stanly and Stephen W. Purington, trustees, of the second part. The defendants were James P. Merritt and others, including Stanly and Purington. The general object of the suit was to quiet the title of the plaintiffs to the real estate conveyed by the above deed to Stanly and Purington, and to secure an injunction restraining the other defendants from violating certain alleged covenants, promises and agreements made with the grantor, and also the specific performance of such covenants, promises and agreements.

The bill contained these allegations as explanatory of the reasons why the suit was not instituted by the trustees Stanly and Purington:

"Your orators and oratrices allege and aver that they have requested the said Stephen W. Purington and John A. Stanly, as trustees as aforesaid, to institute such action, suit or proceedings against the defendants, the said James P. Merritt

and Frederick A. Merritt, and their confederates, as would be necessary to quiet their title to the real estate so conveyed to them in trust as aforesaid, or to secure a perpetual injunction restraining the said James P. Merritt and Frederick A. Merritt and each of them from violating their repeated covenants, promises and agreements made with the said Catharine M. Garcelon, as is hereinbefore stated, and to secure a specific performance of said covenants, promises and agreements, and the said Purington and Stanly have declined to accede to this request of your orators and oratrices; that by reason of such refusal your orators and oratrices are compelled to institute this suit, which your orators and oratrices do, not only in their own behalf, but on behalf of all other beneficiaries of said trust who may elect to join your orators and oratrices herein."

The defendants James P. Merritt and Frederick A. Merritt demurred to the bill of complaint, assigning as grounds of demurrer that it appeared from the bill that the plaintiffs were not entitled to the relief prayed against them; had not by the bill made out any title to the relief prayed; that the subject of the suit was not within the jurisdiction of a court of equity; that the court below had no jurisdiction of the suit; that it appeared from the bill that the same was exhibited against the defendants for several distinct and independent matters having no relation to each other or to one another, and in which or in the greater part of which the defendants demurring were not in any way interested or concerned; that the bill was multifarious; that it appeared from the bill that certain persons were not brought before the court who were necessary and proper parties; and that the bill did not show any matter of equity entitling the plaintiffs to the relief asked against the defendants who demurred.

The demurrer was overruled, and the opinion of the court thereon will be found in 54 Fed. Rep. 55.

The case was next heard on the application of the plaintiffs to file a supplemental bill making Harry P. Merritt a party defendant, and for an injunction to restrain the prosecution of an action commenced by him in the Superior Court of Alameda

Statement of the Case.

County, California. Leave to file such a bill was given, and a preliminary injunction was granted. 59 Fed. Rep. 6.

Subsequently the defendant James P. Merritt filed a plea, in which it was stated that all the defendants to the bill (including the defendant Purington who had then recently died) were at the time of the commencement of the action and ever since had been citizens of California; that Stanly and Purington "could not at any time bring or maintain in this court this action nor any cause of action alleged in the said bill of complaint; that said last-named defendants for the purpose of bringing and maintaining this action in this court, and to evade the provisions of the Constitution of the United States and the laws giving jurisdiction to this court, brought and maintained this action in the names of the persons named in said bill of complaint as complainants therein, and without any authority thereto by or from said named complainants or any of them; that said named complainants are only nominal parties to said bill of complaint and in this action, and that said last-named defendants John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, have always been in truth and in fact the only real parties conplainant in said bill of complaint and in this action, and that they are only nominally and colorably defendants in said bill and in this action;" that "the said John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, never were, nor was either of them at any time, nor is the said John A. Stanly, as trustee or otherwise, now in truth or in fact, real or genuine parties defendant or a real or genuine party defendant to said bill of complaint; and that said John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, were, and each of them is named in said bill of complaint as a party defendant thereto only colorably and by false pretense, for the purpose of making it falsely to appear that he is a party defendant thereto and in truth the real and genuine party complainant therein; that none of the parties named in said bill as complainants therein ever was or is in truth or in fact complainants or a party complainant to said bill of complaint or in this action."

The plea further averred —

"That the persons named in said bill of complaint as complainants never did, and that none of said persons ever did, in truth or in fact or in good faith, request the said Stephen W. Purington and John A. Stanly, claiming to be the trustees aforesaid, or in any capacity, or either of them, to institute any suit, action or proceeding against the defendants, the said James P. Merritt and Frederick A. Merritt, or either of them, or any person or persons whatever, to quiet the title to real estate, or any part thereof, alleged in the said bill of complaint to have been conveyed to said Stephen W. Purington and John A. Stanly in trust, or to secure an injunction restraining the said James P. Merritt and Frederick A. Merritt, or either of them, from violating what is alleged in said bill of complaint to be their covenants, promises and agreements, alleged in said bill to have been made by them with Catharine M. Garcelon, or from violating any of said alleged covenants, promises or agreements, or to secure a specific performance of said alleged covenants, promises or agreements or any of them, or any action, suit or proceeding whatever; that said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, or in any capacity, never in truth or in fact or in good faith declined or refused to bring such or any action; that if the persons or any of them named in said bill of complaint as complainants therein ever did request said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, or either of them, to institute any action, suit or proceeding whatever, or if they or either of them ever declined or refused so to do, such request and such declination were not and each of them was not made honestly or in good faith, but at the fraudulent instance and request of said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, and solely to enable said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, to feign and falsely pretend to refuse such request, and thereupon to institute falsely fraudulently and prosecute in this court this action against this defendant.

"That in truth and in fact said bill of complaint was prepared and filed in this court by said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, and

Counsel for Parties.

by them only, and the same and this action has ever since been and is now being prosecuted by them only. . . .

"That this action is not in truth or in fact a controversy between citizens of different States. That this action is in truth and in a fact a controversy solely between citizens of the State of California, that is to say, until the death of said Stephen W. Purington, between the said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, citizens of the State of California, and since his death, by said John A. Stanly, claiming to be such trustee, on the one side, and the said Frederick A. Merritt and this defendant on the other side. That this court has no jurisdiction of the said bill of complaint and no jurisdiction of this cause."

The cause was heard on a motion of the defendant James P. Merritt to dismiss the suit as a collusive one within the meaning of section five of the act of March 3, 1875. It was adjudged that the plea in abatement was not sustained by the evidence, and the motion to dismiss was consequently overruled. 63 Fed. Rep. 213. A final decree in favor of the plaintiffs was entered June 18, 1896. From that decree an appeal was prosecuted directly to this court. But on the 24th of May, 1897, the appeal was dismissed upon the authority of *Colvin* v. *Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687, 692; and *Chappell* v. *United States*, 160 U. S. 499, 507, 508. *Merritt* v. *President & Trustees of Bowdoin College*, 167 U. S. 745. In the first of the cases cited it was adjudged that when a case is brought here directly from a Circuit Court of the United States upon the ground that it involves the jurisdiction of that court, the certificate as to jurisdiction must be granted during the term at which the judgment or decree is entered. The present appeal was taken on the 17th of June, 1897, and the case is before the court on a motion of appellees to dismiss the same for want of jurisdiction in this court.

Mr. William A. Maury, *Mr. Thomas H. Hubbard*, *Mr. George N. Williams*, *Mr. Robert Y. Hayne* and *Mr. E. S. Pillsbury* for the motion.

Mr. A. T. Britton, *Mr. A. B. Browne*, opposing.

Mr. Justice Harlan delivered the opinion of the court.

The object of the plea in abatement was to bring about a dismissal of the suit under the fifth section of the act of March 3, 1875, c. 137, 18 Stat. 470. That section provides for the dismissal of a suit in a Circuit Court of the United States if it shall appear to the satisfaction of the court at any time that the parties to it "have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act."

By the act of March 3, 1891, c. 517, 26 Stat. 826, appeals or writs of error may be taken from the District Courts or the Circuit Courts directly to this court in certain cases, among which are cases in which the "jurisdiction of the court is in issue," and cases that involve "the construction or application of the Constitution of the United States." The former appeal was dismissed upon the ground that a direct appeal to this court would not lie on an issue as to the jurisdiction of the Circuit Court unless the question of jurisdiction was certified during the term at which the final decree was rendered.

It is now sought to bring the case here by appeal directly from the Circuit Court upon the ground that it involves the "construction or application of the Constitution of the United States." This position cannot be sustained. When it appears that parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of 1875, then the Circuit Court is, within the meaning of the act of 1891, without jurisdiction to proceed. But the plea in this case raised no question as to the constitutionality of the act of 1875, and called for no order or judgment that would require a construction or application of the Constitution, although an allowance of the plea may have involved the application of an act of Congress. The plea set out certain facts which, if found to be true, required the dismissal of the suit as one of which the court could not take cognizance under the statute regulating the jurisdiction of the Circuit Courts of

the United States. While the issue involved the jurisdiction of the Circuit Court, it did not involve or require, within the meaning of the act of March 3, 1891, either the construction or application of the Constitution.

For the reasons stated, the motion to dismiss the present appeal is sustained, and the appeal is

Dismissed.

The CHIEF JUSTICE did not sit in this case nor participate in its decision.

BACKUS *v.* FORT STREET UNION DEPOT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 55. Argued January 17, 18, 1898. — Decided March 7, 1898.

As the respondents, both at the trial in the Circuit Court of the State, and in the subsequent proceedings on the certiorari in the Supreme Court of the State, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt.

While this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation, it may not inquire into matters which do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied.

The settled rule of this court in cases for the determination of the amount of damages to be paid for private property condemned and taken for public use, is that it accepts the construction placed by the Supreme Court of the State upon its own constitution and statutes.

In case of such condemnation and taking, a State may authorize possession to be taken prior to the final determination of the amount of compensation, provided adequate provision for compensation is made.

As to the court to determine the question, or the form of procedure, all that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this has been provided for there is that due process of law which is required by the Federal Constitution.

Statement of the Case.

There is no vested right in a mode of procedure established by state law for the condemnation of property for public use; but each succeeding legislature may establish a different one, provided only that in each is preserved the essential element of protection.

An appellate court is not required to set aside the judgment of the trial court by reason of failure to give instructions which were not asked for.

The limit of interference by this court with the judgments of state courts is reached when it appears that no fundamental rights have been disregarded by the state tribunals.

The Supreme Court of Michigan was called upon to consider only such objections as had been particularly specified, and all others were deemed to have been waived.

The decision by the Supreme Court that it had power to set aside the verdict and order a new trial was not a reversal of a ruling that the Circuit Court had no such power.

This court is bound to accept the construction placed upon the state statute by the Supreme Court of the State, and to hold that it means that if the second appraisal was less than the first, and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid.

The facts in this case are as follows: The defendant in error is a corporation created under the laws of the State of Michigan, for the purpose of constructing a union depot in the city of Detroit. In order to connect this depot with the railroads desiring to enter, it was necessary to place tracks on River street, and some of the way, at least, these tracks had to be elevated above the grade of the street. As a part of its enterprise the Depot Company undertook the work of constructing these tracks. The plaintiffs in error were the owners of a manufacturing plant. The individual plaintiff in error held the title in fee to the property and the corporation plaintiff in error was his lessee. This manufacturing plant fronted on River street, and fronted on that part of it where the tracks were necessarily on a viaduct far above the surface. No part of the ground actually occupied by the plant was sought to be taken, but under the laws of Michigan the owner of a lot fronting on a street owns to the centre of the highway and is entitled to recover damages in case that street is appropriated to the use of a railroad. The third clause in section 4 of the Union Depot act (1 How. Comp. § 3461) provides specifically that the amount of these damages shall be ascer-

tained in the same way as is provided in ordinary cases of condemnation.

The constitution of Michigan provides:

Article XV, Section 9. "The property of no person shall be taken by any corporation for public use without compensation being first made or secured, in such manner as may be prescribed by law."

Article XVIII, Section 2. "When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law."

The Michigan Union Depot act (Act of June 9, 1881, No. 224) was passed in 1881. Public Acts, 1881, p. 320. It prescribes proceedings for the condemnation of private property, substantially similar to those in the Michigan General Railroad Law, first passed in 1855. Act of February 12, 1855, No. 82, Sections 9, 10 and 11 of the Depot act, being sections 3466, 3467 and 3468 of 1 How. Comp., provide:

§ 3466 — Sec. 9. "The commissioners shall take and subscribe the oath prescribed by article eighteen of the constitution. . . . They may view the premises described in the petition, and shall hear the proof and allegations of the parties, and shall reduce the testimony, if any is taken by them, to writing, if requested to do so by either party, and after the testimony is closed in such case, and without any unreasonable delays, and before proceeding to the examination of any other claim, all being present and acting, shall ascertain and determine the necessity of taking and using any such real estate or property for the purposes described; and, if they deem the same necessary to be taken, they shall ascertain and determine the damages or compensation which ought justly to be made by the company therefor to the party or parties owning or interested in the real estate or property appraised by them. . . . They shall make a report to said court or judge, signed by them, of the proceedings before them, if any, which

may be filed with the clerk of the court, either in vacation or term time, or the probate court, as the case may be. . . . In case a jury shall have been demanded and ordered by the court, pursuant to section eight of this act, the said jury shall proceed to ascertain and determine the necessity of taking and using any such real estate or property, and the damage or compensation to be paid by the company therefor, in the same manner and with like effect as is provided in this section in the case of commissioners, and as is further provided in said section eight. . . . The said judge, or a circuit court commissioner to be designated by him, may attend said jury, to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings. And the jury shall proceed to determine the amount of damages to be awarded, and shall have all the powers hereby conferred upon commissioners; and a report signed by the jury, whether the judge is or is not in attendance, shall be valid and legal. . . ."

§ 3467 — Sec. 10. "On such report being made by the commissioners or jury, the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party; and when said report is confirmed, said court shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal, and a description of the real estate or property appraised, for which compensation is to be made, and shall also direct to whom the money is to be paid, or when and where it shall be deposited by the company. Said court, as to the confirmation of such report, shall have the powers usual in other cases."

§ 3468 — Sec. 11. "A certified copy of the order so to be made shall be recorded in the office of the register of deeds for said county, in the book of deeds; and thereupon, on the payment or deposit by the said company, of the sum to be paid as compensation for such land, franchise or other property, and for costs, expenses and counsel fees as aforesaid, and as directed by said order, the company shall be entitled to

enter upon and take possession of and use the said land, franchise and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be divested and barred of all right, estate and interest in such real estate, franchise or other property, until such right or title shall be again legally vested in such owner; and all real estate or property whatsoever acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: *Provided*, The said sum to be paid as damages and compensation, and costs, expenses and counsel fees as aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and abandonment of the proceedings to acquire any rights in said land or property. Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the Supreme Court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may

have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interests of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings."

The proceedings were commenced in the usual form by a petition filed by the Depot Company, January 24, 1891, in the circuit court for the county of Wayne, in which county the city of Detroit is situate.

The plaintiffs in error, respondents below, demanded a jury. The first hearing commenced on February 25, 1891, and terminated on March 18, 1891, in a disagreement of the jury upon both issues, that of necessity and that of compensation. A second hearing was had, commencing on June 10, 1891, and resulting on July 16, 1891, in a verdict in favor of the Depot Company on the question of public necessity, and assessing the damages of the respondents as follows: To Absalom Backus, Jr., as the owner of the fee, $17,850; to the corporation, A. Backus, Jr., & Sons, $78,293. At neither of these hearings was the judge of the circuit court present. Upon the motion of the Depot Company the circuit court vacated the award of damages, and ordered that a new jury be empanelled. Thereupon the respondents applied to the Supreme Court of the State for a writ of mandamus, to compel the setting aside of this order. That court, on November 19, 1891, issued a peremptory writ of mandamus, as prayed for. 89 Michigan, 210. On November 30, 1891, the circuit court, in compliance with this writ, entered an order which, as amended, confirmed the verdict and award of the jury, and also provided as follows:

"It is further ordered that within sixty days from the date of this order the Fort Street Union Depot Company is required to tender and pay to Absalom Backus, Jr., the sum of seven-

teen thousand eight hundred and fifty dollars, and to A. Backus, Jr., & Sons the sum of seventy-eight thousand two hundred and ninety-three dollars, and to James N. Dean and William H. Davidson, executors, the sum of one dollar, together with their costs and expenses, if the same have been taxed, including an attorney's fee of twenty-five dollars; and if the said parties or either of them refuse to accept the tender and payment of said sums, the Fort Street Union Depot Company is required to deposit the same, under the supervision of the clerk of this court, in the Detroit National Bank and to the credit of this cause, including said costs and expenses; provided, that if said costs and expenses have not been taxed within the said sixty days, the same to be so deposited within five days after they are taxed.

"Said money shall remain on deposit in said bank, but at the risk of the petitioner, subject to be drawn therefrom and to be paid to the parties entitled to the same on orders signed by one of the judges of this court and countersigned by the clerk.

"It is further ordered that upon the tender and payment or deposit of said sum of ninety-six thousand one hundred and forty-four dollars, and of said costs, expenses and counsel fees, as aforesaid, the said Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation under its articles of association and the constitution and laws of this State, and that said respondent shall be divested and barred of all right, estate and interest in such right of way until such right or title shall be again legally vested in them and said right of way shall be deemed to have been acquired by said company for public use."

On December 2, 1891, the Depot Company appealed from the award of the jury, and from the confirmation thereof, to the Supreme Court of the State. On January 26, 1892, the Depot Company paid to the respondents, and they received, the amounts awarded to them, and thereupon the Depot Company took full possession of the property, constructed its tracks and has been ever since in possession and use of them.

Statement of the Case.

On March 3, 1892, the appeal was argued in the Supreme Court, and on June 10, 1892, its decision was announced. 92 Michigan, 33. It was held by a majority of the court (the Chief Justice dissenting) that the opinion expressed on the granting of the mandamus had too narrowly restricted the powers of the circuit court, and it was ordered that the verdict of the jury, while confirmed so far as it determined the question of necessity, should be vacated and set aside so far as it awarded compensation; and that the cause be remanded to the circuit court, with directions to proceed with a new appraisal, the costs of the appeal to abide the event of such appraisal.

It was also held that the fact that the amount of the award and confirmation had been paid to the respondents and the property taken possession of by the Depot Company since the taking of the appeal did not affect the right of the Depot Company to a new trial upon the question of compensation.

When the case was returned to the circuit court the respondents objected to any further proceedings, but the same were overruled, and a jury empanelled. The sessions of this jury were presided over by the circuit judge, and, after hearing the testimony and examining the property, it returned a verdict, assessing the damages of the individual respondent at the sum of $15,000, and of the corporation respondent at the sum of $48,000. Thereupon, on motion of the Depot Company, and on December 28, 1893, the circuit court entered a judgment against the individual respondent for $2850, the difference between the amount of the first and second awards, and a like judgment against the corporation respondent for $30,293, and also a judgment against both respondents for the costs of the appeal and subsequent proceedings taxed at $4168.20. On the 26th of June, 1894, the respondents filed their petition in the Supreme Court of the State of Michigan, praying for a writ of certiorari. The writ was allowed, whereby the entire record was transferred to that court, which, in an opinion filed on January 8, 1895, affirmed the proceedings below, with costs. 103 Michigan, 556. Whereupon the plaintiffs below sued out this writ of error.

Opinion of the Court.

Mr. Don M. Dickinson for plaintiffs in error.

Mr. Fred. A. Baker for defendant in error.

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

Inasmuch as the respondents, both on the trial in the circuit court and in the subsequent proceedings on the certiorari in the Supreme Court, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. They again and again insisted that certain provisions of the Federal Constitution, which they named, stood in the way of any further proceedings against them.

It is also not open to further debate, since the decision in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246):

"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."

While in cases of this kind coming from the Supreme Court of a State, questions of fact passed upon in the state courts are not here open to review, *Egan* v. *Hart*, 165 U. S. 188, and

cases cited in the opinion, it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondents the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground, upon which the plant stood and the business was carried on, was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights.

It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the Supreme Court of the State upon its own constitution and statutes as correct. *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited in those opinions. His contention, however, is that the true construction of the constitution and laws of the State, as settled by repeated decisions of its Supreme Court, was wholly disregarded in this case, and that by reason thereof the respondents were denied that equal protection of the laws which is guaranteed by the Fourteenth Amendment to the Federal Constitution. His contentions are grouped under the following heads:

"I. They were denied the fundamental right to have an ascertainment and determination of the amount of compensation and its final payment before being deprived of their property.

"II. They were denied the protection of that guaranty of the state constitution providing that the questions of compensation and necessity should be passed upon by one and the same jury, and of the settled, uniform and unreversed construction of the constitution to that effect by the state judiciary in respect of all other citizens.

"III. They were denied the protection of a trial on the questions of necessity and compensation by the tribunal

guaranteed by the constitution of the State, in accordance with the settled, uniform and unreversed construction of that constitution in respect of all other citizens.

"IV. They were denied that measure of just compensation for their property taken, guaranteed by the constitutions, Federal and state, as the same was and is accorded to all other persons than themselves.

"V. They were denied a hearing and deprived of a hearing guaranteed by the Constitutions, Federal and state, as 'due process of law,' when summoned into court as appellees to defend their property, rights and themselves from imputations upon them.

"VI. Finally, having been deprived of their property sought by the railroad company for its purposes, their personal assets of the value of one hundred and ten thousand ($110,000) dollars were taken from them under the color of a judgment and process unknown to the constitution and statutes of Michigan, and unknown to jurisprudence, whereby they were deprived of their property without 'due process of law.'"

Attention is called to the fact that while upon the return of the first verdict the respondents moved to confirm it, which motion was denied by the circuit court and the verdict set aside, yet after the decision of the Supreme Court awarding the writ of mandamus, they did not renew that motion; that the petitioner alone asked for confirmation, though, as expressly stated, for the purpose of taking an appeal to the Supreme Court; that, after the order of confirmation had been entered, it paid the amount of the award to the respondents, which sum was accepted by them, and that thereupon it took possession of the property and has since continued in undisturbed possession and use. It is insisted that such payment and taking possession created under the constitution and statutes of Michigan a finality so far as the Depot Company was concerned, and that to this effect had been the repeated adjudications of the Supreme Court of the State. The argument is that the property owner has a constitutional right to have the amount of his compensation finally determined and

paid before yielding possession; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the Supreme Court of the State held against this contention, and we must assume therefrom that it is not warranted by the constitution and statutes of the State. Indeed, the language of that constitution is "made or secured." Does this amount to a denial of the right to that protection to property which is guaranteed by the Fourteenth Amendment to the Federal Constitution? In other words, is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, and *Sweet* v. *Rechel*, 159 U. S. 380. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.

Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many States the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Boom Company* v. *Patterson*, 98 U. S. 403, 406; *United States* v. *Jones*, 109 U. S. 513; *Cherokee Nation* v. *Kansas Railway Company*, *supra*.

Neither was there anything in the proceedings actually had

before the last jury and in the Circuit Court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by a jury of inquest, but were forced to trial before a common law jury, presided over and controlled by the circuit judge. But the Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution. *Bauman* v. *Ross*, 167 U. S. 548, 593. These considerations dispose of all the objections embraced in the first three contentions of counsel so far as those objections run to the validity of the proceedings actually had, providing those proceedings were warranted by the constitution and statutes of the State.

But it is insisted that those proceedings were not so warranted; that the settled, uniform and unreversed construction thereof by the Supreme Court of the State theretofore forbade them, and hence there was a discrimination against the respondents, and they were denied that equal protection of the laws which the Federal Constitution guarantees. Thus, for instance, it is insisted that the previous rulings of the courts, both trial and Supreme, had been to the effect that a jury called under these condemnation statutes was a jury of inquest and not a trial jury, whereas in this case the ruling was practically to the contrary, and the respondents were compelled to submit their rights to a trial jury, subject to the control of

the presiding judge, as in ordinary common law cases. We deem it unnecessary to review the many authorities from the Supreme Court of Michigan cited by counsel, or determine whether the ruling in this case as to methods of procedure and the true construction of the statute is or is not in harmony with prior decisions of that court. Accepting the contention of counsel, that in this case the Supreme Court of the State has put a different construction on the state statutes from that theretofore given, and has sustained modes of procedure different from those which had previously obtained, still it does not follow that this court has a right to interfere and say that the present ruling is erroneous and the prior construction correct, or that the change of construction works a denial of any fundamental rights. There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection. The fact that one construction has been placed upon a statute by the highest court of the State does not make that construction beyond change. Suppose it were true, in the fullest sense of counsel's contention, that for a series of years the courts had ruled that the jury in condemnation cases was a jury of inquest, or in the nature of a sheriff's jury — one determining for itself all matters of law and fact, and that in this case, for the first time, they held otherwise, and that such jury was a common law jury, subject to be controlled by the presiding judge, whose duty it was to determine all questions of law, and still, whatever might be thought of the propriety of such a change of construction, there is in it nothing to justify this court in reversing the judgment of the state court and denying the correctness or validity of this last ruling. We fail to see why the presence of the judge with this jury, his assumption of power to control its proceedings, his instructions to it on questions of law, necessarily vitiated the proceedings. Grant that such a course had never been taken before; grant that it had never been held to be a proper proceeding; grant that it was unexpected by counsel, and yet if the judge's rulings and instructions were in themselves correct, and the propriety of

his presence and control be held by the Supreme Court of the State warranted by the statutes, we do not perceive that any right possessed under the Constitution of the United States has been violated.

The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the State have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.

We, of course, do not mean to affirm that there has been by the Supreme Court of the State such a change of adjudication. We simply in this respect accept the contention of counsel for the respondents, and hold that, even if the facts be as claimed by him, they furnish no ground for interference by this court. It should be noticed in passing, however, that nearly all, if not absolutely all, of the cases which he cites from the Supreme Court of Michigan arose under the provisions respecting condemnation in the General Railroad Act, while these proceedings were had under the Union Depot Act, and, although the two acts may be substantially similar, yet this adjudication is under a different statute from that

under which most, if not all, of the prior decisions were made.

Passing now to the fourth point. Under this it is claimed that the trial judge gave to the jury an improper measure of damages. During the argument of counsel for the respondents this colloquy took place, as appears from the record:

"COURT: A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?

"MR. DICKINSON: They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years.

"COURT: That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

Afterwards, when the counsel for petitioner was making his argument, he said:

"In other words, if the court please, the question as to what business is carried on there, and as to how profitable an institution it might be is merely an element to be considered in establishing the market value of the property."

Upon which the judge made this comment:

"In other words, if a profitable business is carried on in connection with a certain site, the profitableness of the business itself must be taken into consideration by the jury in estimating the value?"

Opinion of the Court.

After the arguments were over the judge charged the jury as follows:

"Upon this question, viz., compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character, you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiassed judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with, under the so-called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the condition of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.

"I shall not call attention to any particular part of the testimony in the case: the responsibility of its application and the weight to be given it rests with you, always regarding that which is real and substantial and disregarding that which is fictitious and speculative; treating conditions as they have been shown and as they are, without speculating as to what might possibly happen or occur, taking conditions as you find them, and the natural and probable consequences following such conditions."

And this was all which was said in reference to the measure of compensation. Now, it is insisted by counsel that the profits which the manufacturing plant was making were to be taken into consideration by the jury in awarding compensation, inasmuch as the business of that plant was seriously interrupted, if not practically destroyed, by this condemnation; that inasmuch as the query was suggested by the judge during the argument whether profits did not come within the rule as to speculative damages, the failure to charge distinctly that they were proper subjects of consideration was equivalent to an instruction that they were not to be considered, and that, therefore, the true rule of compensation was not given to the jury.

It is evident that the judge did not attempt to define the several elements which enter into the general fact of compensation, or the various matters to be considered by the jury. He simply charged generally that as this was an arbitrary taking of the property of the respondents they were entitled to full compensation, and left to the jury the duty of determining what should be such compensation, telling them plainly that they were vested with large powers and great discretion. If it be said that the judge had intimated by his query that the matter of profits came within the rule applicable to speculative damages, it must also be noticed that further on he suggested that the profitableness of a business was to be taken into consideration in estimating the value. It is true he nowhere instructed the jury to make the profits of the business the criterion of value, nor indeed would he have been justified in so doing. The profitableness of the business was undoubtedly a matter to be considered, and so the judge fairly intimated in

these prior colloquies. But the profits of a business are not destroyed unless the business is not only there stopped, but also one which in its nature cannot be carried on elsewhere. If it can be transferred to a new place and there prosecuted successfully, then the total profits are not appropriated, and the injury is that which flows from the change of location.

But beyond this no special instructions were asked by the respondents at the time of the giving of the charge. The statute (§ 3466) provides that the judge "may attend said jury, to decide questions of law." So far as he gave instructions it is obvious that he stated that which was the law, and the real objection is that he did not go further and enter into a more minute description of the elements which were to be taken into consideration by the jury in fixing the amount of compensation; that they may from the colloquies which had taken place during the arguments have drawn improper inferences as to the limit to which they were warranted in going, and that those inferences he failed to correct by specifically stating what matters they should consider. A sufficient answer is that the respondents did not ask any further instructions. All they did was to except to what had been stated. By well-settled rules no appellate court would under such circumstances be required to set aside the judgment of the trial court. *Shutte* v. *Thompson*, 15 Wall. 151, 164; *Mutual Life Ins. Co.* v. *Snyder*, 93 U. S. 393; *Texas & Pacific Railway* v. *Volk*, 151 U. S. 73; *Isaacs* v. *United States*, 159 U. S. 487.

But a more complete and satisfactory answer is that whatever error there may have been affords no ground for the interference of this court. The respondents were not thereby deprived of any rights secured by the Federal Constitution. They were not denied "due process of law." The proceedings were had before a duly constituted tribunal, in accordance with the declared law of the State, with full opportunity to be heard. Nor were they denied "the equal protection of the laws." The rule as to the necessity of asking special instructions was administered in this case no differently than in others. *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380.

The error, if any there be, was not one "in absolute disregard of their right to just compensation," but was only error in the administration of the law under which those proceedings were instituted. As clearly pointed out in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, *supra*, it is not every error occurring in a state court in the administration of its law concerning condemnation of private property for public purposes that opens the door to review by this court. We are not called upon to search the record simply to inquire whether there may or may not have been errors in the proceedings. Our limit of interference is reached when it appears that no fundamental rights have been disregarded by the state tribunals.

Under the fifth head counsel presents two matters:

"(1) The denial by the Supreme Court of the State of a hearing on the substantial and essential question, of whether counsel for plaintiffs in error abused their privilege as counsel by arguing to the jury on the question of necessity that the margin of the depot grounds that belonged to the Michigan Central road could be taken for the elevated structure; and (2) the reversal of the unanimous judgment of the Supreme Court of the State in 89 Michigan, 209, without a rehearing, by the judgment in 92 Michigan, 33."

With reference to the first, it is enough to say that the respondents did not appeal to the Supreme Court, and that under section 3468 it would seem that that court was called upon to consider only such objections as had been particularly specified. "Either party may appeal, by notice in writing;" "such notice shall specify the objections;" "the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived." No objection to the finding of the jury as to the question of necessity had been made by the appellant, and therefore was to be treated as waived. Under those circumstances it cannot be said that the Supreme Court deprived the respondents of any rights by refusing to hear counsel in respect to the question of necessity, or connected with its determination.

With regard to the second, technically the decision on the mandamus proceeding and that on the appeal did not conflict.

The writ of mandamus directed the circuit judge to set aside the order which he had entered vacating the award. It thus in effect declared that that judge ought not to have made such an order. On the appeal the Supreme Court itself ordered that the award be set aside, and a new jury empanelled, and remanded it to the Circuit Court for such new appraisal. This is within the letter of the statute, (§ 3468,) "on the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion." The decision by the Supreme Court that it had power to set aside the verdict and order a new appraisal was not a reversal of a ruling that the Circuit Court had no such power, although it may suggest consequences somewhat singular. Appreciating that fact, in the last opinion the court declared that in the former decision its language restricting the power of the Circuit Court had been too strong.

Coming now to the last point, the Supreme Court held that as upon the second appraisal the damages were less than those awarded on the first, and the amount of the first had been paid to the respondents, the petitioner was entitled to a judgment for the difference. The language of the statute (§ 3468) is "but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing." It may be that this language is not entirely apt, for in this case the party appealing was not the landowner but the Depot Company, and so it cannot be said that judgments were rendered against "the party appealing." But the true intent of the statute is obvious, and at any rate we are bound to accept the construction placed upon it by the Supreme Court, and hold that it means that if the last appraisal was less than the first and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid. Nothing is said, it is true, in the statute about execution, but the Supreme Court ruled that under the general statutes the recovery of the judgment carried with it a right to an execution.

These are all the questions in this case. We find nothing in them which justifies an interference by this court with the proceedings of the state courts; nothing in which it can be said that any ruling of those courts was in absolute disregard of the respondents' right to compensation. The judgment must, therefore, be

Affirmed.

MR. JUSTICE HARLAN dissenting.

Did the trial court prescribe any rule of law for the guidance of the jury that was in absolute disregard of the right of the plaintiffs in error to such compensation?

In *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 241, it was held 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 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."

Before proceeding with his argument to the jury, Mr. Dickinson, the attorney for the plaintiffs in error, called the attention of the trial court to some of the principles which, in his judgment, should control the ascertainment of the just compensation to which they were entitled. Addressing the court in the presence of the jury, he said: "Now, as to what is compensation, I refer your honor to the case of *The Grand Rapids & Indiana Railroad* v. *Heisel*, in 47 Michigan, 398: 'It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated, and in *Jubb* v. *Hull Dock Co.*, 9 Q. B. 443, it was held, where the property taken was a brewery in

operation, the damages included the necessary loss in finding another place of business. In cases where damage is by injury aside from the actual taking of property, the rule has been to make the party whole as nearly as practicable, and where it affected the rental value or enjoyment the same principle has been applied as in other cases. There is no reason, and so far as we can discover, no law which allows the wrongdoer to cast any portion of an actual and appreciable loss on the party whom he injures.' (In this case the same rule of damages would apply as in the Grand Rapids and Indiana case, and the suit was brought for damages, and the question was what was compensation.) 'In such a case as this, it is in the power of the company and always has been to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment. Until this is done the possession is a continual wrong.'"

At this point the court interrupted the argument of counsel with this observation: "A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?" To this counsel made the following response: "They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years." The court then said: "That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

Counsel then observed: "Not at all, your honor. If the profits are shown and the business is destroyed, you can only show it by the effect upon the business, and upon that point I call your honor's attention to the unanimous opinion of the Supreme Court delivered by Mr. Justice Campbell in the case of *Grand Rapids & Indiana Railroad* v. *Weiden*, 70 Michigan, 390, 393: 'Under our present constitution there is never any presumption that a railroad is necessary, or that any particular land ought to be given up to its uses. Every landowner therefore has a perfect right to object to giving up his land, and is not confined to objections depending upon price or value. . . . And a road already established has no better claim than any other to extend or change its lines. Although railroads are allowed by public policy to condemn lands, because they cannot exist otherwise, nevertheless the enterprise is, under our laws, which prohibit public ownership of railways, one of private interest and emolument, and must show its claims to legal assistance.' Now upon the question of profits: 'We are bound to see that parties are not deprived of their property without necessity, or without full compensation for being compelled to relinquish it. And, while respect is due to the honest action of juries, it is not conclusive, and is subject to comparison with the facts in the record. Both of the appellants were using their property in lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to any other that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses.' That goes directly upon the question which

your honor suggests. Now I shall not take time to refer to the other cases."

I cannot doubt, from what passed between the court and counsel in the presence of the jury, that the court meant to characterize profits from the business of the parties owning the real estate as speculative damages.

After the counsel for the parties concluded their argument to the jury upon the whole case, the trial judge delivered a carefully prepared charge, in which he said: "The question, and the only question before you for your determination, is that of compensation, and of compensation only. Your duty, and your only duty, is to ascertain and determine what compensation or damages ought justly to be paid by the Fort Street Union Depot Company to the respondents for the real estate, property, franchises, easements and privileges described in the petition, viz.: 1. The amount to be allowed to Absalom Backus, Jr., as the owner of the fee of the land described. 2. The amount to be allowed to A. Backus, Jr., & Sons, a corporation, as tenants in possession of such lands. Upon this question, viz., compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiassed judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with under the so called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken,

or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."

Is it not clear that the trial judge, while indulging in very general language as to the duty of the jury not to allow too much or too little compensation, gave the jury to understand that compensation was to be ascertained upon the basis only of the ownership by Absalom Backus, Jr., of the fee in the land described, and of the rights of A. Backus, Jr., & Sons as tenants in possession, excluding damages to the business of the plaintiffs in error, which would arise from the condemnation of their property rights? The jury were, in effect, instructed that the profits derived by them from their business were to be excluded from consideration as being "fictitious or speculative."

That he was so understood by counsel for the plaintiffs in error is manifest from the circumstance that, immediately upon the charge being concluded, he made the following exceptions to it: "We except to that part of the charge of the court wherein he says that the damages are to be confined to the damage to the real estate described and the improvements upon it; whereas, in our view, the damages are to the entire plant, including the injury to the business from the impairment of the mill as affecting its adjuncts, the lumber yard and

the storehouse. . . . To what is said by the court as to avoiding the giving of speculative damages, in view of what has been said before by the court in regard to taking into consideration the profits, I refer to what has been said upon the records in the course of the testimony and upon the argument, expressing the views of the court against taking into consideration the profits. We except to the refusal of the court to charge as I requested in the language or in the substance, according to the decisions of the Supreme Court, which I read in full upon the opening of my argument and called attention of the court to it, especially to the expression of Campbell, J., in delivering the opinion of the court in *Grand Rapids & Indiana Railroad* v. *Weiden*, 70 Michigan, 395, 398."

If the trial judge did not intend to say to the jury that injury to the business of the plaintiffs in error was to be deemed speculative, and therefore to be excluded from consideration, he would instantly have said that no such impression was intended to be made as that indicated by the exceptions taken to his charge.

The views expressed by counsel for the plaintiffs in error as to the principles which should guide the jury in the matter of compensation were sustained by the authorities. In addition to the cases in 47th and 70th Michigan above referred to, reference may be made to many others decided by the Supreme Court of Michigan.

In *Commissioners* v. *Chicago &c. Railroad*, 91 Michigan, 291, which was a case of the condemnation of the lands of a railroad company, that court said: "If, therefore, their adjoining land is rendered less valuable by the location of a public highway, or another railroad across its property, there is no reason why they should not recover compensation therefor. Situated near this crossing is a small tract of land used for warehouse purposes. It is insisted by the respondents that, by reason of this crossing, this land, with the warehouse thereon, is rendered less available and less valuable for the purposes for which it was constructed and used. This was a proper element of damage, and should have been submitted to the jury."

At the same term the court, in *Commissioners* v. *Moesta*,

91 Michigan, 149, 154, quoted with approval what had been said in *Grand Rapids Railroad Co.* v. *Weiden*, 70 Michigan, 295, saying: "The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent. In such cases damages for the interruption of the owner's business are allowed. *Allison* v. *Chandler*, 11 Mich. 549." In *City of Detroit* v. *Brennan*, 93 Michigan, 338, the court reaffirmed the doctrine of the former cases, that the full measure of compensation and the injury done to the business should be allowed, and said: "The law considers the rights of the property and business carried on by the respondent as of equal consideration and entitled to as much protection as the right of the city to take the property and interfere with the business; and will not permit the property to be taken and the business to be interfered with, unless an actual public necessity exists for the making of the improvement. . . . The element of damages are: (1) The value of the property taken for the opening of the street; the injury to the works and property not taken, and left in the parcel of land from which the property is taken; (2) the injury to the business of the owner; (3) compensation for all prospective loss or injury resulting from the opening of the street, and the taking of the property for that purpose."

See also *Grand Rapids &c. Railroad* v. *Chesebro*, 74 Michigan, 466, where the court said: "An owner has a right to be indemnified for anything that he may have lost. The farming test, which is the one petitioner sought to apply, would be of no particular use in a great many cases of suburban lands. . . . The mere taking of four acres for a right of way could not be regarded, in any sensible point of view, as compensated by one tenth of the value of the forty acres, taking acre for acre.

The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken." Further: "The jury here, as in all cases where no certain measure exists, must trust somewhat to their own judgment. That is one of the purposes for which juries of inquest are provided. They are expected to view the premises and use their own senses. . . . But the purpose throughout is to give all the damages which they reasonably discover, past or present, and to result, but no more. No one can read this record without seeing that the jury did not deal fully with the case. It is manifest that they gave no damages beyond what they assumed to be the price of four acres by the acre. . . . It cannot be said there is any real conflict as to the damages arising from the cutting off one part from the other of the forty acres, and this was left out altogether, unless they regarded the proofs of value wantonly, which we cannot believe." See also *Pearsall* v. *Supervisors*, 74 Michigan, 558; *Barnes* v. *Michigan Air Line*, 65 Michigan, 251; *Grand Rapids &c. Railroad* v. *Railroad*, 58 Michigan, 641, 648; *Toledo &c. Railway* v. *Detroit &c. Railroad*, 62 Michigan, 564; *Commissioners* v. *Chicago Railroad*, 91 Michigan, 291; *Commissioners* v. *Chicago &c. Railroad*, 90 Michigan, 385; *City of Grand Rapids* v. *Bennett*, 106 Michigan, 528.

Without referring to other matters discussed at the bar and in the elaborate brief of counsel, I place my dissent from the opinion and judgment of the court upon the ground that the trial court committed error in its charge to the jury as to the principles which should guide them in determining the just compensation to which the plaintiffs in error were entitled. The rules laid down by the Supreme Court of Michigan, in the cases above cited, as to what was just compensation, were, I think, in accord with the principles that obtain in the courts of the Union when determining the just compensation to be made for private property taken for public use.

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

WILSON *v.* NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 558. Submitted January 17, 1898. — Decided March 21, 1898.

Chapter 320 of the Laws of North Carolina of 1891 was a valid law, and the action of the Governor of the State under it in suspending the plaintiff in error as railroad commissioner, appointed under it, was, as construed by the Supreme Court of that State, a valid exercise of the power conferred upon the Governor by that act, and was due process of law, within the meaning of the Constitution.

The Federal question which is attempted to be raised in this case is unfounded in substance, and does not really exist.

The judgment of the state court in this case operated of itself to remove the plaintiff in error from the office of railroad commissioner, and there is no foundation in the evidence for the allegation that his successor knew of the filing of the supersedeas bond when he took possession of the office, or was guilty of contempt in doing so.

Two motions were made in this case. The defendant in error made a motion to dismiss the writ on the ground of want of jurisdiction. The plaintiff in error obtained from this court a rule against the relator Caldwell to show cause why he should not be punished as for a contempt in proceeding upon the judgment of the state court after a writ of error from this court had been allowed and a supersedeas bond duly filed. The two motions were heard together. The following were the facts presented upon the motion to dismiss:

By chapter 320, of the laws of 1891, the general assembly of North Carolina passed an act creating a state railroad commission, the first section of which is set out in the margin.[1]

[1] "There shall be three commissioners elected by the general assembly to carry out the provisions of this act. . . . Said commissioners shall not jointly, or severally, or in any way, be the holder of any stock or bond, or be the agent or attorney or employé of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or

At the same session the legislature passed another act making such commission a court of record.

Under the authority of the first mentioned act, James W. Wilson, the plaintiff in error, was elected railroad commissioner by the general assembly of 1893, for the term ending April 1, 1899, and he duly qualified and entered upon the discharge of his duties as such railroad commissioner.

On the 24th of August, 1897, the Governor sent a communication to the plaintiff in error, in which, after stating that it had been charged that he had been guilty of a violation of the act above mentioned, and giving the particulars regarding such violation, the Governor directed him to show cause on a day named, at the office of the executive, in Raleigh, why he should not be suspended from office, and a report thereof made to the next general assembly according to law, and he was directed on the return day of the notice to make answer and proofs in writing and to be present in person or by counsel, at his election.

On the return day the plaintiff in error appeared and denied in writing the various charges contained in the Governor's communication, after which, in explanation of the charges, he made a written statement in regard to them. The plaintiff in error demanded of the Governor that the evidence against him be produced and that he have an opportunity to confront

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interest therein of any such company he shall at once dispose of the same; and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next general assembly, and the question of his removal from office shall be determined by a majority of the general assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the general assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the general assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to a salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next general assembly."

his accusers and cross-examine the witnesses. This demand was refused.

After receiving the answer and explanation of the plaintiff in error, and after hearing him upon the return day, the Governor subsequently and on the 23d of September, 1897, sent him a written notice, in which he said to the plaintiff in error "that you have not only violated said act in the specification set out in said act, but that you have otherwise, within the meaning and intent and words of said act, become disqualified to act." The Governor, therefore, assuming to proceed under the statute, further informed the plaintiff in error that he thereby suspended him "from the office of railroad commissioner and chairman of said commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the general assembly in joint session. The fact of your suspension, together with the reasons therefor, and the evidence, documents and information connected therewith, will be reported to the next general assembly. You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the chief executive I have appointed L. C. Caldwell, Esq., of the county of Iredell, to fill the vacancy created by your suspension. Inasmuch as you are understood to deny the power of the executive to suspend you from office, as provided by the statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

"D. L. Russell, *Governor.*"

The plaintiff in error in reply to the communication of the Governor sent him the following letter:

"Raleigh, N. C., *September* 24, 1897.

"To D. L. Russell, *Governor.*

"Sir: Yours of the 23d inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until

removed by a tribunal other than a self-constituted 'star chamber.'

"JAS. W. WILSON,
"*Chairman Railroad Commission.*"

Mr. Caldwell duly qualified as railroad commissioner, and thereupon demanded that the plaintiff in error should surrender the office, papers, records, etc., to him, which the plaintiff in error refused to do. Mr. Caldwell then obtained leave from the attorney general to bring this action in the nature of a *quo warranto* to test the title to the office. In the complaint the foregoing facts are set forth and a judgment asked determining the title to the office to be in relator and granting him judgment for the possession thereof.

The defendant below served an answer, in which it was admitted that the Governor undertook or attempted to suspend the defendant from his office, and that he designated the plaintiff, the relator, for the vacancy which he had attempted to create, and that the relator had taken the oath prescribed by law for railroad commissioner. It was also admitted that the defendant refused to vacate his office or to surrender the same to the relator, and the defendant alleged that he was advised that his suspension was illegal, and that he was still entitled to discharge the duties of his office. He also set up that by an act of the general assembly of the State the railroad commission had been constituted a court of record inferior to the Supreme Court, to be known as the board of railroad commissioners, and with general jurisdiction as to all subjects embraced in the act creating the commission. Being a judge of a court of record, the defendant alleged that the Governor had no constitutional power to suspend him.

The answer then set forth the proceedings already mentioned, resulting in the suspension of the defendant by the Governor, and it also set forth the various demands made by defendant before the Governor, to be confronted with witnesses and to have an opportunity to cross-examine them, and the Governor's refusal of those demands, and as a result the

defendant alleged that the Governor had without evidence and without trial found that the defendant had violated the law, and had become disqualified to act as railroad commissioner, and that he had, without a more specific finding, assumed to suspend the defendant and deprive him of his office.

The defendant also alleged in his answer that the action of the Governor was taken in violation of the Fourteenth Amendment of the Constitution of the United States.

Upon these pleadings the action came on for trial, and the record states that "at the conclusion of the reading of the pleadings the defendant tendered the following issues and demanded a trial by jury:

"1. Is the plaintiff entitled to the office of railroad commissioner?

"2. Does the defendant unlawfully intrude into, hold and exercise the office of railroad commissioner and chairman of said commission?

"3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

"4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?

"5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob Hotel to R. M. Brown?

"6. Did the defendant demand of the Governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

"7. Was said demand refused?

"8. Was any evidence produced?"

The court refused to submit these questions to the jury and the defendant excepted.

The plaintiff thereupon moved for judgment upon the complaint and answer. The defendant objected that the motion was irregular and that the plaintiff should either demur or go to trial before the jury, and that the statute in question and the action of the Governor, set out in the pleadings, deprived

defendant of his office without due process of law and denied to him the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which he expressly claimed.

The court ruled that the plaintiff was entitled to judgment upon the pleadings, which judgment was thereupon rendered, and the defendant excepted and appealed to the Supreme Court of the State. After argument that court adjudged that the defendant had been lawfully suspended from the office of railroad commissioner; that the relator had been duly appointed to fill the vacancy thus created, and that the defendant should be ousted from and the relator inducted into that office. Judgment to that effect was accordingly entered. The defendant then sued out a writ of error from this court, which was allowed. The two motions were then made, one to dismiss the writ of error, and the other to punish the defendant as for contempt.

Mr. R. O. Burton for plaintiff in error.

Mr. James C. McRae, *Mr. W. H. Day* and *Mr. A. C. Avery* for defendant in error.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court on the motion to dismiss.

A consideration of the facts convinces us that the motion to dismiss this writ of error for lack of jurisdiction ought to be granted.

Under the statute of 1891, creating the railroad commission and providing for the appointment, suspension and removal of the officers of such commission, the act of the Governor in suspending the plaintiff in error was not a finality. Before there could be any removal, the fact of suspension was to be reported to the next legislature by the Governor, and unless that body removed the officer the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension.

In speaking of the statute and the purpose of this particular provision the Supreme Court of the State said: "The duty of suspension was imposed upon the Governor from the highest motives of public policy to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the Governor was, therefore, by the very letter and spirit of the law, required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the Governor would have no power to direct an issue like a chancellor."

The highest court of the State has held that this statute was not a violation of the constitution of the State; that the hearing before the Governor was sufficient; that the office was substantially an administrative one, although the commission was designated, by a statute subsequent to that which created it, a court of record; that the officer taking office under the statute was bound to take it on the terms provided for therein; that he was lawfully suspended from office; and that he was not entitled to a trial by jury upon the hearing of this case in the trial court. As a result the court held that the defendant had not been deprived of his property without due process of law, nor had he been denied the equal protection of the laws.

The controversy relates exclusively to the title to a state office, created by a statute of the State, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the constitution of the State, excepting in so far as they may be protected by any provision of the Federal Constitution.

Authorities are not required to support the general proposition that in the consideration of the constitution or laws of a State this court follows the construction given to those instruments by the highest court of the State. The exceptions to

this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the Supreme Court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the constitution of the State.

The only question for us to review is whether the State, through the action of its Governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws.

We are of opinion the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the Governor under the statute above mentioned, and resulting in his suspension from office.

The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the state legislature to determine, having regard to the constitution of the State. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of a State with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question.

Upon this subject it was said, in the case of *Allen* v. *Georgia*, 166 U. S. 138, 140, as follows: "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 had 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."

This statement is quoted with approval in *Hovey* v. *Elliott*, 167 U. S. 409, 443.

No such fundamental rights were involved in the proceedings before the Governor. In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court.

In *Kennard* v. *Louisiana*, 92 U. S. 480, the proceeding under which the title to the office of Justice of the Supreme Court of the State was tried, was held not to violate the Fourteenth Amendment of the Constitution of the United States. The court said the officer had an opportunity to be heard before he was condemned. There was no intimation in that case that a hearing such as was had here would be insufficient or that the officer would be entitled to be "confronted with his accusers and to cross-examine the witnesses," and to have a jury trial. In *Foster* v. *Kansas*, 112 U. S. 201, the *Kennard case* was approved. Neither case gives any support to the claim that such a hearing as was given in this case would be insufficient under the Fourteenth Amendment.

Nothing in that amendment was intended to secure a jury trial in a case of this nature.

The demand made by the plaintiff in error for such a trial in the court below must have been for the purpose of submitting to the jury the question of the truth of the allegations

set up in the answer regarding the proceedings before the Governor, and to claim that if the jury found them to be true, he was not legally suspended. But the motion for judgment on the pleadings was equivalent to a demurrer to the answer for insufficiency, and was, therefore, an admission of all the facts well pleaded. The question then became one of law for the court to decide, and in granting the motion the court did decide that no defence was set forth in the answer. In a case like this, such a decision of the state court is conclusive. The mere refusal of a jury trial, in and of itself and separated from all other matters, raises no Federal question. *Walker* v. *Sauvinet*, 92 U. S. 90.

In the proceeding for trying the title to office in the case of *Kennard* v. *Louisiana*, 92 U. S. 480, the statute provided for a hearing without a jury, and this court held it was not objectionable for that reason.

Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

In *Hamblin* v. *Western Land Company*, 147 U. S. 531, it was stated that "a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar* v. *Hartupee*, 6 Wall. 258 ; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

We think this case falls within the principle thus stated. Although an office has been held in North Carolina to be generally and in a certain restricted sense the property of the incumbent, yet in this case the Supreme Court held that the

incumbent, in taking the office, holds its subject to the act creating it, which binds him by all its provisions, all of which were held to be valid. We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution.

We are of opinion that the facts herein present no such case, and that the jurisdiction of this court does not extend to the case as made in the record now before us.

For these reasons the motion of the defendant in error to dismiss this writ should be granted, and the writ is accordingly

Dismissed.

The following are the facts upon the motion to punish defendant in error as for a contempt:

The plaintiff in error, after the entry of the judgment of the Supreme Court affirming the judgment of ouster, sued out a writ of error from this court, which was duly allowed by the Chief Justice of the Supreme Court of that State on the 23d day of December, 1897, and on the same day a good and sufficient bond, conditioned as required by law in cases of supersedeas, was tendered, and the Chief Justice duly approved it and signed the citation. A few minutes after seven o'clock in the afternoon of that day the writ of error with the petition therefor and the assignment of errors and the citation and bond were filed in the clerk's office of the state Supreme Court, and at the same time copies of the writ of error were lodged in the clerk's office, for the State of North Carolina and for the relator. The plaintiff in error alleged, on informa-

tion and belief, that the relator, with full knowledge of the issuing of the writ and of the action of the Chief Justice, broke into the room occupied as offices by the railroad commission and took possession. The judgment of affirmance directed the issuing of a writ of possession. On the morning of the 24th of December, 1897, counsel for the relator made a motion in the state court to set aside the supersedeas, while at the same time counsel for the plaintiff in error made a motion that the execution of the writ of possession issued on the judgment of the state court be recalled on account of the supersedeas. Both motions were refused, and an opinion delivered by Mr. Justice Clark holding that the judgment of the court *ex proprio vigore* placed the relator in the possession of the office at the time the judgment was filed, and that such judgment took effect immediately upon being entered, and it was not superseded by the subsequent writ of error, regular or irregular. He also held that the court had no power to set aside the writ of error or to pass upon the regularity thereof.

The relator made answer under oath. He alleged that after the judgment of the Supreme Court of North Carolina was rendered, and pursuant to its directions, a writ was issued out of that court at half-past five o'clock of that day, and was immediately placed in the hands of the sheriff, and that the sheriff went to the offices of the railroad commission for the purpose of executing the writ, but that the plaintiff in error could not be found, and that he was absent from the county and State for the purpose, as alleged, of avoiding service of the writ; that the doors of the commission's rooms were locked, and the sheriff left the building for the purpose of getting keys or other means of entry, but did not return, and that the relator, after waiting a reasonable time for the return of the sheriff and being advised by counsel that he had good right in law so to do, procured the door of the room to be opened, and he then entered therein and assumed to exercise the duties of the office of railroad commissioner.

He denied under oath that any notice of the filing of a supersedeas by the plaintiff in error was served upon him, or that he had any knowledge of the filing of said bond until

the day after the taking possession of the rooms of the commission as above stated.

Mr. Justice Peckham, after stating the above facts, delivered the opinion of the court on the motion to punish for contempt.

Plaintiff in error claims that by virtue of the allowance of the writ of error and the filing of the supersedeas bond, the relator was precluded from taking any step under the judgment of the state court, which ousted the plaintiff in error and adjudged the right to the office to be in the relator. It is argued that the filing of a proper bond operates as a supersedeas of the judgment in an action in the nature of a *quo warranto*, as well as in any other action. *United States, ex rel. Crawford* v. *Addison*, 22 How. 174. In that case Addison held the office of mayor of the city of Georgetown. Proceedings in the nature of *quo warranto* were commenced against him by the United States on the relation of Crawford. Upon the trial of the action judgment of ouster was entered against the defendant. A writ of error from this court was sued out by him and a sufficient bond was filed. The relator applied to this court for a peremptory writ of mandamus to be directed to the judges of the Circuit Court of the District of Columbia commanding them to execute the judgment of that court by which Addison had been ousted and the relator adjudged entitled to the office. This court denied the motion, and decided that after a writ of error had been sued out from this court and the proper bond filed further proceedings were stayed in the court below. It was not a case where immediately upon the entering of the judgment of ouster the court had directed the possession of the office to be taken by the relator, who had taken possession accordingly. The court was asked to actively intervene to put the relator in possession of the office, notwithstanding the allowance of a writ of error and the filing of a bond. The court refused to do so, holding that the supersedeas bond stayed further proceedings under the judgment.

Opinion of the Court.

In *Foster* v. *Kansas*, 112 U. S. 201, the attorney general of Kansas had instituted a proceeding to remove Foster, the plaintiff in error, from the office of county attorney for Saline County. The Supreme Court of Kansas rendered judgment on the 1st of April, 1884, removing Foster, and, under a statute of the State making it his duty so to do, the judge of the district court of Saline County, upon being presented with an authenticated copy of the record of the Supreme Court which removed Foster, duly appointed Moore to such office, and approved his bond on the 7th of April. A writ of error from this court had been allowed in Washington on the 5th of April, and the supersedeas bond approved and citation signed. Although notice of these facts was telegraphed on the same day from Washington to counsel in Kansas, who immediately exhibited the telegram to the judge of the district court, and notified him of what had been done in Washington, yet neither the writ of error nor the supersedeas bond arrived from Washington until the 8th of April, on which day they were duly lodged in the office of the clerk of the Supreme Court of the State. Moore, the appointee of the district judge, thereafter appeared as county attorney, and a rule was therefore granted requiring him to appear before this court and show cause why he should not be adjudged in contempt for violating the supersedeas. This court, after argument, held that he was not in contempt, and that the supersedeas was not in force when Moore was appointed to and accepted the office. The court said: "The judgment operated of itself to remove Foster and leave his office vacant. It needed no execution to carry it into effect. The statute gave the judge of the district court authority to fill the vacancy thus created. The judge was officially notified of the vacancy on the 7th, when the authenticated copy of the record of the Supreme Court was presented to him. The operation of that judgment was not stayed by the supersedeas until the 8th, that being the date of the lodging of the writ of error in the clerk's office. It follows that the office was in fact vacant when Moore accepted his appointment, gave his bond and took the requisite oath. He was thus in office before the supersedeas became

operative. What effect the supersedeas had, when it was afterwards obtained, on the previous appointment, we need not consider. This is not an appropriate form of proceeding to determine whether Foster or Moore is now legally in office." The rule was therefore discharged.

In this case it is also true that the judgment operated of itself to remove the plaintiff in error. The judgment also adjudged the title to the office to be in the relator. After the filing of the supersedeas bond it may be assumed that further action under the judgment was stayed. The question is whether the relator is shown to be guilty of a contempt in proceeding to take possession after he knew of the filing of the bond. He swears unequivocally that he was ignorant of the fact of the allowance of a writ or the filing of the bond at the time when he took possession of the room occupied by the commission, and that he was not informed of that fact until some time the next day. We think this a sufficient answer to the case as it is now presented to us, and that any further proceeding is rendered unnecessary because of our conclusion to dismiss the writ of error for want of jurisdiction. We see no evidence of any intentional contempt on the part of relator, and our conclusion is that the rule must be

Discharged.

In WILSON *v.* NORTH CAROLINA, No. 559 submitted with No. 558, the same questions are involved and the same orders are made.

UNITED STATES, *ex rel.* BERNARDIN *v.* BUTTERWORTH.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 404. Submitted February 21, 1898. — Decided March 21, 1898.

A suit to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner, and cannot be revived so as to bring in his successor, although the latter gives his consent.

The act of Maryland of 1785, c. 80, is not applicable to such a case.

Opinion of the Court.

THIS was a motion to substitute Mr. Duell, Commissioner of Patents as defendant in the place of Mr. Butterworth, Commissioner, deceased. The case is stated in the opinion.

Mr. Julian C. Dowell for the motion.

Mr. J. M. Wilson opposing.

MR. JUSTICE SHIRAS delivered the opinion of the court.

On March 23, 1895, John S. Seymour, Commissioner of Patents, on appeal in an interference proceeding between the applications of Alfred S. Bernardin and William H. Northall, decided that Bernardin was entitled to a patent for the invention involved in the interference. From this decision an appeal was taken by Northall to the Court of Appeals of the District of Columbia, and the decision of the Commissioner was by that court reversed.

Bernardin then instituted proceedings in the Supreme Court of the District of Columbia, seeking to compel the Commissioner to issue a patent in accordance with his previous decision, claiming that the act of Congress approved February 9, 1893, which, in form, confers jurisdiction upon the Court of Appeals of the District of Columbia to hear appeals from the action of the Commissioner of Patents, is unconstitutional and void, in that it attempts to confer jurisdiction upon that court to review or reverse the action of the Commissioner.

The Supreme Court of the District of Columbia dismissed the petition for mandamus, and, on appeal, the Court of Appeals of the District sustained the judgment of the Supreme Court. *Bernardin* v. *Seymour*, 10 App. D. C. 294.

Thereafter John S. Seymour resigned his office as Commissioner of Patents, and, on April 12, 1897, Benjamin Butterworth was appointed his successor. On April 17, 1897, Bernardin filed a new petition for mandamus in the Supreme Court of the District of Columbia, which was dismissed, and that decision was, on appeal to the Court of Appeals of the District, on May 11, 1897, affirmed.

On May 25, 1897, a writ of error was allowed from this court, and, while the case was here pending, on January 16, 1898, Benjamin Butterworth died, and C. H. Duell was thereafter appointed to the office thus left vacant; and a motion has been made for leave to substitute Duell in the stead of Butterworth, notwithstanding that by the death of the latter the action had abated.

The question thus presented is not a novel one. In *Secretary* v. *McGarrahan*, 9 Wall. 298, it was held that a judgment in mandamus ordering the performance of an official duty against an officer, as if yet in office, when in fact he had gone out after service of the writ, and before the judgment, is void, and cannot be executed against his successor. In *United States* v. *Boutwell*, 17 Wall. 604, it was held that, in the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office, and that his successor in office cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties. The conclusion reached was put upon two independent grounds, and we quote the reasoning of the court, expressed in its opinion delivered by Mr. Justice Strong, as follows:

"The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what fact or relations the duty has grown, what the law requires, and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear

right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express or distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant that warrants the impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this, that on the death or retirement from office, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists, only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the default of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. In all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. . . .

"And even if the retirement of the defendant from office and his consequent inability to perform the act demanded to be done does not abate the writ, or necessitate its discontinuance, there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case. But any summons issued, or rule upon the successor in office, requiring him to become a party to the suit, would be an exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor."

In *Thompson* v. *United States*, 103 U. S. 480, the distinction is pointed out between proceedings where the obligation sought be enforced devolves upon a corporation or continuing body, and those where the duty is personal with the officer. In the former case there is no abatement. The duty is per-

petual upon the corporation; in the latter, the delinquency charged is personal, and involves no charge against the Government, against which a proceeding would not lie.

United States v. *Chandler*, 122 U. S. 643, was the case of a writ of error in review of a judgment of the Supreme Court of the District of Columbia refusing a mandamus against William E. Chandler, Secretary of the Navy, to require of him the performance of certain alleged official duties. When the case was called, it appeared that Mr. Chandler was no longer Secretary, and that the office was filled by his successor. Thereupon this court, upon the authority of *United States* v. *Boutwell*, held that the suit had abated, and dismissed the writ of error.

A similar view prevailed in *United States* v. *Lochren*, 164 U. S. 701.

In *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, the subject was considered at some length. There a bill had been filed against Hoke Smith, as Secretary of the Interior, to compel him to cause patents to be issued to the plaintiff for certain tracts of land. The Supreme Court of the District sustained a demurrer to the bill and dismissed the suit. While an appeal to this court was pending, Hoke Smith resigned his office, and it was held that the bill could not be amended by making his successor a defendant, because he was not in office before the bill was filed and had no part in the doings complained of, and accordingly the cause was remanded with directions to dismiss the bill. In discussing the case Mr. Justice Gray cited the cases just mentioned and several others to the same effect, and again pointed out the difference between the case of a public officer of the United States and that of a municipal board, which is a continuing corporation, although its individual members may be changed, to which in its corporate capacity a writ of mandamus may be directed; and in respect to which the language of Chief Justice Waite, in *Commissioners* v. *Sellew*, 99 U. S. 624, was quoted: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in Boutwell's case may be avoided."

In the absence, therefore, of statutory authority, we cannot, after a cause of this character has abated, bring a new party into the case. Nor is the want of such authority supplied by the consent of a person not a party in the cause.

It is, however, contended that an act of the State of Maryland enacted in 1785, chapter 80, section 1, and which, it is claimed, became the law of the District of Columbia when the territory thereof was ceded to the United States, is applicable. The terms of said section are as follows:

"No action, brought or to be brought, in any court of this State shall abate by the death of either of the parties to such action, but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued, and the heir, devisee, executor or administrator of the defendant, as the case may require, or other person interested on the part of the defendant, may appear to such action."

It is suggested that the attention of this court was not called to this statute in the previous cases. However that may have been, we are unable to perceive that this statute, either in its terms or its spirit, is applicable to cases like the present one. Neither the heir, devisee, executor or administrator of a deceased official would have any legal interest in such a controversy. Nor, in the case of a resignation, could the successor be said to be "a person interested on the part of the defendant."

In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method.

The motion is refused, and the judgment of the Court of Appeals is reversed, the costs in this court to be paid by the plaintiff in error, and the cause remanded to that court with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand

the cause to that court with directions to dismiss the petition for the writ of mandamus because of the death of the defendant Butterworth.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

McCORMICK HARVESTING MACHINE CO. *v.* AULTMAN.

SAME *v.* AULTMAN-MILLER COMPANY.

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

Nos. 130, 131. Argued December 1, 2, 1897. — Decided March 21, 1898.

If the owner of a patent applies to the Patent Office for a reissue of it and includes, among the claims in the application, the same claims as those which were included in the old patent, and the primary examiner rejects some of such claims for want of patentable novelty, by reference to prior patents, and allows others, both old and new, the owner of the patent does not, by taking no appeal and by abandoning his application for reissue, hold the original patent (the return of which he procures from the Patent Office) invalidated as to those of its claims which were disallowed for want of patentable novelty by the primary examiner in the proceeding for reissue ; as the Patent Office, by the issue of the original patent, had lost jurisdiction over it, and did not regain it by the application for a reissue.

THIS was a question certified to this court by the Circuit Court of Appeals for the Sixth Circuit, involving the authority of a primary examiner of the Patent Office to reject as invalid claims of an original patent which were incorporated in an application for a reissue.

It appears that the McCormick Harvesting Machine Company filed a bill in equity in the United States Circuit Court for the Northern District of Ohio against C. Aultman et al., and also one against the Aultman-Miller Company, in each of

which it was sought to restrain the defendant from the future infringement of two patents covering automatic twine binders for harvesting machines. As the interests of the several defendants were closely identified the two cases were heard together.

The question certified involves only patent No. 159,506, issued to Marquis L. Gorham, February 9, 1875, and the other patent sued upon will therefore not be considered. The record shows that there was filed in the Patent Office by the executrix of Gorham an application for a reissue of this patent, in which were included several claims of the original patent, as well as many new claims. Upon consideration, the assistant or primary examiner decided that claims 3, 10, 11, 25 and 26 of the original patent should be rejected for want of patentable novelty, and reference was made to prior patented devices. No appeal was taken from this decision, and subsequently, in compliance with a request, the original patent was returned to the plaintiff corporation, which had become the owner thereof. Thereafter these suits were brought against the defendants upon the original patent.

In the Circuit Court it was decided, that as the original claims 3, 10, 11, 25 and 26 had been determined by the examiner to be invalid, and no appeal had been taken from that decision, but the same had apparently been acquiesced in, the adverse action must be regarded as fatal to the claims in question, and to the same extent as if the rejection had been incident to the original application for the patent. 58 Fed. Rep. 778.

Upon appeal the Circuit Court of Appeals decided that there was no infringement by the defendants as to claims 25 and 26, but that there was infringement of claims 3, 10 and 11 of the original patent, unless it should be determined that they were invalidated by their being rejected by the examiner upon an application for a reissue of the same; and, desiring instruction upon this point, it certified to this court the following question: "If the owner of a patent applies to the Patent Office for a reissue of it, and includes among the claims in the application the same claims as those which were included in

the old patent, and the primary examiner rejects some of such claims for want of patentable novelty, by reference to prior patents, and allows others, both old and new, does the owner of the patent, by taking no appeal and by abandoning his application for reissue, hold the original patent, the return of which he procures from the Patent Office, invalidated as to those of its claims which were disallowed for want of patentable novelty by the primary examiner in the proceeding for reissue?"

Mr. Robert H. Parkinson for appellant.

Mr. Thomas A. Banning, (with whom was *Mr. Ephraim Banning* on the brief,) and *Mr. Edmund Wetmore* for appellees.

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

The validity of the claims in question depends upon the view taken of the action of the examiner in rejecting them when incorporated in an application for a reissue of the patent, upon the ground that the claims were wanting in patentable novelty, as evidenced by prior patents cited by him. No appeal was taken from this decision, and the matter lay in abeyance for nearly two years before the plaintiff corporation, which had in the meantime become the owner of the patent, abandoned the application for a reissue and requested and obtained from the Patent Office the return of the original patent.

It has been settled by repeated decisions of this court that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. *United States* v. *Schurz*, 102 U. S. 378; *United States* v. *Am. Bell Telephone Co.*, 128

U. S. 315, 363. It has become the property of the patentee, and as such is entitled to the same legal protection as other property. *Seymour* v. *Osborne*, 11 Wall. 516; *Cammeyer* v. *Newton*, 94 U. S. 225; *United States* v. *Palmer*, 128 U. S. 262, 271, citing *James* v. *Campbell*, 104 U. S. 356.

The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent. *Moore* v. *Robbins*, 96 U. S. 530, 533; *United States* v. *Am. Bell Telephone Co.*, 128 U. S. 315, 364; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 593. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands. The power to issue either one of these patents comes from Congress and is vested in the same department. In the case of a patent for lands it has been held that when one has obtained a patent from the Government he cannot be called upon to answer in regard to that patent before the officers of the Land Department, and that the only way his title can be impeached is by suit. *United States* v. *Stone*, 2 Wall. 525, 535; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165. But a suit may be maintained by the United States to set aside a patent for lands improperly issued by reason of mistake, or fraud; but only in the case where the Government has a direct interest, or is under obligation respecting the relief invoked. *United States* v. *Missouri, Kansas & Texas Railway*, 141 U. S. 358.

While a patent for a grant of lands is absolutely free from the future control of the officers of the Land Department after it has once issued, and jurisdiction over the matter cannot again be obtained, this is subject to a single qualification in the case of a patent for an invention where the patentee, his legal representatives or assigns, find the original patent inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention or discovery more than he had a right to claim as new (provided the error has arisen through inadvertence,

accident or mistake, and without fraudulent or deceptive intention). In such case a reissue will be granted by the Commissioner upon the surrender of the patent, but such surrender takes effect only upon the issue of the amended patent. This provision is embodied in Rev. Stat. § 4916, which also declares that "the specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications, . . . but no new matter shall be introduced into the specifications."

The plain purpose of this section is to give the patentee an opportunity to make valid and operative that which was before invalid and inoperative; invalid, because it claimed as new that which had been previously invented or used by the public; inoperative, because the specification was defective or insufficient. New matter cannot be introduced, nor can the scope of the invention be enlarged. All that the applicant can do is to so amend his patent as to enable him to receive some practical and beneficial result from his actual invention, of which he has been deprived by defects or omissions in the original patent. The object of a patentee applying for a reissue is not to reopen the question of the validity of the original patent, but to rectify any error which may have been found to have arisen from his inadvertence or mistake. But until the amended patent shall have been issued the original stands precisely as if a reissue had never been applied for, (*Allen* v. *Culp*, 166 U. S. 501, 505,) and must be returned to the owner upon demand. The fact that the rules of the Patent Office require that the original patent should be placed in its custody for the purpose of surrendering it upon the issue of an amended patent gives that department no right to the possession of it upon the rejection of the application for a reissue. If the patentee abandoned his application for a reissue, he is entitled to a return of his original patent precisely as it stood when such application was made, and the Patent Office has no greater authority to mutilate it by rejecting any of its claims than it has to cancel the entire patent.

In *Peck* v. *Collins*, 103 U. S. 660, an application for reissue made under the laws in force in 1866 was held to absolutely

extinguish the original patent. Subsequent to that time the law of 1870, of which Rev. Stat. § 4916 forms a part, was passed. Mr. Justice Bradley, in discussing the clause in that section which declares that the surrender "shall take effect upon the issue of the amended patent," said: "What may be the effect of this provision in cases where a reissue is refused it is not necessary now to decide. Possibly it may be to enable the applicant to have a return of his original patent if a reissue is refused on some formal or other ground which does not affect the original claim. But if his title to the invention is disputed and adjudged against him, it would still seem that the effect of such a decision should be as fatal to his original patent as to his right to a reissue." This same question was considered but not decided in *Eby* v. *King*, 158 U. S. 366; and in *Allen* v. *Culp*, 166 U. S. 501, 505, it was held that if the original application for a reissue be rejected the original patent stands precisely as though a reissue had never been applied for; but the effect of the refusal of the reissue upon some ground equally affecting the original patent was not considered.

In neither of these cases was this court called upon to decide the question which has been certified, and the expression of opinion in *Peck* v. *Collins*, relied upon by the defendants, must be considered merely a *dictum*, and lacking the force of a judicial determination.

In the case under consideration the examiner acted upon the application as if it were a new proceeding, and dealt with it as the evidence before him seemed to warrant, but his action in rejecting some of the claims which had been repeated from the original patent did not affect that patent. It is true that it was within his power to reject any claims contained in the application for a reissue which he judged to be invalid, whether contained in the original patent or not. It is also true that the reasons given for the rejection of such claims might apply equally to the same claims contained in the original patent; but with respect to such claims he was *functus officio*. His opinion thereon was but his personal opinion, and however persuasive it might be, did not oust the

jurisdiction of any court to which the owner might apply for an adjudication of his rights, and as the examiner had no authority to affect the claims of the original patent, no appeal was necessary from his decision.

Had the original patent been procured by fraud or deception it would have been the duty of the Commissioner of Patents to have had the matter referred to the Attorney General with the recommendation that a suit be instituted to cancel the patent; but to attempt to cancel a patent upon an application for reissue when the first patent is considered invalid by the examiner would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive.

Our conclusion upon the whole case is that, upon the issue of the original patent, the Patent Office had no power to revoke, cancel or annul it. It had lost jurisdiction over it, and did not regain such jurisdiction by the application for a reissue. Upon application being made for such reissue the Patent Office was authorized to deal with all its claims, the originals as well as those inserted first in the application, and might declare them to be invalid, but such action would not affect the claims of the original patent, which remained in full force, if the application for a reissue were rejected or abandoned.

The validity of the claims, so far as their merits are concerned, has been sustained by the Circuit Court of Appeals, and, as the original patent must stand precisely as though a reissue had never been applied for,

The question certified to this court must be answered in the negative.

Syllabus.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* HABER.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 268. Argued January 27, 1898. — Decided March 14, 1898.

The act of Kansas of 1891, c. 201, as amended and as it appears in 2 Gen. Stats. Kansas, 1897, 761, c. 139, relating to bringing into the State cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of the State, and providing for the trial of civil actions brought to recover damages therefor, is not overridden by the act of Congress of March 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, nor by the act of March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating money to carry out the provisions of the above act, nor by section 5258 of the Revised Statutes, authorizing every railroad company in the United States, operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, Government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination"; as Congress has not assumed to give to any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases.

Whether a corporation transporting, or the person causing to be transported from one State to another, cattle of the class specified in the Kansas statute should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the act of March 29, 1884, c. 60, 23 Stat. 31, known as the Animal Industry Act, did not make any provision.

The provision in the Kansas act imposing such civil liability is in aid of the objects which Congress had in view when it passed the Animal Industry Act, and it was passed in execution of a power with which the State did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits, and is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the States.

A state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, without regard to the source of power whence the state legislature derived its enactment.

Counsel for Parties.

Neither corporations nor individuals are entitled by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease to domestic cattle.

Although the powers of a State must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives any one the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle.

Prior cases reviewed and held to proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belongs primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes.

An act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one State to another State, will not authorize a railroad company to carry into a State cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such State.

If the carrier takes diseased cattle into a State, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the State, that does not go beyond the necessities of the case and burden or prohibit interstate commerce, and a statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the State cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes.

If Congress could authorize the carrying of such cattle from one State into another State, and by legislation protect the carrier against all suits for damages arising therefrom, it has not done so, nor has it enacted any statute that prevents a State from prescribing such a rule of civil conduct as that found in the statute of Kansas.

THE case is stated in the opinion.

Mr. James Hagerman, *Mr. T. N. Sedgwick* and *Mr. Simon Sterne* for plaintiff in error.

Mr. E. W. Cunningham, *Mr. J. Jay Buck* and *Mr. W. C.*

Perry for defendants in error. *Mr. Eugene Hagan* was with them on their briefs.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought in one of the courts of Kansas against the Missouri, Kansas and Texas Railway Company, a corporation of that State, and certain persons constituting the respective firms of F. Brogan & Sons and Hozier Bros. Its object was to recover the damages sustained by the plaintiff Charles Haber, one of the appellees, by reason of the defendants having brought and caused to be brought into that State certain cattle alleged to have been affected with the disease known as Texas, splenic or Spanish fever, and communicated by them to the plaintiff's cattle whereby the latter sickened and died.

Many persons having like causes of action intervened as parties defendant, and each by cross-petition asked judgment against the railway company.

It appeared in evidence that Hozier Bros. in the spring of 1892 owned and controlled a ranch of several thousand acres of land in Pecos County, Texas, upon which cattle known as Texas cattle were permitted to range. They entered into an agreement with F. Brogan & Sons, whereby the latter were to receive from the former a part of the above cattle at some point in Lyon County, Kansas, and take them to their ranch in Chase County in the same State to be there grazed during the summer of 1892. In execution of that agreement, Hozier Bros. caused to be shipped by railroad into Kansas from Pecos County, Texas, about 2500 head of cattle which were delivered by the defendant company in its stock yards at Hartford, Kansas, to F. Brogan & Sons, and by the latter were driven through Lyon and Chase counties to their range. These cattle, it was alleged, communicated Texas, splenic or Spanish fever to domestic cattle that were owned by the plaintiff and by the cross-petitioners.

The case was tried and submitted to the jury only as between the plaintiff, the cross-petitioners and the railway com-

pany, the latter denying liability for any damages sustained by the former. The trial resulted in verdicts and judgments in favor of the plaintiff and of each of the cross-petitioners. The judgments having been affirmed by one final judgment in the Supreme Court of Kansas, the case is here upon a writ of error sued out by the railway company, which contends that effect has been given to statutes of the State that are repugnant to the Constitution and laws of the United States. That contention involves the Federal question presented for determination.

In 1881 the legislature of Kansas passed an act for the protection of cattle in that State against contagious diseases. Laws of Kansas, 1881, c. 161. But those provisions need not be set out here, because they appear in subsequent enactments to which we will presently refer.

By a state enactment approved March 25, 1884, provision was made for a Live Stock Sanitary Commission, which was charged with the duty of protecting "the health of the domestic animals of the State from all contagious or infectious diseases of a malignant character," and was empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as it deemed necessary. Laws of 1884, c. 2, § 2. And by an act approved March 26, 1884, that commission was authorized to create and enforce quarantine against the disease known as Texas, splenic or Spanish fever in the unorganized counties of the State. Laws of 1884, c. 4, § 1. The commission was also authorized and directed by another act approved on the same day to coöperate with the Commissioner of Agriculture of the United States or any officer of the General Government in the suppression and extirpation of contagious diseases among domestic animals, and in the enforcement and execution of all acts of Congress passed to prevent the importation or exportation of diseased cattle and the spread of infectious or contagious disease among domestic animals. Laws of 1884, c. 5, § 1.

In 1885 another statute was passed, which was amended in 1891. Laws of 1891, c. 201. As amended, and as it appears in General Statutes of Kansas of 1897, vol. 2, c. 139, p. 761,

that statute made it a misdemeanor for any person, between the first day of February and the first day of December of any year, to drive or cause to be driven into or through any county in the State, or to turn upon or cause to be turned or kept upon any highway, range, common or pasture within the State, any cattle capable of communicating or liable to impart what is known as Texas, splenic or Spanish fever. § 13. By another section it was made the duty of any sheriff, under sheriff, deputy sheriff or constable within the State, upon complaint made to him that there were within the county where such officer resided cattle believed to be capable of communicating or liable to impart the disease known as Texas, splenic or Spanish fever, to forthwith take charge of and restrain them under such temporary quarantine regulations as would prevent the communication of such disease, and make immediate report thereof to the Live Stock Sanitary Commission. § 14.

Other sections provided —

"§ 16. Any person or persons who shall drive, ship or transport, or cause to be shipped, driven or transported, into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever, to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease, or Texas, splenic or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic or Spanish fever.

"§ 17. In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving or keeping, or which are claimed to have communicated the said diseases, were brought into this State from south of the thirty-seventh parallel of north latitude, shall be taken as

prima facie evidence that such cattle were, between the first day of February and the first day of December of the year in which the offence was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle shall show by such certificate or certificates, as shall hereafter be designated by the Live Stock Sanitary Commission of the State, that the said cattle had been kept since the first day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto.

"§ 18. Whenever two or more persons shall in violation of this act, at the same time or at different times during the same year, drive or cause to be driven upon the same highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart Texas, splenic or Spanish fever, they shall be jointly and severally liable for all damages that may arise from the communication of such disease at any time thereafter during the same year to any native, domestic or acclimated cattle that shall have been upon the same highway, range, common or pasture so previously travelled over by such first-mentioned cattle."

The general contention of the plaintiff in error is that the act of Congress of May 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, together with the act of March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating money to carry out the provisions of that act, and section 5258 of the Revised Statutes relating to the transportation of passengers, freight, property, etc., from one State to another State by railroad, cover substantially the whole subject of the transportation from one State to another State of live stock liable to impart or capable of communicating infectious or contagious diseases, and therefore that the State of Kansas has no authority to deal in any form with that subject.

Opinion of the Court.

Are the acts of Congress and the regulations established under their authority of such a character that the legislation of Kansas is without effect so far as it relates to injury done to domestic cattle by the bringing into that State of cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle?

The act of Congress of May 29, 1884, provided for the establishment of a Bureau of Animal Industry, and for the appointment of a chief thereof and two competent, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it should be under the instructions of the Commissioner of Agriculture, to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also to examine and report upon the best methods of treating, transporting and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, contagious, infectious and communicable diseases. §§ 1, 2.

By other sections of the act it was provided:

"§ 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to coöperate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the Governor of a State or other properly constituted authorities signify their readiness to coöperate for the extinction of any contagious, infectious or communicable disease in conformity with the provisions of

this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

"§ 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

"§ 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary.

"§ 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company or corporation drive on foot or transport in private conveyance from

one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

"§ 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication, in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

"§ 10. That the sum of one hundred and fifty thousand dollars, to be immediately available, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to carry into effect the provisions of this act."

1. The answer of the railway company as well as its requests for instructions, and the opinion of the Supreme Court of the State, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the Animal Industry Act, furnished a complete defence to all claims for damages asserted in this action. That contention

was overruled by the trial court, as well as by the Supreme Court of the State. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other words, the state court could not properly have disposed of the case without deciding the Federal question raised by the company. This court therefore has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior[1] gave to the railway company the right, privilege and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 251; *Chicago Life Ins. Co* v. *Needles*, 113 U. S. 574, 579; *Sayward* v. *Denny*, 158 U. S. 180, 184; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 232.

2. If sections 16 and 17 of the Kansas act of 1885, as amended in 1891, are not inconsistent with the legislation of Congress, no question can be raised as to other provisions of the Kansas statutes. The sixteenth section, we have seen, provides that any person or persons, driving, shipping or transporting, or causing to be driven, shipped or transported, into or through any county in that State, cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of Kansas, shall be liable in a civil action to any person injured thereby for all damages sustained by reason of the communication of such fever to his cattle; while the seventeenth section makes the bringing into the State, from south of the 37th parallel of north latitude, of cattle alleged to have communicated Texas, splenic or Spanish fever

[1] By the act approved February 9, 1889, 25 Stat. 659, c. 122, the Department of Agriculture was made an Executive Department. And by the act of March 2, 1889, 25 Stat. 835, 840, c. 373, the authority granted to the Commissioner of Agriculture by the act of May 29, 1884, 23 Stat. 31, establishing the Bureau of Animal Industry, and by the provision of the appropriation act for the Agricultural Department, approved July 18, 1888, relating to that Bureau, was vested in the Secretary of Agriculture. The regulations above referred to were issued by Secretary Rusk, February 26, 1892.

to domestic cattle, *prima facie* evidence that such cattle were, between February 1st and December 1st in any year, capable of communicating that disease, and that the owner or person in charge of such cattle had full knowledge and notice thereof.

May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot* v. *Davenport*, 22 How. 227, 243.

We have seen that the first section of the Animal Industry Act provided for an investigation as to the condition of the domestic animals of the United States, their protection and use, the causes of contagious, infectious and communicable diseases among them, and the means for the prevention and cure of such diseases. The second section provided for an examination as to the best methods of treating, transporting and caring for animals and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to guard against the spreading of other dangerous, contagious, infectious and communicable diseases. If any State was ready to coöperate with the Commissioner of Agriculture, then, by the third section, that officer was authorized to use the money appropriated by Congress in such investigations and in such disinfection and quarantine measures as were necessary "to prevent the spread of the disease from one State or Territory into another." While the States were invited to coöperate with the General Government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of Congress.

The act of Congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communi-

cable diseases. On the contrary, it was made a misdemeanor to deliver for transportation or to transport or drive from one State to another, cattle known to be affected with contagious, infectious or communicable diseases. Whether a corporation transporting, or the person causing to be transported from one State to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the Animal Industry Act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising out of the introduction into that State of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability.

By those regulations the Secretary gave notice to the "managers and agents of railroad and transportation companies of the United States, stockmen and others" that "a contagious and infectious disease known as splenetic or Southern fever exists among cattle" within certain parts of the United States, the outer line of which area or boundary was fully defined by that officer. The same regulations provided that from the 1st day of March to the 1st day of December, 1892, no cattle should be transported from any part of the country included in that area or boundary to any part of the United States north or west of the described line except by rail for immediate slaughter, and when so transported certain directions were to be observed in handling and caring for them. The regulations made provision for moving cattle from specified parts of Tennessee in accordance with the rules established by the authority of that State. Rules were also prescribed for moving cattle from named counties in Texas to the States of Colorado, Wyoming and Montana, "in ac-

cordance with the regulations made by said States for the admission of Southern cattle thereto."

The cattle in question were originally received by the Texas and Pacific Railroad at Midland, Texas, outside of but near to the boundary of the "infected district" as defined by the Secretary of Agriculture. They were received by the defendant company at Dennison, Texas, as a connecting carrier, in the same cars in which they were loaded, and the entire route to the southern boundary line of Kansas was through that district. It may be that in the transportation of the cattle in question from Pecos County, Texas, through the infected district, all the regulations prescribed by the Secretary were observed. But that fact does not show that Congress intended or assumed to exempt any one complying with those regulations from liability to the owners of domestic cattle to which were communicated the contagious disease with which the cattle brought into the State were affected. The controlling object of the regulations was to prevent the spreading from one State to another of the cattle disease in question, not to deprive any one of the right to recover damages for injury inflicted upon his domestic cattle by reason of their being brought into contact with diseased cattle.

It is said that the statute of Kansas giving a right of action for damages is, in itself, a regulation of commerce among the States, and, therefore, inconsistent with the power of Congress to regulate such commerce. But that statute is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the States. It cannot be supposed to have been so intended, even if its validity were to depend upon the intent with which it was enacted. It did nothing more than declare as a rule of civil liability in Kansas, that any one driving, shipping or transporting or causing to be driven, shipped or transported into or through any county in that State, cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle, should be responsible in damages to any persons injured thereby. In fact, the state law is in aid of the objects which Congress had in view when it passed the Animal Industry Act. It was

passed in execution of a power with which the State did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits. We must not be understood as saying that this power may be so exerted as to defeat or burden the exercise of any power granted to Congress. On the contrary, a state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, as was said by Mr. Justice Nelson, speaking for the court in *Sinnot* v. *Davenport*, above cited, "without regard to the source of power whence the state legislature derived its enactment." This results, as was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, as well from the nature of the Government as from the words of the Constitution. In that case, the argument was pressed that if a law passed by a State in the exercise of its acknowledged sovereignty comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like "equal opposing powers." Touching that view, the Chief Justice said: "But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

Nor is the statute of Kansas to be deemed a regulation of

commerce among the States, simply because it may incidentally or indirectly affect such commerce. *Hennington* v. *Georgia*, 163 U. S. 299, 317; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 631; *Chicago, Milwaukee & St. Paul Railway* v. *Solan*, 169 U. S. 133; *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, 169 U. S. 311, and authorities cited in each case. Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the National and state governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the National Government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer. "The same bale of goods," Mr. Justice Johnson well said in his concurring opinion in *Gibbons* v. *Ogden*, "the same cask of provisions, or the same ship, that may be the subject of commercial regulations, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision." 9 Wheat. 235. It is, therefore, a mistake to say that the Kansas statute so far as it gives a right of action for injuries arising from disease communicated to domestic cattle by cattle of a particular kind brought into the State comes into conflict with any regulation established under the authority of Congress, to prevent the spread of contagious or infectious diseases from one State to another. That statute, we repeat, only embodies a rule of civil conduct prescribed by a State whose government is competent to regulate — in subordination always to the supreme law of the land and its

own fundamental law — the relative rights and obligations of all within its jurisdiction. Neither corporations nor individuals are entitled, by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease to domestic cattle. The contrary cannot be affirmed under any sound interpretation of the Constitution. This court while sustaining the power of Congress to regulate commerce among the States has steadily adhered to the principle that the States possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the National Constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument. Although the powers of a State must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives any one the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle.

This principle is illustrated in many adjudged cases. In *Railroad Co.* v. *Husen*, 95 U. S. 465, 471, 473, — a case much relied on by the plaintiff in error, — this court held to be unconstitutional a statute of Missouri declaring that no Texas, Mexican or Indian cattle, not kept the entire previous winter in that State, should be driven or otherwise conveyed into or remain in any county in that State between the first day of March and the first day of November in each year. The statute contained a proviso to the effect "that when such cattle shall come across the line of this State, loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line

of such transportation; and the existence of such disease along such route shall be *prima facie* evidence that such disease has been communicated by such transportation." It also provided: "If any person or persons shall bring into this State any Texas, Mexican or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." In that case, the court cited with approval the language of the Supreme Court of Vermont in *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vermont, 140, in which it was said that, by the general police power of a State, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." Under that power, this court said, that while a State by legislation may not invade the domain of the National Government, it may *exclude* from its limits convicts, paupers, idiots and lunatics, persons likely to become a public charge, as well as persons affected by contagious or infectious diseases — adding, that the same principle "would justify the exclusion of property dangerous to the property of citizens of the State, for example, *animals having contagious or infectious diseases.*" Such exertions of power by a State, it was said, were self-defensive. In affirming the invalidity of state legislation professing to be an exercise of police powers for protection against evils from abroad, but which was beyond the necessity for its exercise, and interfered with the rights and powers of the Federal Government, the court, speaking by Mr. Justice Strong, said, p. 473: "Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle, or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether

they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

The decision in that case was placed distinctly on the ground that although the State could prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State, it could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce, and the Missouri statute was held to be unconstitutional because it went beyond the necessities of the case, having been so drawn as to exclude all Texas, Mexican or Indian cattle from the State, (except cattle to be transported across and out of the State,) whether free from disease or not, or whether they would or would not do injury to the inhabitants of the State.

No such criticism can be made of the statute of Kansas. It does not prohibit the bringing into the State of *all* Texas cattle. It does not in any true sense prohibit or burden any commerce among the States specifically authorized by Congress; but, for purposes of self-protection only and in the exercise of its inherent power to protect the property of its people, declared that any corporation or person bringing into the State or driving into or through any county of the State cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle, should be responsible in damages to any one to whose cattle that disease was communicated by the cattle so brought into the State.

The general views we have expressed are sustained by *Kimmish* v. *Ball*, 129 U. S. 217, 220, 222. That case involved the validity of section 4059 of the Iowa Code providing, in respect of Texas cattle that had not been wintered at least one winter north of the southern boundary of Missouri or Kansas, that "if any person now or hereafter has in his pos-

session, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section." It was contended that that section was in conflict with the power of Congress to regulate commerce among the States, as well as with section 2 of Article 4 of the Constitution of the United States relating to the privileges and immunities of citizens of the several States. The court stated that the statute of Iowa was based upon the notorious fact that cattle which were brought during the spring and summer months from Texas and Arkansas and from the Indian Territory, were often affected with what is known as Texas fever, and that all danger of infection therefrom could be removed by cold weather, such as was usual in the country north of the southern boundary of Missouri and Kansas. Speaking by Mr. Justice Field, it said: "Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the State to run at large." In reference to the other objection made to the act, the court said: "There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of the disease thereby; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned,

citizens of other States and citizens of Iowa stand upon the same footing."

The case of *Sherlock* v. *Alling*, 93 U. S. 99, 103, well illustrates the principle which, we think, must control the present case. That was an action for damages under a statute of Indiana, giving a right of action in favor of the personal representative of one whose death was caused by the wrongful act or omission of another, whenever the latter, if he had lived, could sue for an injury for the same act or omission. In that case the death, on account of which the suit was brought, occurred by reason of a collision between two steamboats navigating the Ohio River. It appears from the report of the case that one of the grounds of defence was that at the time of the alleged injuries the colliding boats were engaged in carrying on interstate commerce under the laws of the United States, and that the defendants, as their owners, were not liable for injuries occurring in navigation through the carelessness of their officers, except as prescribed by Congress; and that the acts of Congress did not cover the liability asserted by the plaintiff under the statute of Indiana. The act of Congress referred to was that of March 30, 1852, 10 Stat. 61, c. 106, providing for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. After referring to some of the principal cases in which state enactments had been held void for interfering with the freedom of interstate commerce, the court said that the Indiana statute "imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety

be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce it was never intended to cut the State off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." Again, in the same case: "Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

In *Patterson* v. *Kentucky*, 97 U. S. 501, 505, this court said that "the States may by police regulations protect their people against the introduction within their respective limits of infected merchandise," and by like regulations "exclude from their midst, not only convicts, paupers, idiots, lunatics and persons likely to become a public charge, but animals having contagious diseases."

So it has been held that in the absence of legislation by Congress on the subject, a State may prescribe, as a rule of civil conduct, that engineers on railroad trains engaged in the transportation of passengers and freight, including interstate trains, shall undergo an examination by a state board as to their qualifications, before becoming entitled to operate locomotive engines within such State, and that persons employed on railways shall be subjected to like examination with respect to their power of vision. *Smith* v. *Alabama*, 124 U. S. 465, 482; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 101.

In *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 633, it was contended that section 5258

of the Revised Statutes, relating to transportation of persons and property from one State to another State, so far covered the whole subject of interstate transportation as to render inapplicable to interstate carriers a statute of New York regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles. But this court said that the authority conferred by Congress "upon railroad companies engaged in commerce among the States, whatever may be the extent of such authority, does not interfere in any degree with the passage by the state of laws having for their object the personal security of passengers while travelling, within their respective limits, from one State to another on cars propelled by steam."

In *Western Union Tel. Co.* v. *James*, 162 U. S. 650, 660, this court sustained as valid a statute of Georgia requiring every telegraph company, with a line of wires wholly or partly within that State, to receive dispatches, and, on payment of the usual charges, to transmit or deliver them with due diligence, under a penalty of one hundred dollars. It was contended in that case, as to telegraph messages from points outside to points inside the State, that the local statute was a regulation of interstate commerce, and, therefore, void. That contention was overruled, the court saying: "It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject, it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor. The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith

and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes.

It is suggested that the statute is so drawn that the railway company would be liable, even if it acted in good faith, and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statute were thus interpreted, it might be — though upon that point we express no opinion — that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in *Railroad Co.* v. *Husen*. But we do not so construe the statute. Its sixteenth section must be interpreted in connection with the seventeenth section. The latter, as we have stated, declares that in the trial of any civil action, under the statute, proof that the cattle were brought into the State from south of the thirty-seventh parallel of north latitude — the southern boundary line of Kansas — should be *prima facie* evidence that they were, between the first day of February

and the first day of December, capable of communicating and liable to impart Texas, splenic or Spanish fever, and that "the owner or owners, or person or persons, in charge of such cattle had full knowledge or notice thereof." As the State is competent to protect its domestic cattle against disease that may be communicated by cattle coming from beyond its limits, this rule of evidence cannot be regarded as inconsistent with any right secured by the National Constitution or as obstructing commerce among the States; for the rule finds its justification in the fact, heretofore recognized by this court, and substantially by the act of Congress, that Texas cattle, when brought northward during the spring and summer months, often carry the germs of fever, or are often, though not always, infected with fever that may be communicated by them to domestic cattle. That rule as prescribed implies that damages shall not be recovered if, from all the evidence, it appears that the defendant had no knowledge or notice that the cattle were of the kind forbidden by the statute to be brought into the State. This was the interpretation placed upon the statute by the plaintiff. His petition alleges that before the cattle in question were shipped, transported and driven as stated, the defendants had knowledge, and were put upon inquiry, and had reason to know, that "said Texas cattle so kept, shipped, transported and driven were of a kind capable of communicating and liable to communicate and impart said disease to the domestic cattle of this State and to the aforesaid cattle of the plaintiff." And under this construction of the statute the case was tried. The trial court, among other things, instructed the jury: "The mere fact that the cattle of the plaintiff or those of any of the cross-petitioning defendants became sick and died from this disease imparted to them by cattle transported by the said defendant into Lyon or Chase counties is not sufficient to warrant a finding against said defendant railway company. You must find from the evidence, first, that Texas cattle were, in fact, brought into this State; of this there is no denial, and you can consider that fact as established; second, that the cattle of the plaintiff and each of the cross-petitioning defendants who seek to recover herein against

said railway, because of the loss of cattle, became infected and died because of the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic or Spanish fever; and, third, that the officers, employés or agents of the railway company defendant had knowledge that such Texas cattle transported by it to this State were liable to impart such disease to the native cattle of this State, or that they ought by the exercise of diligence and care to have known of the dangerous character of these cattle, and that they would or were liable to impart said disease to the native cattle of this State." We do not understand from the opinion of the Supreme Court of the State that it disagreed with this interpretation of the statute.

3. In support of the contention that national legislation leaves no room for state enactments relating to the bringing of diseased cattle into one State from another State, the railway company refers to the act of Congress, approved March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating five hundred thousand dollars for carrying out the provisions of the act for establishing the Bureau of Animal Industry, which authorized the Secretary of Agriculture to use any part of that sum he might deem necessary or expedient, and in such manner as he might think best, to prevent the spread of pleuro-pneumonia and other diseases of animals, and for this purpose to employ as many persons as he might deem necessary, and to expend any part of that sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same, whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia or other diseases of animals from one State into another. This contention is disposed of by what has been already said.

4. In support of the same contention, the company refers to section 5258 of the Revised Statutes of the United States, (brought forward from the act of June 15, 1866, 14 Stat. 66, c. 124,) which authorizes every railroad company in the United States, operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, Government supplies, mails, freight

and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." It is scarcely necessary to say that an act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one State to another State, will not authorize a railroad company to carry into a State cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such State. A railroad company carrying diseased cattle into a State cannot claim the protection of section 5258, any more than it could when carrying into a State rags known, or which by proper diligence could have been known, to be infected with yellow fever. If the carrier takes diseased cattle into a State, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the State that does not go beyond the necessities of the case and burden or prohibit interstate commerce. A statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the State cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes.

Applying the principles settled in prior cases to the case before us, it is clear that a railroad company is not in any just sense hindered or obstructed by the statute of Kansas in the exercise of any privilege given or authority conferred by section 5258 of the Revised Statutes. This must be so, unless the company should be held to be entitled, of right, to carry into a State from another State, as freight or property, cattle liable to impart or capable of communicating disease, and of whose condition at the time it had knowledge, or could have had knowledge by the exercise of reasonable diligence. We cannot so hold. And we adjudge that if Congress could authorize the carrying of such cattle from one State into another

State, and by legislation protect the carrier against all suits for damages arising therefrom, it has not done so, nor has it enacted any statute that prevents a State from prescribing such a rule of civil conduct as that found in the statute of Kansas.

5. Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 242, 246.

Perceiving no error in the record in respect of any question of a Federal nature, the judgment of the Supreme Court of Kansas is

Affirmed.

Mr. Justice Brewer dissenting.

I am unable to concur in the opinion filed in this case. The statute provides that a carrier bringing into the State cattle which are capable of communicating Texas, splenic or Spanish fever to domestic cattle shall be liable to any persons injured thereby for all damages they may sustain by reason of the communication of said fever. This liability is not limited to the injury which may be done by the cattle while in the possession of the carrier, but extends to that which may be done at any time thereafter in whosesoever possession they may be. And in this particular case it is found by the jury that the fever was communicated and the injury done after the cattle had passed out of the custody of the carrier and into the possession of other persons. The statute also provides that proof that the cattle were brought into Kansas from territory south of the Kansas state line shall be *prima facie* evidence that they were capable of communicating the fever, and that the carrier had knowledge of that fact.

I am not disposed to belittle this question, or the difficulties which attend the effort to prevent a communication of Texas fever and the injuries which result therefrom. On the con-

trary, I fully appreciate the importance of securing to all stock owners in Kansas and elsewhere the fullest protection against this so fatal disease, and believe that stringent measures may properly be adopted to accomplish this result. I differ with my brethren only as to the authority by which such measures should be enacted, and as to the validity of the legislation before us. It is conceded in the opinion of the majority that Congress has full control over interstate commerce, and that it is the only authority by which that commerce can be regulated. On the other hand, it is equally clear, as pointed out, that the States may make many police restrictions and provisions which, while indirectly affecting interstate commerce, do not directly regulate it, and the question is whether this particular statute comes within the category of such police regulations.

It must be premised that Southern cattle which are capable of communicating this disease are not necessarily themselves diseased, or their meat unfit for consumption. This is not a mere conjecture, but a well-established fact. In the Report of the Bureau of Animal Industry, for the years 1891 and 1892, which contains the results of investigations into the nature, cause and prevention of cattle fever, it is said, on pages 266 and 267: "The presence of the parasite in Southern cattle does not seem to materially affect their health, although it may maintain a more or less constant breaking up of the red corpuscles on a small scale, which would necessarily tax certain vital organs. . . . From a practical economic standpoint we must maintain that Southern cattle may be healthy and yet be the cause of Texas fever;" and in the final summing up of the conclusions of the investigators, on page 290, it is further stated: "Cattle from the permanently infected territory, though otherwise healthy, carry the microparasite of Texas fever in their blood."

And in the regulations concerning cattle transportation, promulgated by the United States Department of Agriculture on February 26, 1892, as appears from the record in this case, as also in similar regulations issued by the same Department on December 15, 1897, it is provided that within certain speci-

fied dates no cattle are to be transported from below the Federal quarantine line except by rail or boat for immediate slaughter. These cattle are being constantly forwarded by the thousands to the packing houses of this country, and when butchered their meat is shipped all over the world and used with impunity. Statistics found in the cases of *Cotting* v. *Kansas City Stockyards Company* and *Hopkins* v. *United States*, now pending in this court, show that in the year 1896 (and that is but a sample of other years) of something over 1,700,000 head of cattle shipped to the Kansas City stockyards, more than 500,000 came from the territory proscribed by the Kansas statute, and that of these cattle 60 per cent or more were sold to the packing houses there situate for immediate slaughter.

It appears from the report above referred to, that this fever is generally disseminated by means of a tick, technically called *boophilus bovis*, though the jury in this case, in answer to specific questions, found that the fever was communicable otherwise than in that way. The presence of ticks upon the cattle does not necessarily indicate disease. They are purely external, like fleas on a dog, and do not prove that the body is in an unhealthy condition. It may be a curious fact, the cause of which is not yet fully explained, that these cattle range in the South without developing in themselves or communicating to others this Texas fever, while when brought into the temperate zone they seem to communicate it freely and in a most dangerous form. Whatever may be the explanation of this fact does not abridge its significance. Hence it is that these Southern cattle, although they may have ticks upon them, and thus be liable to communicate the disease to Northern cattle, may be entirely free from any disease, their meat a perfectly healthy article of food, and they themselves legitimate subjects of commerce. If they are, when brought into the North, pastured at a distance from native cattle, and the latter are not thereafter permitted to range in the field in which the former have been kept, the disease will not be communicated, the Southern cattle may safely be fattened, and prepared for market and use. It is only when the native

cattle are permitted to pasture in or near the grounds in which the Southern cattle are or have recently been kept that injury results. The case presented, therefore, is not that of legislation to prevent importation of diseased meat — that which in itself is unhealthy and unfit for use — but something which, if improperly or carelessly handled, may communicate disease and do injury. The very phraseology of the statute indicates this. It does not name diseased cattle, but only those liable to communicate disease. If other Northern States follow with like legislation commerce between the two sections of the country in this most important product of portions of the South will be practically interrupted.

The cases referred to in the opinion of the majority in which the police power of the State has been sustained were cases in which the restrictions or regulations only indirectly affected interstate commerce. As, for instance, requiring an engineer to take out a state license, *Smith* v. *Alabama*, 124 U. S. 465; or to be free from and submit to an examination for color blindness, *Nashville & St. Louis Railway* v. *Alabama*, 128 U. S. 96; prescribing the mode of heating passenger cars, *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628; requiring the prompt delivery of telegraphic messages under condition of a penalty, *Western Union Telegraph* v. *James*, 162 U. S. 650. Nothing of that kind is prescribed by this statute. No inspection is provided for by the State; none required of the carrier; no duty imposed in respect to the handling and care of the cattle while in its possession. It simply prescribes the conditions upon which the carrier may bring cattle into the State, to wit, liability not merely for injury which its own improper handling may cause, but for injury which may result at any time thereafter from any future improper handling by the consignee or subsequent party into whose custody the cattle may pass. It seems to me, beyond any peradventure, that this is legislation directly regulating commerce between the States, and, as such, is within the sole dominion of Congress. It materially affects the conduct of the carrier outside of the limits of the State. And that is one of the tests of invalidity. *Hall* v. *De Cuir*, 95 U. S. 485, 488;

Bowman v. *Chicago & Northwestern Railway*, 125 U. S. 465, 486. Suppose cattle are presented to a carrier in Texas for shipment to Kansas, can it properly refuse to receive and transmit? Can it plead the Kansas statute in defence of its duty as a common carrier? If it says that the cattle have ticks upon them and therefore are liable to communicate Texas fever, or if not having ticks upon them may otherwise (as shown by the verdict of this jury) communicate the disease, the shipper may reply that he intends them for immediate slaughter, and that they are a legitimate article of commerce. But that will not relieve the carrier. The liability imposed by the Kansas statute does not depend upon the intent with which the cattle are shipped into the State; and having delivered them to the consignee, the carrier has no further control. Although shipped with the intention of immediate slaughter, the consignee may change his mind and pasture them in the State. Whatever may have been the intention of the shipment, the liability of the carrier is the same.

I cannot believe that the carrier is thus placed beneath the upper and the nether millstone, liable under the law of Texas to the owner of the cattle if he refuses to ship them, *Bowman* v. *Chicago & Northwestern Railway*, *supra;* and liable to any one in Kansas under the Kansas statute if injuries result from the improper handling by the consignee or others. The presumption of knowledge, which is provided for in section 17, is, in this aspect of the case, entirely immaterial, and does not affect the validity of the statute. Apply the principle of this legislation to other objects than cattle, and see in what it results. Gunpowder, dynamite, many of the drugs used in medicine, while legitimate articles of commerce, and of great value for certain purposes, may, if improperly or carelessly handled, be the means of doing immense injury. Can a State say to a carrier, You may bring gunpowder or any other article of danger into the State, but if you know its dangerous character you shall be responsible for all damages that it may cause in the hands of the consignee or any subsequent party through improper handling? It certainly places it in the power of the State to most materially interfere with inter-

Counsel for Parties.

state commerce if it can prescribe that as a condition of its being carried on. The number of articles and the amount of interstate commerce thus subjected to the will of the State can scarcely be overestimated.

It is undoubtedly true that legislation should be had in respect to matters of this kind, but in my judgment such legislation can only come from Congress, and that body, and that body alone, can prescribe the conditions upon which commerce in these cattle can be carried on. Congress has legislated, but only partially, and the fact that its legislation does not go so far as in the judgment of the legislature of Kansas is required, is not, in my opinion, sufficient to warrant the State in enacting this statute. For these reasons, thus briefly stated, I am compelled to dissent from the opinion of the court.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* BEHLMER.

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

No. 585. Submitted March 14, 1898. — Decided March 28, 1898.

The provision in § 16 of the act of February 4, 1887, as amended by the act of March 2, 1889, c. 382, that appeals from judgments of Circuit Courts in such cases to this court shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, does not refer to an appeal from a judgment of a Circuit Court of Appeals to this court; and such an appeal to this court from such a judgment of a Circuit Court of Appeals operates as a supersedeas.

THE case is stated in the opinion.

Mr. Claudian B. Northrop for the motion to vacate the supersedeas.

Mr. Joseph W. Barnwell and *Mr. Edward Baxter* opposing.

Opinion of the Court.

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

Henry W. Behlmer filed a petition before the Interstate Commerce Commission, which resulted in an order requiring the Louisville and Nashville Railroad Company and other companies to abstain from charging, demanding, collecting or receiving any greater compensation in the aggregate for transportation of hay or other commodities carried by them, under circumstances and conditions similar to those appearing in the case, from Memphis, Tennessee, to Summerville, South Carolina, to that contemporaneously charged and received for the transportation of hay and other commodities from Memphis to Charleston, South Carolina. The companies having failed to comply with that order, Behlmer filed his petition in the Circuit Court of the United States for the District of South Carolina, setting out the action before the Commission, and the failure of the companies to comply with the order; and prayed for a writ of injunction or other proper process restraining the companies from continuing in their violation and disobedience to said order.

On final hearing the Circuit Court entered a decree dismissing the bill. 71 Fed. Rep. 835. Behlmer appealed to the Circuit Court of Appeals for the Fourth Circuit and that court reversed the decree of the Circuit Court and directed that the order of the Interstate Commerce Commission be enforced. 42 U. S. App. 581.

An appeal was then allowed and perfected to this court, which operated as a supersedeas, and Behlmer now moves the court to declare the appeal not to have that effect; or to vacate the supersedeas resulting from the allowance of the appeal and the approval of the bond tendered.

The sixteenth section of the act of February 4, 1887, c. 104, to regulate commerce, 24 Stat. 379, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, under which resort to the Circuit Courts could be had for the enforcement of lawful orders or requirements of the Interstate Commerce Commission, provided that: "When the subject in dispute

shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeals; but such appeals shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon."

At the date of the passage of these acts the rapid growth of the country and the steady increase of its litigation had so congested the docket of this court that years frequently elapsed before appeals and writs of error could be heard. When then the Interstate Commerce Commission was created and provision made for the enforcement of its orders by the Circuit Courts, while appeals were allowed from the decrees of those courts to this court, it was the legislative will that such appeals should not suspend the operation of the decrees appealed from. It is quite true that if the Circuit Court reversed the order of the Commission and dismissed the petition, the question of superseding such a decree might not be material, but, as the section provided that either party might appeal, the inhibition on the effect of the appeal applied alike to either.

The primary object of the Judiciary Act of March 3, 1891, was to relieve this court of the overburden of cases which impeded the prompt administration of justice. *McLish* v. *Roff*, 141 U. S. 661. Accordingly all cases in which the judgments and decrees of the Circuit Courts of Appeals were made final by the act can only be brought to this court on certiorari, although in other cases, of which this is one, appeal or error will lie. The act also provided that when a case reaches this court through the Circuit Court of Appeals, by appeal, writ of error or certiorari, the cause shall be remanded to the proper District or Circuit Court for further proceedings in pursuance of the determination of this court, exactly as if the case came here directly from the District or Circuit Court.

Assuming that section sixteen of the Interstate Commerce Act remained unrepealed, it was nevertheless so far affected

as that the appeal from the trial court had to be prosecuted to the Circuit Court of Appeals instead of to this court. *Interstate Commerce Commission* v. *Atchison, Topeka &c. Railroad*, 149 U. S. 264.

But such appeal would not operate to supersede the decree of the trial court, nor would such decree be superseded if the case were brought to this court from the Circuit Court of Appeals, even though the judgment of the latter court were superseded. In this case the petition was dismissed by the Circuit Court. The Court of Appeals reversed that decree, but it still remained in force because the judgment of the Circuit Court of Appeals had been superseded. If the Circuit Court had decreed the enforcement of the order of the Commission, and the Circuit Court of Appeals had affirmed that order, and then the case had been brought here, the result would have been the same.

This application of the plain words of the statute gives the same effect to the appeal to this court from the intermediate court as if the appeal had been taken directly to this court from the Circuit Court.

Section eleven of the act of March 3, 1891, provided among other things as follows: "And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method, and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

And it is argued that the words "all provisions for bonds or other securities," which were in force at the time of the adoption of the act of 1891, include as applicable to appeals from the Circuit Courts of Appeals the provision of section

sixteen of the Interstate Commerce Act, that the appeal therein referred to shall not operate to stay or supersede. We cannot accede to that view, for the appeal treated of in section sixteen is an appeal from the trial court, and does not refer to an appeal from the Circuit Courts of Appeals. "Either party to such proceeding before said court may appeal," is the language, and as "said court" confessedly referred to the Circuit Court, the only question would be whether the scope of the provision had been enlarged by the act of 1891, in the matter under consideration, which we do not think it had.

When cases are brought here from the Circuit Courts of Appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below, but our mandate goes to the court of first instance, and is there carried into effect, though the Court of Appeals may have sent its own mandate down before the case was brought to this court by appeal, writ of error or certiorari. *The Conqueror*, 166 U. S. 110.

The rule prescribed by the statute has necessarily not been changed by the omission to strictly observe it in the entry of judgment in some cases.

Motion denied.

UNITED STATES *v.* WONG KIM ARK.

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

No. 132. Argued March 5, 8, 1897. — Decided March 28, 1898.

A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This was a writ of *habeas corpus*, issued October 2, 1895, by the District Court of the United States for the Northern District of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark, who alleged that he was a citizen of the United States, of more than twenty-one years of age, and was born at San Francisco in 1873 of parents of Chinese descent and subjects of the Emperor of China, but domiciled residents at San Francisco; and that, on his return to the United States on the steamship Coptic in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction, in violation of the Constitution and laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretence that he was not a citizen of the United States.

At the hearing, the District Attorney of the United States was permitted to intervene in behalf of the United States in opposition to the writ, and stated the grounds of his intervention in writing as follows:

"That, as he is informed and believes, the said person in

whose behalf said application was made is not entitled to land in the United States, or to be or remain therein, as is alleged in said application, or otherwise.

"Because the said Wong Kim Ark, although born in the city and county of San Francisco, State of California, United States of America, is not, under the laws of the State of California and of the United States, a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons and subjects of the Emperor of China, and the said Wong Kim Ark being also a Chinese person and a subject of the Emperor of China.

"Because the said Wong Kim Ark has been at all times, by reason of his race, language, color and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation.

"That the said Wong Kim Ark is not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of Congress, known as the Chinese Exclusion Acts,[1] which would exempt him from the class or classes which are especially excluded from the United States by the provisions of the said acts.

"Wherefore the said United States Attorney asks that a judgment and order of this honorable court be made and entered in accordance with the allegations herein contained, and that the said Wong Kim Ark be detained on board of said vessel until released as provided by law, or otherwise to be returned to the country from whence he came, and that such further order be made as to the court may seem proper and legal in the premises."

The case was submitted to the decision of the court upon the following facts agreed by the parties:

"That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento Street, in the city and county of San Francisco, State of California, United States of America, and

[1] Acts of May 6, 1882, c. 126, 22 Stat. 58; July 5, 1884, c. 220, 23 Stat. 115; September 13, 1888, c. 1015, and October 1, 1888, c. 1064, 25 Stat. 476, 504; May 5, 1892, c. 60, 27 Stat. 25; August 18, 1894, c. 301, 28 Stat. 390.

Statement of the Case.

that his mother and father were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

"That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicil and residence therein at said city and county of San Francisco, State aforesaid.

"That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

"That during all the time of their said residence in the United States as domiciled residents therein the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

"That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

"That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on July 26, 1890, on the steamship Gælic, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States.

"That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land; and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

"That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The court ordered Wong Kim Ark to be discharged, upon the ground that he was a citizen of the United States. 71 Fed. Rep. 382. The United States appealed to this court, and the appellee was admitted to bail pending the appeal.

Mr. Solicitor General Conrad, with whom was *Mr. George D. Collins* on the brief, for appellants.

Mr. Maxwell Evarts and *Mr. J. Hubley Ashton*, for appellee. *Mr. Thomas D. Riordan* filed a brief for same.

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

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicil and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him

therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history,

of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States;" and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274.

In *Minor* v. *Happersett*, Chief Justice Waite, when construing, in behalf of the court, the very provision of the Fourteenth Amendment now in question, said: "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that." And he proceeded to resort to the common law as an aid in the construction of this provision. 21 Wall. 167.

In *Smith* v. *Alabama*, Mr. Justice Matthews, delivering the judgment of the court, said: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes." "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." 124 U. S. 478.

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual — as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem* — and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.

This fundamental principle, with these qualifications or

explanations of it, was clearly, though quaintly, stated in the leading case, known as *Calvin's Case*, or the *Case of the Post-nati*, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the Judges of England, and reported by Lord Coke and by Lord Ellesmere. *Calvin's Case*, 7 Rep. 1, 4*b*–6*a*, 18*a*, 18*b*; Ellesmere on Post-nati, 62–64; *S. C.*, 2 Howell's State Trials, 559, 607, 613–617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Lit. 8*a*, 128*b*; Lord Hale, in Hargrave's Law Tracts, 210, and in 1 Hale P. C. 61, 62; 1 Bl. Com. 366, 369, 370, 374; 4 Bl. Com. 74, 92; Lord Kenyon, in *Doe* v. *Jones*, 4 T. R. 300, 308; Cockburn on Nationality, 7; Dicey Conflict of Laws, pp. 173–177, 741.

In *Udny* v. *Udny*, (1869) L. R. 1 H. L. Sc. 441, the point decided was one of inheritance, depending upon the question whether the domicil of the father was in England or in Scotland, he being in either alternative a British subject. Lord Chancellor Hatherley said: "The question of naturalization and of allegiance is distinct from that of domicil." p. 452. Lord Westbury, in the passage relied on by the counsel for the United States, began by saying: "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions: one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status." And then, while maintaining that the civil status is universally governed by the single principle of domicil, *domicilium*, the criterion established by international law for the purpose of determining civil status, and the basis on which "the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or in-

testacy, must depend;" he yet distinctly recognized that a man's political status, his country, *patria*, and his "nationality, that is, natural allegiance," "may depend on different laws in different countries." pp. 457, 460. He evidently used the word "citizen," not as equivalent to "subject," but rather to "inhabitant;" and had no thought of impeaching the established rule that all persons born under British dominion are natural-born subjects.

Lord Chief Justice Cockburn, in the same year, reviewing the whole matter, said: "By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality." Cockburn on Nationality, 7.

Mr. Dicey, in his careful and thoughtful Digest of the Law of England with reference to the Conflict of Laws, published in 1896, states the following propositions, his principal rules being printed below in italics: "'*British subject*' *means any person who owes permanent allegiance to the Crown.* 'Permanent' allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes 'temporary' allegiance to the Crown. '*Natural-born British subject*' *means a British subject who has become a British subject at the moment of his birth.*" "*Subject to the exceptions hereinafter mentioned, any person who* (*whatever the nationality of his parents*) *is born within the British dominions is a natural-born British subject.* This rule contains the leading principle of English law on the subject of British nationality." The exceptions afterwards mentioned by Mr. Dicey are only these two: "1. Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such

person's birth is in hostile occupation, is an alien." "2. Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the Sovereign of a foreign State is (though born within the British dominions) an alien." And he adds: "The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the King of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown." Dicey Conflict of Laws, pp. 173–177, 741.

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

In the early case of *The Charming Betsy*, (1804) it appears to have been assumed by this court that all persons born in the United States were citizens of the United States; Chief Justice Marshall saying: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of

that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide." 2 Cranch, 64, 119.

In *Inglis* v. *Sailors' Snug Harbor*, (1830) 3 Pet. 99, in which the plaintiff was born in the city of New York, about the time of the Declaration of Independence, the justices of this court (while differing in opinion upon other points) all agreed that the law of England as to citizenship by birth was the law of the English Colonies in America. Mr. Justice Thompson, speaking for the majority of the court, said: "It is universally admitted, both in the English courts and in those of our own country, that all persons born within the Colonies of North America, whilst subject to the Crown of Great Britain, were natural-born British subjects." 3 Pet. 120. Mr. Justice Johnson said: "He was entitled to inherit as a citizen born of the State of New York." 3 Pet. 136. Mr. Justice Story stated the reasons upon this point more at large, referring to *Calvin's Case*, Blackstone's Commentaries, and *Doe* v. *Jones*, above cited, and saying: "Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*. There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be

subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." 3 Pet. 155. "The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens." 3 Pet. 156. "Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." 3 Pet. 164.

In *Shanks* v. *Dupont*, 3 Pet. 242, decided (as appears by the records of this court) on the same day as the last case, it was held that a woman born in South Carolina before the Declaration of Independence, married to an English officer in Charleston during its occupation by the British forces in the Revolutionary War, and accompanying her husband on his return to England, and there remaining until her death, was a British subject, within the meaning of the Treaty of Peace of 1783, so that her title to land in South Carolina, by descent cast before that treaty, was protected thereby. It was of such a case, that Mr. Justice Story, delivering the opinion of the court, said: "The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations." 3 Pet. 248. This last sentence was relied on by the counsel for the United States, as showing that the question whether a person is a citizen of a particular country is to be determined, not by the law of that country, but by the principles of international law. But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the operation of the established rule of citizenship by birth within the United States; for he referred (p. 245) to the contemporaneous opinions in *Inglis* v. *Sailors' Snug Harbor*,

above cited, in which this rule had been distinctly recognized, and in which he had said (p. 162) that "each government had a right to decide for itself who should be admitted or deemed citizens;" and in his Treatise on the Conflict of Laws, published in 1834, he said that, in respect to residence in different countries or sovereignties, "there are certain principles which have been generally recognized, by tribunals administering public law, [adding, in later editions, "or the law of nations,"] as of unquestionable authority," and stated, as the first of those principles, "Persons who are born in a country are generally deemed citizens and subjects of that country." Story Conflict of Laws, § 48.

The English statute of 11 & 12 Will. III, (1700) c. 6, entitled "An act to enable His Majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens," enacted that "all and every person or persons, being the King's natural-born subject or subjects, within any of the King's realms or dominions," might and should thereafter lawfully inherit and make their titles by descent to any lands "from any of their ancestors, lineal or collateral, although the father and mother, or father or mother, or other ancestor, of such person or persons, by, from, through or under whom" title should be made or derived, had been or should be "born out of the King's allegiance, and out of His Majesty's realms and dominions," as fully and effectually, as if such parents or ancestors "had been naturalized or natural-born subject or subjects within the King's dominions." 7 Statutes of the Realm, 590. It may be observed that, throughout that statute, persons born within the realm, although children of alien parents, were called "natural-born subjects." As that statute included persons born "within any of the King's realms or dominions," it of course extended to the Colonies, and, not having been repealed in Maryland, was in force there. In *McCreery* v. *Somerville*, (1824) 9 Wheat. 354, which concerned the title to land in the State of Maryland, it was assumed that children born in that State of an alien who was still living, and who had not been naturalized, were "native-born citizens of the

United States;" and without such assumption the case would not have presented the question decided by the court, which, as stated by Mr. Justice Story in delivering the opinion, was "whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural-born subject." 9 Wheat. 356.

Again, in *Levy* v. *McCartee*, (1832) 6 Pet. 102, 112, 113, 115, which concerned a descent cast since the American Revolution, in the State of New York, where the statute of 11 & 12 Will. III had been repealed, this court, speaking by Mr. Justice Story, held that the case must rest for its decision exclusively upon the principles of the common law; and treated it as unquestionable that by that law a child born in England of alien parents was a natural-born subject; quoting the statement of Lord Coke in Co. Lit. 8*a*, that "if an alien cometh into England and hath issue two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm;" and saying that such a child "was a native-born subject, according to the principles of the common law, stated by this court in *McCreery* v. *Somerville*, 9 Wheat. 354."

In *Dred Scott* v. *Sandford*, (1857) 19 How. 393, Mr. Justice Curtis said: "The first section of the second article of the Constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." 19 How. 576. And to this extent no different opinion was expressed or intimated by any of the other judges.

In *United States* v. *Rhodes*, (1866) Mr. Justice Swayne, sitting in the Circuit Court, said: "All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England." "We find no warrant for the opinion

that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution." 1 Abbott (U. S.) 28, 40, 41.

The Supreme Judicial Court of Massachusetts, speaking by Mr. Justice (afterwards Chief Justice) Sewall, early held that the determination of the question whether a man was a citizen or an alien was "to be governed altogether by the principles of the common law," and that it was established, with few exceptions, "that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship.'" *Gardner* v. *Ward*, (1805) 2 Mass. 244, note. And again: "The doctrine of the common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born." *Kilham* v. *Ward*, (1806) 2 Mass. 236, 265. It may here be observed that in a recent English case Lord Coleridge expressed the opinion of the Queen's Bench Division that the statutes of 4 Geo. II, (1731) c. 21, and 13 Geo. III, (1773) c. 21, (hereinafter referred to,) "clearly recognize that to the King in his politic, and not in his personal capacity, is the allegiance of his subjects due." *Isaacson* v. *Durant*, 17 Q. B. D. 54, 65.

The Supreme Court of North Carolina, speaking by Mr. Justice Gaston, said: "Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens." "Upon the Revolution, no other change took place in the law of North Carolina, than was consequent upon the transition from a colony dependent on an European King to a free and sov-

ereign State;" "British subjects in North Carolina became North Carolina freemen;" "and all free persons born within the State are born citizens of the State." "The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the king' is now 'a citizen of the State.'" *State* v. *Manuel*, (1838) 4 Dev. & Bat. 20, 24–26.

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than fifty years after the adoption of the Constitution, when the matter was elaborately argued in the Court of Chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. *Lynch* v. *Clarke*, (1844) 1 Sandf. Ch. 583.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, Secretary of State, in 1854, 2 Whart. Int. Dig. (2d ed.) p. 394; by Attorney General Black in 1859, 9 Opinions, 373; and by Attorney General Bates in 1862, 10 Opinions, 328, 382, 394, 396.

Chancellor Kent, in his Commentaries, speaking of the "general division of the inhabitants of every country, under the comprehensive title of aliens and natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent." "To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a State, while

abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered." 2 Kent Com. (6th ed.) 39, 42. And he elsewhere says: "And if, at common law, all human beings born within the ligeance of the King, and under the King's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States, in all cases in which there is no express constitutional or statute declaration to the contrary." "Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land." 2 Kent Com. 258, note.

Mr. Binney, in the second edition of a paper on the Alienigenæ of the United States, printed in pamphlet at Philadelphia, with a preface bearing his signature and the date of December 1, 1853, said: "The common law principle of allegiance was the law of all the States at the time of the Revolution, and at the adoption of the Constitution; and by that principle the citizens of the United States are, with the exceptions before mentioned," (namely, foreign-born children of citizens, under statutes to be presently referred to,) "such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States." p. 20. "The right of citizenship never *descends* in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle."

p. 22, note. This paper, without Mr. Binney's name, and with the note in a less complete form and not containing the passage last cited, was published (perhaps from the first edition) in the American Law Register for February, 1854. 2 Amer. Law Reg. 193, 203, 204.

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicil;" and children born in a foreign country, of a French father who had not established his domicil there nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." Pothier Traité des Personnes, pt. 1, tit. 2, sect. 1, nos. 43, 45; *Walsh-Serrant* v. *Walsh-Serrant*, (1802) 3 Journal du Palais, 384; *S. C.*, 8 Merlin, Jurisprudence, (5th ed.) Domicile, § 13; *Préfet du Nord* v. *Lebeau*, (1862) Journal du Palais, 1863, 312 and note; 1 Laurent Droit Civil, no. 321; 2 Calvo Droit International, (5th ed.) § 542; Cockburn on Nationality, 13, 14; Hall's International Law, (4th ed.) § 68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. Constitutions et Chartes, (ed. 1830) pp. 100, 136, 148, 186.

The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli*, the rule of descent or blood, *jus sanguinis*, as the leading principle; but an eminent commentator has observed that the framers of that code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe — *de la vieille règle française, ou plutôt même de la vieille règle européenne* — according to which nationality had always been, in former times, determined by the place of birth." 1 Demolombe Cours de Code Napoleon, (4th ed.) no. 146.

The later modifications of the rule in Europe rest upon the constitutions, laws or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English Naturalization Act of 33 Vict. (1870) c. 14, and the Commissioners' Report of 1869 out of which it grew, both bear date since the adoption of the Fourteenth Amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey Conflict of Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece and Russia. Cockburn on Nationality, 14–21.

There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed, at various times, enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.

The earliest statute was passed in the reign of Edward III. In the Rolls of Parliament of 17 Edw. III, (1343) it is stated that "before these times there have been great doubt and difficulty among the Lords of this realm, and the Commons, as well men of the law as others, whether children who are born in parts beyond sea ought to bear inheritance after the death of their ancestors in England, because no certain law has been thereon ordained;" and by the King, Lords and Commons, it was unanimously agreed that "there was no manner of doubt that the children of our Lord the King, whether they were born on this side the sea or beyond the sea, should bear the inheritance of their ancestors;" "and in regard to other children, it was agreed in this Parliament, that they also should inherit wherever they might be born in the service of the King;" but, because the Parliament was about to depart, and the business demanded great advisement and good deliberation how it should be best and most surely done, the making of a statute was put off to the next Parliament. 2 Rot. Parl. 139. By reason, apparently, of the prevalence of the plague in England, no act upon the subject was passed until 25 Edw. III, (1350) when Parliament passed an act, entitled "A statute for those who are born in parts beyond sea," by which — after reciting that "some people be in doubt if the children born in the parts beyond the sea, out of the ligeance of England, should be able to demand any inheritance within the same ligeance, or not, whereof a petition was put

in the Parliament" of 17 Edw. III, "and was not at the same time wholly assented" — it was (1) agreed and affirmed, "that the law of the Crown of England is, and always hath been such, that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors;" (2) also agreed that certain persons named, "which were born beyond the sea, out of the ligeance of England, shall be from henceforth able to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of England, as well as those that should be born within the same ligeance:" (3) and further agreed "that all children inheritors, which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid, in time to come; so always, that the mothers of such children do pass the sea by the licence and wills of their husbands." 2 Rot. Parl. 231; 1 Statutes of the Realm, 310.

It has sometimes been suggested that this general provision of the statute of 25 Edw. III was declaratory of the common law. See Bacon, *arguendo*, in *Calvin's Case*, 2 Howell's State Trials, 585; Westlake and Pollock, *arguendo*, in *De Geer* v. *Stone*, 22 Ch. D. 243, 247; 2 Kent Com. 50, 53; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 659, 660; *Ludlam* v. *Ludlam*, 26 N. Y. 356. But all suggestions to that effect seem to have been derived, immediately or ultimately, from one or the other of these two sources: The one, the Year Book of 1 Ric. III, (1483) fol. 4, pl. 7, reporting a saying of Hussey, C. J., "that he who is born beyond sea, and his father and mother are English, their issue inherit by the common law, but the statute makes clear, &c.," — which, at best, was but *obiter dictum*, for the Chief Justice appears to have finally rested his opinion on the statute. The other, a note added to the edition of 1688 of Dyer's Reports, 224*a*, stating that at Trinity Term 7 Edw. III, Rot. 2 B. R., it was adjudged that children of subjects born

beyond the sea in the service of the King were inheritable — which has been shown, by a search of the roll in the King's Bench so referred to, to be a mistake, inasmuch as the child there in question did not appear to have been born beyond sea, but only to be living abroad. Westlake's Private International Law, (3d ed.) 324.

The statute of 25 Edw. III recites the existence of doubts as to the right of foreign-born children to inherit in England; and, while it is declaratory of the rights of children of the King, and is retrospective as to the persons specifically named, yet as to all others it is, in terms, merely prospective, applying to those only "who shall be born henceforth." Mr. Binney, in his paper above cited, after a critical examination of the statute, and of the early English cases, concluded: "There is nothing in the statute which would justify the conclusion that it is declaratory of the common law in any but a single particular, namely, in regard to the children of the King; nor has it at any time been judicially held to be so." "The notion that there is any common law principle to naturalize the children born in foreign countries, of native-born American father *and* mother, father *or* mother, must be discarded. There is not, and never was, any such common law principle." Binney on Alienigenæ, 14, 20; 2 Amer. Law. Reg. 199, 203. And the great weight of the English authorities, before and since he wrote, appears to support his conclusion. *Calvin's Case*, 7 Rep. 17*a*, 18*a*; Co. Lit. 8*a*, and Hargrave's note 36; 1 Bl. Com. 373; Barrington on Statutes, (5th ed.) 268; Lord Kenyon, in *Doe* v. *Jones*, 4 T. R. 300, 308; Lord Chancellor Cranworth, in *Shedden* v. *Patrick*, 1 Macq. 535, 611; Cockburn on Nationality, 7, 9; *De Geer* v. *Stone*, 22 Ch. D. 243, 252; Dicey Conflict of Laws, 178, 741. "The acquisition," says Mr. Dicey, (p. 741) "of nationality by descent, is foreign to the principles of the common law, and is based wholly upon statutory enactments."

It has been pertinently observed that if the statute of Edward III had only been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary. Cockburn on Nationality, 9. By the

statute of 29 Car. II, (1677) c. 6, § 1, entitled "An act for the naturalization of children of His Majesty's subjects born in foreign countries during the late troubles," all persons who, at any time between June 14, 1641, and March 24, 1660, "were born out of His Majesty's dominions, and whose fathers or mothers were natural-born subjects of this realm," were declared to be natural-born subjects. By the statute of 7 Anne, (1708) c. 5, § 3, "the children of all natural-born subjects, born out of the ligeance of Her Majesty, her heirs and successors" — explained by the statute of 4 Geo. II, (1731) c. 21, to mean all children born out of the ligeance of the Crown of England, "whose fathers were or shall be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively" — "shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever." That statute was limited to foreign-born children of natural-born subjects; and was extended by the statute of 13 Geo. III, (1773) c. 21, to foreign-born grandchildren of natural-born subjects, but not to the issue of such grandchildren; or, as put by Mr. Dicey, "British nationality does not pass by descent or inheritance beyond the second generation." See *De Geer* v. *Stone*, above cited; Dicey Conflict of Laws, 742.

Moreover, under those statutes, as is stated in the Report in 1869 of the Commissioners for inquiring into the Laws of Naturalization and Allegiance, "no attempt has ever been made on the part of the British Government, (unless in Eastern countries where special jurisdiction is conceded by treaty,) to enforce claims upon, or to assert rights in respect of, persons born abroad, as against the country of their birth whilst they were resident therein, and when by its law they were invested with its nationality." In the appendix to their report are collected many such cases in which the British Government declined to interpose, the reasons being most clearly brought out in a dispatch of March 13, 1858, from Lord Malmesbury, the Foreign Secretary, to the British Ambassador at Paris, saying: "It is competent to any country to confer by general or special legislation the privileges of nationality upon those

who are born out of its own territory; but it cannot confer such privileges upon such persons as against the country of their birth, when they voluntarily return to and reside therein. Those born in the territory of a nation are (as a general principle) liable when actually therein to the obligations incident to their status by birth. Great Britain considers and treats such persons as natural-born subjects, and cannot therefore deny the right of other nations to do the same. But Great Britain cannot permit the nationality of the children of foreign parents born within her territory to be questioned." Naturalization Commission Report, pp. viii, 67; U. S. Foreign Relations, 1873–1874, pp. 1237, 1337. See also *Drummond's Case*, (1834) 2 Knapp, 295.

By the Constitution of the United States, Congress was empowered "to establish an uniform rule of naturalization." In the exercise of this power, Congress, by successive acts, beginning with the act entitled "An act to establish an uniform rule of naturalization," passed at the second session of the First Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts of March 26, 1790, c. 3; January 29, 1795, c. 20; June 18, 1798, c. 54; 1 Stat. 103, 414, 566; April 14, 1802, c. 28; March 26, 1804, c. 47; 2 Stat. 153, 292; February 10, 1855, c. 71; 10 Stat. 604; Rev. Stat. §§ 2165, 2172, 1993.

In the act of 1790, the provision as to foreign-born children of American citizens was as follows: "The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: Provided, that the right of citizenship shall not descend to persons whose fathers have never been

resident in the United States." 1 Stat. 104. In 1795, this was reënacted, in the same words, except in substituting, for the words "beyond sea, or out of the limits of the United States," the words "out of the limits and jurisdiction of the United States." 1 Stat. 415.

In 1802, all former acts were repealed, and the provisions concerning children of citizens were reënacted in this form: "The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the said States under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." Act of April 14, 1802, c. 28, § 4; 2 Stat. 155.

The provision of that act, concerning "the children of persons duly naturalized under any of the laws of the United States," not being restricted to the children of persons already naturalized, might well be held to include children of persons thereafter to be naturalized. 2 Kent Com. 51, 52; *West* v. *West*, 8 Paige, 433; *United States* v. *Kellar*, 11 Bissell, 314; *Boyd* v. *Thayer*, 143 U. S. 135, 177.

But the provision concerning foreign-born children, being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. 2 Kent Com. 52, 53; Binney on Alienigenæ, 20, 25; 2 Amer. Law Reg. 203, 205. Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law.

In accordance with his suggestions, it was enacted by the

statute of February 10, 1855, c. 71, that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." 10 Stat. 604; Rev. Stat. § 1993.

It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of Congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States. Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty.

So far as we are informed, there is no authority, legislative, executive or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective,) conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country, which have gone the farthest towards holding such statutes to be but declaratory of the common law, have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent Com. 39, 50, 53, 258 note; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 659; *Ludlam* v. *Ludlam*, 26 N. Y. 356, 371.

Passing by questions once earnestly controverted, but finally put at rest by the Fourteenth Amendment of the Constitution, it is beyond doubt that, before the enactment of the Civil Rights Act of 1866 or the adoption of the Constitutional

Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the fore front, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The Civil Rights Act, passed at the first session of the Thirty-ninth Congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." Act of April 9, 1866, c. 31, § 1; 14 Stat. 27.

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several States; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of States. 14 Stat. 358; 15 Stat. 708.

The first section of the Fourteenth Amendment of the Con-

stitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott* v. *Sandford*, (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *The Slaughterhouse Cases*, (1873) 16 Wall. 36, 73; *Strauder* v. *West Virginia*, (1879) 100 U. S. 303, 306; *Ex parte Virginia*, (1879) 100 U. S. 339, 345; *Neal* v. *Delaware*, (1880) 103 U. S. 370, 386; *Elk* v. *Wilkins*, (1884) 112 U. S. 94, 101. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race — as was clearly recognized in all the opinions delivered in *The Slaughterhouse Cases*, above cited.

In those cases, the point adjudged was that a statute of Louisiana, granting to a particular corporation the exclusive right for twenty-five years to have and maintain slaughterhouses within a certain district including the city of New Orleans, requiring all cattle intended for sale or slaughter in that district to be brought to the yards and slaughterhouses of the grantee, authorizing all butchers to slaughter their cattle there, and empowering the grantee to exact a reasonable fee for each animal slaughtered, was within the police powers of the State, and not in conflict with the Thirteenth Amendment of the Constitution as creating an involuntary servitude, nor with the Fourteenth Amendment as abridging the privileges or immunities of citizens of the United States,

or as depriving persons of their liberty or property without due process of law, or as denying to them the equal protection of the laws.

Mr. Justice Miller, delivering the opinion of the majority of the court, after observing that the Thirteenth, Fourteenth and Fifteenth Articles of Amendment of the Constitution were all addressed to the grievances of the negro race, and were designed to remedy them, continued as follows: "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the Thirteenth Article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so if other rights are assailed by the States, which properly and necessarily fall within the protection of these Articles, that protection will apply, though the party interested may not be of African descent." 16 Wall. 72. And in treating of the first clause of the Fourteenth Amendment, he said: "The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." 16 Wall. 73, 74.

Mr. Justice Field, in a dissenting opinion, in which Chief Justice Chase and Justices Swayne and Bradley concurred, said of the same clause: "It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry." 16 Wall.

95, 111. Mr. Justice Bradley also said: "The question is now settled by the Fourteenth Amendment itself, that citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons." 16 Wall. 112. And Mr. Justice Swayne added: "The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant all such citizens; and by 'any person' was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes and conditions of men." 16 Wall. 128, 129.

Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the Fourteenth Amendment, made this remark: "The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States, born within the United States." 16 Wall. 73. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase, is apparent from its classing foreign ministers and consuls together — whereas it was then well settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his in-

tercourse with foreign States or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside. 1 Kent Com. 44; Story Conflict of Laws, § 48; Wheaton International Law, (8th ed.) § 249; *The Anne*, (1818) 3 Wheat. 435, 445, 446; *Gittings* v. *Crawford*, (1838) Taney, 1, 10; *In re Baiz*, (1890) 135 U. S. 403, 424.

In weighing a remark uttered under such circumstances, it is well to bear in mind the often quoted words of Chief Justice Marshall: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, (1821) 6 Wheat. 264, 399.

That neither Mr. Justice Miller, nor any of the justices who took part in the decision of *The Slaughterhouse Cases*, understood the court to be committed to the view that all children born in the United States of citizens or subjects of foreign States were excluded from the operation of the first sentence of the Fourteenth Amendment, is manifest from a unanimous judgment of the court, delivered but two years later, while all those judges but Chief Justice Chase were still on the bench, in which Chief Justice Waite said: "Allegiance and protection are, in this connection" (that is, in relation to citizenship,) "reciprocal obligations. The one is a compensation for the other: allegiance for protection, and protection for allegiance." "At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children, born in a country, of

parents who were its citizens, became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens." *Minor* v. *Happersett*, (1874) 21 Wall. 162, 166–168. The decision in that case was that a woman born of citizen parents within the United States was a citizen of the United States, although not entitled to vote, the right to the elective franchise not being essential to citizenship.

The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the Fourteenth Amendment, is *Elk* v. *Wilkins*, 112 U. S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds, that the meaning of those words was, "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance;" that by the Constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in Congress and direct taxes were apportioned among the

several States, and Congress was empowered to regulate commerce, not only "with foreign nations," and among the several States, but "with the Indian tribes;" that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of Congress; and, therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was observed that the language used, in defining citizenship, in the first section of the Civil Rights Act of 1866, by the very Congress which framed the Fourteenth Amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99–103.

Mr. Justice Harlan and Mr. Justice Woods, dissenting, were of opinion that the Indian in question, having severed himself from his tribe and become a *bona fide* resident of a State, had thereby become subject to the jurisdiction of the United States, within the meaning of the Fourteenth Amendment; and, in reference to the Civil Rights Act of 1866, said: "Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race (excluding only 'Indians not taxed'), who were born within

the territorial limits of the United States, and were not subject to any foreign power." And that view was supported by reference to the debates in the Senate upon that act, and to the ineffectual veto thereof by President Johnson, in which he said: "By the first section of the bill, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States." 112 U. S. 112–114.

The decision in *Elk* v. *Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State — both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. *Calvin's Case*, 7 Rep. 1, 18*b*; Cockburn on Nationality, 7; Dicey Conflict of Laws, 177; *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99, 155; 2 Kent Com. 39, 42.

The principles upon which each of those exceptions rests were long ago distinctly stated by this court.

Opinion of the Court.

In *United States* v. *Rice*, (1819) 4 Wheat. 246, goods imported into Castine, in the State of Maine, while it was in the exclusive possession of the British authorities during the last war with England, were held not to be subject to duties under the revenue laws of the United States, because, as was said by Mr. Justice Story in delivering judgment: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for, where there is no protection or allegiance or sovereignty, there can be no claim to obedience." 4 Wheat. 254.

In the great case of *The Exchange*, (1812) 7 Cranch, 116, the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country, were set forth by Chief Justice Marshall in a clear and powerful train of reasoning, of which it will be sufficient, for our present purpose, to give little more than the outlines. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before this court until some years afterwards in *Cherokee Nation* v. *Georgia*, (1831) 5 Pet. 1; nor upon the case of a suspension of the sovereignty of the United States over part of their territory by reason of a hostile occupation, such as was also afterwards presented in *United States* v. *Rice*, above cited. But in all other respects it covered the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof.

The Chief Justice first laid down the general principle: "The jurisdiction of the nation within its own territory is

necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 7 Cranch, 136.

He then stated, and supported by argument and illustration, the propositions, that "this full and absolute territorial jurisdiction, being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power," has "given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation" — the first of which is the exemption from arrest or detention of the person of a foreign sovereign entering its territory with its license, because "a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation;" "a second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers;" "a third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions;" and, in conclusion, that "a public armed ship, in the service of a foreign sovereign, with whom the Government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly

manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 137–139, 147.

As to the immunity of a foreign minister, he said: "Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents; or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it." "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." 7 Cranch, 138, 139.

The reasons for not allowing to other aliens exemption "from the jurisdiction of the country in which they are found" were stated as follows: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were

not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." 7 Cranch, 144.

In short, the judgment in the case of *The Exchange* declared, as incontrovertible principles, that the jurisdiction of every nation within its own territory is exclusive and absolute, and is susceptible of no limitation not imposed by the nation itself; that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent, express or implied; that upon its consent to cede, or to waive the exercise of, a part of its territorial jurisdiction, rest the exemptions from that jurisdiction of foreign sovereigns or their armies entering its territory with its permission, and of their foreign ministers and public ships of war; and that the implied license, under which private individuals of another nation enter the territory and mingle indiscriminately with its inhabitants, for purposes of business or pleasure, can never be construed to grant to them an exemption from the jurisdiction of the country in which they are found. See also *Carlisle* v. *United States*, (1872) 16 Wall. 147, 155; *Radich* v. *Hutchins*, (1877) 95 U. S. 210; *Wildenhus's Case*, (1887) 120 U. S. 1; *Chae Chan Ping* v. *United States*, (1889) 130 U. S. 581, 603, 604.

From the first organization of the National Government under the Constitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time "within the limits and under the jurisdiction of the United States;" and thus applied the words "under the jurisdiction of the United States" to aliens residing here before they had taken an oath to support the Constitution of the United States, or had renounced allegiance

to a foreign government. Acts of March 26, 1790, c. 3; January 29, 1795, c. 20, § 1; June 18, 1798, c. 54, §§ 1, 6; 1 Stat. 103, 414, 566, 568; April 14, 1802, c. 28, § 1; 2 Stat. 153; March 22, 1816, c. 32, § 1; 3 Stat. 258; May 24, 1828, c. 116, § 2; 4 Stat. 310; Rev. Stat. § 2165. And, from 1795, the provisions of those acts, which granted citizenship to foreign-born children of American parents, described such children as "born out of the limits and jurisdiction of the United States." Acts of January 29, 1795, c. 20, § 3; 1 Stat. 415; April 14, 1802, c. 28, § 4; 2 Stat. 155; February 10, 1855, c. 71; 10 Stat. 604; Rev. Stat. §§ 1993, 2172. Thus Congress, when dealing with the question of citizenship in that aspect, treated aliens residing in this country as "under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States."

The words "in the United States, and subject to the jurisdiction thereof," in the first sentence of the Fourteenth Amendment of the Constitution, must be presumed to have been understood and intended by the Congress which proposed the Amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of *The Exchange;* and as the equivalent of the words "within the limits and under the jurisdiction of the United States," and the converse of the words, "out of the limits and jurisdiction of the United States," as habitually used in the naturalization acts. This presumption is confirmed by the use of the word "jurisdiction" in the last clause of the same section of the Fourteenth Amendment, which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." It is impossible to construe the words "subject to the jurisdiction thereof," in the opening sentence, as less comprehensive than the words "within its jurisdiction," in the concluding sentence of the same section; or to hold that persons "within the jurisdiction" of one of the States of the Union are not "subject to the jurisdiction of the United States."

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the Fourteenth

Amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.

By the Civil Rights Act of 1866, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, "not subject to any foreign power," were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children of foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the Civil Rights Act, "not subject to any foreign power," gave way, in the Fourteenth Amendment of the Constitution, to the affirmative words, "subject to the jurisdiction of the United States."

This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed — "born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof" — in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well considered opinions of the executive departments of the Government, since the adoption of the Fourteenth Amendment of the Constitution.

In 1869, Attorney General Hoar gave to Mr. Fish, the Secretary of State, an opinion that children born and domiciled abroad, whose fathers were native-born citizens of the United States and had at some time resided therein, were, under the statute of February 10, 1855, c. 71, citizens of the United States, and "entitled to all the privileges of citizenship which it is in the power of the United States Government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens." "But," the Attorney General added, "while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States, by any legislation, to interfere with that relation, or, by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be, that a person 'born in a strange country, under the obedience of a strange prince or country, is an alien' (Co. Lit. 128*b*,) and that every person owes allegiance to the country of his birth." 13 Opinions of Attorneys General, 89-91.

In 1871, Mr. Fish, writing to Mr. Marsh, the American Minister to Italy, said: "The Fourteenth Amendment to the Constitution declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' This is simply an affirm-

ance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, 'and subject to the jurisdiction thereof,' was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extra-territoriality." 2 Whart. Int. Dig. p. 394.

In August, 1873, President Grant, in the exercise of the authority expressly conferred upon the President by art. 2, sect. 2, of the Constitution, to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," required the opinions of the members of his cabinet upon several questions of allegiance, naturalization and expatriation. Mr. Fish, in his opinion, which is entitled to much weight, as well from the circumstances under which it was rendered, as from its masterly treatment of the subject, said:

"Every independent State has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization, and this, without regard to the municipal laws of the country whose subjects are so naturalized, as long as they remain, or exercise the rights conferred by naturalization, within the territory and jurisdiction of the State which grants it.

"It may also endow with the rights and privileges of its citizenship persons residing in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the State thus conferring its citizenship.

"But no sovereignty can extend its jurisdiction beyond its own territorial limits so as to relieve those born under and subject to another jurisdiction, from their obligations or duties thereto; nor can the municipal law of one State interfere with the duties or obligations which its citizens incur, while voluntarily resident in such foreign State and without the jurisdiction of their own country.

"It is evident from the proviso in the act of 10th February, 1855, viz., 'that the rights of citizenship shall not descend to persons whose fathers never resided in the United States,' that the law-making power not only had in view this limit to the efficiency of its own municipal enactments in foreign jurisdiction; but that it has conferred only a qualified citizenship upon the children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States, or, in the language of the Fourteenth Amendment of the Constitution, have made themselves 'subject to the jurisdiction thereof.'

"The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father.

"The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.

"Such children are born to a double character: the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country; but the child, from the circumstances of his birth, may acquire rights and owes another fealty besides that which attaches to the father." Opinions of the Executive Departments on Expatriation, Naturalization and Allegiance, (1873) 17, 18; U. S. Foreign Relations, 1873–74, pp. 1191, 1192.

In 1886, upon the application of a son born in France of an American citizen, and residing in France, for a passport, Mr. Bayard, the Secretary of State, as appears by letters from him to the Secretary of Legation in Paris, and from the latter to the applicant, quoted and adopted the conclusions of Attorney General Hoar in his opinion above cited. U. S. Foreign Relations, 1886, p. 303; 2 Calvo Droit International, § 546.

These opinions go to show that, since the adoption of the Fourteenth Amendment, the executive branch of the Government, the one charged with the duty of protecting American citizens abroad against unjust treatment by other nations, has taken the same view of the act of Congress of 1855, declaring children born abroad of American citizens to be themselves citizens, which, as mentioned in a former part of this opinion, the British Foreign Office has taken of similar acts of Parliament — holding that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extra-territorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country.

In a very recent case, the Supreme Court of New Jersey held that a person, born in this country of Scotch parents who were domiciled but had not been naturalized here, was "subject to the jurisdiction of the United States," within the meaning of the Fourteenth Amendment, and was "not subject to any foreign power," within the meaning of the Civil Rights Act of 1866; and, in an opinion delivered by Justice Van Syckel, with the concurrence of Chief Justice Beasley, said: "The object of the Fourteenth Amendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United States were of foreign birth, and could not have been naturalized, or in any way have become entitled to the right of citizenship. The colored people were no more subject to the jurisdiction of the United States, by reason of their birth here, than were the white children born in this country of parents who were not citizens. The same rule must be applied to both races; and unless the general rule, that when the parents are domiciled here birth establishes the right to citizenship, is accepted, the Fourteenth Amendment has failed to accomplish its purpose, and the colored people are not citizens. The Fourteenth Amendment, by the language, 'all persons born in the United States, and subject to the jurisdiction thereof,' was intended

to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race." *Benny* v. *O'Brien*, (1895) 29 Vroom (58 N. J. Law), 36, 39, 40.

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 7 Rep. 6*a*, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides — seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on *Thrasher's Case* in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger

born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; *United States* v. *Carlisle*, 16 Wall. 147, 155; *Calvin's Case*, 7 Rep. 6*a*; Ellesmere on Postnati, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92.

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. *Yick Wo* v. *Hopkins*, (1886) 118 U. S. 356; *Law Ow Bew* v. *United States*, (1892) 144 U. S. 47, 61, 62; *Fong Yue Ting* v. *United States*, (1893) 149 U. S. 698, 724; *Lem Moon Sing* v. *United States*, (1895) 158 U. S. 538, 547; *Wong Wing* v. *United States*, (1896) 163 U. S. 228, 238.

In *Yick Wo* v. *Hopkins* the decision was that an ordinance

of the city of San Francisco, regulating a certain business, and which, as executed by the board of supervisors, made an arbitrary discrimination between natives of China, still subjects of the Emperor of China, but domiciled in the United States, and all other persons, was contrary to the Fourteenth Amendment of the Constitution. Mr. Justice Matthews, in delivering the opinion of the court, said: "The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China." "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says, 'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted, by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States, equally with those of the strangers and aliens who now invoke the jurisdiction of this court." 118 U. S. 368, 369.

The manner in which reference was made, in the passage above quoted, to § 1977 of the Revised Statutes, shows that the change of phrase in that section, reënacting § 16 of the statute of May 31, 1870, c. 114, 16 Stat. 144, as compared with § 1 of the Civil Rights Act of 1866 — by substituting, for the words in that act, "of every race and color," the words, "within the jurisdiction of the United States" — was not

considered as making the section, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form; and is hardly consistent with attributing any narrower meaning to the words "subject to the jurisdiction thereof" in the first sentence of the Fourteenth Amendment of the Constitution, which may itself have been the cause of the change in the phraseology of that provision of the Civil Rights Act.

The decision in *Yick Wo* v. *Hopkins*, indeed, did not directly pass upon the effect of these words in the Fourteenth Amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, "subject to the jurisdiction thereof," that is to say, of the United States, at the beginning, a less comprehensive meaning than to the words "within its jurisdiction," that is, of the State, at the end of the same section; or to hold that persons, who are indisputably "within the jurisdiction" of the State, are not "subject to the jurisdiction" of the Nation.

It necessarily follows that persons born in China, subjects of the Emperor of China, but domiciled in the United States, having been adjudged, in *Yick Wo* v. *Hopkins*, to be within the jurisdiction of the State, within the meaning of the concluding sentence, must be held to be subject to the jurisdiction of the United States, within the meaning of the first sentence of this section of the Constitution; and their children, "born in the United States," cannot be less "subject to the jurisdiction thereof."

Accordingly, in *Quock Ting* v. *United States*, (1891) 140 U. S. 417, which, like the case at bar, was a writ of *habeas corpus* to test the lawfulness of the exclusion of a Chinese person who alleged that he was a citizen of the United States by birth, it was assumed on all hands that a person of the Chinese race, born in the United States, was a citizen of the United States. The decision turned upon the failure of the petitioner to prove that he was born in this country; and the question at issue was, as stated in the opinion of the majority of the court, delivered by Mr. Justice Field, "whether the evidence was sufficient to show that the petitioner was a citizen of the

United States," or, as stated by Mr. Justice Brewer in his dissenting opinion, "whether the petitioner was born in this country or not." 140 U. S. 419, 423.

In *State* v. *Ah Chew*, (1881) 16 Nevada, 50, 58, the Supreme Court of Nevada said: "The Amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United States." In the courts of the United States in the Ninth Circuit, it has been uniformly held, in a series of opinions delivered by Mr. Justice Field, Judge Sawyer, Judge Deady, Judge Hanford and Judge Morrow, that a child born in the United States of Chinese parents, subjects of the Emperor of China, is a native-born citizen of the United States. *In re Look Tin Sing*, (1884) 10 Sawyer, 353; *Ex parte Chin King*, (1888) 13 Sawyer, 333; *In re Yung Sing Hee*, (1888) 13 Sawyer, 482; *In re Wy Shing*, (1888) 13 Sawyer, 530; *Gee Fook Sing* v. *United States*, (1892) 7 U. S. App. 27; *In re Wong Kim Ark*, (1896) 71 Fed. Rep. 382. And we are not aware of any judicial decision to the contrary.

During the debates in the Senate in January and February, 1866, upon the Civil Rights Bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read, "All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color." Mr. Cowan, of Pennsylvania, asked, "Whether it will not have the effect of naturalizing the children of Chinese and Gypsies, born in this country?" Mr. Trumbull answered, "Undoubtedly;" and asked, "Is not the child born in this country of German parents a citizen?" Mr. Cowan replied, "The children of German parents are citizens; but Germans are not Chinese." Mr. Trumbull rejoined: "The law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European." Mr. Reverdy Johnson suggested that the words, "without distinction of color," should be omitted as unnecessary; and said: "The amendment, as it stands, is that all persons born in the United States, and not subject to a foreign power, shall, by virtue of birth, be citizens. To that I am willing to con-

sent; and that comprehends all persons, without any reference to race or color, who may be so born." And Mr. Trumbull agreed that striking out those words would make no difference in the meaning, but thought it better that they should be retained, to remove all possible doubt. Congressional Globe, 39th Congress, 1st sess. pt. 1, pp. 498, 573, 574.

The Fourteenth Amendment of the Constitution, as originally framed by the House of Representatives, lacked the opening sentence. When it came before the Senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form, (less the words "or naturalized,") and reading, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Mr. Cowan objected, upon the ground that the Mongolian race ought to be excluded; and said: "Is the child of the Chinese immigrant in California a citizen?" "I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow-citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that State and the other Pacific States to manage them as they may see fit, they may be useful; but I would not tie their hands by the Constitution of the United States so as to prevent them hereafter from dealing with them as in their wisdom they see fit." Mr. Conness, of California, replied: "The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States." "We are entirely ready to accept the provision proposed in this Constitutional Amendment, that the children born here of Mongolian parents shall be declared by the Constitution of

the United States to be entitled to civil rights and to equal protection before the law with others." Congressional Globe, 39th Congress, 1st sess. pt. 4, pp. 2890–2892. It does not appear to have been suggested, in either House of Congress, that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the Fourteenth Amendment.

Doubtless, the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves; and are, at the least, interesting as showing that the application of the Amendment to the Chinese race was considered and not overlooked.

The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicil in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. *Chae Chan Ping* v. *United States*, 130 U. S. 581; *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Wong Wing* v. *United States*, 163 U. S. 228.

In *Fong Yue Ting* v. *United States*, the right of the United States to expel such Chinese persons was placed upon the grounds, that the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, is an inherent and inalienable right of every sovereign and indepen-

dent nation, essential to its safety, its independence and its welfare; that the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene; that the power to exclude and the power to expel aliens rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power; and, therefore, that the power of Congress to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. 149 U. S. 711, 713, 714.

In *Lem Moon Sing* v. *United States*, the same principles were reaffirmed, and were applied to a Chinese person, born in China, who had acquired a commercial domicil in the United States, and who, having voluntarily left the country on a temporary visit to China, and with the intention of returning to and continuing his residence in this country, claimed the right under a statute or treaty to reënter it; and the distinction between the right of an alien to the protection of the Constitution and laws of the United States for his person and property while within the jurisdiction thereof, and his claim of a right to reënter the United States after a visit to his native land, was expressed by the court as follows: "He is none the less an alien, because of his having a commercial domicil in this country. While he lawfully remains here, he is entitled to the benefit of the guaranties of life, liberty and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land, as if he were a native or

naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reënter the United States in violation of the will of the Government as expressed in enactments of the law-making power." 158 U. S. 547, 548.

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject — always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution.

The power, granted to Congress by the Constitution, "to establish an uniform rule of naturalization," was long ago adjudged by this court to be vested exclusively in Congress. *Chirac* v. *Chirac*, (1817) 2 Wheat. 259. For many years after the establishment of the original Constitution, and until two years after the adoption of the Fourteenth Amendment, Congress never authorized the naturalization of any but "free white persons." Acts of March 26, 1790, c. 3, and January 29, 1795, c. 20; 1 Stat. 103, 414; April 14, 1802, c. 28, and March 26, 1804, c. 47; 2 Stat. 153, 292; March 22, 1816, c. 32; 3 Stat. 258; May 26, 1824, c. 186, and May 24, 1828, c. 116; 4 Stat. 69, 310. By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that "nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." 16 Stat. 740. By the act of July 14, 1870, c. 254, § 7, for the first time, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." 16 Stat. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should "apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent;" and it was amended by the act of February

18, 1875, c. 80, by inserting the words above printed in brackets. Rev. Stat. (2d ed.) § 2169; 18 Stat. 318. Those statutes were held, by the Circuit Court of the United States in California, not to embrace Chinese aliens. *In re Ah Yup*, (1878) 5 Sawyer, 155. And by the act of May 6, 1882, c. 126, § 14, it was expressly enacted that "hereafter no state court or court of the United States shall admit Chinese to citizenship." 22 Stat. 61.

In *Fong Yue Ting* v. *United States*, (1893) above cited, this court said: "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws." 149 U. S. 716.

The Convention between the United States and China of 1894 provided that "Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens." 28 Stat. 1211. And it has since been decided, by the same judge who held this appellee to be a citizen of the United States by virtue of his birth therein, that a native of China of the Mongolian race could not be admitted to citizenship under the naturalization laws. *In re Gee Hop*, (1895) 71 Fed. Rep. 274.

The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case

of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." *Osborn* v. *United States Bank*, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain

classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. § 1999, reënacting act of July 27, 1868, c. 249, § 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents act-

ing for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, dissenting.

I cannot concur in the opinion and judgment of the court in this case.

The proposition is that a child born in this country of parents who were not citizens of the United States, and under the laws of their own country and of the United States could not become such — as was the fact from the beginning of the Government in respect of the class of aliens to which the parents in this instance belonged — is, from the moment of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment, any act of Congress to the contrary notwithstanding.

The argument is, that although the Constitution prior to that amendment nowhere attempted to define the words "citizens of the United States" and "natural-born citizen" as used therein, yet that it must be interpreted in the light of the English common law rule which made the place of birth the criterion of nationality; that that rule "was in force in all

the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established;" and "that before the enactment of the Civil Rights Act of 1866 and the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign Government, were native-born citizens of the United States."

Thus the Fourteenth Amendment is held to be merely declaratory except that it brings all persons, irrespective of color, within the scope of the alleged rule, and puts that rule beyond the control of the legislative power.

If the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since July 28, 1868, when the amendment was declared ratified, were, and are, aliens, unless they have, or shall on attaining majority, become citizens by naturalization *in* the United States; and no statutory provision to the contrary is of any force or effect. And children who are aliens by descent, but born on our soil, are exempted from the exercise of the power to exclude or to expel aliens, or any class of aliens, so often maintained by this court, an exemption apparently disregarded by the acts in respect of the exclusion of persons of Chinese descent.

The English common law rule, which it is insisted was in force after the Declaration of Independence, was that "every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject; save only the children of foreign ambassadors, (who were excepted because their fathers carried their own nationality with them,) or a child born to a foreigner during the hostile occupation of any part of the territories of England." Cockburn on Nationality, 7.

The tie which bound the child to the Crown was indissolu-

ble. The nationality of his parents had no bearing on his nationality. Though born during a temporary stay of a few days, the child was irretrievably a British subject. Hall on Foreign Jurisdiction, etc., § 15.

The rule was the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liegemen to their liege lord. It was not local and temporary as was the obedience to the laws owed by aliens within the dominions of the Crown, but permanent and indissoluble, and not to be cancelled by any change of time or place or circumstances.

And it is this rule, pure and simple, which it is asserted determined citizenship of the United States during the entire period prior to the passage of the act of April 9, 1866, and the ratification of the Fourteenth Amendment, and governed the meaning of the words "citizen of the United States" and "natural-born citizen" used in the Constitution as originally framed and adopted. I submit that no such rule obtained during the period referred to, and that those words bore no such construction; that the act of April 9, 1866, expressed the contrary rule; that the Fourteenth Amendment prescribed the same rule as the act; and that if that amendment bears the construction now put upon it, it imposed the English common law rule on this country for the first time and made it "absolute and unbending," just as Great Britain was being relieved from its inconveniences.

Obviously, where the Constitution deals with common law rights and uses common law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does international relations, and political as contradistinguished from civil status, international principles must be considered, and, unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction.

Nationality is essentially a political idea, and belongs to the sphere of public law. Hence Mr. Justice Story, in *Shanks* v. *Dupont*, 3 Pet. 242, 248, said that the incapacities of femes

covert, at common law, "do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations."

Twiss in his work on the Law of Nations says that "natural allegiance, or the obligation of perpetual obedience to the government of a country, wherein a man may happen to have been born, which he cannot forfeit, or cancel, or vary by any change of time, or place, or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law." Vol. 1, p. 231.

Before the Revolution, the views of the publicists had been thus put by Vattel: "The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country." Book I, c. 19, § 212. "The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage. . . . The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction."

And to the same effect are the modern writers, as for in-

stance, Bar, who says: "To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parents determines it — that of the father where children are lawful, and where they are bastards that of their mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent." Int. Law, § 31.

The framers of the Constitution were familiar with the distinctions between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin, and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

Manifestly, when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the Colonies, in derogation of the principles on which the new government was founded, was abrogated.

The States, for all national purposes embraced in the Constitution, became one, united under the same sovereign authority, and governed by the same laws, but they retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the General Government or restrained by the Constitution, and protection to life, liberty and property rested primarily with them. So far as the *jus commune*, or *folk-right*, relating to the rights of persons, was concerned, the Colonies regarded it as their birthright, and adopted such parts of it as they found applicable to their condition. *Van Ness* v. *Pacard*, 2 Pet. 137.

They became sovereign and independent States, and when the Republic was created each of the thirteen States had its own local usages, customs and common law, while in respect of the National Government there necessarily was no general, independent and separate common law of the United States, nor has there ever been. *Wheaton* v. *Peters*, 8 Pet. 591, 658.

As to the *jura coronæ*, including therein the obligation of allegiance, the extent to which these ever were applicable in this country depended on circumstances, and it would seem quite clear that the rule making locality of birth the criterion of citizenship because creating a permanent tie of allegiance, no more survived the American Revolution than the same rule survived the French Revolution.

Doubtless, before the latter event, in the progress of monarchical power, the rule which involved the principle of liege homage may have become the rule of Europe; but that idea never had any basis in the United States.

As Chief Justice Taney observed in *Fleming* v. *Page*, 9 How. 603, 618, though in a different connection: "It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."

And Mr. Lawrence, in his edition of Wheaton (Lawrence's Wheaton, p. 920), makes this comment: "There is, it is believed, as great a difference between the territorial allegiance claimed by an hereditary sovereign on feudal principles, and the personal right of citizenship participated in by all the members of the political community, according to American institutions, as there is between the authority and sovereignty of the Queen of England, and the power of the American President; and the inapplicability of English precedents is as clear in the one case as in the other. The same view, with particular application to naturalization, was early taken by

the American commentator on Blackstone. Tucker's Blackstone, Vol. 1, Pt. 2, Appx. p. 96."

Blackstone distinguished allegiance into two sorts, the one natural and perpetual; the other local and temporary. Natural allegiance, so-called, was allegiance resulting from birth in subjection to the Crown, and indelibility was an essential, vital and necessary characteristic.

The Royal Commission to inquire into the Laws of Naturalization and Allegiance was created May 21, 1868; and, in their report, the Commissioners, among other things, say: "The allegiance of a natural-born British subject is regarded by the Common Law as indelible. We are of opinion that this doctrine of the Common Law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of emigration."

However, the Commission by a majority declined to recommend the abandonment of the rule altogether though "clearly of opinion that it ought not to be, as it now is, absolute and unbending;" but recommended certain modifications which were carried out in subsequent legislation.

But from the Declaration of Independence to this day, the United States have rejected the doctrine of indissoluble allegiance and maintained the general right of expatriation, to be exercised in subordination to the public interests and subject to regulation.

As early as the act of January 29, 1795, c. 20, 1 Stat. 414, applicants for naturalization were required to take not simply an oath to support the Constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or State, and particularly to the prince or State of which they were before the citizens or subjects.

The statute 3 Jac. 1, c. 4, provided that promising obedience

to any other prince, State or potentate subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason; and in respect of the act of 1795 Lord Grenville wrote to our minister, Rufus King: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part." 2 Amer. St. Pap. 149. And see *Fitch* v. *Weber*, 6 Hare, 51.

Nevertheless, Congress has persisted from 1795 in rejecting the English rule and in requiring the alien, who would become a citizen of the United States, in taking on himself the ties binding him to our Government, to affirmatively sever the ties that bound him to any other.

The subject was examined at length in 1856, in an opinion given the Secretary of State by Attorney General Cushing, 8 Opins. Attys. Gen. 139, where the views of the writers on international law and those expressed in cases in the Federal and state courts are largely set forth, and the Attorney General says: "The doctrine of absolute and perpetual allegiance, the root of the denial of any right of emigration, is inadmissible in the United States. It was a matter involved in, and settled for us by the Revolution, which founded the American Union.

"Moreover, the right of expatriation, under fixed circumstances of time and of manner, being expressly asserted in the legislatures of several of the States, and confirmed by decisions of their courts, must be considered as thus made a part of the fundamental law of the United States."

Expatriation included not simply the leaving of one's native country, but the becoming naturalized in the country adopted as a future residence. The emigration which the United States encouraged was that of those who could become incorporate with its people; make its flag their own; and aid in the accomplishment of a common destiny; and it was obstruction to such emigration that made one of the charges against the Crown in the Declaration.

Ainslie v. *Martin*, 9 Mass. 454, 460, (1813); *Murray* v. *McCarty*, 2 Munf. 393, (1811); *Alsberry* v. *Hawkins*, 9 Dana, 177, (1839) are among the cases cited. In *Ainslie* v. *Martin*, the indelibility of allegiance according to the common law rule was maintained; while in *Murray* v. *McCarty* and *Alsberry* v. *Hawkins*, the right of expatriation was recognized as a practical and fundamental doctrine of America. There was no uniform rule so far as the States were severally concerned, and none such assumed in respect of the United States.

In 1859, Attorney General Black thus advised the President (9 Op. 356): "The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place — the general right, in one word, of expatriation, is incontestable. I know that the common law of England denies it; that the judicial decisions of that country are opposed to it; and that some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion. But all this is very far from settling the question. The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance."

In the opinion of the Attorney General, the United States, in recognizing the right of expatriation, declined, from the beginning, to accept the view that rested the obligation of the citizen on feudal principles, and proceeded on the law of nations, which was in direct conflict therewith.

And the correctness of this conclusion was specifically affirmed not many years after, when the right as the natural and inherent right of all people and fundamental in this country, was declared by Congress in the act of July 27, 1868, 15 Stat. 223, c. 249, carried forward into sections 1999 and 2000 of the Revised Statutes, in 1874.

It is beyond dispute that the most vital constituent of the English common law rule has always been rejected in respect of citizenship of the United States.

Whether it was also the rule at common law that the children of British subjects born abroad were themselves British subjects — nationality being attributed to parentage instead of locality — has been variously determined. If this were so, of course the statute of Edw. III was declaratory, as was the subsequent legislation. But if not, then such children were aliens, and the statute of 7 Anne and subsequent statutes must be regarded as in some sort acts of naturalization. On the other hand, it seems to me that the rule *partus sequitur patrem* has always applied to children of our citizens born abroad and that the acts of Congress on this subject are clearly declaratory, passed out of abundant caution to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere.

Section 1993 of the Revised Statutes provides that children so born "are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent non-residence, and this limitation was contained in all the acts from 1790 down. Section 2172 provides that such children shall "be considered as citizens thereof."

The language of the statute of 7 Anne, c. 5, is quite different in providing that, "the children of all natural-born subjects born out of the ligeance of Her Majesty, her heirs and successors, shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever."

In my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government. If not, and if the correct view is that they were aliens but collectively naturalized under the acts of Congress which recognized them as natural-born, then those born since the Fourteenth Amendment are not citizens at all,

unless they have become such by individual compliance with the general laws for the naturalization of aliens, because they are not naturalized "*in* the United States."

By the fifth clause of the first section of article two of the Constitution it is provided that: "No person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of the Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

In the convention it was, says Mr. Bancroft, "objected that no number of years could properly prepare a foreigner for that place; but as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions, on the seventh of September, it was unanimously settled that foreign-born residents of fourteen years who should be citizens at the time of the formation of the Constitution are eligible to the office of President." 2 Bancroft Hist. U. S. Const. 193.

Considering the circumstances surrounding the framing of the Constitution, I submit that it is unreasonable to conclude that "natural-born citizen" applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay or other race, were eligible to the Presidency, while children of our citizens, born abroad, were not.

By the second clause of the second section of article one it is provided that: "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State of which he shall be chosen;" and by the third clause of section three, that: "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

At that time the theory largely obtained, as stated by Mr. Justice Story, in his Commentaries on the Constitution, "that every citizen of a State is *ipso facto* a citizen of the United States." § 1693.

Mr. Justice Curtis, in *Dred Scott* v. *Sandford*, 19 How. 396, 576, expressed the opinion that under the Constitution of the United States "every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States." And he said: "Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the Government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts. *First:* The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. *Second:* Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. *Third:* What native-born persons should be citizens of the United States.

"The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and, in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty, by an examination of all such other clauses of the Constitution as touch this subject."

But in that case Mr. Chief Justice Taney said: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people' and every citizen is one of this people and a constituent member of this sovereignty. . . . In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of a citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal

Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character."

Plainly the distinction between citizenship of the United States and citizenship of a State thus pointed out, involved then, as now, the complete rights of the citizen internationally as contradistinguished from those of persons not citizens of the United States.

The English common law rule recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents. As allegiance sprang from the place of birth regardless of parentage and supervened at the moment of birth, the inquiry whether the parents were permanently or only temporarily within the realm was wholly immaterial. And it is settled in England that the question of domicil is entirely distinct from that of allegiance. The one relates to the civil, and the other to the political status. *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441, 457.

But a different view as to the effect of permanent abode on nationality has been expressed in this country.

In his work on Conflict of Laws, § 48, Mr. Justice Story, treating the subject as one of public law, said: "Persons who are born in a country are generally deemed to be citizens of that country. A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health or curiosity, or occasional business. It would be difficult, however, to assert that in the present state of public law such a qualification is universally established."

Undoubtedly all persons born in a country are presumptively citizens thereof, but the presumption is not irrebutable.

In his Lectures on Constitutional Law, p. 279, Mr. Justice Miller remarked: "If a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the coun-

try with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction."

And to the same effect are the rulings of Mr. Secretary Frelinghuysen in the matter of Hausding, and Mr. Secretary Bayard in the matter of Greisser.

Hausding was born in the United States, went to Europe, and, desiring to return, applied to the minister of the United States for a passport, which was refused on the ground that the applicant was born of Saxon subjects temporarily in the United States. Mr. Secretary Frelinghuysen wrote to Mr. Kasson, our minister: "You ask 'Can one born a foreign subject, but within the United States, make the option after his majority, and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by emigration and legal process of naturalization.' Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at the time within the jurisdiction of the tribunal of record which confers that character."

Greisser was born in the State of Ohio in 1867, his father being a German subject and domiciled in Germany, to which country the child returned. After quoting the act of 1866 and the Fourteenth Amendment, Mr. Secretary Bayard said: "Richard Greisser was no doubt born in the United States, but he was on his birth 'subject to a foreign power,' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute and the Constitution a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship." 2 Whart. Int. Dig. 399.

The Civil Rights Act became a law April 9, 1866 (14 Stat. 27, c. 31), and provided: "That all persons born in the United States and not subject to any foreign power, excluding Indians

not taxed, are hereby declared to be citizens of the United States." And this was reënacted June 22, 1874, in the Revised Statutes, section 1992.

The words "not subject to any foreign power" do not in themselves refer to mere territorial jurisdiction, for the persons referred to are persons born in the United States. All such persons are undoubtedly subject to the territorial jurisdiction of the United States, and yet the act concedes that nevertheless they may be subject to the political jurisdiction of a foreign government. In other words, by the terms of the act all persons born in the United States, and not owing allegiance to any foreign power, are citizens.

The allegiance of children so born is not the local allegiance arising from their parents merely being domiciled in the country, and it is single and not double allegiance. Indeed double allegiance in the sense of double nationality has no place in our law, and the existence of a man without a country is not recognized.

But it is argued that the words "and not subject to any foreign power" should be construed as excepting from the operation of the statute only the children of public ministers and of aliens born during hostile occupation.

Was there any necessity of excepting them? And if there were others described by the words, why should the language be construed to exclude them?

Whether the immunity of foreign ministers from local allegiance rests on the fiction of extra-territoriality or on the waiver of territorial jurisdiction by receiving them as representatives of other sovereignties, the result is the same.

They do not owe allegiance otherwise than to their own governments, and their children cannot be regarded as born within any other.

And this is true as to the children of aliens within territory in hostile occupation, who necessarily are not under the protection of, nor bound to render obedience to, the sovereign whose domains are invaded; but it is not pretended that the children of citizens of a government so situated would not become its citizens at their birth, as the permanent allegiance

of their parents would not be severed by the mere fact of the enemy's possession.

If the act of 1866 had not contained the words, "and not subject to any foreign power," the children neither of public ministers nor of aliens in territory in hostile occupation would have been included within its terms on any proper construction, for their birth would not have subjected them to ties of allegiance, whether local and temporary, or general and permanent.

There was no necessity as to them for the insertion of the words although they were embraced by them.

But there were others in respect of whom the exception was needed, namely, the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words were inserted.

Two months after the statute was enacted, on June 16, 1866, the Fourteenth Amendment was proposed, and declared ratified July 28, 1868. The first clause of the first section reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The act was passed and the amendment proposed by the same Congress, and it is not open to reasonable doubt that the words "subject to the jurisdiction thereof" in the amendment were used as synonymous with the words "and not subject to any foreign power" of the act.

The jurists and statesmen referred to in the majority opinion, notably Senators Trumbull and Reverdy Johnson, concurred in that view, Senator Trumbull saying: "What do we mean by 'subject to the jurisdiction of the United States'? Not owing allegiance to anybody else; that is what it means." And Senator Johnson: "Now, all that this amendment pro-

vides is that all persons born within the United States and not subject to some foreign power — for that no doubt is the meaning of the committee who have brought the matter before us — shall be considered as citizens of the United States." Cong. Globe, 1st Sess. 39th Cong., 2893 *et seq.*

This was distinctly so ruled in *Elk* v. *Wilkins*, 112 U. S. 94; and no reason is perceived why the words were used if they apply only to that obedience which all persons, not possessing immunity therefrom, must pay the laws of the country in which they happen to be.

Dr. Wharton says that the words "subject to the jurisdiction" must be construed in the sense which international law attributes to them, but that the children of our citizens born abroad, and of foreigners born in the United States have the right on arriving at full age to elect one allegiance and repudiate the other. Whart. Conflict of Laws, §§ 10, 11, 12.

The Constitution and statutes do not contemplate double allegiance, and how can such election be determined? By section 1993 of the Revised Statutes, the citizenship of the children of our citizens born abroad may be terminated in that generation by their persistent abandonment of their country; while by sections 2167 and 2168, special provision is made for the naturalization of alien minor residents, on attaining majority, by dispensing with the previous declaration of intention and allowing three years of minority on the five years' residence required; and also for the naturalization of children of aliens whose parents have died after making declaration of intention. By section 2172 children of naturalized citizens are to be considered citizens.

While then the naturalization of the father carries with it that of his minor children, and his declaration of intention relieves them from the preliminary steps for naturalization, and minors are allowed to count part of the residence of their minority on the whole term required and are relieved from the declaration of intention, the statutes make no provision for formal declaration of election by children born in this country of alien parents on attaining majority.

The point, however, before us, is whether permanent alle-

giance is imposed at birth without regard to circumstances — permanent until thrown off and another allegiance acquired by formal acts — not local and determined by a mere change of domicil.

The Fourteenth Amendment came before the court in *The Slaughterhouse Cases*, 16 Wall. 36, 73, at December term, 1872 (the cases having been brought up by writ of error in May, 1870, 10 Wall. 273), and it was held that the first clause was intended to define citizenship of the United States and citizenship of a State, which definitions recognized the distinction between the one and the other; that the privileges and immunities of citizens of the States embrace generally those fundamental civil rights for the security of which organized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of Congress by the second clause.

And Mr. Justice Miller, delivering the opinion of the court, in analyzing the first clause, observed that "the phrase 'subject to the jurisdiction thereof' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign States, born within the United States."

That eminent judge did not have in mind the distinction between persons charged with diplomatic functions and those who were not, but was well aware that consuls are usually the citizens or subjects of the foreign States from which they come, and that, indeed, the appointment of natives of the places where the consular service is required, though permissible, has been pronounced objectionable in principle.

His view was that the children of "citizens or subjects of foreign States," owing permanent allegiance elsewhere and only local obedience here, are not otherwise subject to the jurisdiction of the United States than are their parents.

Mr. Justice Field dissented from the judgment of the court, and subsequently in the case of *Look Tin Sing*, 10 Sawyer, 353, in the Circuit Court for the District of California, held children born of Chinese parents in the United States to be citizens, and the cases subsequently decided in the Ninth Circuit followed that ruling. Hence the conclusion in this case which the able opinion of the District Judge shows might well have been otherwise.

I do not insist that, although what was said was deemed essential to the argument and a necessary part of it, the point was definitively disposed of in the *Slaughterhouse Cases*, particularly as Chief Justice Waite in *Minor* v. *Happersett*, 21 Wall. 162, 167, remarked that there were doubts, which for the purposes of the case then in hand it was not necessary to solve. But that solution is furnished in *Elk* v. *Wilkins*, 112 U. S. 94, 101, where the subject received great consideration and it was said:

"By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, *Scott* v. *Sandford*, 19 How. 393; and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and *owing no allegiance to any alien power*, should be citizens of the United States, and of the State in which they reside. *Slaughterhouse Cases*, 16 Wall. 36, 73; *Strauder* v. *West Virginia*, 100 U. S. 303, 306.

"This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely subject to their political jurisdiction*, and *owing them direct and immediate allegiance*. And the words relate to the time of birth in the one case, as they do

to the time of naturalization in the other. *Persons not thus subject to the jurisdiction of the United States at the time of birth* cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

To be "completely subject" to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

Now I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.

Generally speaking, I understand the subjects of the Emperor of China — that ancient Empire, with its history of thousands of years and its unbroken continuity in belief, traditions and government, in spite of revolutions and changes of dynasty — to be bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance, and their abettors; and, in effect, held the relatives at home of Chinese in foreign lands as hostages for their loyalty.[1] And

[1] The fundamental laws of China have remained practically unchanged since the second century before Christ. The statutes have from time to time undergone modifications, but there does not seem to be any English or French translation of the Chinese Penal Code later than that by Staunton, published in 1810. That code provided: "All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded; and in the punishment of this offence, no distinction shall be made between principals and accessories. The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of State. . . . The parents, grandparents, brothers and grand-

whatever concession may have been made by treaty in the direction of admitting the right of expatriation in some sense, they seem in the United States to have remained pilgrims and sojourners as all their fathers were. 149 U. S. 717. At all events, they have never been allowed by our laws to acquire our nationality, and, except in sporadic instances, do not appear ever to have desired to do so.

The Fourteenth Amendment was not designed to accord citizenship to persons so situated and to cut off the legislative power from dealing with the subject.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of a country, is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. 149 U. S. 707.

But can the persons expelled be subjected to "cruel and unusual punishments" in the process of expulsion, as would be the case if children born to them in this country were separated from them on their departure, because citizens of the United States? Was it intended by this amendment to tear up parental relations by the roots?

The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." Was it intended thereby that children of aliens should, by virtue of being born in the

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children of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2000 *lee*.

"All those who purposely conceal and connive at the perpetration of this crime, shall be strangled. Those who inform against, and bring to justice, criminals of this description, shall be rewarded with the whole of their property.

"Those who are privy to the perpetration of this crime, and yet omit to give any notice or information thereof to the magistrates, shall be punished with 100 blows and banished perpetually to the distance of 3000 *lee*.

"If the crime is contrived, but not executed, the principal shall be strangled, and all the accessories shall, each of them, be punished with 100 blows, and perpetual banishment to the distance of 3000 *lee*. . . ." Staunton's Penal Code of China, 272, § 255.

United States, be entitled on attaining majority to vote irrespective of the treaties and laws of the United States in regard to such aliens?

In providing that persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens, the Fourteenth Amendment undoubtedly had particular reference to securing citizenship to the members of the colored race, whose servile status had been obliterated by the Thirteenth Amendment, and who had been born in the United States, but were not and never had been subject to any foreign power. They were not aliens, (and even if they could be so regarded, this operated as a collective naturalization,) and their political status could not be affected by any change of the laws for the naturalization of individuals.

Nobody can deny that the question of citizenship in a nation is of the most vital importance. It is a precious heritage, as well as an inestimable acquisition; and I cannot think that any safeguard surrounding it was intended to be thrown down by the amendment.

In suggesting some of the privileges and immunities of national citizenship, in the *Slaughterhouse Cases* Mr. Justice Miller said: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States."

Mr. Hall says in his work on Foreign Jurisdiction, etc., §§ 2, 5, the principle is that "the legal relations by which a person is encompassed in his country of birth and residence cannot be wholly put aside when he goes abroad for a time; many of the acts which he may do outside his native state have inevitable consequences within it. He may for many purposes be temporarily under the control of another sovereign than his own, and he may be bound to yield to a foreign government a large measure of obedience; but his own State still possesses a right to his allegiance; he is still an integral part of the national community. A State therefore can enact laws,

enjoining or forbidding acts, and defining legal relations, which apply to its subjects abroad in common with those within its dominions. It can declare under what conditions it will regard as valid, acts done in foreign countries, which profess to have legal effect; it can visit others with penalties; it can estimate circumstances and facts as it chooses." On the other hand, the "duty of protection is correlative to the rights of a sovereign over his subjects; the maintenance of a bond between a State and its subjects while they are abroad implies that the former must watch over and protect them within the due limit of the rights of other States. . . . It enables governments to exact reparation for oppression from which their subjects have suffered, or for injuries done to them otherwise than by process of law; and it gives the means of guarding them against the effect of unreasonable laws, of laws totally out of harmony with the nature or degree of civilization by which a foreign power affects to be characterized, and finally of an administration of the laws had beyond a certain point. When in these directions a State grossly fails in its duties; when it is either incapable of ruling, or rules with patent injustice, the right of protection emerges in the form of diplomatic remonstrance, and in extreme cases of ulterior measures. It provides a material sanction for rights; it does not offer a theoretic foundation. It does not act within a foreign territory with the consent of the sovereign; it acts against him contentiously from without."

The privileges or immunities which, by the second clause of the amendment, the States are forbidden to abridge are the privileges or immunities pertaining to citizenship of the United States, but that clause also places an inhibition on the States from depriving any person of life, liberty or property, and from denying "to any person within its jurisdiction, the equal protection of the laws," that is, of its own laws — the laws to which its own citizens are subjected.

The jurisdiction of the State is necessarily local, and the limitation relates to rights primarily secured by the States and not by the United States. Jurisdiction as applied to the General Government embraces international relations; as ap-

plied to the State, it refers simply to its power over persons and things within its particular limits.

These considerations lead to the conclusion that the rule in respect of citizenship of the United States prior to the Fourteenth Amendment differed from the English common law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary, and birth during permanent, residence. If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely temporary, either in fact, or in point of law.

Did the Fourteenth Amendment impose the original English common law rule as a rigid rule on this country?

Did the amendment operate to abridge the treaty-making power, or the power to establish an uniform rule of naturalization?

I insist that it cannot be maintained that this Government is unable through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein.

A treaty couched in those precise terms would not be incompatible with the Fourteenth Amendment, unless it be held that that amendment has abridged the treaty-making power.

Nor would a naturalization law excepting persons of a certain race and their children be invalid, unless the amendment has abridged the power of naturalization. This cannot apply to our colored fellow-citizens, who never were aliens — were never beyond the jurisdiction of the United States.

"Born in the United States, and subject to the jurisdiction thereof," and "naturalized in the United States, and subject to the jurisdiction thereof," mean born or naturalized under such circumstances as to be completely subject to that jurisdiction, that is, as completely as citizens of the United States,

who are of course not subject to any foreign power, and can of right claim the exercise of the power of the United States on their behalf wherever they may be. When, then, children are born in the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized, such children are not born so subject to the jurisdiction as to become citizens, and entitled on that ground to the interposition of our Government, if they happen to be found in the country of their parents' origin and allegiance, or any other.

Turning to the treaty between the United States and China, concluded July 28, 1868, the ratifications of which were exchanged November 23, 1869, and the proclamation made February 5, 1870, we find that, by its sixth article, it was provided: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect of travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization on the citizens of the United States in China, nor upon the subjects of China in the United States."

It is true that in the fifth article, the inherent right of man to change his home or allegiance was recognized, as well as "the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of traffic, or as permanent residents."

All this, however, had reference to an entirely voluntary emigration for these purposes, and did not involve an admission of change of allegiance unless both countries assented, but the contrary according to the sixth article.

By the convention of March 17, 1894, it was agreed "that Chinese laborers or Chinese of any other class, either perma-

nently or temporarily residing within the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens."

These treaties show that neither Government desired such change nor assented thereto. Indeed, if the naturalization laws of the United States had provided for the naturalization of Chinese persons, China manifestly would not have been obliged to recognize that her subjects had changed their allegiance thereby. But our laws do not so provide, and, on the contrary, are in entire harmony with the treaties.

I think it follows that the children of Chinese born in this country do not, *ipso facto*, become citizens of the United States unless the Fourteenth Amendment overrides both treaty and statute. Does it bear that construction; or rather is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?

But the Chinese under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Wharton Confl. Laws, § 12.

In *Fong Yue Ting* v. *United States*, 149 U. S. 698, 717, it was said in respect of the treaty of 1868: "After some years' experience under that treaty, the Government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests; and therefore requested and obtained from China a modification of the treaty."

It is not to be admitted that the children of persons so situated become citizens by the accident of birth. On the con-

trary, I am of opinion that the President and Senate by treaty, and the Congress by naturalization, have the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this country under such consent, in spite of treaty and statute.

In other words, the Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens.

Tested by this rule, Wong Kim Ark never became and is not a citizen of the United States, and the order of the District Court should be reversed.

I am authorized to say that Mr. Justice Harlan concurs in this dissent.

Mr. Justice McKenna, not having been a member of the court when this case was argued, took no part in the decision.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 220. SWENSON *v.* SAGE, ASSIGNEE. Error to the Supreme Court of the State of Minnesota. Submitted December 17, 1897. Decided January 10, 1898. *Per Curiam.* Dismissed with costs, with directions that the motion to dismiss and the affidavits and depositions filed thereon in this court be transmitted to the Supreme Court of Minnesota for such consideration and action as to that court may seem fit. *Mr. Moses E. Clapp* for the plaintiff in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* for the defendant in error. *Mr. Attorney General* for the United States.

No. 405. UNITED STATES AND COMANCHE INDIANS *v.* KEMP. Appeal from the Court of Claims. Argued December 10 and 13, 1897. Decided January 10, 1898. Judgment affirmed by a divided court. *Mr. Attorney General*, *Mr. Assistant Attorney General Thompson* and *Mr. Charles H. Russell* for appellants. *Mr. William B. King* and *Mr. Silas Hare* for appellee.

No. 165. CHAPPELL *v.* STEWART. Error to the Court of Appeals of the State of Maryland. Argued and submitted January 4, 1898. Decided January 10, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Sayward* v. *Denny*, 158 U. S. 180, and numerous cases therein cited. *Mr. Thomas C. Chappell* for plaintiff in error. *Mr. David Stewart* for defendant in error.

Decisions announced without Opinions.

No. 378. FENWICK HALL COMPANY *v.* TOWN OF OLD SAYBROOK. Error to the Supreme Court of Errors of the State of Connecticut. Motions to dismiss or affirm submitted January 3, 1898. Decided January 10, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Castillo* v. *McConnico*, 168 U. S. 674; *Eustis* v. *Bolles*, 150 U. S. 361; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648. *Mr. Lewis E. Stanton* for motions to dismiss or affirm. *Mr. M. W. Seymour* opposing.

No. 440. HAMMOND *v.* HORTON. Error to the Supreme Court of the State of Missouri. Motions to dismiss or affirm submitted November 15, 1897. Decided January 10, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Hammond* v. *Johnston*, 142 U. S. 73; *Hammond* v. *Connecticut Mutual Life Insurance Company*, 150 U. S. 633; *Romie* v. *Casanova*, 91 U. S. 379; also see *Hammond* v. *Horton*, 37 S. W. Reporter, 825; *Hammond* v. *Johnston*, 93 Mo. 198; *Hammond* v. *Gordon*, Ib., 223; *Block* v. *Morrison*, 112 Mo. 343. *Mr. John B. Henderson* for motions to dismiss or affirm. *Mr. Henry H. Denison* opposing.

No. 510. MCDONNELL *v.* JORDAN. Error to the Circuit Court of the United States for the Northern District of Alabama. Motion to dismiss submitted December 20, 1897. Decided January 10, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Bender* v. *Pennsylvania Company*, 148 U. S. 502, and cases cited. *Mr. David D. Shelby*, *Mr. Richard W. Walker* and *Mr. Richard R. McMahon* for motion to dismiss. *Mr. Laurence Cooper* and *Mr. William Richardson* opposing.

No. 327. WARREN *v.* CHANDOS. Error to the Supreme Court of the State of California. Motions to dismiss or affirm submitted February 21, 1898. Decided February 28,

1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63; *Castillo* v. *McConnico*, 168 U. S. 674, 679. *Mr. Horace G. Pratt* for motions to dismiss or affirm. *Mr. J. C. Bates* opposing.

No. 509. Darragh *v.* H. Wetter Manufacturing Company. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted February 21, 1898. Decided February 28, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Carey* v. *Houston and Texas Central Railway Company*, 161 U. S. 115. *Mr. U. M. Rose* and *Mr. G. B. Rose* for motion to dismiss. *Mr. John McClure* opposing.

No. 546. Meyer *v.* Cox. Error to the Superior Court of Milwaukee County, State of Wisconsin. Motion to dismiss submitted March 21, 1898. Decided March 28, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Werner* v. *Charleston*, 151 U. S. 360, and *Union Mutual Life Insurance Company* v. *Kirchoff*, 160 U. S. 374. *Mr. Howard Morris* for motion to dismiss. *Mr. Rublee A. Cole* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 536. Carroll, Trustee, *v.* Goldschmidt. Second Circuit. Denied January 10, 1898. *Mr. Arthur v. Briesen* for petitioner. *Mr. Edwin H. Brown* opposing.

No. 554. Post *v.* Burnham. Third Circuit. Denied January 10, 1898. *Mr. Joseph S. Clark* and *Mr. Richard C. Dale* for petitioners.

No. 555. Fulton *v.* Fletcher. Court of Appeals of the

District of Columbia. Denied January 10, 1898. *Mr. D. W. Baker* for petitioner.

No. 525. Washburn & Moen Manufacturing Company *v.* Reliance Marine Insurance Company, Limited. First Circuit. Granted January 17, 1898. *Mr. Eugene P. Carver* and *Mr. E. E. Blodgett* for petitioner. *Mr. Frederic J. Stimson* opposing.

No. 535. Bosworth, Receiver, *v.* Terminal Railroad Association of St. Louis. Seventh Circuit. Granted January 17, 1898. *Mr. Bluford Wilson* and *Mr. P. B. Warren* for petitioner. *Mr. M. F. Watts* and *Mr. S. P. Wheeler* opposing.

No. 562. Smiley *v.* Barker. Eighth Circuit. Denied January 17, 1898. *Mr. Frederic H. Bacon* for petitioner. *Mr. T. F. Burke* and *Mr. B. F. Fowler* opposing.

No. 567. Board of Supervisors of the County of Presque Isle *v.* Ashley. Sixth Circuit. Denied January 31, 1898. *Mr. Henry M. Duffield* for petitioner. *Mr. C. E. Warner* opposing.

No. 561. Guarantee Company of North America *v.* Mechanics Savings Bank and Trust Company. Sixth Circuit. Granted February 28, 1898. *Mr. William L. Granbery* and *Mr. Albert D. Marks* for petitioner.

No. 579. De La Vergne Refrigerating Machine Co. *v.* German Savings Institution. Eighth Circuit. Granted February 28, 1898. *Mr. Charles H. Aldrich* and *Mr. F. W. Lehmann* for petitioner. *Mr. Eleneious Smith* opposing.

Decisions announced without Opinions.

No. 584. MORAN *v.* DILLINGHAM. Fifth Circuit. Granted February 28, 1898. *Mr. L. W. Campbell* for petitioner.

No. 587. DODGE *v.* STRASBURGER. Court of Appeals of the District of Columbia. Denied February 28, 1898. *Mr. Chapin Brown*, *Mr. Henry P. Blair* and *Mr. Arthur H. O'Connor* for petitioner. *Mr. Leon Tobriner* and *Mr. I. W. Nordlinger* opposing.

No. 588. BUCKSTAFF *v.* RUSSELL & Co. Eighth Circuit. Denied February 28, 1898. *Mr. Charles O. Whedon*, *Mr. John H. Ames* and *Mr. A. S. Tibbets* for petitioner.

No. 590. MAGRUDER *v.* BELT. Court of Appeals of the District of Columbia. Denied February 28, 1898. *Mr. H. Randall Webb* and *Mr. J. J. Waters* for petitioner. *Mr. F. H. Mackey* opposing.

No. 580. POPE, RECEIVER, *v.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD CO. Seventh Circuit. Denied March 7, 1898. *Mr. John S. Miller* and *Mr. W. P. Fishback* for petitioner. *Mr. G. W. Kretzinger* and *Mr. E. C. Field* opposing.

No. 603. NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST CO. *v.* GRAY. Court of Appeals of the District of Columbia. Denied March 21, 1898. *Mr. R. Ross Perry* for petitioner. *Mr. Samuel Maddox* opposing.

No. 609. HARDING *v.* MINNEAPOLIS NORTHERN RAILWAY COMPANY. Eighth Circuit. Denied March 21, 1898. *Mr. M. H. Boutelle* for petitioner. *Mr. S. S. Burdett* opposing.

Decisions announced without Opinions.

No. 602. DODGE *v.* MENASHA WOOD SPLIT PULLEY COMPANY. Seventh Circuit. Denied March 28, 1898. *Mr. Lysander Hill* for petitioner. *Mr. William F. Vilas* opposing. *Mr. Edward Rector* filed a brief, in opposition to the petition, in behalf of certain outside interested parties, by special leave of the court.

APPENDIX.

I.

ASSIGNMENTS TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

ORDER.

There having been an Associate Justice of this Court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.
For the Second Circuit, RUFUS W. PECKHAM, Associate Justice.
For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.
For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth Circuit, EDWARD D. WHITE, Associate Justice.
For the Sixth Circuit, JOHN M. HARLAN, Associate Justice.
For the Seventh Circuit, HENRY B. BROWN, Associate Justice.
For the Eighth Circuit, DAVID J. BREWER, Associate Justice.
For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

February 21, 1898.

II.

COSTS IN CIRCUIT COURTS OF APPEALS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

ORDER.

Ordered, That the table of fees and costs in the Circuit Courts of Appeals, established in pursuance of the act of Congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, .15," by substituting twenty-five cents in place of fifteen cents, for each printed page, so that said order as amended shall read as follows:

Ordered, In pursuance of the act of Congress of February 19, 1897, 29 Stat. 536, c. 263, that the following table of fees and costs in the Circuit Courts of Appeals be, and the same is hereby, established, to take effect on the first day of March, A.D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record	$5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order, or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00
Affixing a certificate and a seal to any paper	1 00

Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorney's docket fee	20 00

February 28, 1898.

INDEX.

ABATEMENT.

A suit to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner, and cannot be revived so as to bring in his successor, although the latter gives his consent. The act of Maryland of 1785, c. 80, is not applicable to such a case. *United States, ex rel. Bernardin* v. *Butterworth*, 600.

CASES AFFIRMED AND FOLLOWED.

See FINDING OF FACTS;
JURISDICTION, A, 6;
LIMITATION, STATUTES OF.

CIRCUIT COURTS OF THE UNITED STATES.

1. In December, 1894, when the proceedings took place which are questioned in this case, there were not two judicial districts in the State of South Carolina, to the territorial limits of each of which the jurisdiction of the Circuit Court of the United States was confined. *Barrett* v. *United States*, No. 1, 218.
2. The legislation on this subject from the commencement of the Government reviewed. *Ib.*

CITIZENSHIP.

See CONSTITUTIONAL LAW, 15.

CIVIL WAR, ITS EFFECT UPON CONTRACTS.

See MARRIED WOMAN, 2, 3.

CLAIMS AGAINST THE UNITED STATES.

1. The act of March 3, 1891, c. 540, providing for the payment to the city of Louisville of the amount found under the act of June 16, 1890, c. 424, was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by

that act were not discretionary, and were limited to the clerical function of making payment as directed by the act. *United States* v. *Louisville*, 249.

2. By the act of February 25, 1893, c. 165, making provision for the payment of further and other claims of the same character, Congress did not intend to in anywise open the transactions which had been closed by the payment of the moneys directed in the act of 1891. *Ib.*
3. Article 420 of the Treasury Regulations, providing that night watchmen shall be divided into two watches as nearly as possible, both watches to perform duty every night, and empowering the surveyor of the port to make such changes in the division of the watches as he may deem expedient, and to appoint the hours of duty for different watches; and that when it is necessary to assign a night watchman to a vessel, or to any other all night charge, the night watchman so assigned must remain on the vessel or on his charge until relieved, and will be excused from performing duty the following night, does not authorize the payment of an extra day's work to a night watchman so employed during the whole night, and again put upon duty in the following night. *United States* v. *Garlinger*, 316.
4. It is not possible for the Secretary of the Treasury, by passing regulations, to divide a day's service into parts, and to attach to each part the pay for a full day's work. *Ib.*
5. Where payments for work done in Government employ are made frequently and through a considerable period of time, and are received without objection or protest, and where there is no pretence of fraud or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were made in full; and such a presumption is much strengthened if the employé waits two years after the expiration of his service before making any demand for further compensation. *Ib.*

CONSTITUTIONAL LAW.

1. A statute of a State, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the State under a contract for interstate transportation, contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce. *Chicago, Milwaukee & St. Paul Railway Co.* v. *Solan*, 133.
2. It is the rule of courts, both state and Federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court. *Baker* v. *Grice*, 284.
3. The provisions in the act of March 30, 1896, c. 72, of Utah, providing that "The period of employment of workingmen in all underground

mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger;" that "The period of employment of workingmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger;" and that "Any person, body corporate, agent, manager or employer who shall violate any of the provisions of sections one and two of this act shall be deemed guilty of a misdemeanor," are a valid exercise of the police power of the State, and do not violate the provisions of the Fourteenth Amendment of the Constitution of the United States by abridging the privileges or immunities of its citizens, or by depriving them of their property, or by denying to them the equal protection of the laws. *Holden* v. *Hardy*, 366.

4. The cases arising under the Fourteenth Amendment are examined in detail, and are held to demonstrate that, in passing upon the validity of state legislation under it, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some States methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals or classes had proved detrimental to their interests; and other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection: but this power of change is limited by the fundamental principles laid down in the Constitution, to which each member of the Union is bound to accede as a condition of its admission as a State. *Ib.*

5. The statute of Oregon of October 26, 1882, taxing mortgages of lands in that State to the mortgagees in the county where the land lies, does not, as applied to mortgages owned by citizens of other States and in their possession outside of the State of Oregon, contravene the Fourteenth Amendment of the Constitution of the United States. *Savings & Loan Society* v. *Multnomah County*, 421.

6. A suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of the Eleventh Amendment. *Smyth* v. *Ames*, 466.

7. It is settled that: (1) A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; (2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earn-

ing such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment to the Constitution of the United States; (3) While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. *Ib.*

8. The grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that State has reference to "reasonable" maximum rates, as the words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness; and as it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, and that the judiciary may not, when its jurisdiction is properly invoked, protect those rights. *Ib.*
9. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions; as the duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. *Ib.*
10. The effect of the Nebraska statute of 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act," is to deprive each of the companies involved in these suits of the just compensation secured to them by the Constitution of the United States, and therefore the decree below restraining its enforcement was correct. *Ib.*
11. If the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute. *Ib.*
12. Chapter 320 of the Laws of North Carolina of 1891 was a valid law, and the action of the Governor of the State under it in suspending the plaintiff in error as railroad commissioner, appointed under it,

was, as construed by the Supreme Court of that State, a valid exercise of the power conferred upon the Governor by that act, and was due process of law, within the meaning of the Constitution. *Wilson* v. *North Carolina*, 586.

13. The Federal question which is attempted to be raised in this case is unfounded in substance, and does not really exist. *Ib.*
14. The judgment of the state court in this case operated of itself to remove the plaintiff in error from the office of railroad commissioner, and there is no foundation in the evidence for the allegation that his successor knew of the filing of the supersedeas bond when he took possession of the office, or was guilty of contempt in doing so. *Ib.*
15. A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *United States* v. *Wong Kim Ark*, 649.

See DISEASED CATTLE, INTERSTATE TRANSPORTATION OF; EMINENT DOMAIN; INTERSTATE COMMERCE.

CONSULS AND VICE-CONSULS.

1. Congress has power, under the Constitution, to vest in the President authority to appoint a subordinate officer, called a vice-consul, to be temporarily charged with the duty of performing the functions of the consular office. *United States* v. *Eaton*, 331.
2. The Revised Statutes confer upon the President full power, in his discretion, to appoint vice-consuls, and fix their compensation, to be paid out of the allowance made by law for the principal consular officer in whose place such appointment shall be made. *Ib.*
3. The facts that the minister resident and consul-general at Siam had obtained a leave of absence from the President, and was ill and unable to discharge his duties, and that the vice-consul previously appointed had not qualified, and was absent from Siam, created a temporary vacancy and justified an emergency appointment to fill it. *Ib.*
4. The accounting officers of the Government did not err in treating the salary fixed by law for the joint service of minister resident and consul-general at Siam as indivisible. *Ib.*
5. There was no error in allowing Eaton compensation for a period during which he performed the duties of the office before his official bond was received and approved. *Ib.*

6. A consular officer must account to the Government for fees received by him for administering upon the estates of citizens of the United States, dying within the limits of his jurisdiction. *Ib.*

CONTRACT.

See MARRIED WOMAN;
TAX AND TAXATION.

CORPORATION.

See TAX AND TAXATION.

CUSTOMS DUTIES.

1. In proceedings brought before the board of general appraisers by protests under § 14 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, to review decisions of a collector of customs upon entries, the board has jurisdiction to inquire into and impeach the dutiable valuation reported to the collector by the appraiser upon which the collector assessed the rate of duty to which the merchandise was subject. *United States* v. *Passavant*, 16.
2. The "German duty," which is a tax imposed by the German Government on merchandise when sold by manufacturers for consumption or sale in the markets of Germany, but is remitted by that Government when the goods are purchased in bond or consigned while in bond for exportation to a foreign country, was lawfully included by the appraiser in his estimate of the dutiable value of the importation in question in this case. *Ib.*
3. In paragraph 297 of the tariff act of August 27, 1894, c. 349, 28 Stat. 509, providing that "the reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, eighteen hundred and ninety-five," the words "manufactures of wool" had relation to the raw material out of which the articles were made, and, as the material of worsted dress goods was wool, such goods fell within the paragraph. *United States* v. *Klumpp*, 209.

DAMAGES.

This was an action to recover damages for injury done to certain land in the city of Washington by reason of the illegal occupation by a railroad company of the street on which the land abutted. The land constituted original lot one in square 630, and long prior to the action it had been subdivided between the owners, and a plat thereof recorded. In the partition it was provided that the alleys marked on the plat were exclusively for the sole benefit and use of the sub-lots, should be private and under the control of all owners of property thereon, and that,

except as provided, could not be closed unless by common consent. Before the action was brought the plaintiff had become the owner of the fee of all the sub-lots constituting original lot one. *Held*, (1) If the plaintiff did not own all of original lot one, she was entitled to recover damages for any injury done to such part of it as she did own; (2) The plaintiff, being the owner of all the sub-lots, was entitled, under the deed, to close the alleys altogether; and therefore it was error to instruct the jury that she could not have conveyed a good title to the land marked on the plat as alleys; (3) The plaintiff was entitled to recover such damages as were equivalent to or would fairly compensate her for the injury done to her land by the defendant. Absolute certainty as to damages in such cases is impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. What the plaintiff was entitled to was reasonable compensation for the wrongs done to her. *Hetzel* v. *Baltimore & Ohio Railroad*, 26.

DISEASED CATTLE, INTERSTATE TRANSPORTATION OF.

1. The act of Kansas, 1891, c. 201, as amended and as it appears in 2 Gen. Stats. Kansas, 1897, 761, c. 139, relating to bringing into the State cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of the State, and providing for the trial of civil actions brought to recover damages therefor, is not overridden by the act of Congress of May 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, nor by the act of March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating money to carry out the provisions of the above act, nor by section 5258 of the Revised Statutes, authorizing every railroad company in the United States, operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, Government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination; as Congress has not assumed to give to any corporation, company or person, the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases. *Missouri Kansas & Texas Railway Co.* v. *Haber*, 613.
2. Whether a corporation transporting, or the person causing to be transported from one State to another, cattle of the class specified in the Kansas statute should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the act of May 29, 1884, c. 60, 23 Stat. 31, known as the Animal Industry Act, did not make any provision. *Ib.*

3. The provision in the Kansas act imposing such civil liability is in aid of the objects which Congress had in view when it passed the Animal Industry Act, and it was passed in execution of a power with which the State did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits, and is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the States. *Ib.*

4. A state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, without regard to the source of power whence the state legislature derived its enactment. *Ib.*

5. Neither corporations nor individuals are entitled by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease to domestic cattle. *Ib.*

6. Although the powers of a State must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives any one the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle. *Ib.*

7. Prior cases reviewed and held to proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belongs primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes. *Ib.*

8. An act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one State to another State, will not authorize a railroad company to carry into a State cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such State. *Ib.*

9. If the carrier takes diseased cattle into a State, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the State that does not go beyond the necessities of the case and burden or prohibit interstate commerce; and a statute prescribing as a rule of civil conduct that a person or corpora-

tion shall not bring into the State cattle that are known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes. *Ib.*

10. Congress could authorize the carrying of such cattle from one State into another State, and by legislation protect the carrier against all suits for damages arising therefrom; but it has not done so, nor has it enacted any statute that prevents a State from prescribing such a rule of civil conduct as that found in the statute of Kansas. *Ib.*

DISTRICT OF COLUMBIA.

1. A summary process to recover possession of land, under the landlord and tenant act of the District of Columbia, (Rev. Stat. D. C. c. 19,) can be maintained only when the conventional relation of landlord and tenant exists or has existed between the parties; and cannot be maintained by a mortgagee against his mortgagor in possession after breach of condition of the mortgage, although the mortgage contains a provision that until default the mortgagor shall be permitted to possess and enjoy the premises, and to take and use the rents and profits thereof, "in the same manner, to the same extent, and with the same effect, as if this deed had not been made." *Willis* v. *Eastern Trust & Banking Co.*, 295.

2. In the District of Columbia it is the rule that when, upon a purchase of real estate the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust arises, which may be shown by parol proof; and the grantee in the conveyance will be held, on such evidence, as trustee for the party from whom the consideration proceeds, whose rights will be enforced as against those claiming under the record title. *Smithsonian Institution* v. *Meech*, 398.

3. This case comes within that rule, the evidence being clear and satisfactory that the oral agreement made between Mr. and Mrs. Avery, at the time when the property was conveyed to the latter, was made as asserted by the Smithsonian Institution. *Ib.*

4. Such being established as the fact, it is the duty of a court of equity to recognize that agreement as against the legal effect of the conveyance to Mrs. Avery. *Ib.*

5. The presumption that when the consideration for a deed is paid by a husband, and the conveyance is made to his wife, the conveyance is intended for her benefit, is one of fact which can be overthrown by proof of the real intent of the parties. *Ib.*

6. When a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, no legatee can, without compliance with that condition, receive

his bounty, or be put in a position to use it in an effort to thwart his expressed purposes. *Ib.*

EJECTMENT.

See JURISDICTION, C, 1.

EMINENT DOMAIN.

1. The settled rule of this court in cases for the determination of the amount of damages to be paid for private property condemned and taken for public use, is that it accepts the construction placed by the Supreme Court of the State upon its own constitution and statutes. *Backus* v. *Fort Street Union Depot Co.*, 557.
2. In case of such condemnation and taking, a State may authorize possession to be taken prior to the final determination of the amount of compensation, provided adequate provision for compensation is made. *Ib.*
3. As to the court to determine the question, or the form of procedure, all that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this has been provided for there is that due process of law which is required by the Federal Constitution. *Ib.*
4. There is no vested right in a mode of procedure established by state law for the condemnation of property for public use; but each succeeding legislature may establish a different one, provided only that in each is preserved the essential element of protection. *Ib.*
5. This court is bound to accept the construction placed upon the state statute by the Supreme Court of the State, and to hold that it means that if the second appraisal was less than the first, and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid. *Ib.*

EQUITY.

See DISTRICT OF COLUMBIA, 2, 4; LACHES, 1;
JURISDICTION, C, 7; LIMITATION, STATUTES OF.

EXCEPTION.

When a bill of exceptions does not contain the evidence, it is impossible for this court to know the ground on which the trial court proceeded in overruling a motion on the evidence to compel the district attorney to elect, and an exception in that regard will not be considered. *Barrett* v. *United States*, No. 1, 218.

FINDING OF FACTS.

Stuart v. *Hayden*, 169 U. S. 1, affirmed to the point that when two courts have reached the same conclusion on a question of fact, their finding

will not be disturbed unless it be clear that their conclusion was erroneous. *Baker* v. *Cummings*, 189.

HABEAS CORPUS.

1. Application for leave to file a petition for a writ of *habeas corpus* will be denied if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner. *In re Boardman*, 39.
2. The action of a Circuit Court in refusing an appeal from a final order dismissing a petition for *habeas corpus* and denying the writ cannot be revised by this court on *habeas corpus*. *Ib.*
3. The fact that, when an appeal from a final order of a Circuit Court, denying a writ of *habeas corpus* and dismissing the petition therefor, of a person confined under state authority, has been prosecuted to this court and the order affirmed, the state court proceeds to direct sentence of death to be enforced before the issue of the mandate from this court, does not justify the interposition of this court by the writ of *habeas corpus*. *Ib.*
4. Where the statutes of a State provide that execution under a sentence of death shall not be stayed by an appeal to the highest tribunal of the State unless a certificate of probable cause be granted as provided, and such certificate has been refused, and application for supersedeas denied, this court cannot interfere on *habeas corpus* on the ground, if Federal questions were raised on such appeal, that thereby the party condemned is deprived of the privilege or immunity of suing out a writ of error from this court. *Ib.*

See JURISDICTION, C, 5, 6.

HUSBAND AND WIFE.

See DISTRICT OF COLUMBIA, 3, 4, 5.

INDIAN.

See TAX AND TAXATION, 3.

INSURANCE.

See LIFE INSURANCE.

INTEREST.

See NATIONAL BANK.

INTERSTATE COMMERCE.

Section 1295 of the Virginia Code of 1887, enacting that "when a common carrier accepts for transportation anything, directed to a point of destination beyond the terminus of his own line or route, he shall

be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge" does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line; and it does not conflict with the provisions of the Constitution of the United States, touching interstate commerce. *Richmond & Alleghany Railroad Co.* v. *R. A. Patterson Tobacco Co.*, 311.

See DISEASED CATTLE, INTERSTATE TRANSPORTATION OF.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. Where the Circuit Court and the Circuit Court of Appeals agree as to what facts are established by the evidence, this court will not take a different view, unless it clearly appears that the facts are otherwise. *Stuart* v. *Hayden*, 1.
2. The court below having dismissed the bill in this case on the ground that it had no jurisdiction, as the matter in dispute was determined not to exceed $2000 exclusive of interest and costs, this court examines the bill at length in its opinion, and holds that upon the face of the pleading the matter in dispute is sufficient to give the court below jurisdiction, and remands the case for further proceedings, without determining any of the other questions on the merits. *Dakota Building & Loan Association* v. *Price*, 45.
3. A judgment of the Circuit Court of the United States, against a party contending that that court has no jurisdiction because the case has not been duly removed from a state court, may be reviewed as to the question of jurisdiction by this court upon writ of error directly to that court under the act of March 3, 1891, c. 517, § 5. *Powers* v. *Chesapeake & Ohio Railway Co.*, 92.
4. An order of the Circuit Court of the United States, remanding a case to a state court, is not reviewable by this court. *Ib.*
5. The defendant in error filed a bill against the plaintiff in error in a state court in Illinois to compel the performance of a contract to convey to her land in that State. The case proceeded to judgment in plaintiff's favor in the Supreme Court of the State, but was re-

manded with directions to take an account for the purpose of ascertaining for how much payment should be directed. A writ of error, sued out from this court to review that judgment was dismissed here on the ground that the judgment was not final. It does not appear that any right or title had been specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the Supreme Court of Illinois, prior to such judgment of that court. It appeared on the second hearing that prior to September 10, 1884, the United States had seized the property for revenue taxes due from a firm then occupying it as a distillery, the defendant in error being in no way connected with the firm, that the property was sold, the Government bidding it in and taking a deed for it, and that the Government conveyed to the plaintiff in error. In the account stated the defendant in error was required to repay the amount so paid with interest. It also appeared that the plaintiff in error, after the case went back, moved to amend its answer by setting up that title, as a right and title acquired and claimed under the Constitution, statutes and authority of the United States, which motion was refused, and the trial court disposed of the case on other grounds. In the Appellate Court and in the Supreme Court the plaintiff in error contended that there was error in refusing its motion; but the Appellate Court held, and its decision was sustained by the Supreme Court, that it was bound by the first decision, and that error could not be assigned, on the second appeal, for any cause existing at the time of the prior judgment. In this court it was contended that, at the second trial it appeared that plaintiff in error claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that the decision of the case necessarily involved passing on the claim of title; that the opinion of the Supreme Court of Illinois showed that it was passed upon; and that the necessary effect of the decree and judgment of the state court was against the right and title of defendant sufficiently claimed under Federal authority. *Held*, that the point thus raised was certainly embraced by the first judgment, and that this court cannot revise the second judgment on the ground that the plaintiff in error was thereby denied any right, properly claimed, in apt time, in accordance with Rev. Stat. § 709. *Union Mutual Life Insurance Co.* v. *Kirchoff*, 103.

6. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, cited, quoted from and approved to the point that the words "specially set up or claimed," in Rev. Stat. § 709, 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. *Ib.*

7. After the answers of this court to the questions of the Circuit Court of Appeals in this case, reported in *New Orleans* v. *Benjamin*, 153 U. S. 411, Benjamin amended his bill in the Circuit Court by inserting an averment that "each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made." The city demurred on the ground that the case was not one of equitable cognizance, and that the amendment was insufficient to show jurisdiction. This demurrer was sustained in the Circuit Court, and the Circuit Court of Appeals affirmed its decree because the necessary diversity of citizenship was not affirmatively shown. *Held*, that this judgment of the Circuit Court of Appeals was final, and could not be appealed from. *Benjamin* v. *New Orleans*, 161.

8. An appeal does not lie to this court from the decision of a Circuit Court in which, after overruling, on the facts, a plea by the defendant that the action was not in truth a controversy between citizens of different States, but solely between citizens of one State, to whom other parties were collusively added for the purpose of giving the Circuit Court jurisdiction, the court then rendered a final judgment in favor of the plaintiffs on the merits. While such an issue involves the jurisdiction of the Circuit Court, it does not involve or require, within the meaning of the act of March 3, 1891, c. 517, either the construction or application of the Constitution. *Merritt* v. *Bowdoin College*, 551.

9. As the respondents, both at the trial in the Circuit Court of the State, and in the subsequent proceedings on the certiorari in the Supreme Court of the State, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. *Backus* v. *Fort Street Union Depot Co.*, 557.

10. While this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation, it may not inquire into matters which do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied. *Ib.*

11. The limit of interference by this court with the judgments of state courts is reached when it appears that no fundamental rights have been disregarded by the state tribunals. *Ib.*

See CONSTITUTIONAL LAW, 13;
MOTION TO DISMISS.

B. Jurisdiction of Circuit Courts of Appeal.

The provision in § 16 of the act of February 4, 1897, as amended by the act of March 2, 1889, c. 382, that appeals from judgments of Circuit Courts in such cases to this court shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, does not refer to an appeal from a judgment of a Circuit Court of Appeals to this court; and such an appeal to this court from such a judgment of a Circuit Court of Appeals operates as a supersedeas. *Louisville & Nashville Railroad Co.* v. *Behlmer*, 644.

C. Jurisdiction of Circuit Courts.

1. In an action of ejectment the question whether the land in dispute is of sufficient value to give a Circuit Court jurisdiction is purely one of fact, and the statutes regulating jurisdiction leave the mode of trying such issues to the discretion of the trial judge. *Wetmore* v. *Rymer*, 115.
2. Whether he elects to submit such issue to a jury, or to himself hear and determine it without the intervention of a jury, in either event the parties are not concluded by the judgment of the Circuit Court. *Ib.*
3. In this case the question was passed upon by the court below on affidavits, and the judgment dismissing the action for want of jurisdiction is reviewable here. *Ib.*
4. A suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Ib.*
5. While Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the statement of the case, to issue a writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction, by the discharge of a prisoner, unless in cases of peculiar urgency, but should leave the prisoner to be dealt with by the courts of the State; and even after a final determination of the case by those courts should ordinarily leave the prisoner to his remedy by writ of error from this court. *Baker* v. *Grice*, 284.
6. Upon the facts appearing in this case no sufficient case was made out for the exercise of the jurisdiction of the Circuit Court by the issue of a writ of *habeas corpus* to take the prisoner out of the custody of the state court. *Ib.*
7. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that

right by reason of his being allowed to sue at law in a state court on the same cause of action. *Smyth* v. *Ames*, 466.

See CIRCUIT COURTS OF THE UNITED STATES.

D. JURISDICTION OF STATE COURTS.

1. On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the District Court of Pottawattamie County, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit was pending in the Supreme Court of the State of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the Supreme Court of New York had gone to decree, and attached a copy of that decree. The suit in the Supreme Court of the State of New York was commenced on the 3d of November, 1892. Blackman was served personally within the limits of that State, but the other defendants therein, Wright, Phelan and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them, notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed made by him and his wife to Blackman, and enjoining the several de-

fendants from further prosecuting the action in the Iowa court. After certain other pleadings and amendments thereto had been made the case in the District Court of Pottawattamie County, Iowa, came on for hearing, and upon the testimony that court entered a decree quieting Phelan's title to the land as against any and all other parties to the suit, subject, however, to certain mortgage interests which were recognized and protected, but which are not in any way pertinent to this controversy between Dull and wife and the defendants in error. On appeal to the Supreme Court of the State such decree was, on January 21, 1896, affirmed. *Held*, that the decree of the Supreme Court of Iowa was right, and that it should be affirmed. *Dull* v. *Blackman*, 243.

2. In August, 1880, Sackett brought suit in the Supreme Court of the State of New York, on behalf of himself and all other holders and owners of bonds of certain railroad companies against Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and David Butterfield, receiver of said company, praying for the appointment of a receiver and for a sale of the railroad and franchises for the benefit of the bondholders. On October 11, 1880, a receiver was appointed and qualified. On April 2, 1881, on petition of the receiver, and after a report by an expert disclosing the necessity for expenditure to make the road safe and to enable trains to be run, an order was made by the court authorizing the receiver to issue and negotiate $350,000 in certificates, the same to be a first lien. The certificates were sold, and the proceeds expended under the approval of the court. On June 12, 1885, sale was made of the road and deed delivered to Foster and Hazard for $155,000, subject to the payment of the unpaid portion of the principal and interest of the certificates. On April 9, 1886, the Central National Bank of Boston brought suit in the Supreme Court of New York, on its own behalf and that of others as owners of the certificates, against Foster, Hazard, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company. On March 24, 1887, the suit having been transferred on the petition of the defendants to the Circuit Court of the United States, after full hearing and argument the latter court rendered a final decree, establishing the rights of the Central National Bank of Boston and of others as owners of said certificates, declaring the latter to be a first lien, decreeing that Foster and Hazard were liable for any deficiency if the sale should fail to realize enough to pay certificates. On March 23, 1892, sale under said decree to Foster for $7500, and on April 25, 1892, deed of conveyance by referee to Foster were made. On December 8, 1890, Stevens and others brought their suit in the Supreme Court of New York against the Central National Bank of Boston, the other holders of certificates, Foster, Hazard and others, to set aside the decree in Sackett's case and to enjoin proceedings in the

Circuit Court of the United States. November 11, 1891, judgment setting aside the sale in Sackett's case and finally enjoining the Central National Bank and others, plaintiffs in the Circuit Court of the United States, from selling under the decree of the Federal court. On May 16, 1892, sale and conveyance were made by referee under the decree in the present suit to Foster. On May 9, 1893, judgment of the general term was rendered, and November 27, 1894, judgment of the Court of Appeals, each affirming the judgment of the Supreme Court, *Held* that the judgment of the Supreme Court of New York and of the Court of Appeals affirming the same are erroneous in so far as they command the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company and other holders of the receiver's certificates whose rights, as such holders, were adjudged by the Circuit Court of the United States, to appear before the referee appointed by the Supreme Court in the present case, and which enjoin the Central National Bank of Boston and others, whose rights have been adjudged by the Circuit Court of the United States for the Northern District of New York, from proceeding with the sale under the decree of that court. *Central National Bank* v. *Stevens*, 432.

LACHES.

1. In this case the court arrives at the conclusion, on the evidence, that if the false representations as to the earned fees were made by Baker as alleged, there was entire knowledge thereof by Cummings more than three years before the filing of his bill, which is the time in which an action at law for such a cause is barred in the District of Columbia, and that the conduct of Cummings, in permitting Baker to go on and prosecute the claims as if they were his own, debars him from proceeding in a court of equity; but in so holding the court must not be considered as intimating that it concludes that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings. *Baker* v. *Cummings*, 189.
2. The decree of the Circuit Court, affirmed by the Circuit Court of Appeals, dismissing the bill in this case on the ground of laches, was correct, and that decree is affirmed. *Wetzel* v. *Minnesota Railway Transfer Co.*, 237.

LANDLORD AND TENANT.

See DISTRICT OF COLUMBIA, 1.

LIFE INSURANCE.

This was an action on six policies of insurance, all alike (except as to the amount of insurance), and in the following form: "In consideration of the application for this policy, which is hereby made a part of this

contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto William M. Runk, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, his executors, administrators or assigns, twenty thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of the said William M. Runk during the continuance of this policy, upon the following condition, and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made part thereof. The annual premium of seven hundred and eighty-two dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the tenth day of November in every year during the continuance of this contract. In witness whereof," etc. The principal defence was that the assured, when in sound mind, deliberately and intentionally took his own life, whereby the event insured against — his death — was precipitated. One of the issues was the sanity or insanity of the assured when he committed self-destruction. *Held*, (1) If the assured understood what he was doing, and the consequences of his act or acts, to himself as well as to others — in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would, then he is to be regarded as sane; (2) In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind but with the intention of simply effecting its destruction; (3) Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract; (4) A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment; (5) If, therefore, a policy — taken out by the person whose life

is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns — expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. The case is not different in principle, if the policy be silent as to suicide, and the event insured, the death of the assured, is brought about by his wilful, deliberate act when in sound mind. *Ritter* v. *N. Y. Life Insurance Co.*, 139.

LIMITATION, STATUTES OF.

Metropolitan National Bank v. *St. Louis Dispatch Co.*, 149 U. S. 436, affirmed to the point that courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law. *Baker* v. *Cummings*, 189.

MARRIED WOMAN.

1. Under the laws of Maryland, which were in force in the District of Columbia in 1859, it was competent for a married woman, outside of the District, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the District, thereby became a valid and sufficient instrument to authorize the conveyance by attorney; and the first section of the act of March 3, 1865, c. 110, 13 Stat. 531, contains a clear legislative recognition of the right to execute such power. *Williams* v. *Paine*, 55.
2. Such a power of attorney, executed in one of the Northern States before the civil war by a married woman then residing there, was not revoked by the fact that when that war broke out she and her husband removed to the Southern States, where he entered the Confederate service, and where she resided to the close of the war. *Ib.*
3. When the purchase money for land sold under such a power is received by the principal, to permit her heirs after her death to repudiate the transaction, on the ground that the power of attorney had been revoked by the war, would be in conflict with every principle of equity and fair dealing. *Ib.*
4. A majority of the court think that the deed made under the power of attorney which is in controversy in this suit, and which is printed at length in the Statement of the Case, was in the nature of a conveyance of the legal title, though defectively executed, and that it came within the provisions of the act of March 3, 1865, and its defective execution was thereby cured. *Ib.*

5. By this disposition of the whole case upon the merits the court is not to be considered as deciding that parties situated as the plaintiffs were in this case, out of possession, can maintain an action for partition. *Ib.*

MEXICAN LAND GRANT.

See PUBLIC LAND, 1, 3, 4, 5, 6.

MORTGAGOR AND MORTGAGEE.

See DISTRICT OF COLUMBIA, 1.

MOTION TO DISMISS.

On a motion to dismiss for want of jurisdiction, this court being of opinion that the ruling of the state court on the points upon which the case turned there was obviously correct, does not feel constrained to retain the case for further argument, and accordingly affirms the judgment. *Richardson* v. *Louisville & Nashville Railroad Co.*, 128.

NATIONAL BANK.

1. One who holds shares of national bank stock — the bank being at the time insolvent — cannot escape the individual liability imposed by the statute by transferring his stock with intent to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, that it is insolvent or about to fail. *Stuart* v. *Hayden*, 1.

2. A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. *Ib.*

3. The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent; and the shareholder cannot, by transferring his stock, compel creditors to surrender this security as to him, and force the receiver and creditors to look to the person to whom his stock has been transferred. *Ib.*

4. If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is immaterial, as a transfer under such circumstances does not impair the security given to creditors; but if the bank be insolvent, the receiver may, without suing the transferee and litigating the question of his liability, look to every shareholder who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of

his stock in order to escape the individual liability to which the statute subjected him. *Ib.*

5. Whether, the bank being in fact insolvent, the transferrer is liable to be treated as a shareholder in respect of its existing contracts, debts and engagements, if he believed in good faith, at the time of the transfer, that the bank was solvent — not decided; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible. *Ib.*
6. Section 5198 of the Revised Statutes of the United States prescribing what rate of interest may be taken, received, reserved or charged by a national banking association, makes a difference between interest which a note, bill or other evidence of debt "carries with it, or which has been agreed to be paid thereon," and interest which has been "paid." *Brown* v. *Marion Nat. Bank*, 416.
7. Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198. *Ib.*
8. If a national bank sues upon a note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. *Ib.*
9. The forfeiture declared by the statute is not waived by giving a renewal note, in which is included the usurious interest. No matter how many renewals may be made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid. *Ib.*
10. If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five years, without any money being in fact paid by the borrower, — each renewal note including past interest, legal and usurious, — the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid. *Ib.*
11. If the note when sued on includes usurious interest, or interest upon usurious interest, agreed to be paid, the holder may elect to remit such interest, and it cannot then be said that usurious interest was paid to him. *Ib.*
12. If the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter. *Ib.*

PARTITION.

See MARRIED WOMAN, 5.

PATENT FOR INVENTION.

If the owner of a patent applies to the Patent Office for a reissue of it and includes, among the claims in the application, the same claims as those which were included in the old patent, and the primary examiner rejects some of such claims for want of patentable novelty, by reference to prior patents, and allows others, both old and new, the owner of the patent does not, by taking no appeal and by abandoning his application for reissue, hold the original patent (the return of which he procures from the Patent Office) invalidated as to those of its claims which were disallowed for want of patentable novelty by the primary examiner in the proceeding for reissue; as the Patent Office, by the issue of the original patent, had lost jurisdiction over it, and did not regain it by the application for a reissue. *McCormick Harvesting Machine Co.* v. *Aultman*, 606.

See ABATEMENT.

POWER OF ATTORNEY.

See MARRIED WOMAN.

PRACTICE.

1. Decree affirmed on a question of fact only. *Lewis* v. *Kengla*, 234.
2. An appellate court is not required to set aside the judgment of the trial court by reason of failure to give instructions which were not asked for. *Backus* v. *Fort Street Union Depot Co.*, 557.
3. The Supreme Court of Michigan was called upon to consider only such objections as had been particularly specified, and all others were deemed to have been waived. *Ib.*
4. The decision by the Supreme Court that it had power to set aside the verdict and order a new trial was not a reversal of a ruling that the Circuit Court had no such power. *Ib.*

See MOTION TO DISMISS.

PUBLIC LAND.

1. The decision of the Court of Private Land Claims that the ayuntamiento of El Paso had no power to make a grant, like the one in controversy in this case, entirely outside of the four square leagues supposed to belong to El Paso, and that even if it had such power, the conditions of the alleged grant were never performed by the grantee, and therefore that he acquired no title to the property, was correct. *Cessna* v. *United States*, 165.

2. A deputy marshal of the United States, duly appointed as such prior to the passage of the act of March 2, 1889, c. 412, providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President of March 23, 1889, fixing the time of the opening of the lands for settlement, and who entered on said lands and remained there in his official character prior to the day fixed for said opening, was thereby disqualified from making a homestead entry immediately upon the lands being opened for settlement. *Payne* v. *Robertson*, 323.
3. The patent to the defendant in error does not preclude this court from inquiring into the effect of the act of July 23, 1866, c. 219, "to quiet land titles in California;" and the court holds that that act does not require proof of an actual grant from the Mexican authorities to some grantee through whom the title set up is derived; but that the proper officers of the United States had jurisdiction to issue a patent upon being satisfied of the existence of those facts in regard to which it was their province to determine; and that the act includes those who, in good faith and for a valuable consideration, have purchased land from those who claimed and were thought to be Mexican grantees or assignees, provided they fulfil the other conditions named in the act. *Beley* v. *Naphtaly*, 353.
4. The facts in this case do not show, as matter of law, that Millett could not have been a *bona fide* purchaser of these lands for a valuable consideration; and whether in fact he were so was a fact to be determined by the Government on the issue of the patent, which precluded further inquiry into that question. *Ib.*
5. A person who was within the statute and had the right to purchase land as provided therein, could assign or convey his right of purchase and his grantee could exercise that right. *Ib.*
6. The rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter were all acts within his jurisdiction. *Ib.*

RAILROAD.

1. The reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control; nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. *Smyth* v. *Ames*, 466.

2. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is, therefore, under governmental control — subject, of course, to the constitutional guarantees for the protection of its property. It may not fix its rates with a view solely to its own interests, and ignore the rights of the public; but the rights of the public would be ignored if rates for the transportation of persons or property on a railroad were enacted without reference to the fair value of the property used for the public or for the services rendered, and in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. *Ib.*

3. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stock, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged. *Ib.*

4. A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against the exaction of unreasonable charges for the services rendered by it: but it is equally true that the corporation performing such public services, and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. *Ib.*

5. The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public; and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present value as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the pub-

lic convenience; and on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. *Ib.*

See CONSTITUTIONAL LAW, 1, 7 to 12;
DAMAGES;
TAX AND TAXATION, 2;
UNION PACIFIC RAILROAD COMPANY.

REMOVAL OF CAUSES.

1. An action brought in a state court, which, by reason of joinder as defendants of citizens of the same State as the plaintiff, is not a removable one under the act of Congress until after the time prescribed by statute or rule of court of the State for answering the declaration, may, upon a subsequent discontinuance in that court by the plaintiff against those defendants, making the action for the first time a removable one by reason of diverse citizenship of the parties, be removed into the Circuit Court of the United States by the defendant upon a petition filed immediately after such discontinuance, and before taking any other steps in defence of the action. *Powers* v. *Chesapeake & Ohio Railway Co.*, 92.

2. If sufficient grounds for the removal of a case into the Circuit Court of the United States are shown upon the face of the petition for removal and of the record of the state court, the petition for removal may be amended in the Circuit Court of the United States by stating more fully and distinctly the facts which support those grounds. *Ib.*

3. The right of a party to insist that a case has been duly removed into the Circuit Court of the United States is not lost or impaired by his making defence in the state court, after that court had denied his petition for removal. *Ib.*

RES JUDICATA.

See JURISDICTION, A, 5, 6.

SOUTH CAROLINA, DISTRICT OF.

It having been decided in *Barrett* v. *United States*, *ante*, 218, that the State of South Carolina constitutes but one judicial district, it follows that the indictment in this case was properly remitted to the next session of the District Court of that district. *Barrett* v. *United States*, No. 2, 231.

See CIRCUIT COURTS OF THE UNITED STATES.

STATUTE.

A. CONSTRUCTION OF STATUTES.

See EMINENT DOMAIN, 1, 5.

B. Statutes of the United States.

See Circuit Courts of the United States, 2;
Claims against the United States, 1, 2;
Consuls and Vice-Consuls, 2;
Customs Duties, 1, 3;
Diseased Cattle, Interstate Transportation of, 1, 2;
District of Columbia, 1;
Jurisdiction, A, 3, 5, 6, 8;
Married Woman, 1, 4;
National Bank, 6, 7;
Public Land, 2, 3;
Tax and Taxation, 2;
Union Pacific Railway Company.

C. Statutes of States and Territories.

District of Columbia. *See* District of Columbia, 1.
Kansas. *See* Diseased Cattle, Interstate Transportation of, 1.
Maryland. *See* Abatement;
Married Woman, 1.
Michigan. *See* Tax and Taxation, 1.
Nebraska. *See* Constitutional Law, 10.
North Carolina. *See* Constitutional Law, 12.
Oklahoma. *See* Tax and Taxation, 3.
Oregon. *See* Constitutional Law, 5.
Utah. *See* Constitutional Law, 3.
Virginia. *See* Interstate Commerce, 1.
Wisconsin. *See* Constitutional Law, 1.

TAX AND TAXATION.

1. Under a statute of a State, imposing a franchise tax on foreign corporations doing business in the State without having filed articles of association under its laws, and providing that "all contracts made in this State" after a certain date, "by any corporation which has not first complied with the provisions of this act, shall be wholly void," a contract of such a corporation, signed by its local agent and by the other party within the State, and stipulating that the contract is not valid unless countersigned by its manager in the State, and approved at its home office in another State, is not "made in this State," within the meaning of the statute, even if it is to be performed within the State. *Holder* v. *Aultman*, 81.
2. Where a railroad company pays a tax on its undistributed surplus under the internal revenue act of June 30, 1864, c. 173, 13 Stat. 223, it is thereby paying a tax upon its own property, and such payment cannot be regarded as a payment of a tax upon a stock dividend thereafter declared by the company. *Logan County* v. *United States*, 255.
3. The act of the legislature of the Territory of Oklahoma of March 5,

1895, c. 43, which provided that "when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes," was a legitimate exercise of the Territory's power of taxation, and, when enforced in the taxation of cattle belonging to persons not resident in the Territory grazing upon Indian reservations therein, does not violate the Constitution of the United States. *Thomas* v. *Gay*, 264.

4. The Supreme Court of the Territory in this case sustained the authority of the board of equalization to increase the assessment or valuation, and in a subsequent case decided the other way. In view of the fact that the judgment in this case is reversed, and the case remanded for further proceedings, this court declines to pass upon the question. *Ib.*

See CONSTITUTIONAL LAW, 3.

TREASURY REGULATIONS.

See CLAIMS AGAINST THE UNITED STATES, 3, 4.

TRUST.

See DISTRICT OF COLUMBIA, 2 to 5.

UNION PACIFIC RAILROAD COMPANY.

Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of July 1, 1862, incorporating the Union Pacific Railroad Company, or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by that company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits. *Smyth* v. *Ames*, 466.

See CONSTITUTIONAL LAW, 6 to 11;
RAILROAD, 1 to 5.

USURY.

See NATIONAL BANK, 6 to 12.

WASHINGTON, CITY OF.

See DAMAGES, 1.

WILL.

See DISTRICT OF COLUMBIA, 6.