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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1897

AND

OCTOBER TERM, 1898

J. C. BANCROFT DAVIS

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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.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

SCHOLLENBERGER *v.* PENNSYLVANIA.

PAUL *v.* PENNSYLVANIA.

PAUL *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 86, 87, 88. Argued March 23, 24, 1898. — Decided May 23, 1898.

Oleomargarine has, for nearly a quarter of a century, been recognized in Europe and in the United States as an article of food and commerce, and was recognized as such by Congress in the act of August 2, 1886, c. 840; and, being thus a lawful article of commerce, it cannot be wholly excluded from importation into a State from another State where it was manufactured, although the State into which it was imported may so regulate the introduction as to insure purity, without having the power to totally exclude it.

A sale of a ten pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict in this case, was a valid sale, although made to a person who was himself a consumer; but it is not decided that this right of sale extended beyond the first sale by the importer after its arrival within the State.

The importer had not only a right to sell personally, but he had the right to employ an agent to sell for him, and a sale thus effected was valid.

The right of the importer to sell does not depend upon whether the original package was suitable for retail trade or not, but is the same, whether

Statement of the Case.

to consumers or to wholesale dealers, provided he sells in original packages.

Act No. 21 of the legislature of Pennsylvania, enacted May 21, 1885, enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food" and making such act a misdemeanor, punishable by fine and imprisonment, is invalid to the extent that it prohibits the introduction of oleomargarine from another State, and its sale in the original package.

THE questions in these three cases are the same, and they arise out of the selling of certain packages of oleomargarine.

The plaintiffs in error were indicted for and convicted of a violation of a statute of Pennsylvania prohibiting such sale. The act (No. 25) was passed on the 21st of May, 1885, and is to be found in the volume of the laws of Pennsylvania for that year, page 22. It provides as follows:

"That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food."

A violation of the act is made a misdemeanor and punishable by fine and imprisonment.

The jury found a special verdict in each case. The only difference between the facts stated in the verdict in Number 86 and those contained in the other cases is that in the latter the package sold was ten pounds instead of forty pounds and was sold by the plaintiffs in error in those cases as agents of a different principal, carrying on the same kind of business in the State of Illinois, and the package was sold to a different person and upon a different date.

Statement of the Case.

The following facts were set out in the special verdict in Number 86:

"(1.) The defendant, George Schollenberger, is a resident and citizen of the Commonwealth of Pennsylvania, and is the duly authorized agent in the city of Philadelphia of the Oakdale Manufacturing Company of Providence, Rhode Island.

"(2.) The said Oakdale Manufacturing Company is engaged in the manufacture of oleomargarine in the said city of Providence and State of Rhode Island, and as such manufacturer has complied with all the provisions of the act of Congress of August 2, 1886, entitled 'An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine.'

"(3.) The said defendant, as agent aforesaid, is engaged in business at 219 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the 2d day of October, 1893, and is not engaged in any other business, either for himself or others.

"(4.) The said defendant, on the 1st day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for the Oakdale Manufacturing Company, in oleomargarine, and obtained from said collector a writing in the words following:

'Stamp for		Special tax,
$480	United States	$480
per year.	internal revenue.	per year.
No. A 434.		No. A 434.

"'Received from George Schollenberger, agent for the Oakdale Manufacturing Company, the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at 219 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

"'Dated at Philadelphia, Pa., July first, 1893.

"'[SEAL.] WILLIAM H. DOYLE,

"'$480. *Collector, First District of Penna.*'

"The following clauses appear on the margin of the above:

"'This stamp is simply a receipt for a tax due the Government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. (See section 3243, Revised Statutes, U. S.)

"'Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2, 1886.'

"Attached to this were coupons for each month of the year in form as follows:

"'Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.'

"(5.) On or before the said second day of October, 1893, the said Oakdale Manufacturing Company shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing forty pounds, packed, sealed, marked, stamped and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package, as required by said act, and was of such form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages forming said consignment were unloaded from the cars and placed in defendant's store and then offered for sale as an article of food.

"(6.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James

Anderson the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps and brands unbroken, in which it was packed by the said manufacturer in the said city of Providence, Rhode Island, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant; and the said tub was not broken nor opened on the said premises of the said defendant, and as soon as it was purchased by the said James Anderson it was removed from the said premises.

"(7.) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter, and sold by the defendant, to James Anderson as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter, or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2, 1886, as an article of commerce.

"(8.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years."

Upon this special verdict the trial court directed judgment to be entered for the defendant. The case was taken by the Commonwealth to the Supreme Court of the State, where, after argument, the judgment was reversed and judgment was entered in favor of the Commonwealth, and the record remanded that sentence might be imposed by the court below. The plaintiffs in error have brought these judgments of conviction before this court for review by virtue of writs of error.

The opinion of the Supreme Court of the State is to be found reported under the name of *Commonwealth* v. *Paul*, in 170 Penn. St. 284.

Mr. William D. Guthrie for plaintiffs in error. *Mr. Richard C. Dale*, *Mr. Henry R. Edmunds* and *Mr. Albert H. Veeder* were on his brief.

Mr. John G. Johnson for defendant in error.

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

Counsel in behalf of the Commonwealth rests the validity of the statute in question upon two principal grounds:

(1.) That oleomargarine is a newly invented or discovered article, and that each State has the right in the case of a newly invented or discovered food product to determine for its citizens the question whether it is wholesome and non-deceptive, and neither the Congress of the United States nor the legislatures of other States can deprive it of this right, and that being such newly discovered article it does not belong to the class universally recognized as articles of commerce, and hence the legislation of Pennsylvania does not regulate or affect commerce; that non-discriminative legislation enacted in good faith for the protection of health and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void but is conclusively valid.

(2.) That if the right of citizens of another State to send oleomargarine into the Commonwealth of Pennsylvania be admitted, it can only be introduced in original packages suitable for wholesale trade, and where the article imported is intended and used for the supply of the retail trade or is sold by retail directly to the consumer, the package in which it is imported from another State is not an "original package" within the protection of the interstate commerce provision of the Constitution of the United States.

These are the main grounds upon which the conviction is sought to be sustained. The Supreme Court of the State upheld the statute upon the ground that it was a legitimate exercise of the police power of the State not inconsistent with the right of the owner of the product to bring it within the State

in appropriate packages suitable for sale to the wholesale dealer and not intended for sale at retail by the importer to the consumer, and that in the cases under consideration the packages were not wholesale original packages and their sale amounted to a mere retail trade.

Upon the first ground for sustaining the conviction in these cases the argument upon the part of the Commonwealth runs somewhat as follows: It may be admitted that actually pure oleomargarine is not dangerous to the public health, but whether it be pure depends upon the method of its manufacture, and its purity cannot be ascertained by any superficial examination, and any certain and effective supervision of the method of its manufacture is impossible. It is manufactured to imitate in its appearance butter, with a view to deceiving the ultimate consumer as to its character, and this deception cannot be avoided by coverings, labels or marks upon the product; the legislature of Pennsylvania was therefore so far justified in protecting its citizens against oleomargarine by prohibiting its sale; that the legislation in question does not discriminate in favor of the citizens of Pennsylvania or in any manner against any particular State or any particular manufacturer of the article, and, as there is nothing in the case tending to prove the contrary, it must be assumed that the legislation was enacted in good faith for the protection of the health of the citizens and for the prevention of deception, and as such legislation did not hamper the actual transportation of merchandise, the statute must be held to be within the power of the legislature to enact, and is therefore valid; at all events, the State has a right in cases of newly invented food products to determine for its citizens the question whether they are wholesome and non-deceptive, and that oleomargarine is one of that class of products, and is necessarily subject to the right of the State either to regulate or absolutely to prohibit its sale.

In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record.

We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

Any legislation of Congress upon the subject must, of course, be regarded by this court as a fact of the first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration. By reference to the statutes we discover that Congress in 1886 passed "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine." Act of August 2, 1886, c. 840, 24 Stat. 209. In that statute we find that Congress has given a definition of the meaning of oleomargarine and has imposed a special tax on the manufacturers of the article, on wholesale dealers and upon retail dealers therein, and the provisions of the Revised Statutes in relation to special taxes are, so far as applicable, made to extend to the special taxes imposed by the third section of the act, and to the persons upon whom they are imposed. Manufacturers are required to file with the proper collector of internal revenue such notices, and to keep such books and conduct their business under such supervision as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. Provision is made for the packing of oleomargarine by the manufacturer in packages containing not less than ten pounds and marked as prescribed in the act, and it provides that all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in the original stamped packages. A tax of two cents per pound is laid upon oleomargarine, to be paid by the manufacturer, and the tax levied is to be represented by coupon stamps. Oleomargarine imported from foreign countries is taxed, in addition to the import duty imposed on the same, an internal revenue tax of fifteen cents per pound. Provision is made for warehousing, and a penalty imposed for selling the oleomargarine thus imported if not properly stamped. Provision is

also made for the appointment of an analytical chemist and microscopist by the Secretary of the Treasury, and such chemist or microscopist may examine the different substances which may be submitted in contested cases, and the Commissioner of Internal Revenue is to decide in such cases as to the taxation, and his decision is to be final. The Commissioner is also empowered to decide "whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, composed of the Surgeon General of the Army, the Surgeon General of the Navy and the Commissioner of Agriculture, and the decisions of this board shall be final in the premises." Provision is also made for the removal of oleomargarine from the place of its manufacture for export to a foreign country without payment of tax or affixing of stamps thereto, and there is a penalty denounced against any person engaged in carrying on the business of oleomargarine who should defraud or attempt to defraud the United States of the tax.

This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself.

As to the extent of the manufacture and its commercial nature, it is not improper to refer to the reports of the Secretary of the Treasury, which show that the tax receipts from its manufacture and sale in the United States under the act above mentioned, during the nine years beginning with 1887, amounted to over ten million dollars.

When we come to an inquiry as to the properties of oleomargarine and of what the substance is composed, we find that answers to such inquiries are to be found in the various

encyclopædias of the day, and in the official reports of the Commissioner of Agriculture and in the legal reports of cases actually decided in the courts of the country. In brief, every intelligent man knows its general nature, and that it is prepared as an article of food, and is dealt in as such to a large extent throughout this country and in Europe.

Upon reference to the Encyclopædia Britannica it is said that "pure oleomargarine butter is said to contain every element that enters into cream butter, and to keep pure much longer; but there is the defect of not knowing when it is pure or what injurious ingredients, or objectionable processes, may be used in its manufacture by irresponsible parties." The article also says "we append a comparative analysis of natural and artificial butter, which shows that, when properly made, the latter is a wholesome and satisfactory substitute for the former."

There is contained in the 17th volume of the Encyclopædia Britannica an extract from a report by the secretary of the British Embassy at Washington, in 1880, describing the method of obtaining oleomargarine oil. This shows the article was then well known.

In *Ex parte Scott and others*, the Circuit Court for the Eastern District of Virginia, (66 Fed. Rep. 45,) speaking by Hughes, District Judge, said: "It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe, as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce, and furnishes a large income to the general government annually. . . . It is entering rapidly into domestic use, and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a source of revenue. . . . Provincial prejudice against this now staple of commerce is natural, but a city of the size and prospects of Norfolk as a world's *entrepot* ought not to be foremost in manifesting such a prejudice."

In *People* v. *Marx*, 99 N. Y. 377, 381, which was a prosecution under the New York statute (Chap. 202, Laws of 1884), April 24, 1884, prohibiting the manufacture or sale of oleomargarine, the Court of Appeals of New York held the act unconstitutional. It appears from the opinion that on the trial of that action "it was proved on the part of the defendant by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion — from three to six per cent. That it exists in no other substance than butter made from milk, and it is introduced to oleomargarine butter by adding to oleomargarine stock some milk, cream or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in the butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist, who had been employed by the French government to devise a substitute for butter." This extract from the opinion in the New York case, speaking of the testimony given before the trial judge, is not quoted for the purpose of proving the facts therein stated, but for the purpose of showing that as

long ago as the time when that case was decided — June, 1885 — the article was then well known as an article of food, and manufactured as a substitute for butter, and we may notice from some of the histories of the article the fact (which is stated in the opinion) that it was first devised as long ago as 1872 or 1873 by a French gentleman who had been employed by the French government to devise a substitute for butter. The article is a subject of export, and is largely used in foreign countries. Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the States and with foreign nations.

The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

In *Minnesota* v. *Barber*, 136 U. S. 313, it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the State if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other States. This was held in relation to the slaughter of animals whose meat was to be sold as food in the State passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman*, 138 U. S. 78, and in *Scott* v. *Donald*, 165 U. S. 58, 97.

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire*, 5 How. 504, involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin*, 135 U. S. 100, 125, the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that

"whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

To the same effect we think is the case of *Railroad Company* v. *Husen*, 95 U. S. 465, 469, in which it was said that "whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations." The court, therefore, while conceding the right of the State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a State could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any State through its legislature to forbid the introduction of the unadulterated article into the State. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopædias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. But in carrying out its purposes the State cannot absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine. It has ceased to be what counsel for the Commonwealth has termed it, a newly discovered food product. An article that has been openly manufactured for nearly a quarter of a century, where the ingredients of the pure article are perfectly well known and have been known for a number of years, and where the general process of manufacture has been known

for an equal period, cannot truthfully be said to be a newly discovered product within the proper meaning of the term as here used. The time when a newly discovered article ceases to be such cannot always be definitely stated, but all will admit that there does come a period when the article cannot be so described. In this particular case we have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients and effect upon the health are and have been for many years as well known as almost any article of food in daily use. Therefore if we admit that a newly discovered article of food might be wholly prohibited from being introduced within the limits of a State, while its properties, whether healthful or not, were still unknown, or in regard to which there might still be doubt, yet this is not the case with oleomargarine. If properly and honestly manufactured it is conceded to be a healthful and nutritious article of food. The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question.

It is claimed, however, that the very statute under consideration has heretofore been held valid by this court in the case of *Powell* v. *Pennsylvania*, 127 U. S. 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the State, and the question was one as to the police power of the State acting upon a subject always

within its jurisdiction. The plaintiff in error was convicted of selling within the Commonwealth two cases containing five pounds each of an article of food designed to take the place of butter, the sale having taken place in the city of Harrisburg, and it was part of a quantity manufactured in and, as alleged, in accordance with the laws of the Commonwealth. The plaintiff in error claimed that the statute under which his conviction was had was a violation of the Fourteenth Amendment to the Constitution of the United States. This court held that the statute did not violate any provision of that Amendment, and therefore held that the conviction was valid.

The *Powell case* did not and could not involve the rights of an importer under the commerce clause. The right of a State to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument.

Referring what is said in the opinion in *Powell's case* to the facts upon which the case arose, and in regard to which the opinion was based and the case decided, there is nothing whatever inconsistent with that opinion in holding, as we do here, that oleomargarine is a legitimate subject of commerce among the States, and that no State has a right to totally prohibit its introduction in its pure condition from without the State under any exercise of its police power. The legislature of the State has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the State or to entirely forbid such manufacture and sale, so long as the legislation is confined to the manufacture

and the sale within the State. Those are questions of public policy which, as was said in the case of *Powell*, belong to the legislative department to determine; but the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the State of an article like oleomargarine, properly and honestly manufactured.

The *Powell case* was, in the opinion of the court, governed in its important aspect by that of *Mugler* v. *Kansas*, 123 U. S. 623, in which case it was said that it did not involve any question arising under the commerce clause of the Constitution of the United States. The last cited case was followed in *Kidd* v. *Pearson*, 128 U. S. 1.

Nor is the question determined adversely to this view in the case of *Plumley* v. *Massachusetts*, 155 U. S. 462. The statute in that case prevented the sale of this substance in imitation of yellow butter produced from pure unadulterated milk or cream of the same, and the statute contained a proviso that nothing therein should be "construed to prohibit the manufacture or sale of oleomargarine in a separate or distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredients that cause it to look like butter." This court held that a conviction under that statute for having sold an article known as oleomargarine, not produced from unadulterated milk or cream, but manufactured *in imitation of yellow butter produced from pure unadulterated milk or cream, was valid.* Attention was called in the opinion to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk. If free from coloration or ingredient that caused it to look like butter, the right to sell it in a separate and distinct form and in such manner as would advise the consumer of the real character was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practice in such matters a fraud upon the general public; that the statute seeks to suppress false pretences and to promote fair dealing in the

sale of an article of food, and that it compels the sale of oleomargarine for what it really is by preventing its sale for what it is not; that the term "commerce among the States" did not mean a recognition of a right to practise a fraud upon the public in the sale of an article even if it had become the subject of trade in different parts of the country. It was said that the Constitution of the United States did not take from the States the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever State manufactured, and that that instrument did not secure to any one the privilege of committing a wrong against society.

It will thus be seen that the case was based entirely upon the theory of the right of a State to prevent deception and fraud in the sale of any article, and that it was the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the State was upheld. The question of the right to totally prohibit the introduction from another State of the pure article did not arise, and, of course, was not passed upon. The act of Congress, above cited, was referred to by the counsel for the appellant in the *Plumley case* as furnishing a full system of legislation upon the subject, and he claimed that it excluded any legislation on the same subject by the State, but it was held that there was no ground to suppose that Congress intended by that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine, and, as section 3243 of the Revised Statutes was referred to in the act, it was held that the section was incorporated in the act for the purpose of making it clear that Congress did not intend to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits.

The taxes prescribed by that act were held to have been imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine within any State which law-

fully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. It was also held that the act of Congress was not intended as a regulation of commerce among the States.

By the reference which we have already made to this statute we have not intended to claim that it was a regulation of commerce among the States further than the provisions of the act distinctly applied to its manufacture and sale. We refer to it for the purpose of showing that the article itself was therein recognized as a proper and lawful subject of commerce with foreign nations and among the several States under such lawful regulations as the State might choose to impose. We think that what Congress thus taxes and recognizes as a proper subject of commerce cannot be totally excluded from any particular State simply because the State may choose to decide that for the purpose of preventing the importation of an impure or adulterated article it will not permit the introduction of the pure and unadulterated article within its borders upon any terms whatever.

We are therefore of opinion that the first ground for upholding the conviction in these cases cannot be sustained.

Nor do we think the conviction can be sustained upon the ground taken in the opinion of the Supreme Court of Pennsylvania.

The question in regard to packing the oleomargarine first arose in the case of *Commonwealth* v. *Schollenberger*, 156 Penn. St. 201. The defendant in that case was an agent of a non-resident manufacturer of oleomargarine, and he sold at his store in Pennsylvania a package of the article weighing eighty pounds, made and stamped and branded in Rhode Island for use as an article of food. It was held that the case did not show that the sales were made in the original package of commerce. And it was said that a jury would be justified in finding that the mode of putting up the package was not adapted to meet the requirements of actual interstate commerce, but the requirements of an unlawful interstate retail trade. But the special verdict in this case shows what the

court said was lacking in the case just cited, for it appears in the verdict that the package in which the oleomargarine was sold was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant." It also appears from the special verdict that the defendant was engaged in business in the city of Philadelphia as a wholesale dealer in oleomargarine as agent for the manufacturer; that he had paid the special tax upon the business as a wholesale dealer, and had otherwise complied with all the requirements of the act of Congress, and the article was openly sold as oleomargarine, and that fact was made known to the purchaser, and he understood that he was buying oleomargarine, and as soon as the tub was purchased it was removed unbroken from the place of sale by the purchaser thereof.

Upon the facts found in the special verdict, it is said in the opinion of the court below, 170 Penn. St. 291, that "it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an original package within the proper meaning of that phrase. The non-residence of the manufacturer does not play any important part in this case, for he comes into this State to establish a store for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers for their consumption from its own shelves; and unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute. . . . The

question is whether a package intended and used for the supply of the retail trade is an 'original package' within the protection of the interstate commerce cases."

What are the rights of one engaged in interstate commerce in regard to the introduction of a lawful article of commerce into a State? Those rights have been declared by various decisions of this court, some of them made at a very early date, and coming down to the present time.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 193, it was said by Marshall, Chief Justice, that the commerce clause extends to every species of commercial intercourse among the several States, and that it does not stop at the external boundary of a State, and that this power to regulate included the power to prescribe the rule by which commerce is to be governed, and it was held that navigation was included within that power.

In *Brown* v. *Maryland*, 12 Wheat. 419, it was stated that this power to regulate commerce could not be stopped at the external boundary of a State, but must enter its interior, and that if the power reached the interior of the State and might be there exercised, it must be capable of authorizing the sale of those articles which it introduces. It was said that "sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

Years after the decision of the last case and after many other decisions had been made upon the general subject of the commerce clause, this court in *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, held that the State could not, for the purpose of protecting its people against the evils of intemperance, pass an act which regulated commerce by forbidding any common carrier to bring intoxicating liquors into the State from another State or Territory, excepting upon conditions mentioned in the act. Such act was held to be repugnant to the Constitution of the United States as af-

fecting interstate commerce in an essential and vital part. But whether the right to transport an article of commerce from one State to another included by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminated was not decided. In *Brown* v. *Maryland*, it was said that the right of transportation did include the right to sell, as to foreign commerce, and in the course of his opinion Chief Justice Marshall said that the conclusion would be the same in the case of commerce among the States; but as it was not necessary to express any opinion upon the point, it was simply held in the *Bowman case* that the power to regulate or forbid the sale of a commodity after it had been brought into a State does not carry with it the right and power to prevent its introduction by transportation from another State.

The case of *Leisy* v. *Hardin*, 135 U. S. 100, 124, went a step further than the *Bowman case*, and held that the importer had the right to sell in a State into which he brought the article from another State in the original packages or kegs, unbroken and unopened, notwithstanding a statute of the State prohibiting the sale of such articles except for the purposes therein named and under a license from the State. Such a statute was held to be unconstitutional as repugnant to the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States. Mr. Chief Justice Fuller, in speaking for the court, said: "Under our decision in *Bowman* v. *Chicago & Northwestern Railway*, they had the right to import this beer into that State, and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of Congressional permission to do so, the State had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer." The right of the State to prohibit the sale in the original package was denied in the absence of any law of Congress upon the subject permitting the State to prohibit such sale.

There is no such law of Congress relating to articles like oleomargarine. Such articles are therefore in like condition as were the liquors in the cases above cited.

Subsequent to the decision in the *Leisy case* and on the 8th of August, 1890, c. 728, 26 Stat. 313, Congress passed an act commonly known as the Wilson act, which provided that upon the arrival in any State or Territory of the intoxicating liquors transported therein they should be subject to the operation and effect of the laws of the State or Territory enacted in the exercise of its police power to the same extent and in the same manner as though such liquors had been produced in such State or Territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress. *In re Rahrer, Petitioner*, 140 U. S. 545. In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one State to another continues until a sale in the original package in which the article was introduced into the State.

The case of *Emert* v. *Missouri*, 156 U. S. 296, involved the validity of a statute of Missouri providing that peddlers of goods, going from place to place within the State to sell them, should take out and pay for licenses. The statute was held not to violate the commerce clause of the Constitution of the United States because it made no discrimination between residents or products of the State and those of other States. The conviction of the plaintiff in error for a violation of the statute was upheld, although he was an agent of a corporation which manufactured the property in another State and sent it to him to sell as its agent. It was held to be within the police power of the State to regulate the occupation of itinerant peddlers and to compel them to obtain licenses to practise their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall in *Brown* v. *Maryland*, *supra*, was quoted, that "the right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the

State to make sales in a peculiar way." (Page 313.) It was the privilege of selling in a peculiar way, as a peddler, which was licensed in the *Emert case*, and such a person, it was therein decided, could properly be made to pay a license for selling in that way an article manufactured in another State and sent into Missouri, as well as for selling in the same way articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.

The *Emert case* does not overrule or affect the cases above cited as to the right to sell.

We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a sale of a ten pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the State. *Waring* v. *The Mayor*, 8 Wall, 110, 122. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not sub-

stantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot for the purpose of preventing the introduction of an impure or adulterated article absolutely prohibit the introduction of that which is pure and wholesome. The act of the legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid.

The judgments are therefore reversed and the cases remanded to the Supreme Court of Pennsylvania for further proceedings not inconsistent with this opinion.

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

Mr. Justice Harlan and myself cannot concur in this judgment, and will state, as briefly as may be, some of the grounds of our dissent. The question at issue appears to us to be so completely covered by two or three recent judgments of this court, as to make it unnecessary to cite other authorities.

As has been said by this court, speaking by the present Chief Justice, "The power of the State to impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided, expressly or by implication, to the National Government." *Rahrer's case*, 140 U. S. 545, 554.

The statute of Pennsylvania of May 21, 1885, under which the plaintiffs in error were indicted and convicted, for selling in Pennsylvania oleomargarine in the original packages in

which it had been sent to them from other States, provides that "no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same, as an article of food." Penn. Stat. 1885, c. 25.

In *Powell* v. *Pennsylvania*, 127 U. S. 678, the defendant was indicted, under this very statute, for selling, and for having in his possession with intent to sell, oleomargarine manufactured in Pennsylvania before the passage of the statute; and, at the trial, in order to show that the statute was not a lawful exercise of the police power of the State, offered to prove that the articles which he sold, and those which he had in his possession for sale, were, in fact, wholesome and nutritious, and were part of a large quantity manufactured by him before the passage of the statute, by the use of land, buildings and machinery, purchased by him at great expense for carrying on this business, and the value of which would be destroyed if he were prevented from continuing it. The evidence offered was excluded, and the defendant was convicted; and his conviction was affirmed by the Supreme Court of Pennsylvania, and by this court upon writ of error.

This court, in its opinion upholding this statute as a constitutional and valid exercise of the police power of the State, after mentioning the defendant's offer to prove that the articles which he sold or had in his possession for sale were in fact wholesome and nutritious, proceeded as follows: "It is entirely consistent with that offer, that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that

such is the fact." "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions." "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles." 127 U. S. 684–686.

That decision appears to us to establish that the courts cannot take judicial cognizance, without proof, either that oleomargarine is wholesome, or that it is unwholesome; and we are unable to perceive how judicial cognizance of such a fact can be acquired by referring to the various opinions which have found expression in scientific publications, or in testimony given in cases before other courts and between other parties.

Evidence that the articles sold were wholesome and nutritious having been excluded as immaterial when offered in defence in *Powell's case*, it necessarily follows that the Commonwealth in the case at bar had no occasion to offer evidence to prove the contrary.

The decision in *Powell's case* conclusively establishes that the statute in question is a constitutional exercise of the police power of the State, unless it can be considered as affected by the power to regulate commerce, as granted to or exercised by Congress under the Constitution of the United States.

The act of Congress of August 2, 1886, c. 840, imposing internal revenue taxes upon manufacturers and sellers of oleomargarine, and defining what shall be considered as oleomargarine for the purposes of that act, expressly provides, in § 3, that section 3243 of the Revised Statutes, so far as applicable, shall apply to such taxes and persons. 24 Stat. 209. By section 3243 of the Revised Statutes, "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State, or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for state or other purposes."

As was said by this court in *Plumley* v. *Massachusetts*, 155 U. S. 461, "It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in

reference to that article. Nor was the act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress, or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment, so far as the General Government is concerned; but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits." 155 U. S. 466, 467. "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the General Government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States." 155 U. S. 472.

In *Plumley's case*, it was accordingly adjudged by this court, affirming the judgment of the Supreme Judicial Court of Massachusetts, that a statute of Massachusetts, imposing a penalty on the manufacture, sale, offering for sale, or having in possession with intent to sell, "any article or compound, made wholly or partly out of any fat, oil or oleaginous substance, or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream from the same," was constitutional and valid, as applied to sales in Massachusetts of oleomargarine made in another State, artificially colored so as to look like yellow butter, and imported in the packages in which it was sold.

The necessary result of the decisions in *Powell's case* and in *Plumley's case*, and of the reasoning upon which those deci-

sions were founded, and by which alone they can be justified, appears to us to be that each State may, in the exercise of its police power, without violating the provisions of the Constitution and laws of the United States concerning interstate commerce, make such regulations relating to all sales of oleomargarine within the State, even in original packages brought from another State, as the legislature of the State may deem necessary to protect the people from being induced to purchase articles, either not fit for food, or differing in nature from what they purport to be; that the questions of danger to health, and of likelihood of fraud or deception, and of the preventive measures required for the protection of the people, are questions of fact and of public policy, the determination of which belongs to the legislative department, and not to the judiciary; and that, if the legislature is satisfied that oleomargarine is unwholesome, or that, in the tubs, pots or packages in which it is commonly offered for sale, it looks so like butter, that the only way to protect the people against injury to health, in the one case, or against fraud or deception, in the other, is to absolutely prohibit its sale, it is within the constitutional power of the legislature to do so.

COLLINS *v.* NEW HAMPSHIRE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

No. 17. Argued March 23, 24, 1898. — Decided May 23, 1898.

Following the decision in *Schollenberger* v. *Pennsylvania*, *ante*, 1, the court holds that the statute of New Hampshire prohibiting the sale of oleomargarine as a substitute for butter, unless it is of a pink color, is invalid, as being, in necessary effect, prohibitory.

The case is stated in the opinion. It was argued with *Schollenberger* v. *Pennsylvania*, *ante*, 1, by the same counsel for plaintiff in error.

Mr. William D. Guthrie for plaintiff in error. *Mr. Richard*

C. Dale, *Mr. Henry R. Edmunds* and *Mr. Albert H. Veeder* were on his brief.

Mr. John G. Johnson was for the defendant in error in *Schollenberger* v. *Pennsylvania*, argued with this case; but there was no appearance for the defendant in error in this case.

Mr. Justice Peckham delivered the opinion of the court.

This case comes here by virtue of a writ of error to the Supreme Court of the State of New Hampshire, by which we are called upon to review the judgment of that court sustaining a conviction of the plaintiff in error in the court of first instance of a violation of the public statutes of the State, prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color. The law is to be found in sections 19 and 20, chap. 127, Public Statutes, 1891. The two sections are set forth in the margin.[1]

The plaintiff in error was convicted of selling a package of

[1] § 19. It shall be unlawful to sell, offer for sale, or keep in possession with intent to sell, in this State, any substance or compound made wholly or in part of fats, oils or grease, not produced from milk or cream, in imitation of, or as a substitute for, butter or cheese, unless the same is contained in tubs, firkins, boxes or other packages, each of which has upon it, to indicate the character of its contents, the words "Adulterated butter," "Oleomargarine," or "Imitation cheese" as the case may be, in plain roman letters not less than one half inch in length, and so placed and made or attached that they can be readily seen and read and cannot be easily defaced; and if the substance or compound is a substitute for cheese, unless the cloth surrounding it has a like inscription; and if it is a substitute for butter, unless it is of a pink color. When any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as above, in like letters.

§ 20. If any person shall sell, or offer for sale, or keep in possession with intent to sell, in this State, any substance or compound of the kinds described in the preceding section in a manner that is made unlawful by said section, or shall sell, offer for sale, or keep in possession with intent to sell, any such substance or compound without disclosing its true character, he shall be fined not more than one hundred dollars, or be imprisoned not more than sixty days, or both.

oleomargarine not of pink color in violation of the statute and was sentenced to pay a fine of $100, and to pay the costs of prosecution and to stand committed until sentence was performed.

The following are the facts appearing in the record:

"The respondent is agent at Manchester of Swift & Co., an Illinois corporation, having its principal place of business in Chicago. The corporation manufactures oleomargarine and puts it up in packages in Chicago, and distributes the packages from there to different places — one of which is Manchester — where it maintains stores and sells the article at wholesale in the original packages. It has paid the special United States taxes imposed by the act of Congress of August 2, 1886 (Supp. to R. S. of U. S., v. 1, p. 505), and has complied with all other requirements of that act in respect to the manufacture and sale at wholesale of oleomargarine. The article has the color of butter, the same coloring matter being used to color it that is frequently used to color butter, and is made wholly or in part of fats, oils or grease not produced from milk or cream, in imitation of or as a substitute for butter. It is not manufactured in this State. The respondent as such agent sold in Manchester, at wholesale, at the store of the company, a package of said article weighing ten pounds in the form it was put up in Chicago by his principal. The provisions of section 19, chapter 127, Public Statutes of this State, were complied with, so far as the package was concerned, except the color of its contents was not pink. The oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food.

"The respondent claimed that upon these facts he was not guilty, because the statute of this State is in contravention of the Constitution of the United States and its amendments and of the laws of Congress; otherwise he admitted his guilt. The court ruled against the respondent as to the above claim, and he excepted."

It was stated on the argument that since the conviction of the plaintiff in error the statute above cited had been repealed, but that such repeal did not affect the conviction, because of

the provision made in the New Hampshire statutes that "no suit or prosecution, pending at the time of the repeal of an act, for any offence committed or for the recovery of a penalty or forfeiture incurred, under the act so repealed, shall be affected by such repeal." We are therefore called upon to determine the validity of the conviction.

The plaintiff in error claims that the statute under which he was indicted and convicted is void, because in contravention of the Constitution of the United States, which gives power to Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

We think this case comes within the principle of the cases just decided regarding the statute of the Commonwealth of Pennsylvania prohibiting the introduction of oleomargarine into that Commonwealth. This statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended. The act is a mere evasion of the direct prohibition contained in the Pennsylvania statute, and yet if enforced the result, within the State, would be quite as positive in the total suppression of the article as is the case with the Pennsylvania act.

In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute

must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition.

If this provision for coloring the article were a legal condition, a legislature could not be limited to pink in its choice of colors. The legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black. Nor do we see that it would be limited to the use of coloring matter. It might, instead of that, provide that the article should only be sold if mixed with some other article which, while not deleterious to health, would nevertheless give out a most offensive smell. If the legislature have the power to direct that the article shall be colored pink, which can only be accomplished by the use of some foreign substance that will have that effect, we do not know upon what principle it should be confined to discoloration, or why a provision for an offensive odor would not be just as valid as one prescribing the particular color. The truth is, however, as we have above stated, the statute in its necessary effect is prohibitory, and therefore upon the principle recognized in the Pennsylvania cases it is invalid.

The judgment of the Supreme Court of New Hampshire is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice Harlan and Mr. Justice Gray dissented.

POUNDS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 298. Submitted May 6, 1898. — Decided May 23, 1898.

An indictment under Rev. Stat. § 3296, for the concealment of distilled spirits on which the tax has not been paid, removed to a place other than the distillery warehouse provided by law, which charges the performance of that act at a particular time and place, and in the language of the statute, is sufficiently certain.

When there is nothing in the record to show that the jury in a criminal case separated before the verdict was returned into court, and the record shows that a sealed verdict was returned by the jury by agreement of counsel for both parties in open court, and in the presence of the defendant, the verdict was rightly received and recorded.

THE indictment under which the defendant (plaintiff in error) was tried contained fifteen counts. He was convicted on the sixth count, which read as follows:

"The grand jurors aforesaid, upon their oaths aforesaid, do further present, that, at the time and place and within the jurisdiction aforesaid, the said George Pounds unlawfully did conceal and aid in the concealment of distilled spirits on which the tax had not been paid, which said spirits had been removed to a place other than the distillery warehouse provided by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The count was drawn under section 3296 of the Revised Statutes, which provides that —

"Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals, or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals, or aids

in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

After the verdict, and before the judgment, the plaintiff in error filed his motion in arrest of judgment, as follows:

"Now comes the defendant after the rendition of the verdict of the jury finding him guilty as charged in the sixth count of the indictment and before judgment and sentence, and moves the court to arrest the judgment in this case, upon the ground that the sixth count of the indictment is too vague and uncertain to authorize a judgment and sentence against the defendant."

Afterwards an amended motion in arrest of judgment was filed, as follows:

"By leave of the court first had and obtained the defendant amends his motion in arrest of judgment by adding the following grounds:

"First. The said sixth count of the indictment fails to show that there was a warehouse provided by law to which the spirits alleged to have been concealed should have been removed.

"Second. That the jury separated before the verdict of the jury was returned into court."

The overruling of this motion was assigned as error.

Mr. J. A. W. Smith for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

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

Section 3271 of the Revised Statutes provides that "every distiller shall provide, at his own expense, a warehouse, to be

situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall be paid; . . . and such warehouse, when approved by the Commissioner of Internal Revenue on report of the collector, is hereby declared a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district and in charge of an internal revenue storekeeper assigned thereto by the Commissioner."

Section 3287 provides that all distilled spirits shall be drawn from the receiving cisterns into casks of a designated capacity and the quantity of spirits marked thereon, "and shall be immediately removed into the distillery warehouse," and stamps designating the quantity of spirits shall be applied thereto.

Other sections provide that no distilled spirits upon which the tax has been paid shall be stored or allowed to remain on any distillery premises, and such spirits found in a cask containing five gallons or more without having the stamp required by law shall be forfeited.

To secure the enforcement of this provision, section 3296 was enacted.

Plaintiff in error says:

"It seems clear that section 3296 of the Revised Statutes intended to provide a punishment for a distiller who had complied with the various provisions of chapter four of the Revised Statutes, and had provided a warehouse as required by section 3271, and then concealed or aided in the concealment of distilled spirits which had been removed, the tax not having been paid, to a place other than the distillery warehouse so provided."

And it hence claimed that the indictment is too uncertain to sustain the judgment, because it does not inform the defendant that a warehouse was provided in which the spirits which he is charged to have concealed should have been stored until the tax was paid. Undoubtedly, the statute was intended to punish a distiller who violated its provisions. It was also intended to punish any one else who did, and the

offence could be committed by a removal of spirits from the premises before storage in the distillery warehouse or by concealment of the spirits so removed. And it is this concealment which the indictment charges, and it sufficiently alleges the existence of a warehouse. It also alleges that the tax had not been paid. The offence was purely statutory. In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter. *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Britton*, 107 U. S. 655.

One of the acts which is made an offence by section 3296 is the concealment of distilled spirits on which the tax has not been paid, removed to a place other than the distillery warehouse provided by law. The indictment charges in the language of the statute the performance of that act at a particular time and place. It was therefore sufficiently certain.

As to the second ground of motion in arrest of judgment, it is enough to say that there is nothing in the record to show that the jury separated before the verdict was returned into court, but the record does show that a sealed verdict was returned by the jury by agreement of counsel for both parties in open court and in the presence of the defendant. This verdict was rightly received and recorded. *Commonwealth* v. *Carrington*, 116 Mass. 37.

The judgment is

Affirmed.

HARRISON *v.* MORTON.

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

No. 245. Argued May 2, 3, 1898. — Decided May 23, 1898.

Eustis v. *Bolles*, 150 U. S. 361, affirmed to the points:

(1) That to give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it

Statement of the Case.

was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it;

(2) That where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question not Federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

THIS suit was brought by the plaintiff in error Harrison against the defendant in error on the 8th of February, 1895, in the Baltimore City Court to recover the sum of $300,000 damages for the breach of a contract under seal for the sale of certain patent rights.

Under the alleged contract the plaintiff in error sold, and the defendant in error bought and agreed to pay for, a certain machine, method and device for making barrels and kegs, and all his right, title and interest in certain pending letters patent therefor, when issued, at and for the price of three hundred thousand dollars, whereof one hundred thousand dollars were to be paid in cash within ten days after the issuing of letters patent, and the remaining two hundred thousand dollars were to be paid in the full-paid, non-assessable shares of a corporation, to be incorporated and organized by the defendant in error Morton under the laws of Maryland, with a capital stock of five hundred thousand dollars.

The pleas were:

First. *Non est factum.*

Second. That the signature of the defendant in error to the alleged agreement was procured by the fraud of the plaintiff in error.

Third. That the signature of the defendant in error was procured by the undue influence of the plaintiff in error.

And also three supplemental pleas on equitable grounds:

1st. That there was no consideration for the alleged agreement.

2d. That at the date of the alleged agreement Harrison

was not the owner of and had no valid title to the machine, method and device mentioned in the declaration.

3d. That at the time of the alleged assignment of the patent Harrison was not the owner of and had not a valid title to the said patent.

The defendant also filed a plea of set-off, and upon demand for a bill of particulars of such set-off filed a bill of particulars, amounting to thirty-one thousand seven hundred and ninety-one dollars and fifty-two cents ($31,791.52).

Replications were duly filed and issues joined on all of them.

The case was tried before the judge without a jury.

At the trial the parties asked the court to rule on certain propositions contained in what the record calls "prayers." They were as follows, with the action of the court expressed thereon:

"*Plaintiff's First Prayer.*

"The plaintiff, by his counsel, prays the court to rule that if it shall find from the evidence that the contract between the plaintiff and defendant, dated December 8, 1894, and read in evidence, was signed and sealed by the plaintiff and defendant, and left in the possession of the defendant as a complete and operative instrument according to its terms, and that in accordance with said contract, shortly after the execution thereof, the plaintiff executed to the defendant the assignment read in evidence of his right to the invention therein mentioned, on which application for a patent was then pending, and that defendant afterwards employed and paid patent attorneys to procure for him the patent from the Government of the United States and from the governments of other countries; and if the court shall further find that the said application for a patent was allowed by the Government of the United States, and subsequently that letters patent for said invention were granted, bearing date January 22, 1895, as read in evidence, and that the plaintiff, at the time of the execution of said agreement with the *plaintiff*, had no knowledge or notice of the agreement between Henry Campbell and the Campbell Barrel Company offered in evidence, then the plaintiff is entitled to recover.

"('*And that there is no evidence that the plaintiff had any knowledge or notice of said agreement between said Campbell and said Campbell Barrel Company.*') (Rejected as offered, but granted as modified by omitting the words in Italics.)

"*Plaintiff's Second Prayer.*

"The plaintiff, by his counsel, prays the court to rule that the defendant has offered no evidence legally sufficient to show that the contract set out in the declaration was procured by the plaintiff from the defendant by fraud, or by undue influence. (Conceded.)

"*Plaintiff's Third Prayer.*

"The plaintiff, by his counsel, prays the court to rule that the defendant has offered no evidence legally sufficient to show that there was no consideration for the agreement set out in the declaration. (Rejected.)

"*Plaintiff's Fourth Prayer.*

"The plaintiff prays the court to rule that if the court shall find that on the 11th day of September, 1894, Henry Campbell made to the plaintiff the assignment of one half interest in his then pending application to the United States Patent Office for a patent for the invention in said assignment mentioned, and subsequently, on or about the 26th of November, 1894, made to the plaintiff a further assignment of all his interest in his said pending application and to the patent thereon, whenever the same should thereafter be granted; then, by virtue of said two assignments, the plaintiff acquired an inchoate title to said invention and to the patent thereon, when the same should thereafter be granted, which title it was competent for the plaintiff to sell, assign and dispose of; and if the court shall further find that on or about the 10th day of December, 1894, the plaintiff executed to the defendant the assignment read in the evidence and dated the 8th day of December, 1894, for the consideration therein mentioned, and that subsequently, on or about the 22d day of January, 1895, a patent was issued by the United States in the name of said Henry Campbell, for the invention described

in said several assignments from said Campbell to the plaintiff and from the plaintiff to the defendant, then the defendant, by virtue of said letters patent, acquired a valid title to and became the owner of said patent, and said assignment from the plaintiff to the defendant, bearing date the 8th day of December, 1894, was supported by a good and sufficient consideration, and the plaintiff is entitled to recover upon the contracts set out in the declaration, provided the court, sitting as a jury, shall find that the said contract was signed and sealed by the plaintiff to the defendant, and was designed by them to be an operative instrument according to its terms; and provided further that at the time of the execution of said contract, the plaintiff had no knowledge or notice of the agreement between Henry Campbell and the Campbell Barrel Company, bearing date the — day of January, 1892, and offered in evidence by the defendant, and that there is no evidence legally sufficient to show that the plaintiff had any such knowledge or notice of said agreement. (Rejected.)

"*Fifth Prayer.*

"That the agreement of January, 1892, between Henry Campbell and the Campbell Barrel Company, offered in evidence by the defendant, is no defence to this action, if the court shall find that by the true construction of said agreement the invention and device described in the contract set out in the declaration is not embraced within said agreement. (Granted.)"

And the defendant offered the following two prayers:

"*Defendant's First Prayer.*

"The defendant asks the court to rule as matter of law that upon the pleadings of the case the burden is upon the plaintiff to prove the delivery of the sealed instrument sued on, and if the court, sitting as a jury, finds that the paper sued on never was delivered, the verdict must be for the defendant. (Granted.)

"*Defendant's Second Prayer.*

"If the court, sitting as a jury, shall find that when the paper sued on was presented by the plaintiff to the defendant

for the latter's signature, with the request that he would sign it, the defendant declined so to do, as the terms of such papers did not correspond with any agreement made or talked of between the plaintiff and defendant, and that thereupon it was agreed between them that the papers in duplicate should be signed by the defendant, and both kept in his possession, and should not be of any force, and should belong to the defendant until he chose to put them in force, and that in pursuance of this agreement they were then signed by the defendant, and always afterwards kept in his possession until produced at the trial of this cause, on notice, and that at no time after the signing of said papers did the defendant ever exercise his option of putting into force, but on the contrary, subsequently thereto, exercised his option by declining to recognize them as in force, then the verdict shall be for the defendant. (Granted.)"

The trial judge rendered a general verdict for the defendant, on which judgment was entered for $35,091.65, with interest and costs.

An appeal having been taken to the Court of Appeals of Maryland by the plaintiff Harrison, the judgment of the court below was affirmed by the said Court of Appeals on the 17th of June, 1896, for $39,091.65, with interest from the 13th of December, 1884, until paid, and costs.

On September 21, 1896, a writ of error to review this judgment was issued to the Court of Appeals of Maryland.

There are nine assignments of error. They embrace rulings on testimony, on the prayers and the following:

"1. It was error to decide that under the laws of the United States the assignments from Henry Campbell to Walter H. Harrison, dated the 11th day of September, A.D. 1894, and the 26th day of November, 1894, respectively, purporting to convey to the said Harrison the 'entire right, title and interest in and to the application for patent — serial number, 522,266 — and the patent right contained therein and covered thereby,' operated to convey to the plaintiff Harrison merely the equitable title in and to said invention and the patent rights covered by said application.

"2. It was error to decide that the said assignments were

not drawn as the laws required, and hence did not convey the legal title to the invention in question."

The opinion of the Supreme Court of Maryland, 83 Maryland, 456, is quite long, necessarily so, as it passes upon all the points which were raised by plaintiffs. The parts of it which concern the case are as follows:

"We think there can be no doubt that the defendant's two prayers were properly granted. By the first the court declared as matter of law that upon the pleadings the burden was upon the plaintiff to prove the delivery of the sealed instrument sued on, and that if the court, sitting as a jury, should find that said paper never was delivered the verdict must be for the defendant. The second prayer recites the evidence more at length, but asserts the same proposition of law, which appears to be well settled in this State. *Edelen* v. *Saunders*, 8 Md. 129. We discover no inconsistency between the two prayers. The plaintiff specially excepted to the second on the ground that there was no evidence in the cause legally sufficient to prove the facts therein set forth. It is clear, however, that the testimony of the witnesses, Morton and Coale, support the facts set forth in the prayer, and we have already held it to be competent and admissible under the issue made by the plea of *non est factum*.

"We will now consider the prayers of the plaintiff. He offered five, the second having been conceded and the fifth granted.

"The controlling proposition in this part of the case is that contended for by the plaintiff in his first, third and fourth prayers, namely, that there is no legally sufficient evidence in the case to show that he had any knowledge or notice of the agreement between the inventor, Campbell, and the Campbell Barrel Company.

"The correctness of this contention of the plaintiff depends, first, upon the legal effect of the assignments from Campbell to the plaintiff, and, secondly, upon the effect of the contract of Campbell with the Campbell Barrel Company — that is to say, whether said Campbell thereby assigned to said company an equitable title to his invention prior in date to the title he

claims to have assigned to the defendant, which latter title the plaintiff claims to be an absolute legal title; and the defendant's contention, on the contrary, is that it is a mere equitable title, subsequent in date, and therefore inferior to the title of the Barrel Company. The plaintiff claims title through two assignments from Campbell, each being for one half interest in a certain application filed in the Patent Office of the United States, at Washington, D.C., which application is for letters patent covering the invention of a machine for forming and making barrels and kegs.

"It will be found upon an examination of these instruments that they do not contain a request to the Commissioner of Patents to issue letters patent to the plaintiff. Notwithstanding they were recorded in the Patent Office, letters patent were issued in the name of Henry Campbell, the inventor, and the defendant contends that the legal effect of such an assignment, in which the inventor fails to embody a request to the Commissioner of Patents to issue letters to the assignee, is to convey to such assignee only an equitable title. It is conceded that by one of the rules of the Patent Office the Commissioner will not and cannot issue the letters patent to an assignee, unless specially requested so to do by the terms of the assignment. One of the witnesses refers to this rule in his testimony. The patent having been issued to Campbell instead of to the defendant, the witness thus explains: 'I ascertained that the probable reason why it (the patent) had not been issued to Mr. Morton was this: The original assignment from Mr. Campbell to Mr. Harrison did not contain the request which the rules of the Patent Office required in order that the patent should be issued in the name of the assignee.' (Rule 26, Rules of Practice in U. S. Patent Office, page 9. Revised April 1, 1892.)"

After considering authorities, the opinion decides that —

"If, therefore, the Campbell Barrel Company acquired an equitable title to the patent, as it undoubtedly did, under its contract with the inventor, before the assignment of the equity to the defendant, the latter took subject to the equitable title in the said company, and the first, third and fourth prayers of

the plaintiff were properly refused, for they all asked the court to say that there was no legally sufficient evidence to show that the plaintiff had knowledge or notice of the agreement between the plaintiff and the barrel company; but, as we have seen, knowledge and notice will be imputed to him, as C. J. Gibson said in *Chew* v. *Barnett*, *supra*, 'whether he had notice or not,' holding as he did only an equitable title."

The opinion concludes as follows: "Finding no error in the rulings of the learned judge below, the judgment will be affirmed."

Mr. William Pinckney Whyte and *Mr. Frederic D. McKenney* for plaintiff in error. *Mr. Samuel F. Phillips* was on their brief.

Mr. Edgar H. Gans and *Mr. Bernard Carter* for defendant in error.

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

It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery. This contention was clearly presented by defendant's prayers, and they contained the only rulings urged upon the court in that way, that is, in the nature of instructions. They were given and the verdict was generally for the defendant. It is therefore natural to presume that the verdict was rendered on account of them and on the ground urged by them. The ruling of the court granting them was sustained by the Supreme Court of the State. It affirmed the ruling as correct in law and as supported by competent testimony. The Supreme Court, it is true, passed on other grounds, passed on the one which it is

claimed involved a Federal question, and decided it adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in *Eustis* v. *Bolles*, 150 U. S. 361. It is sufficient to announce the rule pronounced in that case:

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment." See also *Wade* v. *Lawder*, 165 U. S. 624.

The writ of error must therefore be dismissed.

Mr. Justice Gray did not hear the argument and took no part in the decision.

DETROIT CITIZENS' STREET RAILWAY COMPANY *v.* DETROIT RAILWAY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 236. Argued April 26, 27, 1898. — Decided May 23, 1898.

At the time when the plaintiff in error received from the city of Detroit exclusive authority to construct and operate its railways in that city, the common council of Detroit had no power, either inherent or derived from the legislature, to confer an exclusive privilege thereto.

THE plaintiff in error is a street railway company of the State of Michigan, organized for the purpose of owning and operating lines in the city of Detroit, and is the successor in interest of a similar corporation named the Detroit City Railway. The rights asserted by it arise from an ordinance of the common council of that city passed upon November 24, 1862. This provided that the Detroit City Railway was "exclusively authorized to construct and operate railways as herein provided, on and through" (certain specified streets) "and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit and assented to in writing by said corporation. . . . And provided the corporation does not assent in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route."

The ordinance provided also that "the powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage."

Section 2 of the ordinance is only necessary to be quoted, and it is inserted in the margin.[1]

[1] SEC. 2. The said grantees are, by the provisions of this ordinance, exclusively authorized to construct and operate railways as herein provided, on and through Jefferson, Michigan and Woodward avenues, Witherell, Gratiot, Grand River and Brush or Beaubien streets; and from Jefferson

There is also inserted in the margin sections 33 and 34 of the Tram Railway Act.[1] Howell's Stats. 1882, c. 94, Title 16.

By an ordinance passed November 14, 1879, it was provided further that "the powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1862, and the amend-

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avenue through Brush or Beaubien streets to Atwater street; and from Jefferson avenue, at its intersection with Woodbridge street, to Third street; up Third street to Fort street and through Fort street to the western limits of the city; and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit, and assented to, in writing, by said corporation, organized as provided in section first of this ordinance. And provided, The corporation does not assent, in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid, at their own cost and expense; Provided, always, that the railways on Grand River street, Gratiot street and Michigan avenue shall each run into and connect with the Woodward avenue railways, in such direction that said railways shall be continued down to, and form, each of them, one continuous route to Jefferson avenue; Provided, always, that said railroad down Gratiot street may be continued to Woodward avenue, through State street, or through Randolph street, and Monroe avenue and the Campus Martius, as the grantees, or their assigns, under this ordinance may elect.

[1] SEC. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State.

SEC. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; Provided, further, that, after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof.

ments thereto, are hereby extended and limited to thirty years from this date."

On November 20, 1894, the common council passed an ordinance granting to several third parties the right to construct street railways upon portions of certain streets upon which the plaintiff in error was maintaining and operating street railways, and also the right to construct, maintain and operate railways on certain other streets, alleys and public places in the city of Detroit, without giving to plaintiff in error the opportunity to decide whether it would construct the same. The present suit was brought in the circuit court for the county of Wayne and State of Michigan, to enjoin the grantees named in the latter ordinance, and also the city, from acting thereunder, upon the ground that it impaired the contract between the city and the plaintiff in error arising from the ordinances first aforesaid. The bill was dismissed, and, on appeal to the Supreme Court of the State, the decree of dismissal was affirmed. From that decree the present writ of error has been duly prosecuted to this court.

There are five assignments of error. They present the contention that the grant to the plaintiff in error was a contract within the protection of the provision of the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of a contract, and that the subsequent grant to the defendant in error, the Detroit Railway, was a violation and an impairment of the obligation of that contract.

Mr. John C. Donnelly, *Mr. H. M. Duffield* and *Mr. Frederic A. Baker* for plaintiff in error. *Mr. Michael Brennan*, *Mr. David Willcox* and *Mr. Frank Sullivan Smith* were on the plaintiff in error's briefs.

Mr. John B. Corlies, *Mr. Charles Flowers* and *Mr. Joseph H. Choate* for defendants in error. *Mr. Philip A. Rollins* was on their brief.

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

Opinion of the Court.

The controversy turns primarily upon the power of the city of Detroit over its streets, whether original under the constitution of the State, and hence as extensive as it would be in the legislature, or whether not original but conferred by the legislature, and hence limited by the terms of the delegation.

The first proposition is asserted by the plaintiff in error; the second proposition by the defendants in error.

The provisions of the constitution which are pertinent to the case are as follows:

"The State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property.

"There shall be elected annually on the first Monday of April in each organized township . . . one commissioner of highways . . . and one overseer of highways for each highway district.

"The legislature shall not . . . vacate or alter any road laid out by the commissioners of highways, or any street in any city or village, or in any recorded town plat.

"The legislature may confer upon organized townships, incorporated cities and villages, and upon boards of supervisors of the several counties such powers of a local, legislative and administrative character as they may deem proper."

The Supreme Court of Michigan, in its opinion, 68 N. W. Rep. 304, interprets these provisions adversely to the contention of plaintiff in error, and, reviewing prior cases, declares their harmony with the views expressed. "The scope of the earlier decisions," the court said, "is clearly stated by Mr. Justice Cooley in *Park Commissioners* v. *Common Council*, 28 Michigan, 239. After stating that the opinion in *People* v. *Hurlbut* had been misapprehended, Justice Cooley said: 'We intended in that case to concede most fully that the State must determine for each of its municipal corporations the powers it should exercise, and the capacities it should possess, and that it must also decide what restrictions should be placed upon these, as well to prevent clashing of action and interest in the State as to protect individual corporators

against injustice and oppression at the hands of the local majority. And what we said in that case we here repeat — that, while it is a fundamental principle in this State, recognized and perpetuated by expressed provisions of the constitution, that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government, the constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the State from considerations of general policy, as well as those which pertain to the local benefit and local desires. And in conferring those powers it is not to be disputed that the legislature may give extensive capacity to acquire and hold property for local purposes or it may confine authority within the narrow bounds; and what it thus confers it may enlarge, restrict or take away at pleasure.' "

This decision of the Supreme Court of Michigan is persuasive if not authoritative; but, exercising an independent judgment, we think it is a correct interpretation of the constitutional provisions. The common council of Detroit, therefore, had no inherent power to confer the exclusive privilege claimed by the plaintiff in error.

Did it get such power from the legislature? It is contended that it did by the act under which the Detroit City Railway Company, the predecessor of plaintiff in error, was organized, and to whose rights and franchises it succeeded. This act is the Tram Railway Act, and at the time of the adoption of the first ordinance in 1862, section 34 of that act provided that "all companies or corporations formed for such purposes [the railway purposes mentioned in the act] shall have the exclusive right to use and operate any railways constructed, owned or held by them: Provided, that no such company or corporation shall be authorized to construct a railway, under this act, through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

In 1867 the further proviso was added that, after such consent should be given and accepted, such authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed or unreasonably impaired, or such company be deprived of the right of constructing, maintaining and operating such railway.

It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this — reasons which flow from the nature of the municipal trust — even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared — insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in *Minturn* v. *Larue*, 23 How. 435; *Wright* v. *Nagle*, 101 U. S. 791; *State* v. *Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262; *Parkhurst* v. *Salem*, 32 Pac. Rep. 304; *Saginaw Gas Light Co.* v. *Saginaw*, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this court; *Long* v. *Duluth*, 51 N. W. Rep. 913. See also *Grand Rapids Electric Light and Power Co.* v. *Grand Rapids &c. Co.*, 33 Fed. Rep. 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S.

1; *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24.

The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in *Grand Rapid &c. Power Co.* v. *Grand Rapid &c. Co.*, *supra*, says: . . . "that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'" The italics are his. This would make "necessarily implied" mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson* v. *Adam*, 1 Ves. & B. 422, 466, that "a necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed." If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark; or if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough — would have been natural under any constitution not prohibiting it, and the power to prescribe the terms and regulations of the occupation derive very little if any breadth from the expression of it. But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise which stops short, or which rather does not extend to granting an exclusive privilege of occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one, contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it which is the test of the cases. The rule is one

of construction. Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose — from the general purview of the act which confers it. A municipality is a governmental agency — its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.

Decree affirmed.

Mr. Justice Shiras did not hear the argument and took no part in the decision.

DEL MONTE MINING AND MILLING COMPANY *v.* LAST CHANCE MINING AND MILLING COMPANY.

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

No. 147. Argued December 8, 9, 1897. — Decided May 23, 1898.

To the first question certified by the Circuit Court of Appeals, viz.: "1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extralateral rights not in conflict with any rights of the senior location?" this court returns an affirmative answer, subject to the qualification that no forcible entry is made.

Syllabus.

It passes the second question, viz.: "2. Does the patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes them from the premises previously granted to the New York Lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?" because it needs no other answer than that which is contained in the discussion of the first question in its opinion.

To the third question, viz.: "3. Is the easterly side of the New York Lode mining claim and 'end line' of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?" it gives a negative answer.

The fourth question, viz.: "4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?" it answers in the affirmative.

It holds that the fifth question, viz.: "5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?" in effect seeks from this court a decision of the whole case, and therefore is not one which it is called upon to answer.

In discussing the first of these questions the court holds:

(1) That it is dealing with statutory rights, and may not go beyond the terms of the statutes;

(2) That as Congress has prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his own territory;

(3) That the Government does not grant the right to search for minerals in lands which are the private property of individuals, or authorize any disturbance of the title or possession of such lands;

(4) That the location of a mining claim means the giving notice of that claim: that it need not follow the lines of Government surveys: that it is made to measure rights beneath the surface: and that although the statute requires it to be distinctly marked on the surface, the doing so does not prevent a subsequent location by another party upon the same, or a part of the same territory, as, in such case, the statute provides a way for determining the respective rights of the parties:

(5) That the requisition in the statute that the end lines of the location should be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location might exercise.

(6) That the answer to the first question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires.

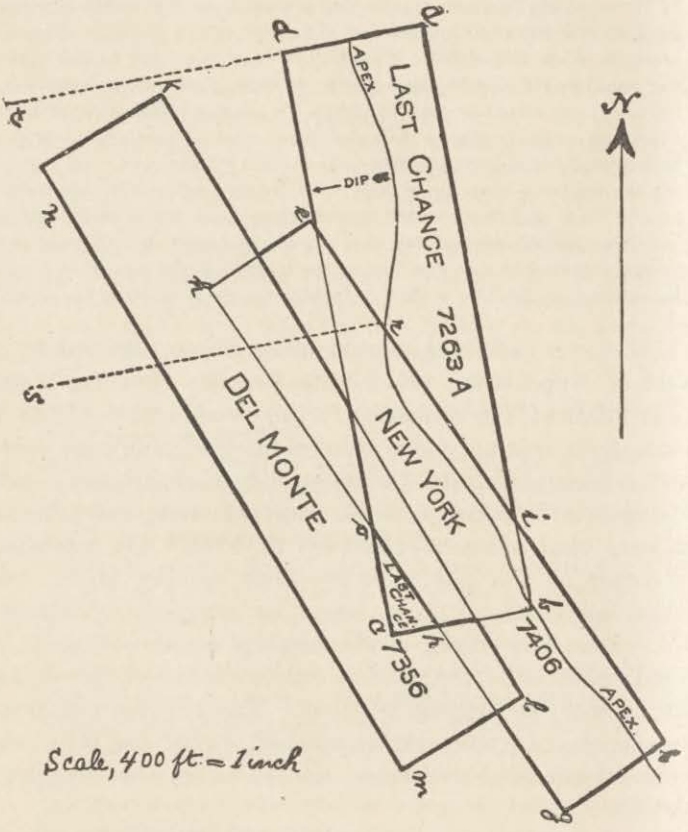
In discussing the fourth of these propositions the court says: "Our conclu-

sions may be summed up in these propositions: *First*, the location as made on the surface by the locator determines the extent of rights below the surface. *Second*, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. *Third*, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. *Fourth*, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location.

This case is before this court on questions certified by the Court of Appeals for the Eighth Circuit. The facts stated are as follows: The appellant is the owner in fee of the Del Monte Lode mining claim, located in the Sunnyside mining district, Mineral County, Colorado, for which it holds a patent bearing date February 3, 1894, pursuant to an entry made at the local land office on February 27, 1893. The appellee is the owner of the Last Chance Lode mining claim, under patent dated July 5, 1894, based on an entry of March 1, 1894. The New York Lode mining claim, which is not owned by either of the parties, was patented on April 5, 1894, upon an entry of August 26, 1893. The relative situation of these claims, as well as the course and dip of the vein, which is the subject of controversy, is shown in the diagram on page 58.

Both in location and patent the Del Monte claim is first in time, the New York second and the Last Chance third. When the owners of the Last Chance claim applied for their patent proceedings in adverse were instituted against them by the owners of the New York claim, and an action in support of such adverse was brought in the United States Circuit Court for the District of Colorado. This action terminated

in favor of the owners of the New York and against the owners of the Last Chance, and awarded the territory in conflict between the two locations to the New York claim. The ground in conflict between the New York and Del Monte, except so much thereof as was also in conflict between the



Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The New York secured a patent to all its territory, except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory, except that in conflict with the New York, in which last-named patent was included the triangular sur-

face conflict between the Del Monte and Last Chance, which, by agreement, was patented to the latter. The Last Chance claim was located upon a vein, lode or ledge of silver and lead bearing ore, which crosses its north end line and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location which was patented to the Last Chance as aforesaid, and no part of the apex is within the surface boundaries of the Del Monte mining claim. The portion of the vein in controversy is that lying under the surface of the Del Monte claim and between two vertical planes, one drawn through the north end line of the Last Chance claim extending westerly, and the other parallel thereto and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram. Upon these facts the following questions have been certified to us:

"1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extralateral rights not in conflict with any rights of the senior location?

"2. Does the patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

"3. Is the easterly side of the New York Lode mining claim an 'end line' of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

"4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

"5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?"

Mr. Charles S. Thomas for Del Monte Mining & Milling Company. *Mr. William H. Bryant* and *Mr. Harry H. Lee* were on his brief.

Mr. Joel F. Vaile for Last Chance Mining & Milling Company. *Mr. Edward O. Wolcott* was on his brief.

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

The questions thus presented are not only important but difficult, involving as they do the construction of the statutes of the United States in respect to mining claims. As leading up to a clearer understanding of those statutes it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface. Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. It is said by Lindley, in his work on Mines, (vol. 1, sec. 4,) that in certain parts of England and Wales so called

local customs were recognized which modified the general rule of the common law, but the existence of such exceptions founded upon such local customs only accentuates the general rule. The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. *Mining Company* v. *Tarbet*, 98 U. S. 463, 468; 1 Lindley on Mines, sec. 13. The peculiarities of the Mexican law are discussed by Lindley at some length in the section referred to. It is enough here to notice the fact that by the Mexican as by the common law the surface rights limited the rights below the surface.

In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their "public lands." By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the Government. For nearly a century there was practically no legislation on the part of Congress for the disposal of mines or mineral lands. The statute of July 26, 1866, c. 262, 14 Stat. 251, was the first general statute providing for the conveyance of mines or minerals. Previous to that time it is true that there had been legislation respecting leases of mines, as, for instance, the act of March 3, 1807, c. 49, § 5, 2 Stat. 448, 449, which authorized the President to lease any lead mine in the Indiana Territory for a term not exceeding five years; and acts providing for the sale of lands containing lead mines in special districts, act of March 3, 1829, c. 55, 4 Stat. 364; act of July 11, 1846, c. 36, 9 Stat. 37; act of March 1, 1847, c. 32, 9 Stat. 146; act of March 3, 1847, c. 54, 9 Stat. 179; also such legislation as is found in the act of February 27, 1865, c. 64, 13 Stat. 440, providing for a District and Circuit Court for the District of Nevada, in which it was said, in section 9: "That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of posses-

sion;" that of May 5, 1866, c. 73, 14 Stat. 43, concerning the boundaries of the State of Nevada, which provided that "all possessory rights acquired by citizens of the United States to mining claims, discovered, located and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the State of Nevada shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining States and Territories;" and the act of July 25, 1866, c. 244, 14 Stat. 242, which, granting to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel, conferred upon the grantees the right of preëmption of lodes within two thousand feet on each side of said tunnel. Two laws were also passed regulating the sale and disposal of coal lands; one on July 1, 1864, c. 205, and one on March 3, 1865, c. 107, 13 Stat. 343, 529.

Notwithstanding that there was no general legislation on the part of Congress, the fact of explorers searching the public domain for mines, and their possessory rights to the mines by them discovered, was generally recognized, and the rules and customs of miners in any particular district were enforced as valid. As said by this court in *Sparrow* v. *Strong*, 3 Wall. 97, 104: "We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." See also *Forbes* v. *Gracey*, 94 U. S. 762; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Broder* v. *Water Company*, 101 U. S. 274, 276; *Manuel* v. *Wulff*, 152 U. S. 505, 510; *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449.

The act of 1866 was, however, as we have said, the first

general legislation in respect to the disposal of mines. The first section provided: "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The second section gave to a claimant of a vein or lode of quartz, or other rock in place, bearing gold, etc., the right "to file in the local land office a diagram of the same . . . and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The purpose here manifested was the conveyance of the vein, and not the conveyance of a certain area of land within which was a vein. Section 3, which set forth the steps necessary to be taken to secure a patent and required the payment of five dollars per acre for the land conveyed, added: "But said plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Nowhere was there any express limitation as to the amount of land to be conveyed, the provision in section 4 being: "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons." Obviously the statute contemplated the patenting of a certain

number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface as was "fixed by local rules," or was in the absence of such rules in its judgment necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title.

As might be expected, the patents issued under this statute described surface areas very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein on its course or strike departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location.

The litigation in respect to the Flagstaff mine in Utah illustrates this. There was a local custom giving to the locator of a mine fifty feet in width on either side of the course of the vein, and the Flagstaff patent granted a super-

ficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein described therein to the extent of twenty-six hundred feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but a hundred feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein on its course passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course or strike to the full extent of twenty-six hundred feet. This was denied by the Supreme Court of Utah. *McCormick* v. *Varnes*, 2 Utah, 355. In that case the controversy was with the location on the west of the Flagstaff. The decision of that court in respect to the controversy with the location on the east of the Flagstaff is not reported, but the case came to this court. *Mining Company* v. *Tarbet*, 98 U. S. 463. In the course of the opinion (pages 467, 468) it was said:

"It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to."

These decisions show that while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872, c. 152, 17 Stat. 91, found in the Revised Statutes, sections 2319 and following. This is the statute which is in force to-day, and under which the con-

troversies in this case arise. Section 2319, Revised Statutes, (corresponding to section 1 of the act of 1872,) reads:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States."

It needs no argument to show that if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along

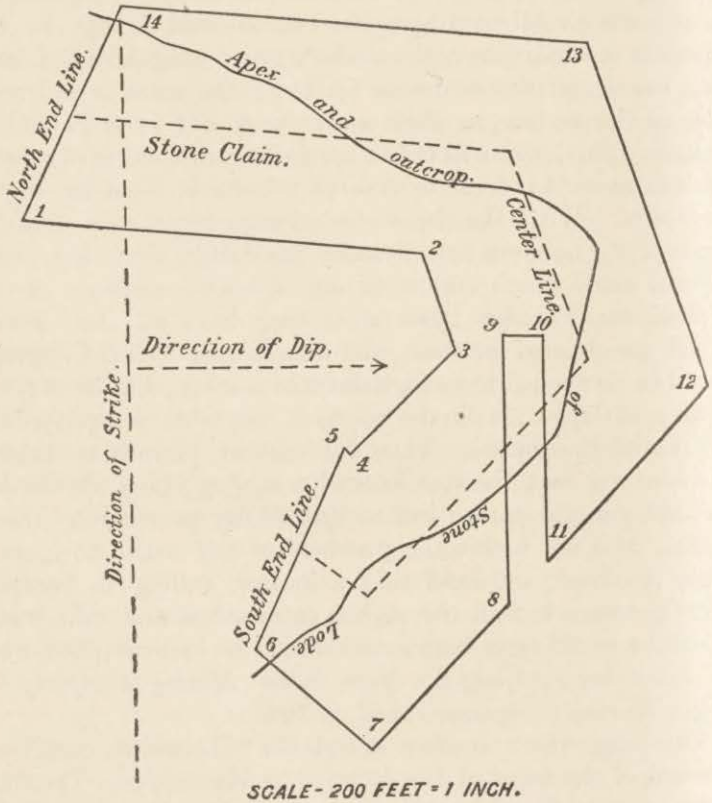
its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line there would be little difficulty in legislation to provide for all contingencies, but mineral is apt to be found in mountainous regions where great irregularity of surface exists and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, what is equity, but what saith the statute. Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Sec. 2320.) It is not within the province of the courts to ignore such provision and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged. *Iron Silver Mining Company* v. *Elgin Mining Company*, 118 U. S. 196.

This case, which is often called the "Horseshoe case," on account of the form of the location, is instructive. The diagram on page 68, which was in the record in that case, illustrates the scope of the decision.

The locator claimed in his application for a patent the lines 1, 14 and 5, 6, as the end lines of his location, and because of their parallelism, that he had complied with the letter of the statute, but the court ruled against him, saying in the opinion (page 208):

"The exterior lines of the Stone claim formed a curved

figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure,



and apparently for no other reason than their parallelism called them end lines.

"We are, therefore, of opinion that the objection that, by reason of the surface form of the Stone claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof."

It is true the court also observed that if the two lines named by the locator were to be considered the end lines, no part of the vein in controversy fell "within vertical planes drawn down through those lines, continued in their own direction." But notwithstanding this observation the point of the decision was that the lines, which were the end lines of the location as made on the surface of the ground, were not parallel, and that this defect could not be obviated by calling that which was in fact a side line an end line. This is made more clear by the observations of the Chief Justice, who, with Mr. Justice Bradley, dissented, in which he said:

"I cannot agree to this judgment. In my opinion the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface."

In other words, the court took the location as made on the surface by the locator, determined from that what were the end lines, and made those surface end lines controlling upon his rights; and rejected the contention that it was proper for the court to ignore the surface location and create for the locator a new location whose end lines should be crosswise of the general course of the vein as finally determined by explorations. That this decision and that in the *Tarbet case*, *supra*, were correct expositions of the statute and correctly comprehended the intent of Congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, Congress has not seen fit to change the language of the statute, or in any manner to indicate that any different measure of rights should be awarded to a mining locator.

With these preliminary observations we pass to a consideration of the questions propounded. The first is:

"May any of the lines of a junior lode location be laid

within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

By section 2319, quoted above, the mineral deposits which are declared to be open to exploration and purchase are those found in lands belonging to the United States, and such lands are the only ones open to occupation and purchase. While this is true, it is also true that until the legal title has passed the public lands are within the jurisdiction of the Land Department, and although equitable rights may be established Congress retains a certain measure of control. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589. The grant is, as is often said, in process of administration. Passing to section 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim, it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. . . . The end lines of each claim shall be parallel to each other."

Section 2322 gives to the locators of all mining locations, so long as they comply with laws of the United States, and with state, territorial and local regulations not in conflict therewith, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor

of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 in terms authorizes "the miners of each mining district to make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides for the issue of a patent. It reads:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of

land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter

no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 is as follows:

"Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein con-

tained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

These are the only provisions of the statute which bear upon the question presented.

The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. Section 2322 declares that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location," and negatively that "nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Hence, it is said that affirmatively and negatively it is provided that the locator shall have exclusive possession of the surface, and that no one shall have a right to disturb him in such possession. How then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location. If he does so he is a trespasser, and it cannot be presumed that Congress intended that any rights should be created by trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in section 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right superior

to any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the Government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys, but whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible.

Further, Congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are

not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves — men inexperienced in the matter of surveying, and so in the nature of things there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes or other monuments, although sufficient at first and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and, indeed, in every mining camp where large discoveries have been made locations, in fact, overlap each other again and again. *McEvoy* v. *Hyman*, 25 Fed. Rep. 596, 600. This confusion and conflict is something which must have been expected, foreseen — something which in the nature of things would happen, and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to reloca-

tion. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has in terms provided for the settlement of disputes and conflicts, for by section 2325, when a locator makes application for a patent, (thus seeking to have a final determination by the Land Department of his title,) he is required to make publication and give notice so as to enable any one disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or any part of the location may institute adverse proceedings. Then by section 2326 proceedings are to be commenced in some appropriate court, and the decision of that court determines the relative rights of the parties. And the party who by that judgment is shown to be "entitled to the possession of the claim, or any portion thereof," may present a certified copy of the judgment roll to the proper land officers and obtain a patent "for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightfully possess." And that the claim may be found to belong to different persons and that the right of each to a portion may be adjudicated is shown by a subsequent sentence in that same section, which provides that "if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim . . . and patents shall issue to the several parties according to their respective rights." So it distinctly appears that notwithstanding the provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that

locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind is a statutory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized.

This question is not foreclosed by any decisions of this court as suggested by counsel. It is true there is language in some opinions which, standing alone, seems to sustain the contention. Thus, in *Belk* v. *Meagher*, 104 U. S. 279, 284, it is said:

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And again, in *Gwillim* v. *Donnellan*, 115 U. S. 45, 49:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held it is

not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defining or securing "underground or extralateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

In that aspect of the question the decisions referred to, although the language employed is general and broad, do not sustain the contention of counsel. This distinction is recognized in the text books. Thus in 1 Lindley on Mines, section 363, the author says:

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These conflicts sometimes involve a segment of the same vein, on its strike; at others, they involve the dip-bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The

same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void."

It will be seen that while the author denies the right of a second locator to enter upon the ground segregated by the first location, he recognizes the fact that overlapping locations are frequent, and declares the invalidity of the second location so far as it affects the rights vested in the prior locator, and in that he follows the cases from which we have quoted.

The practice of the Land Department has been in harmony with this view. The patents which were issued in this case for the Last Chance and New York claims give the entire boundaries of the original locations, and except from the grant those portions included within prior valid locations. So that on the face of each patent appears the original survey with the parallel end lines, the territory granted and the territory excluded. The instructions from the Land Department to the surveyors general have been generally in harmony with this thought. Thus, in a letter from the Commissioner of the Land Office to the surveyor general of Colorado, of date November 5, 1874, reported in 1 Copp's Land Owner, p. 133, are these instructions:

"In this connection I would state that the surveyor general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

"Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim, as *located*, if held by him in accordance with the local laws and Congressional enactments.

"If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the

established corners at which the exterior boundaries of the respective surveys intersect each other."

Again, in a general circular issued by the Land Department on November 16, 1882, found in 9 Copp's Land Owner, p. 162, it is said:

"The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

"The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

"1. The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

"2. The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

"3. Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

"4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows."

Again, on August 2, 1883, in a letter from the Acting Commissioner to the surveyor general of Arizona, reported in 10 Copp's Land Owner, p. 240, it is said:

"You state, and it is shown to be so by said diagram, that the said Grand Dipper lode, so located, is a four-sided figure with parallel end lines, the provisions of section 2320, U. S. Revised Statutes being fully complied with.

"The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald lode, the easterly end line of the Emerald claim thus becoming one of the boundary lines of the said 'Grand Dipper,' and not parallel to the easterly end line of the Grand Dipper survey.

"I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not con-

form directly to the lines of the location, they being properly run in the first instance."

It is true that on December 4, 1884, a circular letter was issued by the Land Department which slightly qualifies the general instructions previously issued. So that it may, perhaps, be truthfully said that the practice of the Land Department has not been absolutely uniform, and yet the descriptions which are found in the patents before us show that notwithstanding the circular of 1884 the former practice still obtains.

It may be said that the statute gives to the first locator the right of exclusive possession; that an entry upon that territory with a view of making a subsequent location and marking on the ground its end and side lines is a trespass, and that to justify such an entry is to sanction a forcible trespass, and thus precipitate a breach of the peace. But no such conclusion necessarily follows. The case of *Atherton* v. *Fowler*, 96 U. S. 513, illustrates this. It appeared that one Page was in lawful possession of certain premises claimed under a Mexican grant, though his title had not been confirmed by any act of Congress; that while so in possession a party, of persons who had no interest or claim to any part of the land, invaded it by force, tore down the fences, dispossessed those who occupied, and built on and cultivated parts of it under pretence of establishing a right of preëmption to the several parts which they had so seized. It was held that such forcible seizure of the premises gave no rights under the preëmption law, and it was said (p. 516):

"It is not to be presumed that Congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In parts of the country where these preëmptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring and the unscrupulous to dispossess by

force the weak and the timid from actual improvements on the public lands, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the Government when it comes into market."

But while thus declaring that it cannot be presumed that Congress countenanced any such forcible seizure of premises, the court also observed (p. 516):

"Undoubtedly there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of preëmption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, unenclosed, and neither party interferes with the actual possession of the other. In such cases, the settlement of the latter of the two may be *bona fide* for many reasons. The first party may not have the qualifications necessary to a preemptor, or he may have preëmpted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become preëmptor, or it may not be known that the settlements are on the same quarter."

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange — on the contrary it is something to be expected and, as we have seen, is a common experience — that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins

beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must — when it appears that his lines are to any extent upon territory covered by a prior valid location — go through the form of making a relocation simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

In this connection it may be properly inquired what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1500 feet of the length of a discovered vein, and it was expected that the locator would so place it as in his judgment would make the location lengthwise cover the course of vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are

bounded by the several lines of his location, and the end lines must be parallel in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward enclose. If the end lines are not parallel, then, following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.

For these reasons, therefore, we are of opinion that the first question must be answered in the affirmative.

It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r s*, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line *e h*, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line *r s*, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, *b c*, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior

location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration.

The second question needs no other answer than that which is contained in the discussion we have given to the first question, and we, therefore, pass it.

The third question is also practically answered by the same considerations, and in the view we have taken of the statutes the easterly side of the New York lode mining claim is not the end line of the Last Chance lode mining claim.

The fourth question presents a matter of importance, particularly in view of the inferences which have been drawn by some trial courts, state and national, from the decisions of this court. That question is —

"If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

The decisions to which we refer are *Mining Company* v. *Tarbet*, 98 U. S. 463; *Iron Silver Mining Company* v. *Elgin Mining Company*, 118 U. S. 196; *Argentine Mining Company* v. *Terrible Mining Company*, 122 U. S. 478; *King* v. *Amy &c. Mining Company*, 152 U. S. 222.

Two of these cases have been already noticed in this opinion. In *Mining Company* v. *Tarbet* a surface location, 2600 feet long and 100 feet wide had been made. This location was so made on the supposition that it followed lengthwise the course of the vein, and the claim was of the ownership of 2600 feet in length of such vein. Subsequent explorations developed that the course of the vein was at right angles to that which had been supposed, and that it crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. It was held that the side lines were to be regarded as the end lines. In *Iron Silver Mining Company* v. *Elgin Mining Company* the location was in the form of a horseshoe. The end lines were not parallel. The location was quite irregular in form, and

inasmuch as one of the side lines was substantially parallel with one of the end lines it was contended that this side line should be considered an end line, and this although the vein did not pass through such side line. But the court refused to recognize any such contention and held that the end lines were those which were in fact end lines of the claim as located, and that as they were not parallel there was no right to follow the vein on its dip beyond the side lines. In *Argentine Mining Company* v. *Terrible Mining Company* the claims of the plaintiff and defendant crossed each other, and in its decision the court affirmed the ruling in *Mining Company* v. *Tarbet*, saying (p. 485):

"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface."

In *King* v. *Amy &c. Mining Company* the prior cases were reaffirmed, and those lines which on the face of the location were apparently side lines were adjudged end lines because the vein on its course passed through them, the location being not along the course of the vein but across it. But in neither of these cases was the question now before us presented or determined. All that can be said to have been settled by them is, first, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, reading, as it does, that a mining claim "may equal, but shall not exceed, 1500 feet in length along the vein or lode;" and, third, that when subsequent explorations disclose that the location has been made not along the course of the vein, but across it, the side lines of the location become in law the end lines. Nothing was said in either of these cases as to how much of the apex of the vein must be found within the surface, or what rule obtains in case the vein crosses only one

end line. So, when *Last Chance Mining Company* v. *Tyler Mining Company*, 157 U. S. 683, 696, was before us, (in which the question here stated was presented but not decided, the case being disposed of on another ground,) we said, after referring to the prior cases, "but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line."

We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the location, that he is entitled to make a location not exceeding 1500 feet in length along the course of such vein and not exceeding "three hundred feet on each side of the middle of the vein at the surface," that a location thus made discloses end and side lines, that he is required to make the end lines parallel, that by such parallel end lines he places limits not merely to the surface area but limits beyond which below the surface he cannot go on the course of the vein, that it must be assumed that he will take all of the length of the vein that he can, we find from section 2322 that he is entitled to "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the "right of possession to such

outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits, beyond which a grant does not go, is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all that the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein, "the top or apex of which lies inside of such surface lines extended downward vertically." And the same is true if it enters at an end and passes out at a side line.

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the

limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Mining Company* v. *Tarbet*, 98 U. S. 463, 468.

These conclusions find support in the following decisions: *Stevens* v. *Williams*, 1 McCrary, 480, 490, in which is given the charge of Mr. Justice Miller to a jury, in the course of which he says: "You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes; and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines, but if he happens to strike out diagonally, as far as his side lines include the apex, so far he can pursue it laterally." *Wakeman* v. *Norton*, decided by the Supreme Court of Colorado, June 1, 1897, 49 Pac. Rep. 283, in which Mr. Justice Goddard, whose opinions, by virtue of his long experience as trial judge in the mining districts of Leadville and Aspen as well as on the supreme bench of the State, are entitled to great consideration, said (p. 286): "In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should

on its course pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases." *Fitzgerald* v. *Clark*, 17 Montana, 100, a case now pending in this court on writ of error. *Tyler Mining Company* v. *Last Chance Mining Company*, Court of Appeals, Ninth Circuit, decided by Circuit Judge McKenna, now a Justice of this court, Circuit Judge Gilbert and District Judge Hawley, 7 U. S. App. 463. *Consolidated Wyoming Gold Mining Company* v. *Champion Mining Company*, Circuit Court Northern District California, decided by Hawley, District Judge, 63 Fed. Rep. 540. *Tyler Mining Company* v. *Last Chance Mining Company*, Circuit Court District of Idaho, decided by Beatty, District Judge, who in the course of his opinion pertinently observed: "What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of its location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner." 71 Fed. Rep. 848, 851. *Carson City Gold and Silver Mining Company* v. *North Star Mining Company*, Circuit Court Northern District of California, decided by Beatty, District Judge, 73 Fed. Rep. 597. *Republican Mining Company* v. *Tyler Mining Company*, Circuit Court of Appeals, Ninth Circuit, decided by Circuit Judges Gilbert and Ross and District Judge Hawley, 48 U. S. App. 213. See also 2 Lindley on Mines, section 591.

The fourth question, therefore, is answered in the affirmative.

The fifth question in effect seeks from this court a decision

of the whole case, and therefore is not one which this court is called upon to answer. *Cross* v. *Evans*, 167 U. S. 60; *Warner* v. *New Orleans*, 167 U. S. 467.

It will, therefore, be certified to the Court of Appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.

CLARK *v.* FITZGERALD.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 145. Argued December 7, 8, 1897. — Decided May 23, 1898.

The answer given to the fourth question in *Del Monte Mining and Milling Co.* v. *Last Chance Mining and Milling Co. ante*, 55, compels an affirmance of the judgment below in this case.

THE case was thus stated by the plaintiff in error in his brief.

The plaintiff in error is the owner and in possession of the Black Rock lode mining claim situated in the Summit Valley mining district in Silver Bow County, Montana.

The defendants in error own two thirds interest, and the plaintiff in error one third interest in the Niagara lode mining claim situated in the same district and county. The Niagara lode lies along side of the Black Rock lode so that the south side line of the Niagara forms or is a part of the north side line of the Black Rock lode.

The Black Rock lode is the older of the two locations. As appears from the pleadings in the cause the vein or lode crosses the east end line and south side line of the Niagara lode 513 feet west of the northeast corner of the Black Rock lode and dips to the south and under the surface of the Black Rock lode claim.

The plaintiff in error entered upon that part of the vein, east of the point where it crosses the division side line between the Black Rock and Niagara lode claims and extracted ore

from the said vein on its dip under the Black Rock lode at the point above described, and which is designated on the diagram as "ore bodies."

Thereupon the defendants in error, who as stated *supra*, own two thirds interest in the Niagara lode claim brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of $27,242.54, being two thirds the value of the ore extracted and for the cost of the suit.

An appeal was taken to the Supreme Court of the State and the judgment of the lower court was affirmed.

Mr. Robert B. Smith for plaintiff in error. *Mr. Robert L. Wood* was on his brief.

Mr. James W. Forbis for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The case is before us on error to the Supreme Court of Montana. It is unnecessary to state its facts in detail, and it is sufficient to say that the answer given to the fourth question in the opinion just filed in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, *ante*, 55, compels an affirmance of the judgment.

Affirmed.

JOHNSON *v.* DREW.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 239. Submitted April 28, 1898. — Decided May 31, 1898.

The substantial rights of the defendant were not prejudiced by the ruling of the trial court sustaining the demurrer to the first equitable plea and refusing leave to file the second, and such ruling involved merely a question of state practice.

The evidence in the case shows that the particular lots of land described in the declaration were not embraced in the Fort Brooke reservation when the patent was issued.

A party cannot defend against a patent duly issued for land which is at the time a part of the public domain, subject to administration by the

Statement of the Case.

land department, and to disposal in the ordinary way, upon the ground that he was in actual possession of the land at the time of the issue of the patent.

The act of Congress of July 5, 1884, c. 214, 23 Stat. 103, concerning the disposal of abandoned and useless military reservations, has no significance in this case, as the patent had issued and the title passed from the Government prior to its enactment.

In September, 1886, defendant in error commenced an action of ejectment in the Circuit Court of the State of Florida, for the county of Hillsborough, to recover possession of a tract of land described as follows:

"Lot eight (8) of section nineteen (19), township twenty-nine (29) south, of range nineteen (19) east, and lot seven (7) of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing about forty and nineteen one-hundredths (40.19) acres."

The defendant, now plaintiff in error, filed a plea of not guilty and also a plea based on equitable grounds. A demurrer to this latter plea was sustained, and thereupon the defendant asked leave to file an amended equitable plea. This application was denied, the court holding that the grounds of defence set up therein were not sufficient. That plea alleged in substance that the plaintiff's title rested on a patent from the United States, issued on a location of Valentine scrip; that such scrip was, by the terms of the statute under which it was issued, to be located only upon unoccupied and unappropriated lands of the United States; that the land in controversy was, at the time of the location of the scrip, a part of Fort Brooke military reservation, and was also in the actual occupancy of the defendant. The case came on for trial in September, 1889, and the defendant offered evidence in support of all his defences, including therein the matters set up in the equitable plea which he had been refused leave to file. This testimony was held insufficient by the court, and the trial resulted in a verdict and judgment for the plaintiff, which judgment was thereafter, and in June, 1894, affirmed by the Supreme Court of the State; whereupon the defendant sued out this writ of error.

The Valentine Scrip Act was passed April 5, 1872, c. 89,

17 Stat. 649, and authorized the location of such scrip on "the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws." The patent to the plaintiff was issued September 30, 1882, and recited that it was upon a location of Valentine scrip, and in his equitable plea defendant averred that the patent was predicated upon an entry at the local land office of the United States at Gainesville, Florida. On August 18, 1856, Congress passed an act, c. 129, 11 Stat. 81, 87, containing this provision:

"That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be, and are hereby, placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: *Provided*, That said lands shall not be so placed under the control of said General Land Office until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing, shall be filed and recorded."

At that time there was in existence what was known as the Fort Brooke military reservation, near the town of Tampa, Florida. As appears from the testimony offered by the defendant, on July 24, 1860, the Secretary of War wrote to the Secretary of the Interior as follows:

"War Department, *July 24th*, 1860.

"Sir: Referring to the correspondence between the two departments on the subject, I have the honor to enclose to you a report of the Quartermaster General showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior, in pursuance of the arrangements made to that effect.

"Very respectfully, your obedient servant,

"John B. Floyd, *Secretary of War*."

"Hon. J. Thompson, Secretary of the Interior."

The enclosed report from the Quartermaster General stated that all the movable property of the Government had been sold, and that there was no reason why the military reservation should not be turned over to the Interior Department. Probably the exigencies of the war, which soon thereafter commenced, prevented any further action by either department, for on April 6, 1870, the following communication was sent by the Secretary of War to the Secretary of the Interior:

"War Department, Washington City, *April* 6, 1870.

"The honorable Secretary of the Interior.

"Sir: I have the honor to reply to a letter addressed to this department by the Commissioner of the General Land Office on the 26th ultimo relative to the public lands occupied by this department for military purposes at Fort Brooke, Florida, and to inform you that there is no longer any objection to their disposition by the General Land Office under the laws governing the subject.

"Very respectfully, your obedient servant,

"Wm. W. Belknap, *Secretary of War.*"

From the date of this last communication up to 1877 the record discloses no action by either department, but in January, 1877, the Secretary of War requested that a military reservation at Fort Brooke be declared and set apart by the executive. Subsequently, and on May 29, 1878, the Secretary of War addressed a communication to the President as follows:

"War Department,

"Washington City, *May 29th*, 1878.

"To the President.

"Sir: In accordance with recommendation of commanding general department of the South, concurred in by division commanders, I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, with boundaries as hereinafter described, may be duly declared and set apart by the executive in lieu of the lands at that post reserved by executive order dated January 22, 1877, to wit: Beginning at the intersection of the line which bounds the

town of Tampa on the south with the Hillsborough River, running thence along said line which bounds the town of Tampa on the south, and in prolongation thereof north 68 degrees 45 minutes east 2976 feet; thence north 4 degrees 28 minutes west 2342 feet; thence north 38 degrees east 1052 feet; thence south 52 degrees east 459.2 feet; thence south 38 degrees west 1052 feet; thence south 4 degrees 28 minutes east 1931 feet; thence south 5 degrees 29 minutes east 2007.2 feet to the Hillsborough Bay; thence westerly along the shore of Hillsborough Bay and the shore of Hillsborough River to the place of beginning, containing 155 and one half acres, more or less. A plat of the reservation and report and notes and survey by Lieutenant James C. Bush, 5th artillery, are enclosed herewith.

"I have the honor to be, sir, with great respect,

"Your obedient servant,

"Geo. W. McCrary, *Secretary of War.*"

This request was approved, and the reservation was made and declared accordingly. The plat, notes and survey referred to in this letter were not introduced in evidence, so that the exact boundaries of the reservation then ordered were not distinctly shown, nor can it be determined from the description in the letter alone whether it included the lands in controversy. In March, 1883, this last reservation was abandoned, and the land again turned over to the Interior Department. Defendant also offered a diagram, certified by the Commissioner of the Land Office, of sections 18 and 19 of township 29, range 19, and section 24 of township 29, range 18, which, as the record recites, "shows the contiguity of the land in question to that portion of the Fort Brooke military reservation last relinquished by the Secretary of War to the Secretary of the Interior." The diagram is not very definite, and it is difficult to determine therefrom the boundaries of either the earlier or later Fort Brooke military reservation. The defendant also offered evidence tending to show that he entered into occupation of the tract in controversy in 1871, and had continued in occupancy ever since.

Mr. Samuel Y. Finley for plaintiff in error.

Mr. C. M. Cooper and *Mr. J. C. Cooper* for defendant in error.

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

The ruling of the trial court in sustaining the demurrer to the first equitable plea and refusing to permit the second to be filed presents no question for the consideration of this court, for it was held by the Supreme Court of the State that under the plea of not guilty all the matters of defence set up in these equitable pleas could be offered in evidence and made available; and, in fact, the defendant on the trial did offer his testimony to establish them. So the substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice.

We pass therefore to a consideration of the merits of the case: Was the land within the limits of any military reservation at the time that it was patented? The Supreme Court of the State said in respect to this matter:

"There is doubt whether the documentary evidence offered by the defendant shows that the particular lots of land described in the declaration were embraced in the Fort Brooke reservation when the patent was issued."

It is clear to us that they were not. The description of the reservation asked for in the letter of May 29, 1878, from the Secretary of War to the President, is not of itself sufficient to show whether the land was within or without the limits of such reservation. The plat, notes and survey were not in evidence. But the record recites that the diagram, certified by the Commissioner of the Land Office, "shows the contiguity of the land in question." If contiguous it was not within, and while the diagram is unsatisfactory, yet it tends to support this statement of the record. Again, the testimony of the defendant is that he entered into possession of this land in 1871, which was before the reservation was established, and

continued in such possession until after the restoration in 1883, and this is in accord with the averments in the equitable plea. This also indicates that the land was not included in any government reservation. Further and finally, the plat on file in the General Land Office, and a part of the public records, puts the question at rest and locates the land outside the reservation. Hence, as shown by the testimony and by the public records, this land ever since 1870 has been part of the public lands of the United States, and subject to disposal in accordance with the general land laws. It was unappropriated land within the meaning of the act of 1872.

It being so a part of the public domain, subject to administration by the land department and to disposal in the ordinary way, the question arises whether a party can defend against a patent duly issued therefor upon an entry made in the local land office on the ground that he was in actual possession of the land at the time of the issue of the patent? We are of opinion that he cannot. It appears from the testimony that the defendant, although in occupation of this land, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and in fact did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights. But whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. The law in reference to this matter was summed up in the case of *Burfenning* v. *Chicago, St. Paul &c. Railway*, 163 U. S. 321, 323, as follows:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is

swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reëxamined. *Johnson* v. *Towsley*, 13 Wall. 72; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Company*, 106 U. S. 447; *Wright* v. *Roseberry*, 121 U. S. 488; *Heath* v. *Wallace*, 138 U. S. 573; *McCormick* v. *Hayes*, 159 U. S. 332.

"But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. *Smelting Company* v. *Kemp*, 104 U. S. 636, 646; *Wright* v. *Roseberry*, 121 U. S. 488, 519; *Doolan* v. *Carr*, 125 U. S. 618; *Davis' Admr.* v. *Weibbold*, 139 U. S. 507, 529; *Knight* v. *U. S. Land Association*, 142 U. S. 161."

Reference is made in the brief to the act of Congress, of July 5, 1884, c. 214, 23 Stat. 103, concerning the disposal of abandoned and useless military reservations. But obviously that statute can have no significance in this case, for the patent had issued and the title passed from the Government prior to its enactment. We see no reason to doubt that upon the facts in this case the judgment of the Supreme Court of Florida was right, and it is, therefore,

Affirmed.

Counsel for Parties.

TINSLEY *v.* ANDERSON.

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

SAME *v.* SAME.

ERROR TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS.

Nos. 632, 633. Argued May 5, 6, 1898. — Decided May 31, 1898.

The appellate jurisdiction of this court from a state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a State where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States.

If the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the State having jurisdiction of the case, dismissing the writ of *habeas corpus* issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws or treaties of the United States, it is reviewable by this court on writ of error.

The right to equal protection of the laws is not denied by a state court when it is apparent that the same law or course of procedure would be applied to any other person in the state under similar circumstances and conditions.

When the committing court has jurisdiction of the subject-matter and of the person, and power to make the order for disobedience to which a judgment in contempt is rendered, and to render that judgment, then the appellate court cannot do otherwise than discharge a writ of *habeas corpus* brought to review that judgment, and secure the prisoner's discharge, as that writ cannot be availed of as a writ of error or appeal.

It was competent for the District Court to compel the surrender of the minute book and notes in Tinsley's possession, and he could not be discharged on *habeas corpus* until he had performed, or offered to perform so much of the order as it was within the power of the District Court to impose, even though it may have been in some part invalid.

THE case is stated in the opinion.

Mr. James L. Bishop for appellant and plaintiff in error.

Mr. Presley K. Ewing for appellee and defendant in error.
Mr. Henry F. Ring was on his brief.

Opinion of the Court.

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

The object of both these proceedings is to obtain the discharge of Thomas Tinsley from imprisonment under an order committing him for contempt, under the following circumstances:

On April 23, 1896, upon a petition for the appointment of a receiver of the Houston Cemetery Company, a corporation of Texas, filed against the corporation, and against Tinsley, who was its president, and the other officers of the corporation, both as such officers and individually, by some, in behalf of all, of the owners of lots in the cemetery, the District Court of the county of Harris in the State of Texas made an order appointing a receiver of all the property of the corporation, and requiring each of its officers, upon demand of the receiver, to deliver to him any books, papers, money or property, or vouchers for property, within their control, to which the corporation was entitled. Upon appeal by Tinsley and the other defendants from that order it was affirmed, on May 21, 1896, by the Court of Civil Appeals of the State. 36 Southwestern Rep. 802.

On February 2, 1897, the receiver made a motion to the District Court to commit Tinsley for contempt in refusing to deliver to the receiver a minute book, promissory notes of the amount of $1440.50, and a trust fund, amounting to $492.52, belonging to the corporation. A rule to show cause was issued, in answer to which Tinsley averred that the notes and the minute book had been delivered by the corporation to him as collateral security for money advanced by him to the corporation, and that he had made, at the expense to himself of $7.70, an investment of the trust fund in securities which he had offered, and was still ready, to deliver to the receiver upon payment of this sum.

On February 6, 1897, the District Court, after taking evidence and hearing the parties, adjudged that Tinsley was guilty of a contempt in disobeying its former order by not delivering to the receiver the minute book, notes and trust

fund, being the property of the corporation and in his control; and ordered him to pay to the sheriff a fine of $100, and to deliver to the receiver the property aforesaid, and to be committed until he should pay the fine and should (being allowed by the sheriff reasonable opportunity to do so if he should so desire) deliver the property to the receiver, or until he should be discharged by further order of the court. And upon the same day he was accordingly committed to the county jail.

On March 17, 1897, he presented to the judge of the District Court a petition for a writ of *habeas corpus*, setting forth the above proceedings, and alleging that the judgment and commitment for contempt were void, and his detention under them illegal for these reasons: That his claim to the notes, minute book and trust fund was made in good faith, and that he had the right thereto until deprived thereof by due course of law, and that the proceedings on said motion and said judgment are not due process of law, and that he ought not and cannot be by such proceedings imprisoned or compelled to turn over said property and things, for that thereby he is deprived of a trial by due course of law; that the judgment and commitment were uncertain and indefinite, and did not limit the time of his confinement under them; that the statute of the State provided that the District Court should not have the power to imprison any person for a longer period than three days for a contempt; and that the matters set up in said motion and judgment did not and could not constitute a contempt. This petition for a writ of *habeas corpus* was denied by the judge of the District Court; but on April 2, 1897, was granted by the presiding judge of the Court of Criminal Appeals of the State of Texas, and a writ of *habeas corpus* issued, addressed to the sheriff, who, on April 8, returned that he held the prisoner under the commitment for contempt.

After full arguments by both parties, the Court of Criminal Appeals entered judgment, dismissing the writ of *habeas corpus*, and remanding him to the custody of the sheriff, on the ground that the order of commitment for contempt was within the power of the District Court, at least so far as concerned the notes and minute book, because Tinsley was a

party to the suit in which the receiver was appointed, and claimed no title, other than by way of lien, in the notes and minute book, and such lien, if genuine, would be preserved to him against the property in the hands of the receiver. 40 Southwestern Reporter, 306.

On April 26, 1897, Tinsley filed a motion to set aside that judgment and for a rehearing, which, after further written arguments in his behalf, was overruled on May 12, 1897.

On May 15, 1897, upon a petition alleging that by the order of commitment, he "is deprived of his liberty, and will be, if he submits to the order, of his property, without due process of law, in violation of the Constitution of the United States," he obtained from the Circuit Court of the United States for the Eastern District of Texas a writ of *habeas corpus* to the sheriff, which, after a hearing, was by the judgment of that court dismissed and the prisoner remanded to custody; and on January 21, 1898, he appealed from that judgment to this court.

On January 31, 1898, he sued out a writ of error from this court to review the judgment of the Court of Criminal Appeals of the State of Texas, and filed in that court an assignment of errors, one of which was that by the proceedings in that court "he was deprived of his liberty, and, if he submitted to the order of the trial court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the Fifth and Fourteenth Amendments thereto."

The two cases now before us are the appeal from the judgment of the Circuit Court of the United States, and the writ of error to the Court of Criminal Appeals of the State of Texas.

The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the Circuit Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a State in violation of the Constitution, a law or a

treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the State, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *In re Frederich*, 149 U. S. 70; *Pepke* v. *Cronan*, 155 U. S. 100; *Bergemann* v. *Backer*, 157 U. S. 655; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284. This case shows no such circumstances as to require departure from this rule.

It was argued in behalf of Tinsley that the judgment committing him for contempt was not reviewable by this court; citing the statement in *Chetwood's case*, 165 U. S. 443, 462, that "judgments in proceedings in contempt are not reviewable here on appeal or error, *Hayes* v. *Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573, and 159 U. S. 251." But that statement was made in regard to such judgments in independent proceedings for contempt in the Circuit Courts of the United States, and the reason is, as in cases referred to in *Hayes* v. *Fischer* above cited, that such judgments were considered as judgments in criminal cases, in which this court had no appellate jurisdiction from those courts. *Ex parte Kearney*, 7 Wheat. 38, 42; *New Orleans* v. *Steamship Company*, 20 Wall. 387, 392.

But the appellate jurisdiction of this court from the state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a State where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. Rev. Stat. § 709. Consequently, if the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the State having jurisdiction of the case, dismissing the writ of *habeas corpus* issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws or treaties of the United States, it is doubtless reviewable by this court on writ

of error. *Newport Light Company* v. *Newport*, 151 U. S. 527, 542; *Pepke* v. *Cronan*, 155 U. S. 100, 101.

We perceive no reason for holding that any such rights were denied by the judgment of the Court of Criminal Appeals, in view of the facts appearing in the record and the grounds on which that court proceeded as disclosed by its opinion.

Counsel asserts that the rights claimed under the Constitution of the United States were the right to due process of law, and the right to the equal protection of the laws.

The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of procedure, which was applied to Tinsley, would have been applied to any other person in the State of Texas, under similar circumstances and conditions; and there is nothing in the record on which to base an inference to the contrary.

Was the right to due process of law denied? If the committing court had jurisdiction of the subject-matter, and of the person, and power to make the order for disobedience to which the judgment in contempt was rendered, and to render that judgment, then the Court of Criminal Appeals could not do otherwise than discharge the writ of *habeas corpus* and remand the petitioner. The writ cannot be availed of as a writ of error or an appeal, and if the commitment was not void, petitioner was not deprived of his liberty without due process of law.

The District Court of Harris County, Texas, was a court of general jurisdiction, and had jurisdiction in the suit against the Cemetery Company and its officers, including Tinsley, who was not a stranger, but a party, to the litigation, after hearing had on due notice and appearance by the defendants, to enter the order appointing a receiver and directing the company's officers to deliver to him, on his demand therefor, the company's property in their custody, including the books, notes and moneys on hand, and to determine on the facts that Tinsley was in contempt in refusing to deliver such property, and assuredly to adjudge this as to so much of the property as he conceded belonged to the company, but the possession of

which he claimed the right to retain only in order to enforce an alleged lien.

The Court of Criminal Appeals held that as Tinsley did not claim the legal title in the notes and in the minute book, but merely an equity or lien thereon to secure his debt; as the order to turn over the property to the receiver was by no means an adjudication as to his lien, which if it was a genuine lien would be preserved to him in the hands of the receiver; and as the effect of the order was merely to place the articles in the hands of the receiver for administration under the orders of the court; the District Court unquestionably had the power to make the order as to these articles, and did not exceed its jurisdiction in so doing. So that even though the $492.52 was not a trust fund in his hands, as the District Court had decided, but a mere debt due from him, because, as he alleged, that sum had been taken by another, and he had simply agreed to make it good, the adjudication of the District Court was nevertheless sustainable apart from that item.

We concur in the view that it was undoubtedly competent for the District Court to compel the surrender of the minute book and notes, in Tinsley's possession, and that he could not be discharged on *habeas corpus* until he had performed or offered to perform so much of the order, as it was within the power of the District Court to impose, even though it may have been in some part invalid. *In re Swan*, 150 U. S. 637.

The other objections suggested require no special consideration. It is said that the imprisonment for contempt was limited by the state statute to three days, Art. 1120, Tex. Rev. Stats., but the state court held that that statute had reference to a *quasi* criminal contempt as a punishment, and not to a civil contempt where the authority of the court is exercised by way of compelling obedience. Rapalje on Contempts, § 21. This is not a Federal question, and we accept the ruling of the state court in its construction of the statute. It is urged that the order of commitment imposed an uncertain and indefinite term of imprisonment; but the order was that Tinsley should be confined until he complied, and the addition,

Argument for the Motion.

"or until he shall be discharged by the further order of the court," was merely intended to retain the power to discharge him if the court should thereafter conclude to do so, it being within his own power to obtain his discharge at any time by obeying the order. Nor is there any force in the objection that no trial by jury was awarded, for such trial was not demanded, and a jury trial is not necessary to due process of law on an inquiry for contempt. *Walker* v. *Sauvinet*, 92 U. S. 90; *Eilenbecker* v. *Plymouth County District Court*, 134 U. S. 31; Rapalje on Contempts, § 112.

The judgments of the Circuit Court and of the Court of Criminal Appeals are, severally,

Affirmed.

CENTRAL NATIONAL BANK *v.* STEVENS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Motion to amend mandate. Submitted May 9, 1898. — Decided May 31, 1898.

The motion to amend the mandate is denied.

THIS was a motion to amend the mandate in this case which issued on the judgment reported in 169 U. S. 432. The motion was as follows:

"Come now the defendants in error and move the court that the annexed mandate be amended so as to command that the judgment below be reversed only in the particulars described in the opinion of the court."

Mr. Edward Winslow Paige for the motion.

It is the opinion of the counsel who signs this brief that it is decidedly for the interest of the defendants in error that the motion be denied.

And for the following reasons:

The whole judgment being reversed, there must inevitably under the laws of New York be a new trial of the

whole action. As the defendants in error might succeed in the new trial in all matters except those described in the opinion of the court — as to be reversed — there would be a general judgment in favor of the defendants in error like the present judgment, except that it would omit the injunction and the provision about the plaintiffs in error proving their certificates. Under that judgment there would of course be a new sale and the bondholders could then buy through the medium of a trustee other than Mr. Foster, thus relieving the case from the difficulty described by the court in its opinion.

It would also relieve the defendants in error from paying the costs of the court, since there is not any way under the laws of New York by which a successful plaintiff can be made to pay costs to the defendant.

And they can also show, although as we submit the present record shows, that not any of the proceeds of the certificates went into the property — nevertheless we make the motion.

Mr. Charles E. Patterson opposing.

Per Curiam: The motion to amend the mandate in the above case seems to proceed on a misconception of the meaning of the judgment and mandate.

The judgment of this court does not undertake to affect or reverse the judgment of the Supreme Court of the State of New York, except in so far as that judgment sought to restrain the Central National Bank of Boston and the other plaintiffs in error from proceeding under and in accordance with the decree of the Circuit Court of the United States for the Northern District of New York, and to compel them to again try in the Supreme Court of New York matters tried and determined in the Circuit Court. As between the other parties the judgment of the Supreme Court of New York was, of course, left undisturbed, and it is not perceived that the terms of the mandate signify anything else, or imply the consequences suggested by counsel.

The motion is denied.

NORTH AMERICAN COMMERCIAL COMPANY *v.* UNITED STATES.

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

No. 431. Argued April 18, 19, 1898. — Decided May 31, 1898.

By the agreement of March 12, 1890, between the United States and the North American Commercial Company, that company contracted to pay to the United States a rental of $60,000 per year, during the term of the contract, for the privilege of killing an agreed number of seals each year, subject to a proportionate reduction of this fixed rental, in case of a limitation in the number; and also a further sum of seven dollars, sixty two and one half cents for each seal taken and shipped by it. *Held* that this per capita tax was not a part of the annual rental, and was not subject to reduction as was the annual rental of $60,000 a year.

The proviso in the original act for the naming of a maximum number of seals to be taken, which was not to be exceeded, and making a proportionate reduction in the fixed rental in case of a limitation of that number, remained in force through all subsequent legislation and contracts.

Assuming that the company took all the risk of a catch reduced by natural causes, yet when the number that might be killed was reduced by the act of the Government, the company was entitled to such reduction on the reserved rental as might be proper, that is, in the same proportion as the number of skins permitted to be taken bore to the maximum.

The power to regulate the seal fisheries in the interest of the preservation of the species was a sovereign protective power, subject to which the lease was taken, and if the Government found it necessary to exercise that power, to the extent which appears, the company did not attempt to rescind or abandon, but accepted the performance involved in the delivery of the 7500 skins.

The company cannot maintain its counterclaim for damages for breach of the lease, and the Circuit Court erred in its disposition thereof.

This was an action brought by the United States against the North American Commercial Company to recover the sum of $132,187.50, with interest, for rent reserved for the year ending April 1, 1894, under a so called lease, bearing date March 12, 1890, made by the Secretary of the Treasury to the company, and for royalties upon seventy-five hundred fur seal skins taken and shipped by the company that year in virtue of that instrument, and for the revenue tax of two

dollars on each skin. The claim of the Government consisted of these items:

Annual rental	$60,000 00
Revenue tax on 7500 skins at $2	15,000 00
Per capita at $7.62½ on 7500 skins	57,187 50
Total	$132,187 50

And interest thereon from April 1, 1894.

The case was tried by the Circuit Court without a jury. The court found for the United States in the sum of $94,687.50, with interest, and judgment was entered in their favor for $107,257.29, principal, interest and costs. 74 Fed. Rep. 145.

The company having taken a writ of error to the Circuit Court of Appeals for the Second Circuit, that court certified a certain question arising in the cause concerning which it desired the instructions of this court for its proper decision, whereupon this court ordered that the whole record and cause be sent up for consideration. A counterclaim of the company against the United States for breach of the lease was disallowed and dismissed by the Circuit Court, but not on the merits, and without prejudice to the right of the company to enforce the same by any other proper legal proceeding.

The agreement of lease out of which the cause of action arose is as follows:

"This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890, witnesseth: That the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company for a term of twenty years from the first day of May, 1890, the

exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

"The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following, that is to say:

"To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one half cents apiece for each and every fur seal skin taken and shipped from said islands, and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years, and to secure the prompt payment of the sixty thousand dollars rental above referred to the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

"That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat as the Secretary of the Treasury shall from time to time determine.

"That it will also furnish to the said inhabitants eighty tons of coal annually and a sufficient number of comfortable dwellings in which said native inhabitants may reside, and

will keep said dwellings in proper repair, and will also provide and keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers, who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury, and will also provide and maintain a suitable house for religious worship, and will also provide a competent physician or physicians and necessary and proper medicines and medical supplies, and will also provide the necessaries of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

"The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

"The said company further agrees to employ the native inhabitants of said islands to perform such labor upon the islands as they are fitted to perform and to pay therefor a fair and just compensation, such as may be fixed by the Secretary of the Treasury; and also agrees to contribute, as far as in its power, all reasonable efforts to secure the comfort, health, education and promote the morals and civilization of said native inhabitants.

"The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary

of the Treasury shall judge necessary, under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

"The said company further agrees that it will not permit any of its agents to keep, sell, give or dispose of any distilled spirits or spirituous liquors or opium on either of said islands or the waters adjacent thereto to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

"It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

"The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same at any time on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any treasury regulation respecting the taking of fur seals or concerning the islands of St. George and St. Paul or the inhabitants thereof."

The Circuit Court made eighteen findings, including the following:

"Sixth. The said islands of St. George and St. Paul in the Territory of Alaska are the breeding ground of a herd of seals which in the early spring moves northward to Behring Sea, and are the habitat of that herd during the summer and fall of each year; that the seals land in great numbers upon the said islands and divide into families, each consisting of one male or bull and many females or cows; that the young or male seals, or bachelors as they are called, are not admitted to the breeding ground, but are driven off by the older males and oftentimes destroyed by them; that until such bachelor seals arrive at the age of three or four years they occupy other portions of the islands and can be driven away from the breeding ground and killed without disturbing the seals

on the breeding grounds; that a large proportion of these young bachelor seals may be so killed without diminishing the birth rate of the herd, and their skins are a valuable article of commerce and are more valuable than the skins of the females or older males; that by protecting the females and restricting the capture to the bachelors the fisheries are capable of a permanent and annual supply of skins which would afford a valuable source of revenue.

"Seventh. That after the making of the said lease by the said plaintiff and the said defendant, the said defendant entered upon the enjoyment of the right thereby granted it; but on account of the enforcement by the said plaintiff of the provisions of a convention or agreement made and entered into by the said plaintiff with the Government of Great Britain it prohibited and prevented the said defendant, during the years 1890, 1891 and 1892, from taking on the said islands as many seals as might have been taken without diminution of the herd, and far less in each year than the number mentioned in the said lease for the first year; the numbers taken in those years being in 1890, 20,995; in 1891, 13,482; and in 1892, 7547.

"Eighth. That for the said years of 1890, 1891 and 1892, it was agreed between the Secretary of the Treasury and the said defendant that the said defendant should pay to the said plaintiff for the seal skins taken by it on the said islands the tax and such proportionate part of the rental of $60,000 and the per capita sum of seven dollars sixty-two and one half cents, as the number of seals taken bore to one hundred thousand, except that for 1890 the per capita of seven dollars sixty-two and one half cents was not so reduced.

"Ninth. That by a convention or agreement with the Government of Great Britain, commonly called the *modus vivendi*, the United States promised, during the pendency of the arbitration between those two governments relating to the Behring Sea controversy and the preservation of the seals resorting to those waters, to prohibit seal killing on the said islands in excess of 7500 to be taken from the islands for the subsistence of the natives, and to use promptly its best efforts to insure the enforcement of the prohibition.

"Tenth. That pursuant to such agreement the United States prohibited and prevented the said defendant from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease.

"Eleventh. That the Secretary of the Treasury did not exercise the discretion conferred upon him by section 1962 of the Revised Statutes to limit the right of killing seals when necessary for the preservation of such seals, and did not so limit or restrict the right of the said defendant to take seals under its said lease for the year 1893, and that during that year it was not necessary or even desirable for the preservation of such seals to limit the killing of the seals upon the said islands to the said number of 7500 specified in the said *modus vivendi*.

"Twelfth. That in the year 1893 the United States Government itself, through the agents of the Treasury Department, took upon the said islands 7500 seals; that the said defendant was permitted to coöperate in selecting the seals so killed, and to take, and it did take and retain the skins of those seals, and in this way, and in this way only, the defendant received those 7500 skins.

"In accordance with the power reserved to him in said contract, the Secretary of the Treasury at the commencement of the seal-killing season for the year ending April 1, 1894, fixed the compensation of the natives upon the islands of St. Paul and St. George to be paid to them by the defendant for killing the seals, sorting the skins, and loading them on board the defendant's steamer, at 50 cents for each skin taken from the islands during the said season; and defendant paid to the natives said compensation, to wit, the sum of $3750.

"Thirteenth. That 20,000 bachelor seals could have been killed upon the said islands during the year 1893 in the customary way, without injury to or diminution of the herd, and the said defendant would have taken that number had it been permitted so to do.

"Fourteenth. That if the said defendant had been allowed to and had taken in the year 1893, under its said lease, 20,000

seal skins, there would have been due to the said plaintiff the $60,000 rental and for the per capita of seven dollars and sixty-two and one half cents and the revenue tax of two dollars per skin, the sum of $192,500, making together the sum of $252,500 — that is, twelve dollars and sixty-two and one half cents for each seal skin taken; that for the 7500 received by the said defendant, as above set forth, it owes to the said plaintiff the said sum of twelve dollars and sixty-two and one half cents apiece, amounting to the sum of $94,687.50.

"Fifteenth. The defendant could have sold 12,500 more seal skins if it had been allowed to take the same on the said islands during the year 1893, at the average market price of twenty-four dollars for each skin; which for the said number of 12,500 which it might have taken, but was prevented from taking by the act of the Government of the United States, would amount to $300,000; that for such 12,500 seal skins the said defendant would have been liable to pay, according to the terms of its lease if had taken 20,000 seal skins during that year, the sum of twelve dollars and sixty-two and one half cents each, amounting to $157,812.50, which being deducted from the price at which such skins could have been sold, namely, $300,000, leaves as the net loss sustained by the said defendant in consequence of the breach of its said lease by the said plaintiff, the sum of $142,187.50, which is due and owing to the said defendant by the said plaintiff; and that its claim therefor would be a proper matter of counterclaim or credit in this action, if the conditions prescribed by section 951 of the United States Revised Statutes had been complied with by the said defendant."

"Eighteenth. The defendant did not present to the accounting officers of the Treasury for their examination any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States in entering into the said convention or *modus vivendi* with Great Britain and limiting the catch of seals upon the said islands to 7500; and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was

not proved to the satisfaction of the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident."

The Circuit Court made these conclusions of law:

"First. That the said defendant, having received the said 7500 seal skins taken from the said islands during the year 1893, is liable to pay the said plaintiff therefor the said sum of $94,687.50, with interest thereon from the first day of April, 1894; and the said plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the said defendant.

"Second. That by reason of the breach of the said lease by the said plaintiff, prohibiting the said defendant from taking any seal skins during the year 1893, the said plaintiff is liable to the said defendant for the said sum of $142,187.50, with interest thereon from the first day of December, 1894.

"That on account of the same claim of the said defendant against the said plaintiff for damages for breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it cannot be allowed as a counterclaim or credit in this action, and the said counterclaim is therefore dismissed, but not on the merits thereof, and without prejudice to the right of the said defendant to enforce the same by any other proper legal proceeding."

Mr. James C. Carter for plaintiff in error.

Mr. Attorney General for defendants in error.

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

By the act of July 27, 1868, c. 273, 15 Stat. 240, the laws of the United States relating to customs, commerce and navigation were extended over all the mainland, islands and

waters of the territory ceded to the United States by the Emperor of Russia, March 30, 1867, so far as applicable, and by section six of that act it was made unlawful for any person or persons to kill any otter, mink, marten, sable or fur seal, or any other fur-bearing animal within the limits of said territory, or in the waters thereof; provided that the Secretary of the Treasury might authorize the killing of any such fur-bearing animal, except fur seals, under such regulations as he might prescribe, and it was made his duty to prevent the killing of any fur seal, and to provide for the execution of the provisions of the section until otherwise provided by law. On the third of March, 1869, a resolution was approved, 15 Stat. 348, No. 22, entitled "A resolution more efficiently to protect the fur seal in Alaska," declaring the islands of St. Paul and St. George in Alaska "a special reservation for government purposes," and that, until otherwise provided by law, it should be unlawful for any person to land or remain on either of said islands, except by the authority of the Secretary of the Treasury.

July 1, 1870, an act entitled "An act to prevent the extermination of fur-bearing animals in Alaska" was approved. 16 Stat. 180, c. 189. By the first section it was made unlawful to kill any fur seal upon the islands of St. Paul and St. George or in the waters adjacent thereto, except during the months of June, July, September and October in each year, or to kill such seals at any time by the use of firearms, or to use other means tending to drive the seals away from said islands. Provided, that the natives should have the privilege of killing such young seals as might be necessary for their own food and clothing during other months, and also such old seals as might be required for their own clothing and for the manufacture of boats for their own use, which killing should be limited and controlled by such regulations as should be prescribed by the Secretary of the Treasury.

By section two it was made unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and also to kill any seal in the waters adjacent to the islands, or on the beaches, cliffs or rocks where they haul up from the sea to remain.

The third section reads as follows:

"SEC. 3. That for the period of twenty years from and after the passage of this act the number of fur seals which may be killed for their skins upon the island of St. Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of St. George is hereby limited and restricted to twenty-five thousand per annum: *Provided*, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section, he shall, upon due conviction thereof, be punished in the same way as provided herein for a violation of the provisions of the first and second sections of this act."

The fourth section provided that immediately after the passage of the act the Secretary of the Treasury should lease for the rental mentioned in the sixth section of the act, to the best advantage of the United States, having due regard for the interests of the government, the native inhabitants, parties theretofore engaged in trade, and the protection of the seal fisheries, for a term of twenty years from the first day of May, 1870, "the right to engage in the business of taking fur seals on the islands of St. Paul and St. George, and to send a vessel or vessels to said islands for the skins of such seals," giving a lease duly executed, and not transferable, and taking from the lessee or lessees a bond, conditioned "for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals, and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith; and in making said lease the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance and education of the natives thereof."

The fifth section read:

"SEC. 5. That at the expiration of said term of twenty years, or on surrender or forfeiture of any lease, other leases may be made in manner as aforesaid, for other terms of twenty years; . . . and any person who shall kill any fur seal on either of said islands, or in the waters adjacent thereto, without authority of the lessees thereof, and any person who shall molest, disturb or interfere with said lessees, or either of them, or their agents or employés in the lawful prosecution of their business, under the provisions of this act, shall be deemed guilty of a misdemeanor, and shall for each offence, on conviction thereof, be punished in the same way and by like penalties as prescribed in the second section of this act; and all vessels, their tackle, apparel, appurtenances and cargo, whose crews shall be found engaged in any violation of either of the provisions of this section, shall be forfeited to the United States; and if any person or company, under any lease herein authorized, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then said person or company shall forfeit the value of the same. . . ."

By the sixth section it was provided that "the annual rental to be reserved by said lease shall not be less than fifty thousand dollars per annum, . . . and in addition thereto, a revenue tax or duty of two dollars is hereby laid upon each fur seal skin taken and shipped from said islands during the continuance of such lease to be paid into the Treasury of the United States; and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations for the collection and payment of the same, for the comfort, maintenance, education and protection of the natives of said islands, and also for carrying into full effect all the provisions of this act."

These provisions as well as others from the prior legislation were carried forward into the Revised Statutes, approved

June 22, 1874, sections 1954 to 1976 constituting chapter three of Title XXIII, relating to the territory of Alaska, and sections 1956 to 1976 thereof to the subject under consideration.

By section 1960 the killing of any fur seals upon the islands or their adjacent waters was forbidden, except during June, July, September and October in each year, etc., with the same proviso as in the first section of the act of 1870.

Sections 1962, 1963, 1968, 1969, 1972 and 1973 were as follows:

"SEC. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals which may be killed for their skins upon the island of St. Paul is limited to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of St. George is limited to twenty-five thousand per annum; but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper; and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.

"SEC. 1963. When the lease heretofore made by the Secretary of the Treasury to 'The Alaska Commercial Company,' of the right to engage in taking fur seals on the islands of Saint Paul and Saint George, pursuant to the act of July 1, 1870, chapter 189, or when any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of United

States bonds to that amount, and every such lease shall be duly executed in duplicate, and shall not be transferable."

"SEC. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

"SEC. 1969. In addition to the annual rental required to be reserved in every lease, as provided in section nineteen hundred and sixty-three, a revenue tax or duty of two dollars is laid upon each fur seal skin taken and shipped from the islands of Saint Paul and Saint George, during the continuance of any lease, to be paid into the Treasury of the United States; and the Secretary of the Treasury is empowered to make all needful regulations for the collection and payment of the same, and to secure the comfort, maintenance, education and protection of the natives of those islands, and also to carry into full effect all the provisions of this chapter except as otherwise prescribed."

"SEC. 1972. Congress may at any time hereafter alter, amend or repeal sections from nineteen hundred and sixty to nineteen hundred and seventy-one, both inclusive, of this chapter.

"SEC. 1973. The Secretary of the Treasury is authorized to appoint one agent and three assistant agents who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury."

Pending the adoption of the Revised Statutes, and on March 24, 1874, 18 Stat. 24, c. 64, the act of July 1, 1870, was amended so as to authorize the Secretary of the Treasury to designate the months in which fur seals "may be taken for their skins on the islands of St. Paul and St. George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about the islands respectively." Thus the

Revised Statutes were in effect amended so that whereas by section 1960 the months of June, July, September and October had been designated as the months in which fur seals might be taken on the islands and in the waters adjacent thereto, for their skins, and by section 1962 the maximum number which might be killed on the island of St. Paul was limited to 75,000, and on the island of St. George to 25,000, per annum, the Secretary of the Treasury was authorized by the amendatory act to designate the months in which fur seals might be taken, and the number to be taken on or about each island respectively. The times of killing and the number to be killed were left to the judgment of the Secretary of the Treasury.

Manifestly the object the Government had in view throughout this legislation was the preservation by proper regulations of the fur-bearing animals of Alaska, including, and particularly, the fur seals.

The first twenty years being about to expire the Secretary of the Treasury on December 24, 1889, advertised for proposals "for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty (20) years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States." Among other things, the advertisement stated: "The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury, in accordance with the provisions of law."

There were twelve proposals or bids, of which the North American Commercial Company put in three, numbered 10, 11 and 12, each of which offered a gross sum as rental, and, in addition to that and the revenue tax, a royalty per capitem. The three bids set forth the advertisement at length. No. 10 contained a proviso that the proposal was made on the express condition that the United States should not, through the Secretary of the Treasury, or otherwise, limit the skins to be taken to any number less than one hundred thousand skins per

annum after the first year of the lease; and No. 12 made the express condition that the United States should protect the exclusive right of the fur seal fisheries in and within the islands, and the waters known as the "Behring Sea." No. 11 contained no such express conditions, and it was this bid which was accepted by the Government. The lease in question was thereupon entered into "in pursuance of chapter 3 of title 23, Revised Statutes," as it recites.

By its terms, the company undertook, in consideration of the lease for twenty years of "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals," "to pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars upon each fur seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one half cents apiece for each and every fur seal skin taken and shipped from said islands, . . . and to secure the sixty thousand dollars rental above referred to" to deposit United States bonds of the face value of fifty thousand dollars; and further "faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall adjudge necessary, under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury."

It was also agreed that, "the annual rental, together with

all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891." The lease also provided that the number of fur seals to be taken and killed for their skins during the year ending May 1, 1891, should not exceed sixty thousand.

1. It is contended on behalf of the company that, conceding that the right of killing in 1893 had been duly limited to seventy-five hundred seals, and that it took and received that number of skins as full performance of the covenants of the lease on the part of the Government, it is entitled under section 1962 of the Revised Statutes to a proportionate reduction of the rent reserved, that is, in the proportion that 7500 bears to 100,000; and that this reduction applies to the per capita of $\$7.62\frac{1}{2}$ for each fur seal skin taken and shipped by it, as well as to the $60,000 annual rental. On this theory, the company tendered to the United States, before action brought, the sum of $23,789.50, being $15,000 for the tax on 7500 skins; $4500, three fortieths of the annual rental; and $4289.50, three fortieths of the full royalty on the skins.

The latter branch of this contention may be dismissed at once as untenable. By the terms of the lease, the per capita of seven dollars sixty-two and one half cents for each and every skin was not a part of the annual rental. The lease is explicit that the annual rental is the sum of $60,000, and that in addition the lessee shall pay the revenue duty of two dollars per skin, and also pay the further sum of this royalty on each and every skin. United States bonds were to be deposited "to secure the prompt payment of the sixty thousand dollars rental above referred to," and "the annual rental, together with all other payments to the United States provided for in this lease," was to be paid on or before the first of April of each and every year.

We think the rent reserved as such was this specified annual rental, and that the per capita payment was in the nature of a bonus in the sense of an addition to the stated consideration.

The Secretary was to lease to the best advantage to the United States, and that included the right to accept an offer of this kind; and while the per capita was a part of the return to the Government, it does not follow that the provision for reduction had reference to anything else than the specific rental, nor is any other construction compelled by the fact that the per capita might exceed the rental. Natural causes might diminish the catch so that this would not be so, and, at all events, the construction of the words of the statute and contract cannot be controlled by the amount of the reduction in one view rather than the other. Of course at the time the lease was made it is evident that it was supposed that sixty thousand seals might be taken annually, and on that basis the per capita royalty would be the principal compensation of the Government. This made it directly to the interest of the Government to allow the largest possible catch, which was undoubtedly a reason for the offer of the lessee in that form, as it tended to induce great circumspection in prescribing any limitation.

On the other hand, it may be that each seal would cost more as the number taken was less, and that, if the price of skins did not keep up, the company might be subjected to a loss, no matter how many it took, and the loss might be greater the more it took. But that was a risk the company assumed, and no reason is perceived for relieving it from the consequences.

The reduction of what the company agreed to pay, so far as the per capita was concerned, regulated itself. The smaller the number of skins, the less the company would pay, the larger the number, the more. We conclude that there is no adequate ground for holding that there should be any reduction on the per capita, which necessarily had to be paid.

By section 1962 of the Revised Statutes it was provided, as it had been by section three of the act of 1870, that for the period of twenty years from July 1, 1870, the number of fur seals which might be killed for their skins on the island of St. Paul was limited to 75,000 per annum, and the number which might be killed on the island of St. George to 25,000;

but the Secretary of the Treasury might limit the right of killing if it became necessary for the preservation of such seals, "with such proportionate reduction of the rents reserved to the Government as may be proper."

By section five of the act of 1870, that at the expiration of the first term of twenty years, or its termination by surrender or forfeiture, other leases might be made "in manner as aforesaid, for other terms of twenty years;" and by section 1963 of the Revised Statutes, that, when the first lease, or any future similar lease, expired, or was surrendered, forfeited or terminated, the Secretary should again lease for the term of twenty years.

It is argued with great force on behalf of the Government that whether reference be had to the act of 1870, or to the Revised Statutes, the limitation of the maximum number was expressly made only for a period of twenty years from July 1, 1870; that that limitation determined with the expiration of that period, and that consequently the provision for a proportionate reduction of rental in case of a limitation by the Secretary did not afterwards apply. But, taking the entire legislation into consideration, as we may, and indeed must, in accordance with well-settled rules of construction, when interpretation results in fairly differing meanings, *United States* v. *Lacher*, 134 U. S. 624, 626; *Barrett* v. *United States*, 169 U. S. 218, 227, we are not persuaded that this position is correct.

In giving authority to make the first lease, by section four of the act of 1870 the character of the lease was described, and a provision for further leases was made in section five, which referred back to the description in section four by saying that other leases might be made, "in manner as aforesaid for other terms of twenty years." When, however, the statutes were revised, the first lease had been executed and was running, and the words "in manner as aforesaid" were eliminated. The provision for succeeding leases was made the subject of section 1963, and, in declaring what they should be, the same language was used as that employed in the original act, whereby the character of future leases was indicated.

And section 1968, taken from the latter part of section five of the act of 1870, provided for the forfeiture of all the skins "if any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed."

It is said that the words "under any lease herein authorized" were intended to apply to the then pending lease, and that the purpose of the section was to provide for a forfeiture against any new lessee who might come in under a lease made on the happening of either of the contingencies mentioned in section 1963, as applied to the first lease, but we think the operation of the section was not intended to be thus restrained, and that it referred to any lease authorized under the chapter, and applied the forfeiture to the killing of seals in excess of the maximum number prescribed, which was to remain, if, when the time arrived for a new bidding, no change had been made by Congress.

The revision of the statutes was approved June 22, 1874, but by the last section, section 5601, provision was made that legislation between December 1, 1873, and the date of enactment should take effect as if passed subsequently.

Accordingly the act of May 24, 1874, operated by way of amendment, and by authorizing the Secretary to designate the months during which seals might be taken and the number to be taken on or about each island respectively, removed the restrictions imposed by sections 1960 and 1962 in those regards. The next day after the approval of the act, the then Secretary availed himself of it by entering into an agreement with the company that the lease of 1870 should be amended so as to provide that not more than 90,000 seals should be killed per annum on the island of St. Paul, and not more than 10,000 on the island of St. George, and that no seals should be killed in any other month except the months of June, July, August to the 15th, September and October. It seems to us reasonably clear that the specific restriction as to number, which, with the other restriction as to the months, it was the object of the act to remove, had relation to the dis-

tribution as between the two islands "respectively," and if it were proper to resort to what passed in Congress no doubt could be entertained on the subject. When the bill was reported from the Committee on Commerce no written report was made, but its purpose and scope were explained on behalf of that committee in each house and those explanations declared the object to be as above indicated.

Although the authority conferred as to the times of killing and the number to be killed was continuing and discretionary, and although the company in the present lease covenanted that it would not kill in any year a greater number than was authorized by the Secretary, yet we think it would be going much too far to hold that the original provision for a maximum number, and a proportionate reduction of the fixed rental in case of a limitation, was done away with by implication.

Repeals where the intention to do so is not expressed are not favored, and, moreover, here the mischiefs sought to be remedied are quite obvious. One was that it was evidently thought that seals might properly be taken during the first half of August, and the existing statute forbade this; the other was, that the maximum was fixed for each island, whereas it had probably been ascertained that the distribution was erroneous, or that the numbers that might be safely taken on one or the other might vary, and consequently that greater elasticity was desirable. The language by which these objects were attained was entirely reconcilable with the prior law so far as it did not purport to change it.

The legislation from the beginning was directed to the preservation of the fur seals, and the act of 1870 recognized that it might be necessary to such preservation that the number to be killed in the different years should be varied, and the discretion to do this was vested in the Secretary, but while this authority was made more comprehensive by the act of 1874, and a redistribution as between the two islands authorized, we cannot accept the view that it was the intention by that act to wholly change the scheme of leasing by making the discretion of the Secretary purely arbitrary, and dispensing with any maximum or reduction.

It should be added that the action of the Treasury Department in the matter of the abatement of rent for 1890, 1891 and 1892 does not impress us as amounting to such departmental construction as entitles it to any particular weight, and the views of the Department of Justice were conflicting.

Reference is made to Article V of the treaty of 1892 extending the *modus vivendi* and the action taken under it before the Tribunal of Arbitration, as if amounting to an estoppel, or an admission against interest, or at the least as having some considerable bearing on the construction of the lease and the statutes. That article provided, among other things, that "if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds." And it appears that the United States originally presented as part of its case a claim for the recovery of the damages which it and its lessee had sustained by reason of the limitation to 7500, but this claim was certainly not presented as a claim which the company could maintain against the United States under the lease, and it involved no question of the power of the Secretary in respect of the lessee under the covenants of that instrument. There was no element of estoppel about the transaction, and counsel had no authority to bind the Government for any other purpose than the pending cause.

Moreover, counsel for the United States were constrained to expressly admit that the evidence failed to establish that an additional take over and above the seventy-five hundred could have been safely allowed. In the argument on behalf of the United States, Judge Blodgett, one of the counsel, and all the counsel concurred, made this statement: "Frankness requires us, as we think, to say that the proofs which appear in the counter case of the United States as to the condition of the seal herd on the Pribiloff Islands show that the United

States could not have allowed its lessees to have much, if any, exceeded the number of skins allowed by the *modus vivendi* of 1892 without an undue diminution of the seal herd, and upon this branch of the case we simply call the attention of the tribunal to the proofs, and submit the question to its decision." And later, counsel announced that the United States would not ask the tribunal for any finding for damages upon and under Article V.

Our opinion is, that, assuming that the lessee took all the risk of a catch, reduced by natural causes, yet that when the number that might be killed was limited by the act of the Government or its agent, the Secretary, the company was entitled to such reduction on the rental reserved as might be proper, and that the rule to be observed in that regard would be a reduction in the same proportion as the number of skins permitted to be taken bore to the maximum. This would reduce the annual rental for the year under consideration from $60,000 to $4500; the tax due would be $15,000, and the per capita $57,187.50, making a total of $76,687.50.

2. Laying out of view the concession under the first proposition, the company further contended that the prohibition by the United States, by agreement with Great Britain, of seal killing in excess of 7500, to be taken on the islands for the subsistence of the natives, relieved the company from its covenants for the payment of rent and royalty, and that no action could be maintained therefor on the lease.

The evidence disclosed that prior to 1890 the number of seals annually resorting to these islands was rapidly diminishing. This was attributed to the open sea or pelagic sealing, whereby the seals, especially the females, who were exempt from slaughter under the laws of the United States, were interrupted in their passage to the islands by the crews of foreign vessels and were killed in great numbers while in the water. For several years the United States, asserting that it had territorial jurisdiction over Behring Sea, had been striving to prevent vessels of foreign nations from seal hunting on the open waters thereof. Great Britain denied the territorial jurisdiction of the United States and denied that the United States

had a right of property in the fur seals while on the high seas during their progress to or from the islands of St. Paul and St. George, and it became necessary to resort to international regulation to prevent the extermination of the seals. Indeed, it appears that the treasury agent in charge made a report to the Secretary of the Treasury after the season of 1890, in which he strenuously urged the necessity of stopping sealing for a number of years absolutely upon the islands as a necessary measure for the preservation of the seals. On the 15th of June, 1891, an agreement for a *modus vivendi* was concluded between the Government of the United States and the Government of Her Britannic Majesty, "in relation to the Fur Seal Fisheries in Behring Sea," (27 Stat. 980,) whereby with a view to promote the friendly settlement of the questions between the two Governments touching their respective rights in Behring Sea, "and for the preservation of the seal species," it was agreed that seal killing should be prohibited until the following May, altogether by Great Britain, and by the United States, "in excess of seventy-five hundred, to be taken on the islands for the subsistence and care of the natives." This was followed by a convention submitting to arbitration the questions concerning the jurisdictional rights of the United States in Behring Sea; "the preservation of the fur seal in, or habitually resorting to, the said sea," and the right to take such seals, which was proclaimed May 9, 1892. 27 Stat. 947.

And under the same date the *modus vivendi* was renewed during the pendency of the arbitration. 27 Stat. 952.

The arbitral tribunal sat in Paris in 1892–3, and the prohibition covered the killing period for which recovery is sought in this case.

The learned Circuit Judge held that the limitation under the *modus vivendi* was not a designation by the Secretary, but was a prohibition by the Government; and, consequently, that if the lessees had not received any skins the action could not have been maintained. But he held that as the seventy-five hundred skins were received by the lessees they must make compensation for them; that a proper way to deter-

mine this was to ascertain what the fair product of the year, which might safely be taken, was, and compute what each skin would have cost the company, assuming they had taken that number; and by this mode of computation, having found that 20,000 might properly have been taken, he reached the sum of $94,687.50 as the amount due to the Government.

The Circuit Court found that the United States, pursuant to the *modus vivendi*, "prohibited and prevented the said company from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease." We think this so far partakes of a conclusion of law that we are not shut up to treating it as a finding of fact. The power to regulate the seal fisheries in the interest of the preservation of the species was a sovereign protective power, subject to which the lease was taken, and if the Government found it necessary to exercise that power to the extent which this finding asserts, and if we assume that the company might thereupon have treated this contract as rescinded, it is sufficient to say that it took no such position, but accepted the performance involved in the delivery of the seventy-five hundred skins. The company did not wish to rescind or abandon, and it could not but recognize that, as the *modus* was entered into in an effort to save the seal race from extermination, and thereby to preserve something for the future years of the lease, the prohibition was so far for its benefit.

Again, although the Government acted in making the lease by the hand of the Secretary, it was the real contracting party, exercising the power of regulation through the Secretary, so that it was immaterial whether the Secretary on his own judgment or in compliance with the will of the Government confined the number of seals taken in the year 1893 to seventy-five hundred. Undoubtedly the Government could have directed the Secretary by law to restrict the killing to seventy-five hundred seals, and the treaty was nothing more.

The company could not object that the Secretary was constrained to impose the limitation, for the Secretary was bound to obey the instructions of his principal, and the company

could not make it the subject of a contest *in pais* as to whether the preservation of the herd in fact required the limitation. The whole business of taking seals was conducted under the supervision of the Government, and by section 1973 the Secretary was authorized to appoint agents, who were charged with the management of the seal fisheries.

The record shows that instructions were issued to the Government supervising agent on April 26, 1893, and a copy delivered to the superintendent of the company before the commencement of the season of that year. These instructions directed the number of seals to be taken during the season of 1893 to be limited to 7500. It was stated by the Secretary that it was believed: "That if the killing be confined between the first of June and the tenth of August, a better quality of skins would be obtained and less injury would be done to the rookeries;" and he added: "This matter is, however, left, as above stated, to your discretion, and in reference thereto you will confer fully with the representative of the company, its interests and those of the Government in the preservation of the fur seals being identical."

In the letter of the attorney of the company of November 15, 1893, he said: "During the present year this company, in strict compliance with the orders of the Treasury Department, restricted its catch to 7500." In other words, it appears that both parties regarded the Secretary of the Treasury as authorizing the taking of 7500 skins in the year 1893.

Under the law of 1870 and the various sections of the Revised Statutes the power was expressly reserved to the Government to make whatever restrictions of the business it might see fit to make; the lease recognized this to the full extent; and it was, moreover, expressly stipulated that the company was not to kill or permit to be killed a greater number than the Secretary might authorize. The company was offered 7500 skins for 1893; took them; paid the amount fixed by the Secretary under the lease for compensation to the natives for taking and loading the skins, and subsequently tendered the sum of $23,789.50 as, according to its computation, the full amount due under the lease. These particular

seals were killed by the Government agent, but notice of the killing, from time to time, was given to the company, and the company requested to select the skins it desired, which it did. The Government did not regard the lease as broken, but proceeded under it, and delivered the 7500 skins as full performance of the covenant on its part, for the privilege of taking the seals was subject to such limitation on the number as the Government believed it necessary to impose; and the company acquiesced in that view by taking the 7500 skins without dissent.

It was after this that the question arose, not of breach of contract, but as to what sum, if any, was due from the company under the lease more than it had tendered. Was the company entitled to a reduction on what it had agreed to pay, and, if so, how much?

3. Finally, the company claims that the United States are liable to it in damages to the extent of $287,725, for skins it could have taken during the season of 1893, without unreasonable injury to or diminution of the seal herd, and which the United States prevented it from doing; and that it can avail itself of this claim in this suit by way of recoupment and counterclaim.

The Circuit Court rejected this counterclaim on the ground that the claim had not been presented and disallowed by the accounting officers of the Treasury, and dismissed it, not on the merits, but without prejudice. The company prosecuted its writ of error from the Circuit Court of Appeals for the Second Circuit, and assigned as errors, among others, that the Circuit Court erred in adjudging that its claim for damages was not duly presented; that the court did not allow its counterclaim; and that judgment was not directed in favor of the company. From what we have already said it will have been seen that we are of opinion that the company cannot maintain this claim for damages, and that, assuming that the claim had been duly presented and disallowed, and that, if meritorious, it might be availed of by way of recoupment in this action, the Circuit Court erred in its disposition of the counterclaim.

Opinion of the Court.

The seal fisheries of the Pribiloff Islands were a branch of commerce and their regulation involved the exercise of power as a sovereign and not as a mere proprietor. Such governmental powers cannot be contracted away, and it is absurd to argue that in this instance there was any attempt to do so, or any sheer oppression or wrong inflicted on the lessee by the Government in the effort to protect the fur seal from extinction.

The privilege leased was the exclusive right to take fur seal, but it was subject, and expressly subjected, from the beginning, to whatever regulations of the business the United States might make. If those regulations reduced the catch, the company was protected by a reduction of the rental, and paid taxes and per capita only on the number taken. The other expenses to which it bound itself were part of the risk of the venture. The catch for 1893 was lawfully limited to seventy-five hundred, and the company accepted and disposed of the skins. It cannot now be heard to insist that that limitation was in breach of the obligations of the Government, for which, though still claiming the contract to be outstanding, it is entitled to recover damages.

The judgment of the Circuit Court is reversed and the cause remanded with a direction to enter judgment in favor of the United States for $76,687.50, *with interest from the first day of April*, 1894; *and to enter judgment in favor of the United States on the counterclaim.*

Syllabus.

PULLMAN'S PALACE CAR COMPANY *v.* CENTRAL TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FROM THE EASTERN DISTRICT OF PENNSYLVANIA; AND ALSO CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 141. Argued March 24, 25, 1898.— Decided May 31, 1898.

By taking an appeal to the Circuit Court of Appeals the Pullman Company did not, under the peculiar circumstances of this case, waive its right to appeal to this court, and the case being now before this court either on appeal or by the writ of certiorari, it has jurisdiction.

In order to authorize a denial of a plaintiff's motion to discontinue a suit in equity, there must be some plain legal prejudice to the defendant, other than the mere prospect of future litigation, rendered possible by the discontinuance.

Unless there be an obvious violation of a fundamental rule of a court of equity, or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

The decision of the Circuit Court in denying the motion of the Pullman Company to discontinue its suit was right, as was also its decision permitting the Central Company to file a cross bill.

In no way, and through no channels, directly or indirectly, will courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract; but the right of recovery must rest on a disaffirmance of the contract, and is permitted only because of the desire of courts to do justice, as far as possible to the party who has made payment or delivered property under a void agreement, which in justice he ought to recover, and no recovery will be permitted which will weaken said rule founded upon the principles of public policy.

Acting upon those settled principles the court decides:

(1) That the Central Company is entitled to recover from the Pullman Company the value of the property transferred by it to that company when the lease took effect, with interest, as that property has substantially disappeared, and cannot now be returned;

(2) That the value of that property is not to be ascertained from the market value of the shares of the Central Company's stock at that time, but by the value of the property transferred;

(3) That the value of the contracts with railroad companies transferred by the Central Company form no part of the sum which it is entitled to recover;

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(4) That the same principle applies to the patents transferred which had all expired;

(5) That it is not entitled to recover anything for the breaking up of its business by reason of the contracts being adjudged illegal.

The record in this case shows that in 1870 the Central Transportation Company, hereafter called the Central Company, was a corporation which had been in 1862 incorporated under the general manufacturing laws of the State of Pennsylvania. It was engaged in the business of operating railway sleeping cars and of hiring them to railroad companies under written contracts by which the cars were to be used by the railroad companies for the purpose of furnishing sleeping conveniences to travellers. The corporation at this time had contracts with a number of different railroad companies in the East, principally, but not exclusively, with what is known as the Pennsylvania Railroad system, and it had been engaged in its business with those companies for some time prior to 1870. In the year last named the Pullman's Palace Car Company, hereafter called the Pullman Company, was a corporation which had been incorporated under the laws of the State of Illinois. It was doing the same general kind of business in the West that the Central Company was doing in the East. For reasons not material to detail, the two companies entered into an agreement of lease, which was executed February 17, 1870.

By its terms the Central Company leased to the Pullman Company its entire plant and personal property together with its contracts which it had with railroad companies for the use of its sleeping cars on their roads, and also the patents belonging to it. The lease was to run for ninety-nine years, which was the duration of the charter of the Central Company.

It was also agreed that the Central Company would not engage in the business of manufacturing, using or hiring sleeping cars while the contract remained in force.

In consideration of these various obligations, the Pullman Company agreed to pay annually the sum of $264,000 during the entire term of ninety-nine years, in quarterly payments, the first quarter's payment to be made on the 1st of April, 1870.

From the time of the execution of the contract its terms were carried out, and no particular trouble occurred between the companies for about fifteen years. During this time and up to the 27th day of January, 1885, the Pullman Company paid to the Central Company, as rent under the contract, the sum of $3,960,000, without any computation of interest. About or just prior to January, 1885, differences arose between the companies. The Pullman Company claimed the right to terminate the contract under the eighth clause thereof, or else to pay a much smaller rent. The merits of the controversy are not material.

The two companies not agreeing, and the Pullman Company refusing to pay the rent stipulated for in the lease, the Central Company brought successive actions to recover the instalments of rent accruing. In one of them the Pullman Company pleaded the illegality of the lease, as being *ultra vires* the charter of the Central Company. The plea prevailed in the trial court, and upon writ of error the judgment upholding this defence was, in March, 1891, sustained in this court. *Central Transportation Company* v. *Pullman's Car Company*, 139 U. S. 24.

After the bringing of several actions for instalments of rent by the Central Company and before the question of *ultra vires* had been argued in this court, the Pullman Company on the 25th day of January, 1887, commenced this suit by the filing of its bill against the Central Company in the Circuit Court of the United States for the Eastern District of Pennsylvania. The bill asked for an injunction to restrain the bringing of more suits for rent. It gave a general history of the transactions between the companies from the execution of the contract between them in February, 1870, down to the time of the filing of the bill, and it alleged the election of the Pullman Company to terminate the lease under the provisions of the eighth clause thereof, and the willingness of the company to pay what should be found by the court to be equitable and right to the Central Company on account of the property which had been transferred by that company to it, and to this end it prayed the aid of the court. The bill also contained the following allegation:

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"And your orator shows that in said lease it is recited that the said contract of lease is made on the part of the defendant, the said Central Transportation Company, under an act of the general assembly of the Commonwealth of Pennsylvania therein named, approved the 9th day of February, A.D. 1870, a copy whereof is hereto attached, marked Exhibit G, and referred to as part of this bill; but your orator is advised, and therefore submits it to the court, that the said lease being a grant, assignment and transfer of all the property, contracts and rights of the said defendant, the Central Transportation Company, and including a covenant on the part of said defendant corporation not to transact during the existence of said lease any of the business for the transaction of which it was incorporated, was never legally valid between the parties thereto, but was void for the want of authority and corporate power on the part of the defendant to make the said contract of lease, and because the same was in violation of the charter conferring the corporate powers of said defendant, and of the purpose of its incorporation, as by the said charter, to which, for greater certainty, reference is made, your orator is advised it will appear; that the said contract of lease was never susceptible of being enforced in law by your orator against said defendant, and cannot therefore be construed and held to continue in force and obligatory upon your orator; and that your orator can be under no other legal obligation or equitable duty to the defendant than to return such of the property assumed to be demised as is capable of being returned, and to make just compensation for such other of the said property as under the said contract of lease it ought to make compensation for, which it is willing and now offers to do."

In the prayer for relief it was also asked —

"That the court may consider and decree whether said contract of lease was not made without authority of law on the part of the defendant and in excess of its corporate powers and in violation of its corporate duties, so as not to be enforceable against your orator beyond the obligation of your orator to make return of or just compensation for the property

demised; and that an account may be taken between your orator and defendant, and that the amount may be ascertained that should be paid by your orator to the defendant on any account whatever; . . . and that an accounting may be had between your orator and defendant as to all the matters and things set out in this bill."

The Central Company answered the bill, denying many of the material allegations therein contained. It denied that the Pullman Company had ever elected to terminate the lease under the provisions of the eighth clause thereof, and it alleged that the lease was still in existence, and that it had the right to recover from the Pullman Company the amount of the rent named in the lease, and that no valid agreement had ever been made between the companies in any way altering the lease or reducing the amount of the rent payable thereunder. It denied that the lease was illegal, and it alleged that even if it were, the illegality did not justify the complainant in applying for any equitable relief whatever.

Upon application on the part of the Pullman Company the court granted an injunction restraining the bringing of suits for the collection of rent accruing after July, 1886, but it declined to enjoin those already pending for rent accruing before that date.

After considerable proof had been taken upon the issues involved in this suit and after the decision of the other case in this court, in March, 1891, holding the lease illegal and void, the complainant herein, on the 25th of April, 1891, applied to the court for leave to dismiss its bill at its own cost. This application was opposed by the defendant, who, on the same day, moved for leave to file a cross-bill, in which it said it would avail itself of the tenders of relief made by the complainant in its bill, and that it would pray such relief in its cross-bill as might be pertinent to the case made by the bill. In December, 1891, complainant's motion for leave to dismiss its bill was denied, and the defendant's motion for leave to file a cross-bill was granted. Thereupon the cross-bill was filed, in which the Central Company acknowledging, under the decision of this court, that the lease in question was void,

claimed to avail itself of the tenders made in complainant's bill upon the subject of the return of its property and compensation for that which it was impossible to return, and claimed, among other things, that the Pullman Company should account for all the profits which it had derived since the making of the lease by the use of the property transferred to it under the agreement, and that the amount found due should be paid to the Central Company, and that the Pullman Company should be adjudged to be a trustee for the Central Company of all the contracts for transportation, whether original, new or renewals, held by the Pullman Company with railroad companies with which there were contracts of transportation with the Central Company at the time of the making of the lease in February, 1870, and that the Pullman Company should be adjudged to pay the Central Company all such sums as should be due to it by the Pullman Company as such trustee, and that defendant should in the future from time to time account for the sums which should be due by reason of future operations under those contracts. It also prayed for a discovery and an accounting by the Pullman Company of its use and disposition of the property turned over to it by the Central Company.

To this cross-bill the Pullman Company filed three demurrers, the first being a general demurrer on the ground that the cross-bill was filed contrary to the practice of the court, and also that it appeared that the court had no jurisdiction of the case; the second demurrer related to the portions of the cross-bill praying that the cross-defendant might be regarded as a trustee and decreed to account accordingly; the third demurrer related to that part of the cross-bill which asked for an account of profits since the making of the lease and for future profits.

The demurrers were overruled with leave to present the questions on final hearing, and the Pullman Company then answered the cross-bill. Among other things it set up that the agreement in question was void, "and that being null and void between the parties hereto because of such character of the agreement, it cannot be made the lawful foundation of any

action or application for any relief whatever between the parties thereto. And this respondent submits that the rule which precludes the granting of relief by any court of either equity or law, upon a contract void for contravention of public policy, forbade this Circuit Court to allow such affirmative relief upon this cross-bill which asserts no claim of right not founded directly upon the express undertakings of this contract of lease, held void by this court itself and by the Supreme Court for the reasons aforesaid." The Pullman Company therefore denied that it owed any duty to the cross-complainant, which was enforceable at law or equity, to return to the Central Company the property assigned under the lease or to account for any profits derived under and by reason of any property delivered to it under the agreement.

Testimony was taken under these pleadings, and the case came before the Circuit Court for final hearing, and that court held that the cross-complainant made out a case for an accounting by the cross-defendant for the value of the property when received, together with its earnings since, less the amount paid as rent. The court, therefore, referred it to a master for the purpose of ascertaining the facts, with directions to report within the time named in the order of reference. Under this order testimony was taken and the master reported in favor of the Central Company, and the exceptions filed having been overruled, judgment was entered in favor of the Central Company for the sum of $4,235,044, together with costs. From this judgment the Pullman Company appealed directly to this court. It also appealed to the Circuit Court of Appeals. The case was there argued upon a motion to dismiss the appeal, and the motion denied, and the further argument was postponed until some disposition was made of the appeal taken directly to this court. 39 U. S. App. 307. A motion has also been made to this court to dismiss the appeal, and thereupon an application was made to us for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and on account of the peculiar circumstances it was granted, and the record has been returned to this court by virtue of that writ.

Mr. Edward S. Isham and *Mr. Joseph H. Choate* for appellant. *Mr. A. H. Wintersteen* and *Mr. Robert T. Lincoln* were on their brief.

Mr. Frank P. Prichard and *Mr. John G. Johnson* for appellee.

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

The motion to dismiss the appeal in this case is now before the court.

Counsel for the Pullman Company took the appeal directly from the Circuit Court to this court on the theory that the case involved the construction or application of the Constitution of the United States, because of the holding of the court below that the cause of action alleged by the Central Company in its cross-bill was, under the circumstances, a proper subject of equitable cognizance, and counsel claimed it was really nothing but a legal cause of action in regard to which the cross-defendant was entitled to a trial by jury under the Constitution of the United States. There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the Circuit Court of Appeals, and we think that by this action he did not waive any right of appeal which he would otherwise have had. Whichever route may be the correct one, either directly from the Circuit Court or through the Circuit Court of Appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by writ of certiorari, and we therefore proceed to determine it upon the merits.

The Pullman Company, complainant in the original suit, insists that it had the right to discontinue that suit at its own cost before any decree was obtained therein, and the refusal of the court below to grant an order of discontinuance upon its application is the first ground of objection to the decree herein.

The general proposition is true that a complainant in an

equity suit may dismiss his bill at any time before the hearing, but to this general proposition there are some well recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in *Detroit* v. *Detroit City Railway Company*, in an opinion by the Circuit Judge, and reported in 55 Fed. Rep. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to in *Chicago & Alton Railroad* v. *Union Rolling Mill Co.*, 109 U. S. 702.

From these cases we gather that there must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens* v. *The Railroads*, 4 Fed. Rep. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

Upon an examination of the facts relating to the motion, we think the Circuit Court was right, in the exercise of its discretion, in denying the same. The original bill was framed really on two theories: One, that by reason of an election made under the eighth clause in the lease, the Pullman Company had terminated the lease, and it was therefore bound under its provisions to return the property which it had received from the Central Company. It stated in its bill the impossibility of returning a large portion of the property which it had received; it announced its willingness to make substantial performance of its contract contained in the lease, and it asked the court to aid it therein by decreeing exactly what it should do for the purpose of carrying out equitably and fairly its obligations incident to its termination of the lease under the clause above mentioned. The other theory rested upon what

was a substantial allegation of the invalidity of the lease as having been made without authority of law, and therefore in violation of the corporate duties of the Central Company, and on that account not enforceable against the Pullman Company beyond the obligation of the latter company to make return of just compensation for the property demised. Upon that theory the bill asked, not that the court should set aside or cancel the lease, but that it should aid the parties by decreeing just what relief should be given by the complainant to the lessor in the execution of its duty to make some compensation for the property it received and which it stated its willingness to make, and to that end, that an accounting might be had and the amount ascertained that should be paid to the Central Company in discharge of the obligations of the complainant in that behalf. Thus the Pullman Company came into a court of equity and in substance alleged that the lease had been terminated by it under the eighth clause, and it also alleged that the lease was void as *ultra vires*, and in either event it tendered such relief as the court might think was proper and fair under the circumstances.

A large amount of proof had been taken under the issues made in this original bill and the answer thereto, and before the case was concluded the decision of this court was made in which the lease was declared to be void. The only obligation left under the original bill of complainant after the decision of this court, was the obligation to return such portion of the property received by it as the court should determine to be right, or to make some compensation to the Central Company for the same. And this obligation it had offered in the original bill to carry out.

The Pullman Company had also obtained an injunction in the original suit, restraining the Central Company from commencing further legal proceedings to recover rent under the lease, and after obtaining this injunction and taking the testimony relating to the subject-matter of the original bill, the complainant should not be permitted under these circumstances to dismiss that bill and thus withdraw the whole case from the jurisdiction of the court, and thereby blot out

its tenders of relief contained in its original bill grounded, among others, upon the allegation that the lease was void, and asking the aid of the court to decree the precise terms upon which its obligations to the Central Company might be fulfilled.

The denial of the motion was made in connection with the application of the Central Company to file a cross-bill in which it would seek to avail itself of the tenders made by the Pullman Company in the original bill. Such an application for leave to file a cross-bill seeking affirmative relief while at the same time availing itself of those tenders of relief made by the original complainants, would furnish additional ground for the exercise of the discretion of the court in refusing to grant the application for leave to discontinue. We think there was no error committed by the court below in refusing the leave asked for.

The further objection is made by the counsel for the Pullman Company that it was error to allow the cross-bill to be filed in this case. Counsel for the Pullman Company assert that the cause of action for a return of the property is a purely legal one of which a court of equity has no jurisdiction, and that it can acquire none simply by the filing of a cross-bill. Whatever may be the original character of the liability of the Pullman Company to return or make compensation for the property, we are of opinion that under the facts above set forth it cannot object to the filing of the cross-bill, or to the determination of the amount of its liability by a court of equity. It had itself voluntarily appealed to the jurisdiction of such a court for the purpose of obtaining its aid in decreeing the terms upon which its obligations to the Central Company might be fulfilled and the lease terminated, either under the eighth clause in the lease or because of its invalidity as being *ultra vires*. Having thus appealed to equity for its aid and the lease having been conclusively determined to have been void, we think it was within the fair discretion of the court to retain jurisdiction of the cause and of the original complainant, and to permit the filing of a cross-bill in which the cross-complainant might seek affirmative relief, and at the same time

avail itself of the tenders made by the complainant in its original bill.

The facts which were set up in the cross-bill closely affected one of the theories upon which the original bill was filed, viz., the invalidity of the lease. They were relevant to the matters in issue in the original suit, and in seeking affirmative relief the cross-complainant is but amplifying and making clearer the foundations for the intervention of equity which had been appealed to by the Pullman Company, and the continued intervention of which would greatly speed a final termination of all matters for litigation between the parties. The court below did not err in permitting the cross-bill to be filed.

This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so called lease mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24. The contract or lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable restraint of trade, and therefore contrary to public policy. In making the lease the lessor was certainly as much in fault as the lessee. It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defence to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the States, finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied.

It is true that courts in different States have allowed a recovery in such cases, among the latest of which is the case of *Bath Gas Light Co.* v. *Claffy*, 151 N. Y. 24, where Chief

Judge Andrews of the Court of Appeals examines the various cases, and that court concurred with him in permitting a recovery of rent upon a void lease where the lessee had enjoyed the benefits of the possession of the property of the lessor during the time for which the recovery of rent was sought.

But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S.), "the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract." And the opinion of the court ended with the statement that, "Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in *Holman* v. *Johnson*, 1 Cowper, 341, decided in 1775, that "the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that

the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.[1]

They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any

[1] *Coppell* v. *Hall*, 7 Wall. 542; *Spring Company* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67; *St. Louis &c. Railroad Company* v. *Terre Haute &c. Railroad Company*, 145 U. S. 393, at 408, 409; *Manchester & Lawrence Railroad Company* v. *Concord Railroad Company*, 66 N. H. 100; *White* v. *Franklin Bank*, 22 Pick. 181; *Utica Insurance Company* v. *Cadwell*, 3 Wend. 296; *Atcheson* v. *Mallon*, 43 N. Y. 147; *Leonard* v. *Poole*, 114 N. Y. 371; *Snell* v. *Dwight*, 120 Mass. 9; *Davis* v. *Old Colony Railroad*, 131 Mass. 258; *Holt* v. *Green*, 73 Penn. St. 198; *Johnson* v. *Hulins*, 103 Penn. St. 498; *Thomson* v. *Thomson*, 7 Ves. 470; *Sykes* v. *Beadon*, L. R. 11 Ch. Div. 170; *Brooks* v. *Martin*, 2 Wall. 70.

recovery which will weaken the rule founded upon the principles of public policy already noticed.

We may now examine the record herein and learn the grounds for the recovery which has been permitted, and determine therefrom whether the judgment in favor of the Central Company should be in all things affirmed, or if not, then how far the liability of the cross-defendant extends, and, if possible, what should be the amount of the judgment against it.

In referring the case to the master for the purpose of taking the account between the parties the learned District Judge stated the principle upon which the liability of the cross-defendant rested. He said:

"The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must therefore be made. What, then, is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent. In ascertaining the value the annual rental may be considered, but it does not afford a conclusive nor an entirely safe measure of value, because the unlawful consideration (that the Central Company would abstain from exercising its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property, the business and its earnings at the time they passed into plaintiff's hands and subsequently. It is not their value to the plaintiff we want, but to the defendant; in effect, what is lost by parting with them. The value of both property and earnings may have been worth more to the plaintiff with the business united, but this cannot be considered."

Acting under these directions of the court, the master in his opinion said:

"Passing to the consideration of the main question raised in the present reference, viz., what the Central Transportation Company lost by the transfer of its property to the Pullman

Company, the measure of damages as determined by the court requires the master to ascertain:

"(1.) What was the value to the Central Transportation Company in 1870 of the property transferred?

"(2.) What was earned by the Pullman Company between January 1, 1870, and January 1, 1885, from the use of the property transferred?

"(3.) The difference between the amount so received by the Pullman Company and the rental paid by it to the Central Transportation Company for the above period.

"(4.) The total amount to be paid by the Pullman Company, as of January 1, 1885, deduced as above, together with interest thereon from January 1, 1885, to date of final decree."

The master proceeded to determine the value in 1870 of the property then transferred. In ascertaining it he said:

"The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the master, supported as it is by the best independent estimate that the evidence affords, it should be accepted as the fairest criterion of value."

He accordingly reported the value of the property when received as $58 a share, (the par value being $50 per share or a total par value of $2,200,000,) making the total market value of the shares $2,552,000, which sum he reported as the value of the property transferred.

When the report came before the court, exceptions having been taken, among other things, to the findings of the value of the property when delivered, the court said:

"It is the value of the property at the time it should have been returned that the Pullman Company should be charged with. Inasmuch as this value would be difficult of ascertainment by the transportation company except by reference to the value in 1870, it was considered proper to direct the inquiry to the latter date. Presumably the value increased; the evidence fully justifies the presumption. If it decreased, the Pullman Company could and should have shown it. The

master's valuation in 1870 is therefore to be taken as the value in 1885, when the property should have been returned. The payment of this sum, with interest from January 1, 1885, seems necessary to a just settlement, treating the value of the use and the rents paid prior to that date as balancing each other. A decree may be prepared accordingly, dismissing the exceptions and confirming the report."

Judgment based upon the value of the property at $2,552,000 on the 1st of January, 1885, with interest from that time was therefore entered, and it amounted, as stated, to the sum of $4,235,044.

We are of opinion that the court erred in the manner of ascertaining the value of the property transferred by the Central Company. The market value of its stock was not a proper measure of the value of the property, and such error resulted in largely increasing the supposed value of the property which the cross-defendant was under liability to account for.

The capital stock of this corporation had been increased from an original amount of $200,000 in 1862 to $2,200,000 in 1870. During this time it had been doing an increasing and a profitable business, and it was supposed that such business might increase in the future. The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross-defendant. Whatever that something may be it is not that kind of property which was delivered or that can be returned or compensation made in lieu of its return. It is not property at all within the meaning of the word as understood in such a case as this. The value of the franchise for one thing enters into the computation of market value. This was, of course, not assigned to the Pullman Company, nor were the shares of the capital stock of the Central Company, all of which remained in the hands of its original owners. The probable prospective capacity for earnings also enters largely into

market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views. A liability to return or make compensation for property received cannot be properly extended so as to include other considerations than those of the actual value of that property.

In this particular case a consideration entering into the market value of the shares must have been the probability or possibility of renewals of the contracts owned by the company for the use of its cars upon the railroads of the companies with which it had such contracts and the possibility of extending its business in the future under contracts with other railroads. These considerations, while they affect more or less the value in the market of the shares of a corporation, do not constitute the value of the property which a party impliedly promises to pay for upon the agreement being determined void under which the property was received. The faith which a purchaser of stock in such a company has in the ability with which the company will be managed, and in the capacity of the company to make future earnings, may be well or ill founded. It is but matter of opinion which in itself is not property. While the value of the property is one of the material factors going to make up the market value of the stock, yet it is plainly not the sole one. Mere speculation has not uncommonly been known to exercise a potent influence on the market price of stock. The capacity to make any future earnings in this case by the lessee arose out of the transfer of the property to it and grew out of the lease itself, and that capacity would therefore be partly founded upon the illegal contract and could not otherwise exist.

As the market value of the shares of this stock was made up to some extent, at least, of certain factors which the lessee cannot, under the rules of law, be held responsible for in this case, it follows that such value cannot furnish a safe guide in

measuring the responsibility of the lessee in an utterly void lease. The court therefore erred in taking the market value of the shares of this stock as a proper or just measure of the value of the property transferred.

We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock. The property transferred consisted (*a*) of cars, bedding, etc.; (*b*) contracts which the Central Company owned with railroad companies for the use of its cars on their roads; (*c*) patents covering the construction and use of sleeping cars owned by the Central Company and by it transferred under the lease to the Pullman Company; and (*d*) $17,000 in cash. It seems to us these values must be taken separately, because, for reasons hereafter suggested, the value of the contracts and patents does not enter into the problem.

As to the value of the cars. We agree with the court below that it is now impossible to decree their return, for the reasons stated. They have substantially disappeared. The property has become incorporated with the business and property of the Pullman Company. Compensation therefore must be made. The master found that the value of the cars as vehicles, together with their equipment, at the time of the transfer, was $710,846.50. This is probably a pretty high figure judging from the whole evidence in the case upon that subject, yet still we are inclined to think that the master was justified in arriving at that sum. We take this value for the reason that the Pullman Company agreed in the lease to keep the cars in good order and repair, and renewed and reconstructed as often as might be needful during the whole term of the lease. During the fifteen years elapsing from 1870, up to January, 1885, no violation of the terms of the lease by either party is complained of, and we think the whole transaction between the parties during those fifteen years must be treated as closed, so that no examination should be made in regard to anything that happened within that time. We must assume the provisions of the lease were fully carried out by both parties, particularly as no complaints were made

of non-performance. We therefore assume that the cars were kept in good order, and when necessary were reconstructed and renewed up to January, 1885. The value at that time may be taken to be as great as the master found it to be for 1870. It is very probable the assumption is not in accordance with the fact, and that the property had greatly depreciated. But as we refuse to look into the transactions between the parties during that period, we will hold the value in 1885 to have been the same as in 1870, on the presumption that the Pullman Company fulfilled its obligations between those dates. What rule of compensation should be deduced from such finding will be alluded to hereafter.

We next come to consider the various contracts. They were entered into with different railroad companies for certain definite periods, and their time of expiration was stated in the contracts themselves. They were valuable only as they were used by the lessee, and its right to use them sprang from and was determined by the lease itself. They were assigned to the lessee for the purpose of enabling it to avail itself of the rights therein created and to use the cars with the consent of the railroads to which the contracts applied. Whether any use was made of these contracts or not they became daily less valuable as they daily neared their termination. The use made of them did not impair their value. The passage of time did that. The rental that was paid by the lessee included compensation for use, and to that extent the transaction was closed and the compensation paid up to the time when the contracts themselves had expired, which was prior to the time when the lease was declared void and payment of rent ceased. There is no principle with which we are familiar that will permit the value of those contracts when assigned to the Pullman Company to enter into and form a part of the value of the property for which the company is to make compensation, when from the nature of the thing itself, its value necessarily, and from the simple passage of time, decreased daily, and upon the arrival of the date named for the expiration of the contract it ceased to have any value.

We think the contracts were not extended by the legislative

extension of the charter of the Central Company by the act of 1870. Some of these contracts were to last during the corporate life of the Central Company. At the time they were made the charter of the company would expire in twenty years from December 30, 1862, or on December 30, 1882. We do not think the contracts meant that they were to cover any further time to which the legislature might thereafter extend the charter of the company. Some language to that effect would have been contained in the contracts if such had been the meaning of the parties. All the contracts had therefore expired by the end of 1882.

Now upon what principle can it be urged that the lessee should compensate the lessor for the value of these contracts when delivered to it when it had paid for the use, and the property was of such a nature that it became valueless by mere limitation of time? In 1885 they had gone out of existence, and, of course, had no value. The basis for a recovery of property or compensation for its value, in cases of illegal agreements, rests upon the implied contract to return it or pay for it, because there is no right in the party in possession to retain it. If at the time when otherwise it would or ought to be returned it has ceased to exist by virtue of the termination of its legal existence, how can it be returned? How can a promise to return or make compensation therefor be implied in the case of a contract having but a limited time to run, and the value of which diminishes daily until the contract itself and its value are wholly extinguished by expiration of time, and where the use of this intangible right during its existence was fully paid for by the party to whom it was assigned? There is no implication of a promise to make any further compensation for such a species of property than is made by paying for its use while it remained in legal existence. When that time expired the value was gone, and while it lived it had been paid for.

We have been able to find no case where any principle was laid down which would authorize or justify a recovery of the value of property at the time of delivery, which, before its return became proper, had passed out of existence by limita-

tion of time, and the use of which was paid for during its lifetime.

What other contracts may have been made by the Pullman Company with railroad companies would form no factor in the value of the contracts assigned. If others were obtained, they had never been the property of the Central Company, and the latter could only make a pretence of a claim in regard to them by virtue of and through the illegal contract. A resort to the illegal instrument cannot be permitted for the purpose of sustaining any recovery.

The same may be said of the patents which the Central Company also undertook to transfer, as they had all expired before January, 1885. They simply protected the use of the cars which had been constructed under them, and they diminished in value as each day brought them nearer to their expiration, and when that time arrived they were absolutely valueless. During all that time they were included in the consideration for the payment of rent made by the Pullman Company under the terms of the lease. The contracts and the patents must be eliminated from the value of the property.

Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

There is no question of trustee in the case. *Root* v. *Railway Company*, 105 U. S. 189, 215.

The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. So long as neither party takes

any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied, and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

As to the claim of the lessor that its business has been broken up, its contracts with railroads terminated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross-defendant herein. The former knew the extent of its obligations under its charter as well as the latter did, and the illegal provisions of the lease were quite as much its doings as they were those of the cross-defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract itself or upon alleged damages arising out of its non-fulfilment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better.

We conclude that the cross-defendant is not liable for the contracts and patents transferred, nor for the possible damage the Central Company may have sustained, as above stated. It is liable for the value of the cars, furniture, etc., transferred. It is a liberal estimate of the value of this property to say that it amounted in 1885 to as much as it did in 1870, yet we are disposed to deal in as liberal a manner with the cross-complainant as we fairly may, while not violating any settled principle of law, in order to give to it such measure of

relief as the circumstances of the case seem to justify. We therefore take the value of the property in the cars, etc., in 1885 at the sum of $710,846.50. To that, we think, should be added the $17,000 cash received from the Central Company, making a total of $727,846.50 and interest from January 1, 1885, for which the cross-defendant is liable, together with costs.

Although the Central Company may have been injured by the result of this lease, yet that is a misfortune which has overtaken it by reason of the rule of law which declares void a lease of such a nature, and while the company may not have incurred any moral guilt it has nevertheless violated the law by making an illegal contract and one which was against public policy, and it must take such consequences as result therefrom.

The judgment appealed from must be

Reversed and the case remitted to the Circuit Court for the Eastern District of Pennsylvania, with directions to enter a judgment for the Central Transportation Company in accordance with this opinion.

Mr. Justice Harlan dissented.

Mr. Justice White dissented on the ground that the judgment appealed from was for the correct amount and should not be reduced.

DISTRICT OF COLUMBIA *v.* BAILEY.

BAILEY *v.* DISTRICT OF COLUMBIA.

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

Nos. 390, 420. Submitted January 10, 1898. — Decided May 31, 1898.

The commissioners of the District of Columbia have no power to agree to a common law submission of a claim against the District.

On July 30, 1879, a contract for resurfacing with asphaltum certain streets in the city of Washington was awarded to

The Bailey-French Paving Company. The agreement was embodied in a writing signed on the one part by Davis W. Bailey as general agent of the company just named, and on the other part signed and sealed by the Commissioners of the District of Columbia. The price specified for the work aggregated a little less than $41,000. On February 12, 1880, when about three fourths of the work to be done under this contract had been completed and about $36,000 earned therefor, including $5784.14 allowed for extra work, the Commissioners notified Bailey that no more work could be performed under the contract, because of the fact that the appropriation made by Congress for the work in question was exhausted. Subsequently, on February 24, 1883, Davis W. Bailey, claiming that he was in fact The Bailey-French Paving Company, instituted an action at law in the Supreme Court of the District of Columbia against the District of Columbia to recover $25,000 as damages, averred to have been sustained by the cessation of the work under the contract. The District, on April 4, 1883, filed pleas, claiming a set-off of $1312.30 for damages alleged to have been sustained by improper performance of the work of resurfacing; averring the termination of the contract by reason of the appropriation having been exhausted; and alleging that the time within which the contractor had stipulated to complete the work had expired long prior to the cancellation of the contract. The plaintiff joined issue and filed a replication on April 18, 1883.

On June 19, 1883, Bailey died. His widow was appointed administratrix, and the action against the District was revived in her name.

On September 16, 1891, the attorney for the claimant addressed a letter, on behalf of the administratrix, to the Commissioners of the District of Columbia, calling attention to the pending case, stating that "the ground of said suit is for breach of contract," reciting the facts as to the making of the contract and the mode by which it was terminated, and claiming that, at the time of such cancellation, Bailey had expended for machinery necessary to the performance of the contract $10,180; that he had at the time stock on hand,

Statement of the Case.

$7000; that the profit on the unexecuted balance of the work would have been $8000; that there was due under the contract for an extra one half inch of surfacing $5000. These items were stated in the letter to amount to $31,180, but only aggregate $30,180. Without calling the attention of the Commissioners to the fact that the item of five thousand dollars for an extra half inch of resurfacing was not asserted in the declaration in the pending suit, the attorney for the administratrix proceeded to refer to the defences interposed in such suit on behalf of the District, and next stated the claim made by the contractor in his replication, that the delay in the work was the fault of the District. The conclusion of the letter, omitting references to immaterial matters, was as follows:

"Now, having stated the principal facts which bear upon this case, that you may have sufficient knowledge to act in the premises, I write to ask if you will appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much litigated case."

This communication was referred by the Commissioners to the attorney for the District, who endorsed thereon under date of October 17, 1891:

"This is a case which has been pending in the court for a long time and it ought to be disposed of. If it could be referred to some first-class referee, who will give us a full hearing, it would be a very good way of disposing of it, and I should favor such a reference, as we can then attend to it at our convenience."

A memorandum was also sent by one of the Commissioners to the assistant attorney for the District, which read as follows:

"Thomas: Think of some good names for a referee, and talk with us about this case.

"October 27, 1891. J. W. D."

A memorandum in pencil, evidently having reference to the foregoing, is as follows:

"Ans. Mr. Douglass. Comm'rs think this case should be settled in court."

On October 28, 1891, Assistant Attorney Thomas sent the following letter:

"To the Hon. Commissioners, etc., etc.:

"Gentlemen: I return to you herewith a communication from W. Preston Williamson, Esq., relative to the case of *Bailey* v. *The District of Columbia*, referred to me with the request that I give you the name of some one who would make a good referee.

"I would suggest either Mr. A. B. Duvall or Mr. J. H. Lichliter, both members of the bar and well qualified to decide the issues in that case.

"Very respectfully,

"S. T. Thomas, *Ass't Att'y D.C.*"

The next document referring to the matter is the following:

"Office of the
"Commissioners of the District of Columbia,
"Washington, *January* 11, 1892.

"Ordered, that J. J. Johnson is hereby appointed referee in the matter of the suit of *Bailey, Administratix of Bailey, deceased*, v. *District of Columbia.*

"Official copy furnished Mr. J. J. Johnson.

"By order: W. Tindall, *Secretary.*"

Under this appointment, on February 17, 1892, the attorneys for the respective parties appeared before Mr. Johnson. It was claimed by witnesses for the plaintiff at the trial of the action subsequently brought to enforce the finding of the referee, that at the commencement of the hearing the latter gentleman, as well as the attorney for the administratrix, raised the question whether or not under the order of appointment the decision of the referee was to be final, and were assured by the attorney for the District that the decision of Mr. Johnson was to be a final determination of the case.

Statement of the Case.

Such witnesses also testified that subsequently, when a question arose with respect to permitting an amended declaration to be filed, setting up a claim for an extra half inch of resurfacing, the referee and attorneys discussed as to whether the decision of the referee "was to wind up finally the whole matter," and an affirmative conclusion was arrived at. No attempt, however, was made to obtain from the Commissioners of the District any modification or amplification of the writing of January 11, 1892.

The hearing before the referee was concluded on July 18, 1892, when Mr. Johnson placed on the files of the Supreme Court of the District of Columbia in action numbered 24,279 his report as referee. The report did not refer to the mode by which its author had become referee. It was entitled in the cause, purported to contain a synopsis of the pleadings, the plaintiff's claim, a statement of the facts and the findings of "J. J. Johnson, referee." The report concluded as follows:

"Upon the evidence and the law I have allowed the plaintiff for the unexecuted balance of 11,385 square yards, $4440.15, being the profit between the cost of resurfacing the streets at fifty cents per square yard and eighty-nine cents, the price received, and for the extra one half inch I have allowed the plaintiff $6079.05, at the contract price, aggregating the sum of $10,519.20. I do therefore find that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs."

The referee also fixed his fee at $550, which was paid by the administratrix.

On September 23, 1892, exceptions were filed on behalf of the District to this report. Upon the exceptions, the attorney for the plaintiff made the following endorsement: "I consent that these exceptions be filed *nunc pro tunc*." On March 10, 1893, a motion for judgment was filed on behalf of the plaintiff.

Without action being had on the exceptions and motions referred to, the administratrix of Bailey, on August 8, 1893, instituted an action at law, numbered 34,564, in the Supreme

Court of the District of Columbia, seeking to recover from the District the sum of $10,519.20, basing the right to such recovery upon the claim that the finding of Mr. Johnson was, in fact, a final decision and award. In the affidavit filed with the declaration, as authorized by the rules of practice of the court, what purports to be a copy of the resolution appointing Mr. Johnson referee is set out, but the words "of the suit" are omitted from before the words "of Bailey, administratrix." On September 2, 1893, pleas were filed on behalf of the District, denying that it had agreed to submit the matters of difference referred to in the declaration to the award and arbitrament of Johnson, and averring that Johnson had not made an award concerning the same. The various steps in the original action (No. 24,279) were stated, and it was alleged that motions to set aside said award and for judgment were still pending. It was also averred that the alleged award was not under seal and was never delivered to the defendant; that the defendant never undertook and promised in the manner and form as alleged, and that the District was not indebted as alleged. The plaintiff joined issue. On October 8, 1895, on motion of the plaintiff, the two causes were consolidated. While the motion to consolidate was opposed by the District, no exception was taken to the entry of the order of consolidation.

The consolidated action came on for trial January 13, 1896. At the trial W. Preston Williamson, a witness for the plaintiff, testified that he had sent to the Commissioners the communication of September 16, 1891. Under objection and exception he was permitted to testify to conversations had separately with two of the Commissioners, which tended to show that in the event of the appointment of an arbitrator or referee, it was the intention of the Commissioners to submit to the individual selected as referee or arbitrator the final determination of the entire controversy referred to in Williamson's letter. Also under objection and exception, the witness testified that after the order appointing Mr. Johnson referee was made by the Commissioners, he and the attorney for the District, in the presence of the referee, discussed the scope of

the submission, and agreed that the decision of the referee was intended by the parties to the controversy to be a final disposition of the whole matter. The indorsements on the letter of Mr. Williamson, the letter of the assistant attorney of the District, and other memoranda heretofore set out were put in evidence on behalf of the plaintiff. Mr. Hazleton, a former attorney for the District, also testified for the plaintiff, in substance, under objection and exception, that it was the intention of the Commissioners, as he knew from oral statements made to him by two of the Commissioners, that the appointment of a referee would be for the purpose of ending the whole controversy, and that nothing occurred between the time of the appointment of the referee and the making of the report to change that understanding. He also testified as to the filing of the amended declaration before the referee, setting up the claim for an extra half inch of resurfacing, which was not embraced in the pending suit at the time the referee or arbitrator was appointed.

J. J. Johnson also testified on behalf of the plaintiff, under objection and exception, as to the understanding had with him at the hearing before him as referee, by the counsel for the respective parties, regarding the finality of any decision made by him, and as to the filing of the amended declaration for the extra half inch of resurfacing. He testified that he filed the report made by him in court of his own motion, and averred that certain written matter filed with his report was not a part of the report, and that it did not contain all the evidence, though it contained all the oral testimony given before him.

The report was next put in evidence, objections being first separately interposed to its introduction on the grounds: (1,) that the papers and evidence attached thereto should also be put in evidence; and, (2,) that the referee was without authority to make an award. To the overruling of each objection the defendant duly excepted.

John W. Douglass, one of the Commissioners for the District in office at the time of the appointment of the referee, testified on behalf of the plaintiff that the intention of the

Commissioners was to make the reference final. The evidence for the plaintiff was closed with the testimony of the plaintiff, who stated, in effect, that the letter of September 16, 1891, had been sent to the Commissioners with her approval, and that nothing had been paid her on account of the award. For the defendant, John W. Ross, who was a Commissioner at the time of the appointment of Mr. Johnson, testified that he was an attorney-at-law, knew the difference between an arbitration and order of reference for a report, and that his understanding when the appointment of Mr. Johnson as referee was made was that the appointment was not of an arbitrator, but was simply one of reference. He further testified "there was no record of the appointment of the referee, except the one in evidence, unless the pencil memorandum may be taken as a record." The witness denied that he made statements attributed to him by the witnesses for the plaintiff, to the effect that it was the intention of the Commissioners that the decision of Mr. Johnson should be final.

After Mr. Ross had concluded his testimony, the record and proceedings in action No. 24,279 were introduced in evidence on behalf of the defendant. On the settlement of the bill of exceptions a dispute arose as to whether the papers attached to the report of the referee had been put in evidence by the offer made, but it is unnecessary to notice the action taken by the trial court with respect to that controversy.

In rebuttal, Mr. Williamson reiterated statements as to alleged declarations of Mr. Ross regarding the finality of the decision of the referee. On cross-examination he said:

"That he wrote the letter of September 16, 1891, at his office, 912 F street; that he did not know why the District filed exceptions, as it was understood that the report was to be final; that witness filed the motion to confirm the award because he thought it the best thing, the only thing, that could then be done, and that he thought it would be simply a matter of form, and he would have confirmation at once of the award, and that the money would be paid; but the District, instead of doing that, violated its agreement; that witness

did not remember ever consenting to the filing of exceptions to the award. Now that counsel shows him the paper which is the exception to the award, witness remembers that he signed the paper consenting that the exceptions should be filed *nunc pro tunc.* Mr. Richardson came to him and asked him if he would make any special objection to the exceptions being filed; that it ought to be filed, so that the District might make their objections, and for that purpose he did it, and did not consent to it because he thought it was not final; that there was not a copy of the award served by him on the Commissioners; that Mr. Johnson was their arbitrator, and it was not for witness to serve them with a copy."

The evidence was then closed. The trial judge granted a request of the defendant that the jury be instructed to render a verdict for the defendant in the first action, and an exception was duly noted on behalf of the administratrix. The trial judge also granted a request of counsel for the plaintiff, in substance that the jury be instructed to find for the plaintiff if they found from the evidence that the Commissioners accepted the proposition contained in Mr. Williamson's letter, that in pursuance of such acceptance the Commissioners made the order of January 11, 1892, and that the hearing before Mr. Johnson was proceeded with under such appointment, and the declaration amended at the hearing by consent of counsel. An exception was taken to the granting of this instruction.

The following requests for instructions were then asked on behalf of the defendant, which, being overruled, separate exceptions were noted:

"2. The jury are instructed, on the whole evidence in cause No. 34,564, they are to render a verdict for the defendant.

"3. The jury are instructed that the Commissioners of the District of Columbia were without authority to agree to submit the matters in controversy in the case of *Bailey, Adm'r,* v. *The District of Columbia,* at law, No. 24,279, to the final award of an arbitrator, but that said Commissioners had authority to agree to refer the case for the award and report of a referee, subject to the approval of the court."

"5. The jury are instructed that the plaintiff, as adminis-

tratrix of the estate of her deceased husband, was without authority to agree to refer the claim of the estate to arbitration without the previous direction of the Supreme Court of the District of Columbia, holding a special term for orphans' court business."

The bill of exception also states that exceptions were taken on behalf of the District to portions of the general charge of the court contained in brackets, but no portion of the charge, as contained in the printed record, is so marked.

A verdict was returned finding in favor of the defendant in action No. 24,279, and in favor of the plaintiff for $10,519.20 and interest in action No. 24,564. Judgment was subsequently entered upon the verdict, and both parties prosecuted error. The Court of Appeals of the District having affirmed the judgment, 9 App. D. C. 360, each party obtained the allowance of a writ of error from the court, and the consolidated cause is now here for review.

Mr. Sidney T. Thomas and *Mr. Andrew B. Duvall* for the District of Columbia.

Mr. A. S. Worthington for Bailey.

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

The decision of this controversy involves two propositions. Did the Commissioners of the District of Columbia have the power to agree to submit the claim in issue to the award of an arbitrator? And if they did have the power, did they lawfully exercise it? To answer either of these questions it becomes essential to ascertain whether an agreement to submit to arbitration involves the power to contract. Both of the matters above stated depend upon this last inquiry, because both the claim that the District of Columbia did not in valid form exercise the power to submit to arbitration, and the assertion that if they so did they were not authorized to that end, rest on the claim that the submission was not made in

the form required by law to constitute a contract, and even if the alleged award was in legal form, nevertheless the District Commissioners were without power to contract for that purpose.

In determining whether an agreement to arbitrate involves the power to contract we eliminate at once from consideration consents to arbitrate made under a rule of court, by consent, in a pending suit, and shall consider only whether an agreement to arbitrate not under rule of court or within the terms of a statute enacted for such purpose is or is not a contract. We do this, because there is no pretence in the case at bar that the submission to arbitration was under a rule of court or equivalent thereto. Indeed, the courts below held that the submission of the claim in question to arbitration was a purely common law one and not made under a statute or rule of court; and in consequence of these views the courts held it to be their duty to make the award executory by rendering a judgment thereon, on the assumption that the parties having agreed to a common law submission were bound by reason thereof to abide by the award of the arbitrator.

The general rule is, "that every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting." Kyd, p. 35; Russell on Arbitrators, p. 14. And Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: "A submission is a contract." And again, at p. 50: "The submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts." In *Whitcher* v. *Whitcher*, 49 N. H. 176, the Supreme Court of New Hampshire said (p. 180): "A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and to be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed." It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be

the act of the corporate body, Russell on Arbitrators, fifth edition, p. 20; which act was of necessity required to be evidenced in a particular manner.

It is true that an executor, at common law, had the power to submit to an award. But this power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. *Wheatley* v. *Martin*, 6 Leigh, 62; *Wamsley* v. *Wamsley*, 26 W. Va. 45; *Wood* v. *Tunnicliff*, 74 N. Y. 38. Whilst, however, the agreement of the executor to a common law submission was binding upon him, such a consent on his part did not protect him from being called to an account by the beneficiaries of the estate, if the submission proved not to be to their advantage, because the submission was the voluntary act of the executor and was not the equivalent of a judicial finding. 3 Williams on Executors, p. 326, and authorities cited. So, also, the power of a municipal corporation to arbitrate arises from its authority to liquidate and settle claims, and the rule on this subject is thus stated by Dillon (Mun. Corp. 4th ed. sec. 478):

"As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, could submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities."

In the early case of *Brady* v. *Brooklyn*, 1 Barb. 584, 589, the power of a municipal corporation to submit to arbitration was ascribed to the capacity to contract, with a liability to pay, and it was held that corporations have all the powers of ordinary parties as respects their contracts, except when they are restricted expressly, *or by necessary implication*. In the

case of minor public officials or corporations, such as selectmen and school districts, the power to arbitrate has been clearly rested upon the existence of the right to adjust and settle claims of the particular character which had been submitted to arbitration. *Dix* v. *Dummerston*, 19 Vermont, 262; *Walnut* v. *Rankin*, 70 Iowa, 65. Indeed, the proposition that an independent agreement to submit to an award must depend for its validity upon the existence of the right to contract is so elementary that further citation of authority to support it is unnecessary.

Examining, then, the questions we have stated in their inverse order, we proceed to inquire whether the Commissioners of the District of Columbia had the power to enter into a contract of the nature of that under consideration. The solution of this inquiry requires a brief examination of the statutes, from which alone the powers of the Commissioners of the District are derived.

By the act of June 20, 1874, c. 337, "An act for the government of the District of Columbia, and other purposes," 18 Stat. 116, the commission provided for in section 2 was vested with the power and authority of the then governor or board of public works of the District, except as thereinafter limited, and it was provided that "said commission, in the exercise of such power or authority, shall make no contract, nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing, or commenced and not completed, at the time of the passage of this act."

By the act of June 11, 1878, c. 180, "An act providing a permanent form of government for the District of Columbia," 20 Stat. 102, the District and the property and persons therein were made subject to the provisions of the act, "and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act." The Commissioners provided for in the act were, by section 3, vested with

all the powers, rights, duties and privileges lawfully exercised by, and all property, estate and effects vested in the Commissioners appointed under the provisions of the act of June 20, 1874, and were given power, subject to the limitations and provisions contained in the act, to apply the taxes or other revenues of the District to the payment of the current expenses thereof, to the support of the public schools, the fire department and the police. It was expressly enacted, however, in the same section, that the Commissioners in the exercise of the duties, powers and authority vested in them "shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress." In the same section it was further provided that the Commissioners should annually submit to the Secretary of the Treasury, for his examination and approval and transmission by him to Congress, a statement "showing in detail the work proposed to be undertaken by the Commissioners during the fiscal year next ensuing, and the estimated cost thereof; also the cost of constructing, repairing and maintaining all bridges authorized by law across the Potomac River within the District of Columbia, and also all other streams in said District; the cost of maintaining all public institutions of charity, reformatories and prisons belonging to or controlled wholly or in part by the District of Columbia, and which are now by law supported wholly or in part by the United States or District of Columbia; and also the expenses of the Washington Aqueduct and its appurtenances; and also an itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia for the next fiscal year." Of the estimates as finally approved by Congress, the act provided that fifty per cent should be appropriated for by Congress, and the remaining fifty per cent assessed upon the taxable property and privileges in the District other than the property of the United States and of the District of Columbia. In the fifth section of the act provision was made for the letting by contract, after due advertisement, of all work of repair on streets, etc., where the cost would exceed one thou-

sand dollars, and it was also, in said section, stipulated that "all contracts for the construction, improvement, alteration or repairs of the streets, avenues, highways, alleys, gutters, sewers and all work of like nature shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied in a book kept for that purpose and be signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

By section 37 of the act of February 21, 1871, c. 62, 16 Stat. 419, 427, it was provided as follows:

"All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District, and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

This section is deemed to be applicable to the present Commissioners. (Comp. Stat. Dis. Col. secs. 30 and 31, pp. 201–2.) So, also, by section 15 of the act of 1871, 16 Stat. 423, it was provided that the legislative assembly should not "authorize the payment of any claim, or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law, and all such unauthorized agreements or contracts shall be null and void."

Section 13 of the joint resolution of June 1, 1878, embodies the second section of the joint resolution approved March 14, 1876, 19 Stat. 211, 212, which made it a misdemeanor for any officer or person to increase or aid or abet in increasing the total indebtedness of the District.

Under the statutes of 1874 and 1878, above referred to, it has been held that the District of Columbia still continued to be a municipal corporation, and that it was subject to the operation of a statute of limitations, *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1, and was also liable

for damages caused by a neglect to repair the streets within the District. *District of Columbia* v. *Woodbury*, 136 U. S. 450. But the mere fact that the District is a municipal corporation is not decisive of the question whether or not the Commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of a municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words, all the general attributes which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the Commissioners of the District of Columbia, it is clear from their face that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District Commissioners to be merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials.

There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind the corporation by a common law submission. And this being true, with how much less reason can it be contended that the administrative officers of the District have such power without the consent of Congress, when the acts defining the powers of the Commissioners, by clear and necessary implication, contain an express prohibition to the contrary?

Nor is it in reason sound to say that because the District Commissioners have the power to sue and be sued, they have therefore the authority to enter into a contract to submit a claim preferred against the District to arbitration, and thus to oust the courts of jurisdiction, when no authority is conferred upon the Commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation had been made by Congress for the payment of any such claim. It cannot be said that because Congress had appropriated for the improvement of streets, and therefore authorized a contract for such improvement to the extent of the appropriation, that it had also authorized and appropriated for a claim in damages asserted to have arisen from the fact that work had been stopped because the appropriation made by Congress had been exhausted. The appropriation of money to improve streets was in no sense the appropriation of money to pay a claim for unliquidated damages arising, not for work and labor performed and materials furnished, but from the refusal to permit the performance of work and labor and the furnishing of materials.

Aside from the prohibition imposed on the Commissioners of the District by the acts of Congress against entering into contracts for the payment of money for any claim not specifically appropriated for, an agreement to submit the claim in question to the arbitrament of a single individual was, if valid, a contract binding the District to pay any sum of money which the arbitrator might award. It cannot be doubted that if the District Commissioners themselves had seen fit to pass a resolution reciting that the appropriation by Congress for the improvement of the streets had been exhausted, and that a given sum of money was set aside to pay a claim for damages preferred against the District for having contracted when there was no appropriation, such action would have been, under the statutes, *ultra vires*. But if the express action of the Commissioners to this end would have been void, how can it be contended that by indirection, that is, by entering into an agreement to submit to an award, the Commissioners had the power to delegate to a third person an authority which

they themselves did not possess? Whilst the fundamental want of power in the District Commissioners to agree to a common law submission is decisive, there is another view which is equally so. By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of one hundred dollars, unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the statute clearly makes the form in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of one hundred dollars cannot take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei.* That the mere statement of the appointment of a referee on the minutes without the signature of any of the Commissioners did not comply with the requirements referred to, is too clear for discussion. The attempt to give effect to such entry as a contract without regard to the requirements of the law illustrates the wisdom of the statute and the evil of disregarding it, for on the trial two of the three commissioners testified, one on behalf of the plaintiff and the other on behalf of the defendant, and swore to directly opposite views as to whether or not there had been a common law submission by the Commissioners.

We have considered what has been referred to by counsel as the order of the Commissioners, according to its terms, which embraced only the matters contained in the action then pending, and have not regarded the parol evidence which sought to vary and contradict the writing by establishing that it was intended thereby to embrace a claim which had not been asserted in the action. The views we have advanced being decisive against the legality of the alleged award, it follows that the judgment in favor of the administratrix based thereon must be reversed. As, however, the consolidation of

the action upon the award with the original action for damages for breach of the contract for the resurfacing, and the trial of such consolidated cause, proceeded upon the hypothesis that a valid agreement to arbitrate had been entered into, the ends of justice will be subserved by also reversing the judgment in favor of the District entered in the original action. It is therefore ordered that the judgments be

Reversed and the cases remanded, with directions to dismiss the action No. 34,564 *founded upon the alleged award, and to grant a new trial in action No.* 24,279.

YOUNG *v.* AMY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 242. Submitted April 27, 1898. — Decided May 31, 1898.

On error or appeal to the Supreme Court of a Territory, this court is without power to reëxamine the facts, and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this respect has been duly excepted to, and the right to attack the same preserved on the record.

There is no error in the conclusions of law in this case: all the assignments of error, and the argument based thereon, rest on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence, and to disregard the facts as found.

The case is stated in the opinion.

Mr. Le Grand Young for appellants.

Mr. C. S. Varian, *Mr. W. H. Dickson* and *Mr. S. P. Armstrong* for appellee.

Mr. Justice White delivered the opinion of the court.

By section 17 of the act of Congress of July 16, 1894, c. 138, providing for the admission of Utah into the Union, 28

Stat. 107, c. 138, power was conferred upon the convention, called for the purpose of framing a constitution for the contemplated State, to provide for a transfer of causes which might be pending in the territorial courts, at the time of the admission of Utah into the Union, to the courts of the State which were to be established. The statute moreover provided that "from all judgments and decrees of the Supreme Court of the Territory mentioned in this act, in any case arising within the limits of the proposed State prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union."

This cause comes here for review in virtue of the foregoing provisions of law. It originated in the probate court of Summit County, Utah Territory, and involved a dispute over the distribution of the estate of Oscar A. Amy, who died intestate in the county of Summit, in Utah Territory, on the 26th day of May, 1891. There were three classes of claimants to the estate. First, Adelia Young, Cedina C. Young and Delecto Maston, who were maternal aunts of the decedent, they being the appellants on this record. Second, Royal D. Amy, Francis R. Jackson and others, half blood brothers and sisters of the deceased. Third, Jennie Amy, who is the appellee, claiming to be the wife of the deceased. Each of these different classes of claimants asserted that they were solely entitled to take distribution of the estate to the entire exclusion of the others. In the probate court a decree was rendered in favor of the first-mentioned persons, the maternal aunts. From this decree an appeal was taken to the District Court of the third judicial district of the Territory of Utah, where after a trial *de novo* the decree of the probate court was affirmed. From this decree further appeal was prosecuted to the Supreme Court of the Territory, and that court reversed the decree of the District Court, rejected the claims of those firstly and secondly mentioned; that is, the maternal aunts and the brothers and sisters of the half blood, the court deciding that the wife of the deceased, Jennie Amy, was solely entitled to the entire

estate. The decree of the Supreme Court of the Territory was entered on December 21, 1895. 12 Utah, 278. On the same day the maternal aunts who were embraced in the first class applied for and were allowed an appeal to this court, and on December 21, 1895, a bond for costs was filed in the Supreme Court of the Territory, and was approved by the Chief Justice thereof. The citation on appeal, however, was not issued until about six months thereafter, September 21, 1896. As in the meanwhile, the State of Utah had been admitted into the Union, this citation was approved by the Chief Justice of the State of Utah, and on the same day findings of fact and conclusions of law were made by the Supreme Court. These findings, as the record certifies, were prepared by the late Chief Justice of the territorial court, and were adopted by the Supreme Court of the State of Utah as its own. From the findings thus made we have ascertained the facts above stated, and the findings moreover show that the controversy involved two issues. First, whether the brothers and sisters of the half blood were entitled to a distribution of the property left by the deceased in preference to the maternal aunts; and, second, whether Jennie Amy, the appellee, was the wife of the decedent, it being conceded that if she was his wife under the laws of Utah, she inherited the property left for distribution to the exclusion of his maternal aunts. The first question, that is, the right to distribution asserted in favor of the brothers and sisters of the half blood, may be at once dismissed from view, as the decree of the Supreme Court rejected their claim, and they have not appealed. The second question, that is, whether Jennie Amy, the appellee, was the wife of the deceased, depended upon the validity of a judgment of divorce, against a former husband which had been rendered in her favor in 1879 in the probate court of Washington County, Utah, the marriage having been contracted in Utah and the ground for the divorce being the abandonment of the wife by the husband. After this judgment of divorce Mrs. Amy on the 4th of August, 1886, was married to Oscar A. Amy, the deceased. The controversy, then, between the parties now before us turned upon a claim advanced by the maternal

aunts, that the judgment of divorce rendered between Mrs. Amy and her former hubsand was void; that she hence did not enter into a lawful marriage with the deceased, and was not entitled, therefore, as his wife to his estate.

The record contains, as we have stated, findings of fact made by the Supreme Court of the State and the conclusions of law, which the Supreme Court held to be decisive of the issues which the case involved, and to which we shall have occasion hereafter to refer. The findings of fact and conclusions of law are immediately followed in the record by this recital: "The foregoing is a statement of the facts found upon the evidence in the case, and the following are the rulings of the court on the admission and rejection of the evidence, which were duly excepted to by counsel for Adelia Young, Cedina C. Young and Delecto Maston." This is followed by a note of evidence, showing what took place during the trial in the District Court, which is also supplemented by the oral and documentary evidence offered in the trial of the cause. It appears that Mrs. Amy offered the decree of divorce between herself and her husband and the complaint filed in the suit in which the judgment of divorce was entered. This was objected to on the ground that the documents were irrelevant, inasmuch as without the summons issued in the cause they proved nothing. The counsel tendering the proof thereupon declared that although the decree on its face recited the fact that the summons had been regularly issued and served, it was absent from the record, and he proposed by further evidence to show that the summons was regularly issued and due notice thereof had been given to the defendant as the law required.

The court received the evidence subject to the objection. That is to say, it declared that it would pass on the objection when all the evidence in the case had been offered, thus treating the objection as in a measure going to the effect. Mrs. Amy and her former husband, the defendant in the divorce proceedings, were then called, and testimony was given by both tending to show that the summons had been issued in conformity to law and the defendant in the divorce

suit was personally cognizant of the suit, as he received and had in his possession the copies of the newspaper containing the published summons, and that due service thereof, in the manner required by law, had been made. All this testimony was objected to, and the court likewise received it subject to objection, no exception being taken to such action. In the course of the testimony of these witnesses various exhibits were offered tending to show the preparation of the summons in compliance with law, the publication in the newspaper of the summons in conformity to legal requirements, its service on the defendant and that he had both legal and actual notice of the suit, all of which was objected to, and this, like the other objections, was reserved to be considered when the evidence was all in. The counsel of Royal D. Amy and others, the sisters and brothers of the half blood, offered in evidence what they designated as the judgment roll of the divorce proceeding. This was also objected to by the counsel for the maternal aunts on the ground that the record was not complete and did not show compliance with the legal requisites, and was objected to by Mrs. Amy because it contained matters asserted not to be properly a part of the judgment roll, and which were therefore not admissible. The court also reserved the objection to this evidence.

At the conclusion of the trial the court sustained all the objections to the evidence and the testimony, and decided the case against Mrs. Amy and in favor of the maternal aunts. To the rulings of the court rejecting the documentary and oral evidence, Mrs. Amy excepted, and upon the record as thus made the case was taken to the Supreme Court of the Territory. In that court, as we have seen, the action of the trial court was reversed and a decree rendered in favor of Mrs. Amy.

The assignments of error are twenty-four in number, and the argument by which their correctness is sought to be maintained has taken a much wider range than the condition of the record justifies. It is settled that on error or appeal to the Supreme Court of a Territory this court is without power to reëxamine the facts and is confined to determining

whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this regard has been duly excepted to, and the right to attack the same preserved on the record. *Harrison* v. *Perea*, 168 U. S. 311, and authorities there cited.

The findings of fact and conclusions of law of the Supreme Court are as follows:

"Eleventh. The court further finds that the said Jennie Amy was married to one Elliot Butterworth in 1875.

"That on the third day of September, 1879, the probate court of Washington County made and entered a decree of divorce, dissolving the bonds of matrimony theretofore existing between the said Jennie Amy and the said Elliot Butterworth, and absolutely releasing the said Jennie Amy and the said Elliot Butterworth from all the obligations of said marriage; that the said probate court so granting said decree of divorce was a court of competent jurisdiction and had jurisdiction of the subject-matter of said divorce action and of both the parties thereto.

"That the said defendant therein, Elliot Butterworth, had knowledge at the time of the said divorce proceedings and was duly served with process in said action.

"That the said Elliot Butterworth married a second wife on the 11th day of October, 1880, being the year after said decree of divorce was rendered; that his second wife is still living, and she and the said Elliot Butterworth are still husband and wife; that as the issue of said second marriage the said Elliot Butterworth and his present wife have seven children, ranging from two years to fifteen years old.

"That afterwards, to wit, on April 4, 1886, the said Jennie Amy, the claimant in this proceeding to the estate of the said Oscar A. Amy, deceased, was duly and lawfully married to the said Oscar A. Amy, and continued to be and was his lawful wife at the time of his death."

From these findings it deduced the following legal conclusion:

"That the said Jennie Amy is now the widow of said Oscar A. Amy, deceased, and as such widow she is the successor to the whole of his estate, consisting of the property hereinabove described."

We will consider the assignments in their logical order. The first to the eleventh, inclusive, and the nineteenth complain of errors, which it is alleged the Supreme Court committed in admitting certain evidence. But all the evidence objected to was received by the trial court subject to the objection, and the question of its admissibility turned on that of its irrelevancy or the quantum of proof which it would establish if considered. The ultimate action of the trial court in rejecting the evidence which it had received, subject to objection, amounted, in effect, to a decision that the evidence did not establish that the judgment in the divorce proceedings had been rendered after due publication of summons in accordance with the laws of the Territory, and therefore the evidence was insufficient. But the express finding from all the evidence by the Supreme Court of the State is that the summons in the divorce suit was duly issued and published according to law, and that the defendant had, besides, personal notice of the pendency of the suit. This conclusion being binding on us, establishes that the evidence was relevant and material, and that there was no ground to reject it. We cannot, therefore, say that the evidence should have been disregarded, because it did not establish the facts, which we are bound to conclude it did fully prove. If specific findings of each item of evidence and the conclusions deduced from the separate items had been made, as in *Cheely* v. *Clayton*, 110 U. S. 701, the case would present a different aspect. Considering, however, the state of the record and the nature of the findings of fact certified, we cannot determine the correctness of the objections to the evidence without going into its weight and making independent conclusions of fact; in other words, without disregarding the findings made by the court below, by which we are concluded. The same reasoning is applicable to the other assignments of error. Thus, the thirteenth, fourteenth, seventeenth and eighteenth assert that the court erred in

holding, as to the burden of proof, that it erroneously treated the denial of the validity of the judgment of divorce by the maternal aunts as a collateral attack by them on such judgment. But there are no findings which raise these questions. On the contrary, the facts found render them wholly immaterial, for it is obvious that if the evidence affirmatively established, as the findings declare, that the judgment of divorce was rendered after due summons, and that the defendant had personal notice of the proceedings, the question of burden of proof and collateral attack are wholly irrelevant. Again, the twenty-first and twenty-second assignments of error complain that the court erred in holding that it was not necessary that there should be an order of the court directing the publication of the summons in the divorce proceeding, and that the court erred in holding that the only papers necessary in proof of publication were the complaint, summons and affidavit of the printer and judgment. But there are no findings which raise these questions. On the contrary, the facts found are that the summons was duly published, and that the defendant had besides personal notice. To maintain the assignments of error, we should be obliged to go into the record and ascertain what was the proof on the subject upon which the court based its findings, and deduce from this analysis that the premise upon which the assignments just mentioned are based was a correct one. The same reasoning applies to the twenty-third and twenty-fourth assignments, which charge that the court erred in holding that the probate court by which the divorce judgment was rendered possessed common law or chancery jurisdiction, or that it was ever a court of general jurisdiction. These questions become only material for the purpose of determining the *prima facie* proof resulting from the record of the divorce proceeding. It is not questioned that it was correctly held that the court which rendered the judgment of divorce had jurisdiction of the subject-matter. If, therefore, it had jurisdiction, and the proof affirmatively shows the regularity and validity of the proceedings, it is wholly immaterial to determine whether it possessed common law or chancery powers, or was a court of general jurisdiction.

Syllabus.

In effect, all the assignments of error and the argument based thereon rest in reason on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence and disregard the facts as found. If the argument be that the findings of fact are the mere statement of ultimate legal propositions, and therefore they may be disregarded or reviewed, then the result of the contention is that there are no findings of fact and nothing to review, and if the other aspect be looked at, the views which we have just expressed are conclusive.

Affirmed.

THE IRRAWADDY.[1]

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

No. 591. Submitted April 11, 1898. — Decided May 31, 1898.

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of § 3 of the act of February 13, 1893, c. 105, 27 Stat. 495, has not a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo.

The main purposes of the act of February 13, 1893, known as the Harter Act, were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence, and, in the event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damages or loss resulting from faults or errors in navigation or in the management of the vessel; but the court cannot say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship.

In determining the effect of this statute in restricting the operation of general and well-settled principles, the court treats those principles as still existing, and limits the relief from their operation afforded by the statute to that called for by the language of the statute.

[1] The docket title of this case is *Flint, Eddy & Company, Appellants*, v. *George Chrystall and James Greig, as Trustees.*

Statement of the Case.

THIS case comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The facts out of which the question arise are as follows:

On November 9, 1895, the British steamship Irrawaddy, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped and supplied, and was seaworthy.

The vessel was relieved from the strand November 20 as the result of sacrifices by jettison of a portion of her cargo, of sacrifices and losses voluntarily made or incurred by the ship owners through the master and of the services of salvors.

The Irrawaddy then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo and the losses and sacrifices of the ship owner.

The respondent thereupon paid $4483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the ship owner, which they refused to pay.

The District Court made a decree in favor of the libellants; from which decree the respondent duly appealed to this court.

Upon these facts the court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of section 3 of the act of February 13, 1895, a right to general average contribution for

sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo?

Mr. Wilhelmus Mynderse and *Mr. James C. Carter* for appellants.

Mr. Harrington Putnam for appellees.

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

The answer we shall give to the question certified by the Circuit Court of Appeals must be determined by the meaning and effect which should be given to the act of February 13, 1893, c. 105, 27 Stat. 445, known as the Harter Act. Admittedly, upon the facts conceded to exist in the present case, the owner of the ship has no right to a general average contribution from the cargo, unless such right arises from the operation of that act.

We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law responsible to the co-contributors. We are not called upon either to trace the history of the rule, or to justify it as based on equitable principles, as it is conceded on both sides that such is the ordinary rule in the absence of statute or contract to modify it.

Nor is it necessary to inquire into the origin or nature of the law of general average. That has been so recently and thoroughly done in *Ralli* v. *Troop*, 157 U. S. 386, that it is sufficient to refer to the opinion of Mr. Justice Gray in that case.

Not only is the ship owner excluded from contribution by

way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and damages so occasioned. And it is the well-settled law of this court that a common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397.

Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy at the time of beginning her voyage, or that he has used his best efforts to make her seaworthy; and that his undertaking is not discharged because the want of fitness is the result of latent defects. *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408; *The E. J. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124.

In this condition of the law the so called Harter Act was approved on February 13, 1893, wherein, after providing in the first and second sections that it shall not be lawful for any owner, agent or master of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to exempt himself from liability for loss or damage arising from negligence in the loading or proper delivery of such property, or to insert in any bill of lading any covenant or agreement whereby the obligations of the owner to exercise due diligence in manning and equipping the vessel, and to make such vessel seaworthy and capable of performing her intended voyage should be in anywise lessened, weakened or avoided, it was, in the third section, enacted as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel

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in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from the danger of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The argument on behalf of the ship owner is clearly expressed by the learned judge of the District Court in the following terms:

"There is no doubt, I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the ship owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation. It therefore seems necessarily to follow that in cases where all such liability is abolished by law, as it is under the circumstances of this case by the Harter Act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average. Where due diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by 'fault or error in the navigation or management of the ship,' the third section of that act declares that 'neither the vessel nor her owner, agent or charterer shall become or be held responsible for damage or loss resulting therefrom;' the previous liability of the ship owner to the cargo owner for faults of navigation is thus abolished in all cases coming within the act. In such cases faults in the navigation or management of the ship are no longer, by construc-

tion of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo owner for his damages therefrom than the latter is liable to the ship owner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit, as much and as truly so when made by the ship owner as when made by the cargo owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifice as the other." "The application of this new relation of non-responsibility under the Harter Act to cases of general average does not, in fact, make the least change in the principles of general average contribution. The rule remains as before, that he by whose fault, actual or constructive, the ship and cargo have been brought into danger cannot recover an average contribution for his expenses in extricating them. And so the counter rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter Act the ship owner, under our law, was constructively in fault for bad navigation and hence fell within the former rule. The Harter Act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter." (82 Fed. Rep. 472, 474–477.)

We are unable to accept this view of the operation of the act of Congress.

Plainly the main purposes of the act were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the

management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?

Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the Federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American ship owner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty.

Although the foundation of the rule that forbade ship owners to contract for exemption from liability for negligence in their agents and employés, was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.

But we think that for the courts to declare, as a consequence of this legislation, that the ship owner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy as previously declared by the courts, but if Congress had intended to grant the further privilege now contended for it

would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the ship owner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew.

What was the reasoning on which the courts proceeded in holding that it was against public policy to permit ship owners to contract for exemption from liability for the negligence of their agents? Was it not that such a state of the law would impel the ship owners to exercise care in the selection of those for whose conduct they were to be responsible? This being so, can it be reasonably inferred that Congress intended, when relieving ship owners from liability for the misconduct of their agents, to confer upon them the further right to participate in a general average contribution, and that to the detriment of the shippers? Such an interpretation of the statute would tend to relieve ship owners, to some extent at least, from care in the selection of the master and crew; and it would likewise operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel, in whole or in part. If he knew that the owner would participate in a contribution occasioned by a loss, he would be the less likely to exert himself and crew to avoid the loss.

It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the ship owner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution.

An examination of the cases cited has not convinced us that there has been any such final decision by the English courts. The case of *The Carron Park*, 15 P. D. 203, does, indeed, hold that the relation of the goods owner to the ship owner was altered by the contract; that the ship owner was not to be responsible for the negligence of his servants in the events which have happened; and that, therefore, the ship owner's claim for general average was allowed. On the other hand,

in the case of *The Ettrick*, 6 P. D. 127, where the ship owner claimed the benefit of a general average contribution rendered necessary by reason of negligence in navigation, and put his claim on the ground that, having availed himself of the limited liability laws by paying into court the £8 a ton, which is the limitation fixed by the statutes of Great Britain, he was thereby relieved from his liability on account of the negligence in the navigation, and stood in the position of an innocent party entitled to share in the contribution. But the Court of Appeals held otherwise, and Sir George Jessel, M. R., said:

"The ground upon which the ship owner puts his claim is this: he says that the payment of £8 per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or his agents that would give rise to any liability. But I cannot read the act so. All it says is that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. It does not give him any new rights as far as I can see. . . . It seems to me that he could have no such right, for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course there is an end of the case."

But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the ship owner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption.

Upon the whole, we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation

afforded by the statute to that called for by the language itself of the statute.

Our conclusion accordingly is, that the question certified to us by the Court of Appeals should be answered in the negative, and it is so ordered.

Mr. Justice Brown, with whom was Mr. Justice McKenna, dissenting.

I am constrained to dissent from the opinion of the court in this case. While I freely concede that the owner of a ship is not by the general maritime law entitled to a general average contribution, where the loss is occasioned by the fault of the master or crew, I regard the third section of the Harter Act as introducing a new feature into the law of carriage by sea, and as eliminating altogether the question of negligence in navigation. This section provides in substance that if the owner shall exercise due diligence to make his vessel in all respects seaworthy, and properly manned, equipped and supplied, he shall not "be held responsible for damage or loss resulting from faults or errors in navigation or in the management" of his vessel.

As the steamer Irrawaddy was stranded on the coast of New Jersey, confessedly by the negligent navigation of her master, it will not be contended that she or her owners became liable to the owners of the cargo for any damages thereby occasioned. It is said, however, that while the Harter Act may be appealed to in defence of any action by the cargo against the ship, it is not available by the ship owner in a suit against the owners of the cargo for a contribution to the general average expenses occasioned by such stranding. If this be so, then the ship is thereby made responsible for a fault in her navigation to the exact extent to which she would be otherwise entitled to a general average contribution, and the statute to that extent is disregarded and nullified. I consider this a narrow and technical construction of the act. I think the third section makes the question of fault in navigation an immaterial one, and eliminates it from

the relations of the ship to the cargo. The section, therefore, becomes available to the ship owner either as a weapon of defence or attack. If the ship owner stands in relation to the cargo as if no fault had been committed, it is impossible for me to see why he may not avail himself of this in whatever shape the question may arise.

As the Harter Act is a novelty in maritime legislation, of course it would be vain to search for authorities based upon a similar enactment; but cases are by no means wanting where a similar question has arisen upon stipulations in bills of lading exempting the owner of the ship from the consequences of faults or errors in navigation. While it is conceded in this country that such stipulations are of no avail, it is equally well settled that by the law of England, and of some, if not all, of the maritime nations of continental Europe, they are held to be valid and binding.

In the case of *The Carron Park*, 15 P. D. 203, a charter party contained a stipulation that the ship owners were not to be responsible "for any act, negligence or default whatsoever of their servants during the said voyage." The cargo having been damaged by water pouring through a valve, negligently left open by one of the engineers, the owners brought suit against the vessel, and the owners of the ship counterclaimed for a general average contribution. It was held by the Admiralty Division that the ship was exonerated in the suit against her by the owners of the cargo, and was also entitled to her contribution. In delivering the opinion, Sir James Hannen, President, observed: "The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the ship owner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen upon the ship owner, and the expenditure or sacrifice made by him is not made to avert loss from himself alone, but from the cargo owner." The case of *Strang* v. *Scott*, 14 App. Cas. 601, was cited to the proposition that the conditions ordinarily existing between parties standing in the relation of ship and cargo owners may be varied by special contract.

It is true that the case of *The Carron Park* was not one arising upon a statute but upon a stipulation in a charter party; but I think it can make no possible difference in the legal aspect of the case whether the exemption be conceded by contract or granted by statute.

The case of *The Ettrick*, 6 P. D. 127, is not in point. In that case the owner of a ship, sunk by a collision in the Thames, admitted the collision to be his fault, and paid into court eight pounds a ton in a suit to his liability. The ship having been subsequently raised at the expense of the owner, he sought to recover in general average against the cargo its contributory portion of such expenses. It was held that this could not be done, the court basing its opinion upon the language of the Merchants' Shipping Act, section 54, which merely declared that the owners of the ship should not be *answerable for damages* in respect of losses to ships or goods to a greater amount than eight pounds per ton of the ship's tonnage. In delivering the opinion of the court, Sir George Jessel observed: "That is merely the limit of the liability for damages. It does not in any way alter the property. . . . Now, property not being altered, the ground upon which the ship owner puts his claim is this: He says that the payment of eight pounds per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or by his agents that would give rise to any liability. But I cannot read the act so. All that it says is, that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. . . . It seems to me that he would have no such right," (that is, to salvage on the cargo,) "for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course that is an end of the case."

In the case of *The Carron Park* the stipulation exempted the ship from the consequences of all negligence in her navigation. In *The Ettrick* the act simply limited the liability of

the owner in damages to a certain sum per ton. The operation of the Merchants' Shipping Act was evidently intended to be merely defensive. *The Ettrick*, though cited by counsel, was not referred to by the court in *The Carron Park*, and was evidently regarded as standing upon a different footing.

The French law in this particular is the same: The case of *Le Normand* v. *Compagnie Générale Transatlantique*, 1 Dalloz, Jurisprudence Générale, 479, before the French Court of Cassation, was an appeal from the court of Rouen, which had treated as general average the expenses of salvage and towage of the steamer Amérique, after having found that the abandonment of the ship was imputable only to the master and crew, and had held that a contract exempting the ship from the consequences of negligence, permitted the owners of the ship to recover from the owners of the cargo their share in contribution of the expenses of salvage. In the opinion of the Court of Cassation upon appeal it was said that in this bill of lading the defendant company, the owner of the Amérique, had formally excepted the acts of God, of enemies, pirates, fire by land or sea, accidents proceeding from the engine, boilers, steam and all other accidents of the sea caused or not caused by the negligence, fault or error of the captain, crew or engineers, of whatever nature these accidents were, or whatever were their consequences. It was further said that no law forbade the owners of ships from stipulating that they would not answer for the faults of the captain or crew; that such an agreement is no more contrary to public policy than to fair dealing; that in upholding this clause in the bill of lading by which the defendant company declined responsibility for the faults of the crew, the decree appealed from violated no law. It was thereby established that the ship had been abandoned at sea, after consultation with the crew; that it had afterwards been picked up by three English vessels, which had towed it to Plymouth, where it was voluntarily stranded, and that the defendant company had reclaimed it from the salvors by paying the expenses of salvage and towage; and thereupon the court held that this was a damage voluntarily suffered, that the expenses were incurred

for the common safety of the ship and cargo, and without the payment of which the salvors would not have been obliged to deliver over the vessel, and that such expenses constituted a claim for general average, notwithstanding the abandonment of the ship was not attributed to a peril of the sea, but to the fault of the master and crew. The decree was affirmed.

The case of *Crowley* v. *Saint Frères*, 10 Revue Internationale du Droit Maritime, 147, also came before the French Court of Cassation in 1894. In this case, an English ship, the Alexander Lawrence, on a voyage from Calcutta to Boulogne, with a cargo of jute, took fire through the carelessness of a sailor. The ship put into Port Louis, an immediate port, with the cargo still burning, and extinguished it, subsequently arriving at her port of destination. By a clause in the charter party the ship was exonerated from responsibility for negligence. It was held that the expenses of putting into the port of refuge should be classed as general average, and not as particular average, as it had been held by the court below. The decree of that court (of Douai) was therefore reversed.

A case arising from the same disaster to the Alexander Lawrence, between the owners and the underwriters, 11 Revue Internationale, 41, subsequently came before the Court of Appeal of Orleans, on appeal from the Tribunal of Commerce of Boulogne, where a similar ruling was made, and the expenses of putting into port classed as general average under the stipulation in the charter party, although in the absence of such stipulation they would have been chargeable to the ship.

The same question came before the Tribunal of Commerce of Antwerp, Belgium, in the case of *The Steamer Alacrity*, 11 Revue Internationale, 123, where the cargo was held to contribute to the expenses of putting into a port of refuge, in consequence of a collision due to the fault of the captain, the ship owner being exonerated by his contract from the consequences of this fault. In this case the parties had stipulated that general average expenses should be payable under the York-Antwerp rules, and that the ship should not be responsible for the faults of the captain or crew. It was

held that, by the Belgium law, parties might contract with reference to these rules, which declared the expenses of putting into a port of refuge general average; that there was no difference between such expenses when occasioned by an inevitable accident or in consequence of the fault of the captain; that the parties having stipulated that the ship should be exonerated from the consequences of such fault, the owners of the cargo were bound for their contributory shares.

From the case of *The Mary Thomas*, P. D. 1894, p. 108, it would seem that the Dutch law is different; but it was said by Mr. Justice Barnes in this case (p. 116) that if the question had arisen in this country (England) "the point could hardly have occurred, as it has done, because it has already been decided by Lord Hannen, in the case of *The Carron Park*, that the cargo owners would be liable for the contribution in general average under circumstances where the accident has occurred through negligence, but where by the bills of lading the owners of the ship were not responsible for that negligence."

These are all the cases I have been able to find directly upon the question under consideration, but there is a class of analogous cases which, I think, have a strong bearing in the same direction. It is well known that by the law of England a ship is not responsible to another for a collision brought about by the negligence of a compulsory pilot. Of course where such ship is solely to blame the rule is easy of application. No recovery can be had against her. But where the faults of the two vessels are mutual, a different question arises; and in the case of *The Hector*, 8 P. D. 218, it was held that, where a collision occurred by the mutual fault of two vessels, and one of such vessels had on board a compulsory pilot, whose fault contributed to the accident, the owner of that vessel was entitled to recover a moiety of the damages sustained by her without any deduction on account of the damage sustained by the other; in other words, she was not responsible for any portion of the damage done to the other vessel, but might recover the half of her damages from such other vessel. Said the Master of the Rolls in delivering the opinion:

"With regard to the Augustus, she was found to blame for the collision, therefore she is, in the first instance, liable to pay all the damage which the Hector has suffered. With regard to the Hector, it is found that her owners are not to blame, but that her navigation was to blame; but that was the fault of the pilot. The owners are not liable for this default, therefore they are not liable for anything to the owners of the Augustus. What is the result? That the liability of the owners of the Augustus is declared to have been proved, but the liability of the owners of the Hector is disproved, and they are dismissed from the suit. Therefore no balance is to be calculated; the owners of the Hector are not liable for a single pennyworth of the damage done to the Augustus. The owners of the Augustus must go against the pilot and get what they can out of him; but the Hector is entitled to succeed."

See also *Dudman* v. *Dublin Port and Docks Board*, Irish Rep. 7 C. L. 518; *Spaight* v. *Tedcastle*, 6 App. Cas. 217.

It seems to me that the cases above cited show an almost uniform trend of opinion against the principle laid down by the court in this case. I do not contend that the decisions of the English, French and Belgian courts should be recognized by us any further than their course of reasoning commends itself to our sense of justice; but upon questions of maritime law, which is but a branch of international law, I think the opinions of the learned and experienced judges of these courts are entitled to something more than respectful consideration. It is for the interest of merchants and ship owners, whose relations and dealings are international in their character, that the same construction should, so far as possible, be placed upon the law maritime by the courts of all maritime nations, and I am compelled to say that I see no reason for creating an exception in this case.

HUBBELL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 198. Argued April 13, 14, 1898. — Decided May 31, 1898.

On the findings and the facts detailed in the statement and in the opinion of this court, it is held that a former judgment of the Court of Claims in an action by Hubbell against the United States in favor of the defendant was upon the same cause of action which is set up in this suit, and, it not having been reversed, or set aside, or appealed from, the claim herein set up is *res judicata*, and the plaintiff is estopped from prosecuting it in this action.

THIS was an appeal from a judgment of the Court of Claims dismissing the petition of William Wheeler Hubbell, who, as patentee of an "improvement in cartridges," claimed that the United States had manufactured and used cartridges covered by his patent under an implied contract to pay a reasonable royalty therefor.

The petition contained, amongst others, the following allegations: That "your petitioner is the first and original inventor of an improvement in cartridges, for which letters patent of the United States were granted to him in due form of law, and, according to law, dated and issued the 18th day of February, A.D. 1879, vesting in him the exclusive right to make, vend and use the same for seventeen years from the date thereof.

"Your petitioner has pending a suit for compensation up to March 31, 1883, case No. 13,793, in the Court of Claims, and has never sued any officer nor brought any other suit than that before this present petition.

"Your petitioner prays for an account of the full and entire number of the said cartridges made or used by the defendant, its officers or employés in its service, or for distribution to the States, since the said March 31, 1883, to be separately stated when ordered, and for leave to make the same a part of this petition when precisely ascertained by amendment.

"Your petitioner further claims a just compensation for the making or use by the defendant, its authorized officers or employés, for its service, of his said patented invention of cartridge, to wit: he claims the sum of one hundred and ten thousand dollars due to him on this behalf by the United States from the 31st March, 1883, up to May 31, 1888.

"And he prays for judgment for all making or use of his said patented invention from the said 31st March, 1883, to said 31st May, 1888, by the defendant, its authorized officers or employés in its service, or on its behalf, in pursuance of law, in the sum of one hundred and ten thousand dollars, with leave to amend his petition in this behalf when the precise numbers have been duly reported by the proper departments of the United States."

Upon the trial of this case the Court of Claims made, amongst others, the following finding:

"The facts in this case are the facts already found in case No. 13,793, between the same parties as to the same subject-matter, except as to the time since the beginning of the other action, during which time, to wit, from the beginning of the other action to the beginning of this action, the Government manufactured cartridges of the same form and kind as those described in these findings, known as the 'reloading' cartridge, in which said case No. 13,793 the following proceedings were had and the following facts were found, which facts are now found herein and are hereto annexed, as follows, to and including finding VIII."

The IXth finding is as follows:

"The following are, in substance, the proceedings had in case No. 13,793 between the same parties:

"April 19, 1883. Petition filed.

"May 18, 1883. Amendment to petition filed by allowance of judge at chambers.

"June 4, 1883. Traverse filed.

"July 25, 1883. Amendment to petition filed and allowed.

"October 2, 1884. Amendment to petition filed and allowed.

"December 15, 1884. Amendment to petition allowed.

"January 10, 1885. Claimant's requests for facts and brief filed.

Counsel for Appellant.

"April 9, 1885. Additional brief for claimant filed.

"April 13, 1885. Defendants' requests for facts and brief filed.

"April 16, 1885. Argued and submitted.

"April 16, 1885. Claimant's brief of argument filed.

"April 20, 1885. Waiver filed by claimant.

"June 1, 1885. Davis, J., filed the opinion of the court. Petition dismissed. Findings of fact filed.

"August 14, 1885. Motions for new trial, amendment of findings and for reversal of judgment filed by claimant.

"August 21, 1885. Application for appeal filed by claimant.

"December 14, 1885. Motion of claimant for new trial overruled, with leave to submit to the consideration of the court. Findings II, III, IV amended in the form requested by claimant in his motion, subject to objection of the defendants to their allowance.

"October 8, 1886. Claimant's request for findings of fact filed under order of court.

"March 15, 1887. Requests, etc., of October 8, 1886, ordered to law docket.

"April 15, 1889. Motion to amend findings continued.

"November 18, 1889. Continued.

"November 12, 1891. Motion of claimant to amend order of court filed.

"November 16, 1891. Motion of claimant to amend order of court heretofore entered as to the evidence to be used on the trial allowed, subject to objections of defendants on the argument."

Upon these and other facts found, the court dismissed the petition, but as no opinion was filed, the reasons for this judgment do not appear.

Subsequently additional findings were made, but as they are not material, they are not here repeated.

From the judgment of the Court of Claims dismissing his petition, petitioner applied for and was allowed an appeal to this court.

Mr. F. P. Dewees and *Mr. George S. Boutwell* for appellant.

Mr. Charles C. Binney for appellees. *Mr. Assistant Attorney General Pradt* was on his brief.

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

As the claimant in his petition relies only upon the patent of February 18, 1879, No. 212,313, for an improvement in cartridges, and as the proceedings in the former suit in the Court of Claims were based, in part at least, upon this patent, it will not be necessary to refer to any prior patents.

The only defence we are called upon to consider is that of *res adjudicata*. As bearing upon this defence the following facts are pertinent:

April 19, 1883, claimant filed his petition in the Court of Claims for a royalty upon cartridges and primers alleged by him to have been manufactured by the United States under his patents, between February 18, 1879, and March 31, 1883;

June 1, 1885, this petition, after having been several times amended, was dismissed and findings of facts filed;

August 14, 1885, motions for new trial, amendment of findings, and for reversal of judgment were filed by the claimant;

August 21, 1885, application for appeal was filed by claimant, but such appeal does not appear to have been allowed;

December 14, 1885, motion for new trial was overruled by the court, and the claimant was given leave to submit to the consideration of the court certain amended findings, subject, however, to objection of the defendants as to their allowance;

October 8, 1886, claimant's request for findings was filed under order of the court, and on March 15, 1887, it was ordered to the law docket;

The argument was deferred from time to time until November 16, 1891, when the motion of claimant to amend an order of court as to evidence was allowed subject to the objections of the defendants on the argument.

The petition under consideration was filed June 11, 1888,

after the first petition had been dismissed by the Court of Claims, and is based upon the patent issued February 18, 1879, which was one of the patents involved in the first petition. A claim is made in this petition for royalty upon cartridges manufactured, in accordance with this patent, and used by the United States for nearly six years prior to the filing of this petition, but subsequent to the time of the filing of the first petition.

In this connection the court has found that the facts in the case under consideration are the same as those in the prior case, except as to the time since the beginning of the other action, during which time, to wit, from the beginning of the other action to the beginning of this action, the Government manufactured cartridges of the same form and kind as those described in these findings.

1. As the prior action was between the same parties, and was based in part, at least, and principally, upon the same patent, it would appear that the judgment of the court dismissing the petition would operate as a complete estoppel to the present suit, unless the proceedings subsequent to the judgment in the former suit in some way deprived that judgment of its force and effect as *res adjudicata.* 3 Robinson on Patents, § 1017.

While the record of the former case was not sent up with the transcript from the Court of Claims, it appears from the petition in the case under consideration that, at the time the petition was filed, there was a suit pending by the petitioner in the Court of Claims in case No. 13,793, for compensation up to March 31, 1883; and, in the findings, that the facts in both cases were the same, except as to the time covered by the petitions. The identity of the two actions with respect to the parties, the subject-matter and the facts sufficiently appear. As it further appears that the petition in the former case was dismissed upon an opinion filed and certain findings of fact, it will be presumed to have been dismissed upon the merits, *Loudenback* v. *Collins*, 4 Ohio St. 251; and that such dismissal covered every question put in issue by the pleadings, including the validity of the patent and its use by the defendants.

But if there were any doubt with regard to this point, it would be resolved by an inspection of the opinion of the court (which may be examined for the purposes of identification), as it is published in 20 Court of Claims, 354, wherein it not only appears that the case was considered and disposed of upon the merits, but the court concludes its opinion (p. 370) in the following language:

"Upon our construction of the patent in issue the Government cartridges do not infringe the claimant's; but if we are in error as to this, still the claimant cannot recover, as the essential characteristics of his invention now found in the Government cartridge were developed by officers of the army in 1864. That is, if the relative position of the vents and the wall of the fulminate chamber is a material part of the claimant's patent, the Government has not infringed, this feature not appearing in its cartridges; but if this position is not material, still the claimant cannot recover, as the other characteristics of his invention, found in the cartridge now used by the defendants, were introduced by them prior to the use of the patent or the filing of the application for it, and even prior to the application of 1865."

Whether the reasons given by the Court of Claims for the dismissal of this petition are correct or not; whether, indeed, this judgment were right or wrong upon the facts presented, is of no importance here. If such judgment were based upon an erroneous view of the claimant's patent, it was his duty to have promptly taken an appeal to this court, where the whole case would have been reopened and the error of the Court of Claims, if such there was, would have been rectified.

It is insisted by the claimant that in the former action the main contention arose upon the manufacture and use of what was known as the "cup-anvil cartridge," together with a certain reloading cartridge, which had been experimentally manufactured, and that no claims for the "cup-anvil cartridge" or for the reloading cartridge in that suit are in issue in the case at bar. The suit, however, was upon the same patent, and it was found by the Court of Claims to have been upon the same facts, and we think the estoppel operates upon every-

thing which was, if not upon everything which might have been, put in issue in the former case. The presumption is that the issues were the same, and if they were in fact different, it was incumbent upon the claimant to show that the prior case was decided upon questions not involved herein. We have before us only a decision upon the merits, and upon the same state of facts, of a claim identical with this, and we perceive no reason why it should not operate as an estoppel.

But there seems to be nothing upon which to base claimant's argument that the issues were not the same. The findings show that the manufacture of the reloading cartridge with the grooved anvil disk, referred to in finding VI, commenced at the Frankfort Arsenal in the month of July, 1879, and that from February, 1879, to March 31, 1883, being the period covered by the first suit, the United States manufactured 3,866,352 reloading cartridges. We see nothing to indicate that these reloading cartridges were manufactured experimentally, or that the issue as to these cartridges was not presented and decided in the former case. The claim in the present suit is also for reloading cartridges.

But, even if a somewhat different theory or state of facts were developed upon the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee cannot bring suit against an infringer upon a certain state of facts, and after a dismissal of his action, bring another suit against the same party upon the same state of facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in a subsequent action upon the same state of facts. Walker on Patents, § 468; *Duboise* v. *Phil. Wilm. & Balt. Railroad*, 5 Fisher, 208; *Bradley Mfg. Co.* v. *Eagle Mfg. Co.*, 57 Fed. Rep. 980.

2. It only remains to consider, then, whether any proceedings taken in the Court of Claims since the dismissal of such petition deprived its judgment of its character as an estoppel. A motion for a new trial was made August 14, 1885, but as this motion was overruled in the following December, clearly this would not deprive the judgment of its efficacy as a plea

in bar. Indeed, it may well be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel. *Harris* v. *Barnhart*, 97 California, 546; *Chase* v. *Jefferson*, 1 Houston, (Del.) 257; *Young* v. *Brehe*, 19 Nevada, 379.

3. It further appears that on August 21, 1885, an application for an appeal was filed by the claimant, but as this appeal was never allowed or perfected, and as it does not appear that a transcript of the record was ever filed in this court, it is obvious that the authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below, have no application to this case.

We are therefore of opinion that the defence of *res adjudicata* is sustained, and the judgment of the Court of Claims dismissing the petition is, accordingly,

Affirmed.

TIDE WATER OIL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 149. Argued April 29, 1898. — Decided May 31, 1898.

The court of claims made the following findings of fact in this case. I. During the years 1889, 1890 and 1891 the claimant was a corporation existing under the laws of New Jersey, organized in 1888, and having a factory for carrying on its business at Bayonne, in that State. II. In 1889 and 1890 the claimant imported from Canada box shooks, and from Europe steel rods, upon which importation duties amounting in the aggregate to $39,636.20 were paid to the United States, of which sum $837.68 was paid on the importation of the steel rods. III. The box shooks imported as set forth in finding II were manufactured in Canada from boards, first being planed and then cut into required lengths and widths, intended to be substantially correct for making into boxes without further labor than nailing the shooks together. They were then tied up in bundles of sides, of ends, of bottoms, and of tops of from fifteen to twenty-five in a bundle for convenience in handling and shipping. IV. The shooks so manufactured in Canada and imported into the United States as aforesaid were, at the claimant's factory in Bayonne, New Jersey, constructed into the boxes or cases set forth in Exhibit E to the

Statement of the Case.

petition herein, by nailing the same together with nails manufactured in the United States out of the steel rods imported as aforesaid, and by trimming when defective in length or width to make the boxes or cases without projecting parts, *i.e.*: the shooks were imported in bundles of ends, of sides, of tops and of bottoms, each part coming in bundles separated from the bundles of other parts. From one of these bundles of ends the ends of a box are selected, to which the sides taken indiscriminately from any bundle of sides are nailed by nailing machines; then the sides are trimmed off even with the ends by saws; then by bottoming machines bottoms taken from any bundle of bottoms are nailed on; then the bottoms are trimmed even with the sides by saws; then, after being filled with cans, the tops are nailed on; and then the boxes or cases are ready for exportation. The cost of the labor expended in the United States in the necessary handling and in the nailing and trimming of the boxes as aforesaid was equal to about one tenth of the value of the boxes. The principal part of the labor performed in trimming the boxes was occasioned by the Canadian manufacturer not cutting the shooks into the required lengths and widths for use in making the boxes, and for which the claimants sometimes charged the cost of such trimming to the Canadian manufacturer. *Held*, that the company, when exporting these manufactured boxes, was not entitled to be allowed a drawback under Rev. Stat. § 3019.

This was a petition by a corporation of New Jersey for a drawback of duties paid upon certain shooks imported from Canada, and iron rods imported from Europe, which were manufactured into boxes or cases by the petitioner in its factory at Bayonne, New Jersey, and were subsequently exported to foreign countries.

The Court of Claims made the following findings of fact:

"1. During the years 1889, 1890 and 1891 the claimant was a corporation existing under the laws of New Jersey, organized in 1888, and having a factory for carrying on its business at Bayonne, in that State.

"2. In 1889 and 1890 the claimant imported from Canada box shooks, and from Europe steel rods, upon which importation duties amounting in the aggregate to $39,636.20 were paid to the United States, of which sum $837.68 was paid on the importation of the steel rods.

"3. The box shooks imported as set forth in finding 2 were manufactured in Canada from boards, first being planed and then cut into required lengths and widths, intended to be sub-

stantially correct for making into boxes without further labor than nailing the shooks together. They were then tied up in bundles of sides, of ends, of bottoms and of tops of from fifteen to twenty-five in a bundle for convenience in handling and shipping.

"4. The shooks so manufactured in Canada and imported into the United States as aforesaid were, at the claimant's factory in Bayonne, N. J., constructed into the boxes or cases set forth in Exhibit E to the petition herein, by nailing the same together with nails manufactured in the United States out of the steel rods imported as aforesaid, and by trimming when defective in length or width to make the boxes or cases without projecting parts, *i.e.*: the shooks were imported in bundles of ends, of sides, of tops and of bottoms, each part coming in bundles separated from the bundles of other parts. From one of these bundles of ends the ends of a box are selected, to which the sides taken indiscriminately from any bundle of sides are nailed by nailing machines; then the sides are trimmed off even with the ends by saws; then by bottoming machines bottoms taken from any bundle of bottoms are nailed on; then the bottoms are trimmed even with the sides by saws; then, after being filled with cans, the tops are nailed on; and then the boxes or cases are ready for exportation.

"The cost of the labor expended in the United States in the necessary handling and in the nailing and trimming of the boxes as aforesaid was equal to about one tenth of the value of the boxes.

"The principal part of the labor performed in trimming the boxes was occasioned by the Canadian manufacturer not cutting the shooks into the required lengths and widths for use in making the boxes, and for which the claimants sometimes charged the cost of such trimming to the Canadian manufacturer.

"5. The boxes or cases made as aforesaid were exported from the United States to foreign countries in conformity with the regulations of the Treasury Department then in force, to wit, Treasury regulations of 1884, sections 966, 967 and 968, hereinafter set out, relating to drawbacks upon the exporta-

tion of articles wholly manufactured of imported materials, and cases so manufactured were entered for such drawback upon the exportation thereof.

"6. For about four years prior to July 31, 1889, the Treasury Department had allowed and paid a drawback upon the exportation of boxes made from imported shooks fastened together with nails made from imported steel rods as aforesaid; and the Treasury Department was requested to pay the drawback on the exportation of the boxes or cases set forth in Exhibit E to the petition, but refused for the reasons set forth in the following communication addressed to the collector of customs at New York:

"'TREASURY DEPARTMENT, *July* 31, 1889.

"'SIR: Referring to department letter of March 2, 1885, addressed to the then collector at your port, in which a rate of drawback was established on shooks used in the manufacture of boxes, you are informed that the department has recently given the matter further consideration, and it appears upon investigation that the boxes are made complete in Canada, with the exception of nailing, and that the only manufacture which they receive in this country consists in their thus being nailed together, which part of the labor is omitted to be done in Canada merely for convenience in shipping to the United States.

"'The boxes appear to have been manufactured complete abroad, and in the condition imported resemble the finished furniture imported in pieces which the department has heretofore held to be dutiable at the rate applicable to finished furniture. (See Synopsis, 4272.)

"'The simple act of nailing them together is not, in the opinion of the department, a manufacture within the meaning of section 3019, Revised Statutes, and the authority to allow drawback thereon is hereby revoked.

"'You will accordingly receive no further entries for drawback in such cases.

"'Respectfully yours, GEORGE C. TICHNOR,

"'*Assistant Secretary.*

"'Collector of Customs, New York.'

"7. The Treasury regulations of 1884 referred to in finding 5, viz., articles 966, 967 and 968, are as follows:

"'ART. 966. On articles wholly manufactured of imported materials on which duties have been paid, a drawback is to be allowed, on exportation, equal in amount to the duty paid on such imported materials, less 10 per cent thereof, except on exportations of refined sugars, in which case the legal retention is 1 per cent.

"'ART. 967. The entry in such cases will be as follows, and must be filed with the collector at least six hours before putting or lading any of the merchandise on board the vessel or other conveyance for exportation.'"

Here follows a form of entry for exportation with oaths of exporter and of the proprietor and foreman of manufactory.

Article 968 contained a form of bond for exportation.

Upon the foregoing findings the court found the ultimate fact, so far as it was a question of fact, that the boxes or cases so exported were not manufactured in the United States, and, as a conclusion of law, that the claimant was not entitled to recover; and the petition was dismissed. Whereupon petitioner appealed to this court.

Mr. Edwin B. Smith for appellant.

Mr. Assistant Attorney General Hoyt for appellees. *Mr. Felix Brannigan* was on his brief.

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

The single question presented for our consideration in this case is whether the boxes or cases exported by the petitioner were "wholly manufactured" in the United States within the meaning of the section hereinafter cited.

The facts were, in substance, that the claimant imported from Canada in 1889 and 1890 box shooks, and from Europe steel rods, upon which duties were paid to the amount of $39,636.20 under the tariff act of March 3, 1883, 22 Stat. 488, 502, which levied a duty of thirty per cent upon "casks and

barrels, empty sugar-box shooks, and packing boxes, and packing-box shooks, of wood, not specially enumerated or provided for in this act." The box shooks so imported were manufactured in Canada from boards, which were planed and cut into the required lengths and widths for making into boxes without further labor than nailing them together. They were then tied up into bundles of sides, ends, bottoms and tops, of from fifteen to twenty-five in a bundle, for convenience in handling and shipping. After importation, they were made up into boxes or cases, by nailing the proper parts together with nails manufactured in the United States out of the imported steel rods, and by trimming, when defective in length or width, to make the boxes or cases without projecting parts.

The ends and sides of the boxes were nailed together by nailing machines, and the sides trimmed off even with the ends by saws. Then bottoms were nailed on and trimmed in the same manner. After being filled, the tops were nailed on, and the boxes made ready for exportation. The cost of the labor expended in the United States in the nailing, handling and trimming of the boxes was about one tenth of the value of the boxes. The principal part of the labor in trimming the boxes was occasioned by the Canadian manufacturer not cutting the shooks into the required lengths and widths for making the boxes, the cost of which trimming the claimant sometimes charged to the Canadian manufacturer.

Upon this state of facts petitioner made claim for duties paid as above upon the shooks under Rev. Stat. § 3019, which reads as follows:

"There shall be allowed on all articles wholly manufactured of materials imported, on which duties have been paid when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury. Ten per centum on the amount of all drawbacks so allowed shall, however, be retained for the use of the United States by the collectors paying such drawbacks respectively."

The question arises whether the boxes in question were

"wholly manufactured" within the United States of "materials imported" from abroad. The section above quoted uses the words "wholly manufactured of materials imported," but we understand it to be conceded that the words "in the United States" should be considered as being incorporated into the section after the word "manufactured." The provision would be senseless without this interpolation. The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind.

The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name. Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name.

The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the

original raw material — in this case the tree or log — but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank. This case, then, resolves itself into the question whether the materials out of which these boxes were constructed were the boards which were manufactured in Canada or the shooks which were imported into the United States.

While the planing and cutting of the boards in Canada into the requisite lengths and shapes for the sides, ends, tops and bottoms of the boxes, was doubtless a partial manufacture, it was not a complete one, since the boards so cut are not adaptable as material for other and different objects of manufacture, but were designed and appropriate only for a particular purpose, *i.e.*, for the manufacture of boxes of a prescribed size, and were useless for any other purpose. It is not always easy to determine the difference between a complete and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article, can only be said to be partially manufactured within the meaning of this section; nor can we regard the mere assembling and nailing together of parts complete in themselves and destined for a particular purpose as a complete and separate manufacture. Thus, chairs are made of bottoms, backs, legs and rounds, each one of these parts being made separately and in large quantities. If imported in this condition from abroad, and the parts were assembled and glued or screwed together here, we think it entirely clear that such chairs would not be wholly manufactured in the United States; and the same may be said of the staves, heads and hoops which constitute a barrel. Upon the theory of the claimant, if all the parts which constitute a wooden house were made separately, as they sometimes are, and imported from abroad and put together in this country in the form of a house, it would follow that the house must be said to have been wholly constructed in this country.

It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior

successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only to be put together to make the finished article. If, for instance, the wheels, chain, springs, dial, hands and case of a watch were all imported from abroad, and merely put together in this country, we do not think it could be said that the watch was wholly manufactured within the United States. The same remark we think may be made with reference to the shooks in this case, which were practically worthless except for being put together for a box of a definite size.

The distinction here made was alluded to in the opinion of this court in *Worthington* v. *Robbins*, 139 U. S. 337, 341, in which the question arose whether "white hard enamel," used for various purposes, including watch dials, was dutiable as "watch materials," or as a simple manufacture. In delivering the opinion of the court Mr. Justice Blatchford said: "The article in question was, to all intents and purposes, raw material. If it were to be classed as 'watch materials,' it would follow that any metal which could ultimately be used, and was ultimately used, in the manufacture of a watch, but could be used for other purposes also, would be dutiable as 'watch materials.' In order to be 'watch materials' the article must in itself bear marks of its special adaptation for use in making watches. The fact that the article in question was used in the manufacture of watches has no relation to the condition of the article as imported, but to what afterwards the importer did with it."

It does not necessarily follow that the shooks in question were not a manufacture, and dutiable as such, or that they were dutiable as boxes, though destined to be put together as such, since in *United States* v. *Schoverling*, 146 U. S. 76, finished gunstocks with locks and mountings, unaccompanied by barrels, were held to be dutiable as manufactures of iron, and not as "guns."

Bearing in mind that the object of the drawback was partly, at least, to encourage domestic manufactures, and that all the substantial work done in this country was in nailing together the tops, bottoms and sides of these boxes, we think it clear that it cannot be said that the boxes so constructed were wholly manufactured in the United States. The work done in trimming or sawing off the ends of the boards was a mere incident to the nailing together, and was caused by the inadvertence, negligence or insufficient instructions given to the Canadian manufacturer, and was no proper part of the manufacture. While the amount of work done to constitute a new manufacture may not be great, *Saltonstall* v. *Wiebusch*, 156 U. S. 601, yet we think the fact that in the transfer of those boards to the completed boxes, the cost of labor expended in the United States represented only one tenth in value of the boxes is important, especially when taken in connection with the fact that the shooks when imported were usable only for a single purpose. It is quite improbable that Congress intended to allow a drawback upon the nine tenths represented by the Canadian material for the benefit of the one tenth represented by the labor put upon the boxes in this country. What was doubtless meant was to allow this drawback upon articles manufactured wholly and *bona fide* within the United States, either from the raw material, or from material which was the result of the last complete manufacture.

While the nails, which were used in fastening the shooks together and were made from iron rods imported from abroad, may be said to have been wholly manufactured in the United States within the principles here announced, they lost their identity as such when used in nailing the shooks together, and became so far a part of the boxes that no separate drawback could be claimed for them.

There was no error in dismissing the petition, and the judgment of the Court of Claims is therefore

Affirmed.

ELY'S ADMINISTRATOR *v.* UNITED STATES.[1]

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 27. Argued March 15, 16, 1898. — Decided May 31, 1898.

The grant which is the subject of controversy in this case was one which, at the time of the cession in 1853, was recognized by the government of Mexico as valid, and therefore is one which it is the duty of this Government to respect and enforce to the extent of one and three fourths sitios.

In *Ainsa* v. *United States*, 161 U. S. 208, it was decided, with reference to such grants, that while monuments control courses and distances, and courses and distances control quantity, where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily is so if the intention to convey only so much and no more is plain: and this case comes within that rule.

On October 19, 1892, proceeding under section 8 of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims, 26 Stat. 854, the United States filed in that court a petition against Santiago Ainsa, administrator of the estate of Frank Ely, deceased, and others, alleging that said administrator claimed to be the owner through mense conveyances of a large tract of land in the Territory of Arizona, known as the Rancho de San Jose de Sonoita; that he had not voluntarily come into the court to seek a consideration of his title; that the title was open to question, and was in fact invalid and void; that the other defendants claimed some interests in the land, and praying that they all might be brought into court and be ruled to answer the petition, set up their titles and have them settled and adjudicated.

In an amended answer the administrator set forth the nature and extent of his title, and prayed that it be inquired into and declared valid. Reply having been filed, the case came on for trial, which resulted in a decree on March 30, 1894, that the claim for confirmation of title be disallowed

[1] The docket title of this case is Santiago Ainsa, administrator of the estate of Frank Ely, deceased, *v.* The United States.

and rejected. The opinion by Associate Justice Sluss contains this general statement of the facts:

"On the 29th day of May, 1821, Leon Herreros presented his petition to the intendente of the provinces Sonora and Sinaloa, asking to obtain title to two sitios of land at the place known as Sonoita. The intendente referred the petition to the commander at Tubac, directing him to cause the tract to be surveyed, appraised and the proposed sale thereof to be advertised for thirty days.

"In obedience to this order the officer proceeded to make a survey of the tract, which was made on the 26th and 27th days of June, 1821, and on the completion of the survey he caused it to be appraised, the appraised value being one hundred and five dollars. Thereupon the proposed sale was advertised for thirty consecutive days by proclamation made by a crier appointed for that purpose, beginning on June 29 and ending on the 28th day of July, 1821. Thereupon, on the 31st day of July, 1821, the officer took the testimony of three witnesses to the effect that Herreros had property and means to occupy the tract. On October 20, 1821, the proceedings above mentioned being reduced to writing, were by the officer returned to the intendente.

"On October 25, 1821, the intendente referred the proceedings to the promoter fiscal for his examination.

"On November 7, 1821, the promoter fiscal reported to the intendente the regularity of the proceedings and recommending that the land be offered for sale at three public auctions, and thereupon the auctions were ordered to be held.

"The first auction was held on November 8, 1821, the second on November 9, and the third on November 10, 1821.

"At the conclusion of the third auction the land was struck off to Herreros at the appraised value by the board of auction, of which board the intendente was a member and the president.

"All these proceedings being concluded, on the 12th day of November, 1821, Herreros paid to the officers of the treasury the amount of the appraisement, together with the fees and charges required to be paid, and with his concurrence the

intendente and the auction board ordered the expediente of the proceedings to be reported to the junta superior de hacienda for its approbation, so that when approved the title might issue.

"There is no evidence that the sale was approved by the junta superior de hacienda.

"On the 15th day of May, 1825, Juan Miguel Riesgo, commissary general of the treasury, public credit and war of the Republic of Mexico for the State of the West, issued a title in the usual form purporting to convey the land to Herreros in pursuance of the proceedings above referred to and professing to act under the authority of the ordinance of the intendentes of Spain of the year 1786."

The conclusion reached was that "the entire proceedings set forth in the expediente of this title and the final title issued thereon were without warrant of law and invalid." Two of the justices dissented. Thereupon the administrator secured an order of severance and took a separate appeal to this court.

Mr. Rochester Ford and *Mr. James C. Carter* for appellant.

Mr. Special Assistant Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

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

The controversy in this case does not turn upon any defect in the form of the papers. The contentions of the Government are that the officers who assumed to make the grant and to execute title papers had no authority to do so, and upon this ground it was held by the Court of Private Land Claims that the grant was in its inception invalid. Secondly, that if a valid grant was made it was one of quantity, and should be sustained for only that amount of land which was named in the granting papers and paid for by the grantee.

It appears that the proceedings to acquire title were initi-

ated by a petition to the intendant, or intendente, as he is called in the opinion of the court below, of the provinces of Sonora and Sinaloa, on May 29, 1821; that, so far as that officer was concerned, they were concluded and the sale completed on November 12, 1821. Nothing seems to have been done after this date until May 15, 1825, when the commissary general of the Republic of Mexico for the State of the West on application issued a title in the usual form. So the question is as to the power of these officers to bind the government of Mexico.

Few cases presented to this court are more perplexing than those involving Mexican grants. The changes in the governing power as well as in the form of government were so frequent, there is so much indefiniteness and lack of precision in the language of the statutes and ordinances, and the modes of procedure were in so many respects essentially different from those to which we are accustomed, that it is often quite difficult to determine whether an alleged grant was made by officers who, at the time, were authorized to act for the government, and was consummated according to the forms of procedure then recognized as essential. It was undoubtedly the duty of Congress, as it was its purpose in the various statutory enactments it has made in respect to Mexican titles, to recognize and establish every title and right which before the cession Mexico recognized as good and valid. In other words, in harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law would enforce before should be enforcible after the cession. As a rule, Congress has not specifically determined the validity of any right or title, but has committed to some judicial tribunal the duty of ascertaining what were good and valid before cession, and provided that when so determined they should be recognized and enforced.

Of course, in proceeding under any particular statute the limitations prescribed by that statute must control, and what-

ever may be the obligations resting upon the nation by virtue of the rules of international law or the terms of a treaty, the courts cannot pass beyond such limitations. In the case of *Hayes* v. *United States*, just decided, 170 U. S. 637, we called attention to the fact that in the act creating the Court of Private Land Claims there was a prohibition upon the allowance of any claim "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 pointed out the difference between this statute and those construed in the *Arredondo case*, 6 Pet. 691, and the act of March 3, 1851, c. 41, 9 Stat. 631, considered in the *Peralta case*, 19 How. 343. We held that under the act of 1891 the court must be satisfied, not merely of the regularity in the form of the proceedings, but also that the official body or person assuming to make the grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified. We are not to presume that, because certain officials made a grant, therefore it was the act of the Mexican government and to be sustained. It must appear that the officials did have the power, and we are not justified in resting upon any legal presumption of the existence of power from the fact of its exercise.

While this is true, yet when the statutes and ordinances defining the powers and duties of an officer are somewhat indefinite and general in their terms, and that officer was in the habit of exercising the same power as was exercised in the case presented, and such exercise of power was not questioned by the authorities of Mexico, and grants purporting to have been made by him were never challenged, there is reason to believe that the true construction of the statutes or ordinances supports the existence of the power. Cases now before us disclose that about the time the intendant acted in this case similar action was taken by him in respect to other applications for the purchase of land; that through a series of years, from 1824 downward, the commissary general, the officer created by the act of September 21, 1824, recognized his acts

as creating equitable obligations on the part of the government, and attempted to consummate the sales by papers passing the legal title; that the title papers thus executed were duly placed of record in the proper office, and fail to show that subsequently thereto the Mexican government took any steps to question the title or disturb the possession. While this may not be conclusive as to the validity of the grants and the existence of the power exercised by the intendant, it certainly is persuasive, and we should not be justified in lightly concluding that he did not possess the power which he was in the habit of exercising.

What powers did the intendant possess at the time this sale is alleged to have taken place? It is conceded by the government that by the ordinance of December 4, 1786, (at which time Mexico was a province of Spain,) the intendants had full authority in reference to the sale of lands. Article 81 of that ordinance (Reynolds' Spanish and Mexican Land Laws, p. 60) is as follows:

"ART. 81. The intendants shall also be judges, with exclusive jurisdiction over all matters and questions that arise in the provinces of their districts in relation to the sale, composition and distribution of crown and seignioral lands. The holders thereof, and those who seek new grants of the same, shall set up their rights and make their applications to said intendants, who, after the matter has been duly examined into by an attorney of my royal treasury, appointed by themselves, shall take action thereon, in accordance with law, and in conjunction with their ordinary legal advisers. They shall admit appeals to the superior board of the treasury, or, should the parties in interest fail to employ that recourse, submit a report thereto, together with the original proceedings, when they consider them in condition to issue the title. The board shall, after examination thereof, return them, either for issue of title, if no correction is necessary, or, before doing so, for such other proceedings as in the opinion of the board are required, with the necessary instructions. In the meantime, and without further delay, the necessary confirmation may be made, which said superior board shall issue at the proper time, proceeding

in this matter, as also the intendants, their deputies and others, in accordance with the requirements of the royal instructions of October 15, 1754, in so far as they do not conflict with these, without losing sight of the wise provisions of the laws therein cited and of Law 9, Title XII, Book IV."

It is, however, contended that prior to the transfer of title in this case this authority was taken away from the intendant. In support of this contention four matters are referred to by counsel: 1. The adoption of the constitution of March 18, 1812, and the promulgation of the law of January 4, 1813. 2. The resolution of the council of the Indies, before a full board at Madrid, December, 23, 1818. 3. The decrees of Ferdinand VII, reëstablishing the constitution of 1812, and convoking the Cortes, March 6, 7, 9, 1820. 4. The imperial colonization law of January 4, 1823.

Of these in their order, though it may be well here to note that the colonization law was not passed until after the sale in controversy had taken place.

On March 18, 1812, in the midst of troublous times in Spain, a constitution (Reynolds, p. 79) was adopted, and by it and the law of the Cortes, of January 4, 1813, (Reynolds, p. 83,) it is insisted that a different mode of disposing of the public lands was created. As, however, this continued in force only until May 4, 1814, when the king, Ferdinand VII, returned to the throne and issued a decree refusing to recognize the existing order of things and declaring the constitution of 1812 revoked, it would seem that the powers theretofore vested in the intendants were reëstablished. Indeed, on December 28, 1814, the king issued a royal cédula or edict, the ninth article of which is as follows (2 White's New Recopilacion, p. 168):

"The governor intendants shall resume all the powers appertaining to them before the promulgation of the constitution, so called; and shall consequently exercise said powers, as well in matters of government as in those of economy and litigation relating to the royal treasury, agreeably to the laws and ordinances respecting intendants."

Clearly thereafter the intendants had the powers given

them by the ordinance of 1786. *Sabariego* v. *Maverick*, 124 U. S. 261.

On December 23, 1818, a resolution passed by the council of the Indies, at Madrid, and approved by the king, provided that all business pertaining to the alienation of lands in New Spain should belong to the department of the office of the treasury of the Indies at Madrid. Hall's Mexican Law, p. 76, sec. 188. In March, 1820, Ferdinand VII, under pressure from the people, adopted the constitution of 1812 and took an oath to support it. Did this resolution of December, 1818, or this reëstablishment of the constitution, or both together, put an end to the power of the intendants in respect to the sale of lands? Clearly the resolution of December, 1818, would not have that effect. The mere placing of the control over land matters in a particular government department at Madrid would in no manner affect the powers of local officers until and unless such department should so order, and there is no suggestion that any orders to that effect were ever issued. The resolution would have no more effect on the powers of the local officers than would a transfer of the land department of this Government from the control of the Secretary of the Interior to that of the Secretary of the Treasury. The local officers would simply have to respond to new superiors, and that is all.

Nor do we think that the reëstablishment of the Constitution even if the reëstablishment of that instrument carried with it the reënactment of the law of the Cortes of January 4, 1813, put an end to the office of intendant, or wholly abrogated his powers. So far as the act of January 4, 1813, is concerned, while it did authorize the distribution of part of the lands on account of military service, it still provided that half of the public and crown lands should be reserved to serve as a mortgage for the payment of the national debt, and recognized the disposition of such lands by the "provincial deputation," as it was called. Turning to the constitution we find the following provisions in chapter 2, article 324: "The political government of the provinces shall reside in the superior chief appointed by the king in each one of them."

Article 325: "In each province there shall be a deputation called provincial, to promote its prosperity, presided over by the superior chief." Article 326: "This deputation shall be composed of the president, the intendant and seven members elected in the manner that shall be stated." While it may be that under the terms of these and subsequent articles the general control over the affairs of a province was vested in the provincial deputation, of which deputation the intendant was to be one member, we find nothing in them that either put an end to the office of intendant or had any other effect than to subject his actions to the control of the provincial deputation. The question is not what the provincial deputation when organized would do, but whether the mere reëstablishment of the constitution, which provided for a provincial deputation, operated, before any action taken under it, to put an end to the powers theretofore vested in the intendants. It may well be that in thus arranging for a new system of control, without abolishing the office of intendant, but on the contrary, in terms recognizing its continuance, the purpose was not to create an interim in which no person should have power to act for the government in the alienation of its lands, but that the intendant should continue to exercise the powers he had theretofore exercised until the king should appoint a superior chief, and the other members of the deputation be elected.

The very next year witnessed the separation of Mexico from the kingdom of Spain. On February 24, 1821, a declaration of independence was made in the form known as the plan of Iguala, and this declaration of independence was made good by the surrender of the City of Mexico on September 27, 1821. The fifteenth section of this plan provided that "the junta will take care that all the revenues of departments of the state remain without any alteration whatever, and all the employés, political, ecclesiastical, civil and military, will remain in the same state in which they exist to-day."

On August 24, 1821, what is known as the treaty of Cordoba was signed at that village by General Iturbide, for Mexico, and Viceroy O'Donoju, for Spain, the latter, how-

ever, having no previous authority from Spain, and this treaty was by Spain afterwards repudiated. This treaty provided that "the provisional junta was to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortes shall form the constitution of the state." Immediately after the surrender of the City of Mexico a provisional council or junta, consisting of thirty-six members, was created under the plan of Iguala, which assumed the control of the government, and on October 5, 1821, this provisional council promulgated the following order (Reynolds, p. 95):

"The sovereign provisional council of government of the empire of Mexico, considering that from the moment it solemnly declared its independence from Spain all authority for the exercise of the administration of justice and other public functions should emanate from said empire, has seen fit to habilitate and confirm all authorities as they now are, in conformity with the plan of Iguala and the treaty of the village of Cordoba, for the purpose of legalizing the exercise of their respective functions."

That the office of intendant was one of those continued in existence by this order is clearly shown by the decree of September 21, 1824, creating the office of commissary general. (Reynolds, p. 123.) Its first two articles are:

"ART. 1. So far as concerns the federation, the officers of general and local depositories, and all revenue employés that have been retained by the federation, are discontinued.

"ART. 2. From the intendants and other discontinued officers the government shall appoint, in each state where it appears necessary, a commissary general for the different branches of the exchequer, public credit and war."

Prior thereto, and on October 24, 1821, the provisional council passed an order declaring that the office of superintendent general of the treasury was not necessary, and added, "and in consequence, has decided that the duties of the superintendency be performed, as your excellency proposed in your said report, by the directories general of the revenues, the officers of the treasury and intendants, in the

cases and matters that severally belong to them, in conformity with their ordinances, without any variation in them." (Reynolds, p. 96.) On January 16, 1822, it ordered that, "until the next august national congress fixes the system of public revenues, the intendants should remain as they are, except those who are reappointed and have, in their former offices, had a higher salary than that the intendants of Sonora and Pueblo now have." (Reynolds, p. 98.) And on February 2, 1822, it directed that "a report of the receipts of the treasuries since independence was sworn to be forwarded by the intendancies of the empire; and a statement of the receipts and disbursements of the last fifteen days since the 24th of December." (Reynolds, p. 99.)

So that long after the sale here in question was made the government of Mexico recognized the office of intendant as continuing, and no statute or ordinance appears which in terms at least took away from that officer all control over the sales of public lands.

It is contended that the mere change of sovereignty revoked all authority to make sales of the public lands, and *United States* v. *Vallejo*, 1 Black, 541, is cited, in which it was held that the decrees of the Spanish Cortes of 1813, in relation to the disposition of the crown lands, was inapplicable to the state of things which existed in Mexico after the revolution of 1820, and could not have been continued in force there, unless expressly recognized by the Mexican congress.

And also *More* v. *Steinbach*, 127 U. S. 70, 81, in which it was observed that —

"The doctrine . . . that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defence. That doctrine has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject."

It is doubtless true that a change of sovereignty implies a revocation of the authority vested by the prior sovereign in local officers to dispose of the public lands. And yet we think that rule is not controlling in this case, for the new sovereign made an order continuing the functions of the local officers, and one of those local officers making a sale in accordance with the provisions of the prior laws caused the money received therefrom to be paid into the treasury of the new sovereign, and that sovereign never returned the money thus received, nor challenged the validity of the sale thus made. This is not a case in which the local officers attempted to dispose of public lands in satisfaction of obligations created by the former sovereign, but one in which a sale was made for money, and that money passed into the treasury of the new sovereign.

Again, the original ordinance of intendants provided for an examination of the proceedings by "an attorney of my royal treasury." The proceedings had in this case were referred to the promoter fiscal, such being the name of the legal adviser of the treasury department, who approved them. So we have presented the case of a sale made by an officer who at one time undoubtedly had power to make a sale, who was directed by the original ordinance creating his office and establishing his powers to refer his proceedings to the legal adviser, a reference of the proceedings had by him to such legal adviser and a decision of such adviser that the proceedings were regular and that the sale ought to be consummated. Under those circumstances it is not inappropriate to refer to what was said in *Mitchel* v. *United States*, 9 Pet. 711, 742, in reference to the validity of a grant in Florida:

"It was done also on the deliberate advice of an officer responsible to the crown, which makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done."

Again, it must be noticed that according to the report of the proceedings the money received for this land was paid into the public treasury, the entry on the account book being in these words:

"Charged one hundred and sixteen dollars, two reales and five grains paid by Don Jose Maria Serrano in the name of and as attorney for Don Leon Herreros, resident of the company of Pimas at Tubac, in the following manner: One hundred and five dollars as the principal value for which was auctioned by this intendencia one sitio and three quarters of another of lands for raising cattle contained in the place of San Jose de Sonoita, situated in the jurisdiction of said company; six dollars, one real and seven grains for the said half annual charge and eighteen per cent for transfer to Spain; two dollars, ten grains for the two per cent as a general charge, and the three dollars as dues for the extinguished account, as is explained by the order of the intendencia marked No. 32, $116 2r. 5g.

"Escalante.
"Fuente.
"Jose Maria Serrano."

It would seem not unwarranted and unreasonable to refer to the familiar rule that where an agent, even without express authority makes a sale of the property of his principal, and the latter with full knowledge receives the money paid on account thereof, his retention of the purchase price is equivalent to a ratification of the sale. We do not mean, however, to state this as a general proposition controlling all municipal and governmental transactions, but only as one of the circumstances tending to strengthen the conclusion that these acts of the intendant were not mere usurpations of authority, but were in the discharge of duties and the exercise of powers conceded to belong to his office.

Passing beyond the action of the intendant, we find that in 1825 the commissary general executed title papers, thereby ratifying the sale made by the intendant four years before. We have heretofore quoted articles 1 and 2 of the act of September 21, 1824, creating such office. We now quote articles 3, 4 and 5:

"Art. 3. These commissaries shall be, in the state or states and territories of their demarcation, head officers of all

branches of the exchequer. Consequently, they are responsible for the prompt execution of the laws that govern their administration, and all employés thereof shall be subordinate to them.

"ART. 4. They shall collect and disburse, under the laws and orders of the government, the proceeds from the revenues and the contingents of the states.

"ART. 5. The revenue on powder, salt deposits, the proceeds from the revenue on tobacco that belong to the federation, national properties and vacant lands (cascos), contingents, customs, tolls and all the branches pertaining to the public credit, shall be administered directly by the commissary. The revenue on tobacco in the places where raised, that from the maritime customs, from the mail and lotteries, shall continue under their special administration, subordinate in all respects to the commissaries."

Obviously these articles gave to this newly created officer the fullest powers in respect to the national revenues. When an office is created with such large powers as these and the incumbent thereof reviewing proceedings theretofore had by prior representatives of the government, and finding that a sale made by one of such prior officers has resulted in the payment of the cash proceeds thereof into the public treasury, confirms his action, ratifies his proceedings and issues appropriate title papers therefor, it would seem that any doubts which might hang over the power of the prior officer were put at rest, and that thereafter no question could be raised as to the validity of the sale.

And, indeed, such seems to have been the assumption on the part of the government of Mexico, for there is no suggestion that from the time of the execution of these title papers in 1825 up to the date of the cession, 1853, the government ever raised any question as to the validity of the sale or sought to disturb the possession of the grantee. While of course time does not run against the government, and no prescription, perhaps, may be affirmed in favor of the validity of this grant, yet the inaction of the government during these many years is very persuasive, not merely that it considered

that the intendant had the power to make the sale, but that in fact he did have such power. These considerations lead us to the conclusion that this grant was one which, at the time of the cession in 1853, was recognized by the government of Mexico as valid, and therefore one which it was the duty of this Government to respect and enforce.

We pass, therefore, to a consideration of the second question, and that is, the extent of the grant. It is claimed by the appellant that the grant should be sustained to the extent of the outboundaries named in the survey. He insists that the accepted rule of the common law is, that metes and bounds control area; that a survey was in fact made and possession given according to such survey, and that although it now turns out that the area within the survey is largely in excess of the amount applied and paid for, the grant must be held effective for the area within the survey.

We had occasion to examine this question in *Ainsa* v. *United States*, 161 U. S. 208, 229, and there said:

"So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain."

We think this case comes within the rule thus stated. The defendant, in his answer, alleges that the grant comprises 12,147.69 acres, while counsel for the Government say that the measurements given by the surveyor make the area 22,925.87 acres. The amount of land appraised, advertised, sold and auctioned off was one and three quarter sitios (7591.61 acres). While, of course, any slight discrepancy between the area of the survey and that ostensibly sold might be ignored, yet the difference between the amount which was understood to have been sold and the amount now found to be within the limits of the survey is so great as to suggest the propriety of the application of the rule laid down in *Ainsa* v. *United States*, *supra*. There can be no doubt from the record of the proceedings that one and three quarter sitios was all that the purchaser supposed he had purchased, all

that the intendant supposed he had sold, and all that was advertised or paid for. The original petition, after stating that there was a place known as San Jose de Sonoita, declared that the petitioner registered "in the aforesaid place two sitios of land," which he desired to have surveyed, and to pay therefor the just price at which it might be valued. The petition, therefore, was not for any tract known by a given name, but for a certain amount of land in such place. The report of the survey is very suggestive. We quote from it as follows:

"In the ancient abandoned place of San Jose de Sonoita, on the 26th day of the month of June, 1821, I, the said lieutenant commander and subdelegate of the military post and company of Tubac and its jurisdiction, in order to make the survey of the land denounced by Don Leon Herreros of this vicinity, delivered to the appointed officials a well-twisted and stretched cord, and in my presence was delivered to them a castilian vara, on which cord were measured and counted fifty regulation varas, and this being done, at each were tied poles, and standing on the spot assigned by the claimant as the centre, which was in the very walls of the already mentioned Sonoita, there were measured in a northeasterly direction sixty-three cords, which ended at the foot of some low hills, a little ahead of a spring — a chain of mountains of a valley which goes on and turns to the east, where was placed a heap of stones as a monument; and being about to return to the centre, the claimant expressed a desire that the survey should be continued down the canon until the two sitios should be completed, that on each side we should survey to him only twenty-five cords, because if the survey should extend further, by reason of the broken-up condition of the country and the rocky hills in sight, such land would be useless to him, saying, at the same time, that, continuing the measurement along the canon (because it was impossible to go in any other direction on account of the roughness of the ground), by reason of the many turns that had to be made, so many cords should be deducted from the total number measured, as would be calculated to result in excess of the

real length measured, taken on a straight line, and considering his demand reasonable I ordered the continuation of the survey as follows, to wit.

* * * * *

"And in view of the suggestion made by the claimant to reduce the number of cords actually measured so much as might be calculated to be in fact in excess of the true measurement by reason of the many turns of the canon over which the survey was made, as it could not be carried on straight, I appointed for that purpose Lieutenant Don Manuel Leon and the citizen Don Jose Ma. Sotelo, who were unanimously of the opinion to deduct twenty-five cords out of the three hundred and twelve cords measured in the last survey down the canon, the claimant consenting thereto as just; the survey was calculated to be two hundred and eighty-seven cords, with which this survey was finished, resulting from it one sitio and three fourths of another sitio, registered by Don Leon Herreros for raising stock and for farming purposes."

The appraisers reported as follows:

"In virtue thereof they said that according to and because of the examination they had made and being aware of the existing regulations on the subject, the price should be fixed at, and they fixed it at, sixty dollars for each sitio, because they have running water and several banks of arable land which can be made use of by cultivation."

The direction for the almoneda or offer of sale was of the lands "composed of one sitio and three fourths of another." The first almoneda was of lands "comprising one sitio and three fourths of another, . . . and appraised in the sum of one hundred and five dollars, at the rate of sixty dollars per sitio." The property put up for sale was lands "comprising one sitio and three fourths of another, . . . appraised at one hundred and five dollars, at the rate of sixty dollars each sitio." The report of the promoter fiscal opens with this statement:

"The promoter fiscal of this treasury has examined carefully the expediente of the lands surveyed in favor of Don Leon Herreros, resident of the military post of Tubac, by the Commissioner Don Elias Ygnacio Gonzales, lieutenant com-

mander of the post, in the place called San Jose de Sonoita, in that jurisdiction, from which resulted one sitio and three fourths of another, for raising stock and horses, valued at sixty dollars each sitio, which sums up one hundred and five dollars, as it has running water and some pieces of land fit for cultivation."

Subsequently to this report the direction was made for three public auctions, which were made, and the record of the first auction, the others being similar, is in these words:

"1st auction. At the city of Arizpe, on the 8th day of the month of November, 1821, there convened as a board of auction the intendente as president and the members composing the board, in order to make the first auction of the lands referred to in this expediente. They caused many persons to collect by the beating of drums at the office of the intendencia, and in their presence they made the crier, Loreto Salcido, announce, as he did in a loud and clear voice, saying: 'There is to be auctioned at this board of auction one sitio and three fourths of another of public lands, for raising cattle, comprised in the place of San Jose de Sonoita, in the jurisdiction of the military post of Tubac, surveyed in favor of Don Leon Herreros, resident of the same, and appraised in the sum of one hundred and five dollars, at the rate of sixty dollars per sitio; whoever wants to make a bid on it, let him do so before this board, which will admit it if done properly; with the understanding that at the third and last auction, which will take place the day after to-morrow, the property will be sold to the highest bidder.'"

The payment was, as appears from the entry in the treasury office, heretofore quoted, of "one hundred and five dollars as the principal value for which was auctioned by this intendencia one sitio and three quarters of another of lands for raising cattle, contained in the place of San Jose de Sonoita." So, notwithstanding the fact that as shown by the report of the surveyors, a survey was made, all the proceedings from the commencement to the close contemplated, not the purchase of a given tract of land, but a certain amount of land in the place of San Jose de Sonoita. Every consideration of equity,

therefore, demands that the title of the purchaser should be confined to the one and three fourths sitios for which he paid.

As indicated in *Ainsa* v. *United States*, *supra*, too much stress cannot be laid on the technical rules of the common law in reference to the dominance of courses and distances over area. It is a matter of common knowledge that in this part of the country large areas beyond the immediate reach of water courses or springs were arid; that purchases were of lands so watered or so susceptible of watering that crops could be expected therefrom, or pasturage furnished for stock. The land beyond the reach of these water supplies was deemed of little value, and hence slight attention was paid to it. Every purchase therefore must be considered as dominated by this important and single fact. Rude methods of measurement were resorted to. As shown in the report of the survey in this case mere estimates were relied upon. Doubtless this carelessness was partly owing to the fact disclosed in *Ainsa* v. *United States*, that any overplus above the actual amount paid for still remained the property of the government, payment for which could be compelled of the locator, or, on his failure to make such payment, could be appropriated by any third party desiring to purchase. The fact that during these years no challenge was made of the overplus is not important. The government was indifferent. Its rights could be enforced at its leisure, and no individual cared to purchase any surplus of arid lands. The presumption which might obtain in other places from the inaction of the government, the failure of any individual to assert a claim to the overplus, is in respect to the lands in this territory of no significance. Who there would care to question the right of a locator along a waterway to any overplus of arid lands? Such overplus was of no value, and no third party would ever care to challenge the locator's right to this overplus, and the government, like the individual, was also indifferent. So the silence and inaction of the government and third parties are not strange, and create no presumption in favor of the validity of the grant to the extent of the survey.

Sustaining the validity of the grant to the extent of the

land paid for is but carrying out the spirit of the treaty, the obligations of international justice and the duties imposed by the act creating the Court of Private Land Claims. Article 8 of the treaty of Guadalupe Hidalgo provided in reference to the ceded territory that "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 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," and that "in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected" 9 Stat. 929; and these stipulations were reaffirmed in Article 5 of the Gadsden treaty. 10 Stat. 1035. Article 6 of that treaty, which placed a limitation, provided "that no grants of land within the territory ceded . . . will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico." But this limitation is not to be understood as denying the obligations imposed by the rules of international law in the case of cession of territory, but simply as defining specifically the evidences of title which are to be recognized. The spirit of the treaty is fully carried out when the amount of land petitioned and paid for is secured to the grantee or his successors in interest. This Government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this Government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico. If that government had a right, as we have seen in *Ainsa* v. *United States*

it had, to compel payment for an overplus or resell such overplus to a third party, then this Government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for.

It may be said that to consider the tract granted as one not extending to the limits of the outboundaries of the survey is to hold that the tract granted was not located, and therefore within the terms of the Gadsden treaty, not to be recognized by this Government, as suggested in *Ainsa* v. *United States*. In that case it appeared that while the outboundaries of the survey extended into the territory ceded by Mexico to the United States, the grantee had taken and was in possession of land still remaining within the limits of Mexico, to the full extent which he had purchased and paid for, and therefore no legal or equitable claim existed against the United States in reference to land within the ceded territory.

It is also undoubtedly true, as disclosed in that case, that where there is a mere grant of a certain number of acres within specified outboundaries there may be such indefiniteness as to prevent a court from declaring the true location of the granted lands. And yet it is also true that there may be disclosed by the survey or other proceedings that which will enable a court of equity to determine with reasonable certainty what lands were intended to be granted and the title to which should be established. It must be remembered in this connection that by section 7 of the act creating the Court of Private Land Claims, it is provided "that all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States." Therefore in an investigation of this kind that court is not limited to the dry, technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico. It was doubtless the purpose of Congress, by this enactment, to provide a tribunal which should examine all claims and titles, and that should, so far as was practicable in conformance with equitable rules, finally settle and determine the rights of all claim-

ants. It will be unnecessarily limiting its powers to hold that it can act only when the grant to the full outboundaries of the survey is valid and is powerless when a tract within those outboundaries was granted. Many things may exist by which the real tract granted can be established. In the case before us, if it be possible to locate the central point from which according to the report the survey was made (and we judge from the testimony that it is possible) the actual grant can be established by reducing each measurement therefrom to such an extent as to make the area that of the tract purchased and paid for. If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity by its commissioner or master to determine exactly what was intended to pass under the grant. We do not mean to anticipate all the questions that may arise. We simply hold that the mere fact that the grant is narrower than the limits of the outboundaries does not prevent the Court of Private Land Claims from determining through the aid of a commissioner, surveyor or master exactly what equitably did pass under the grant. It is enough for this case to hold that the powers of the Court of Private Land Claims are not narrow and restricted, and that, when it finds that there is a valid grant for a certain number of acres within the outboundaries of a larger tract, it may inquire, and, if it finds sufficient reasons for determining the true boundaries of the tract that was granted, it can so prescribe them, and sustain the claim to that extent, referring to the Land Department the final and absolute surveys thereof.

In view of these considerations, we are of opinion that this grant should be sustained to the amount of one and three fourths sitios, and the judgment of the Court of Private Land Claims is reversed and the case remanded to that tribunal, with directions to examine and decide whether there be sufficient facts to enable it to determine the true boundaries of the one and three fourths sitios.

UNITED STATES *v.* MAISH.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 297. Argued March 15, 16, 1898. — Decided May 31, 1898.

Ely's Administrator v. *United States*, *ante*, 220, affirmed and followed.

The case is stated in the opinion.

Mr. Rochester Ford and *Mr. James C. Carter* for appellant.

Mr. Special Assistant Reynolds for appellees. *Mr. Solicitor General* was on his brief.

Mr. George Lines filed a brief on behalf of the Sopori Land & Mining Company.

Mr. Justice Brewer delivered the opinion of the court.

This case resembles that of *Ely's Administrator* v. *United States* just decided, *ante*, 220. The proceedings for the sale were had in 1820 and 1821 and before the same intendant. We deem it unnecessary to add anything to what was stated in that opinion as to the law controlling. It is sufficient to say that while the claim now made is for 46,696.2 acres, the application for purchase was for four sitios (17,353.84 acres). All the proceedings contemplated a sale of only that amount of land. Thus the appraisers stated that "from their examination they said that each sitio should be valued at thirty dollars, taking into consideration that none of them had running water or natural standing water, but that water facilities might be obtained by means of a well." The first of the three final auctions was reported in these words:

"In the city of Arizpe, on the 13th day of December, 1821, there met as a board of auction the provisional intendant, as president, and the other members that compose it, to hold the first auction of the lands to which these proceedings refer, and they caused the people to be assembled at this office by

the beating of the drum, and many persons gathered at the office of the intendant, when the auctioneer, Loreto Salcido, in their presence was ordered to ask for a bid, which he did in a loud and clear voice, saying: 'Here before this board of the treasury are being sold four sitios of public land for the raising of cattle situated at the place called San Ygnacio de la Canoa, within the jurisdiction of the military post of Tubac, surveyed in favor of Tomas and Ygnacio Ortiz, residents of that same town, and appraised in the sum of one hundred and twenty dollars, being at the rate of thirty dollars for each sitio, it being necessary to dig a well to make the land useful. Whosoever wishes to make a bid upon this land, let him come forward and do so in the manner established by law before this board, where his bid will be heard, notice being given that the Rev. Father Fray Juan Bano, minister of the mission of San Xavier del Bac, in the name of Ygnacio Sanches and Francisco Flores, resident citizens of the same town, had bid for said land the amount of two hundred and ten dollars; and with the understanding that on the third auction, which is to take place on the day after to-morrow, the sale shall be settled upon the highest bidder.' As no bidder appeared, the board adjourned, and the minutes were signed by the president and members of this board."

At the third auction a bid of two hundred and fifty dollars was made, and on that bid the property was struck off to Tomas and Ygnacio Ortiz, who subsequently paid into the treasury the full amount of the purchase price with all charges. Nothing seems to have been done on this purchase until 1849, when title papers were issued by the substitute treasurer general of the state of Sonora.

Without repeating the discussion contained in the foregoing opinion, we think that the grant should be sustained for the four sitios purchased, petitioned and paid for, and for no more. As the grant was confirmed *in toto*, we are compelled to order that the decree of the Court of Private Land Claims be

Reversed, and the case remanded to the court for further proceedings.

FAXON *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 119. Argued March 18, 1898. — Decided May 31, 1898.

In order to the confirmation of any claim, the Court of Private Land Claims, under the act of March 3, 1891, c. 539, 26 Stat. 854, creating that tribunal, must be satisfied not merely of the regularity in form of the proceedings, but that the official body or person, assuming to make the grant, was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified; and the same rule applies to this court on appeal.

The Court of Private Land Claims held, in this case, that if the lands which are the subject of controversy belonged to the class of temporalities, it was clear that the treasurer of the department had no power to make a sale by his sole authority, whether the value exceeded five hundred dollars or not; and if the lands did not belong to that class, nevertheless, there was the same want of power under the laws of Mexico in relation to the disposition of the public domain. This court, concurring with the Court of Private Land Claims, further holds that this is not a case in which the sale and grant can be treated as validated by presumption.

THREE separate petitions were filed in the Court of Private Land Claims for the confirmation of what was commonly called and known as the Tumacácori, Calabazas and Huebabi grant, situated in the valley of the Santa Cruz River, Pima County, Arizona, the petitioners in each claiming under the original grantee. The causes were consolidated and tried under the petition of William Faxon, Jr., trustee, and others. The petition alleged that the claimants were the owners in fee of the tract of land in question under and by virtue of a certain instrument in writing, dated April 19, 1844, "made and executed by the treasury department of Sonora in compliance with the law of the Mexican Congress of the 10th of February, 1842, providing for the denouncement and sale of abandoned pueblos," running to Don Francisco Alejo Aguilar, to whom said treasury department sold the tract April 18, 1844, for the sum of five hundred dollars.

That in the year 1806, the governor of the Indian pueblo

of Tumacácori petitioned Don Alejo Garcia Conde, intendente of the province, etc., etc., to issue to the Indians of the pueblo a grant of lands for the "fundo legal" and also for the "estancia" of the pueblo to replace ancient title papers which had been lost or destroyed; that in accordance with that petition the lands mentioned were ordered to be surveyed, which was done, and the boundary monuments established, by Don Manuel de Leon, commandante of the presidio of Tubac; that on April 2, 1807, the said intendant Conde issued a royal patent or title to the Indians of the pueblo of Tumacácori for the lands, as set forth in the proceedings of the survey thereof and in the copy of the original expediente.

That under the law of the Mexican Congress of February 10, 1842, Don Francisco Aguilar, on April 18, 1844, became the owner by purchase, as before mentioned, "of the four square leagues of agricultural and grazing lands of the 'fundo legal' of the abandoned pueblo of Tumacácori and the sitios of the estancia (stock farm) of Calabazas, and the other places thereunder pertaining." It was averred that all the steps and proceedings in the matter of the grant and sale were regular, complete and legal and vested a complete and valid title in fee in the grantee; and that the grantee at the time went into actual possession, use and occupation of the grant and erected the proper monuments thereon, and that he and his legal representatives have continued ever since and until the present time in the actual possession, use and occupation of the same, and are now possessed and seized in fee thereof.

The United States answered alleging that the alleged sale to Aguilar was without warrant or authority of law and void; that, if these lands had been theretofore granted to the pueblo of Tumacácori, they were abandoned about 1820, and by virtue thereof became public lands; that the title to said property, if any passed in 1807, was purely usufructuary, and vested no estate, legal or equitable, in the said pueblo or mission, but that the same and the right of disposition were reserved to and remained in the national government.

The answer denied that Aguilar became the owner by purchase or otherwise of any lands included in the alleged grant

of 1807 to the pueblo, or of any land of that mission or its dependencies; that the alleged grant was ever located and recorded as provided by the sixth article of the treaty of Mesilla (Gadsden purchase); that the original grantee or grantees were ever owners of the property as against the Republic of Mexico, or are now the owners thereof as against the United States or its grantees; that the grantee Aguilar, in the year of 1844, went into actual possession and occupation of the grant, and erected monuments thereon, or that he and his representatives have continued ever since in the actual possession, use and occupation of the same.

The answer averred that the proceedings for sale were never taken under the express order or approval of the general government, and never submitted to said general government for ratification or approval; that the lands claimed far exceeded those contained in the original survey; that the sale was by quantity and limited; and that the alleged grant was so indefinite and uncertain as to description as to carry no title to any land.

On the hearing the testimonios of the grants of 1807 and of 1844 were put in evidence. Evidence was adduced to the effect that Aguilar, the original grantee, never took or had possession of the lands; that he was the brother in law of Manuel Maria Gandara, who was the governor of Sonora in 1842, and in 1845 to 1853, except a few months; to whom Aguilar conveyed in 1856, and, more formally, in 1869; that Gandara was in possession in 1852, 1853, 1854 and 1855, through his herdsmen; and that, as contended by counsel for petitioner, the money for the purchase was furnished by Gandara, and Aguilar took the title as trustee for him. Apparently the *expedientes* were not in the archives, nor was there any note of the grant in the book of *toma de razon* for 1844.

A translation of the titulo of 1844 is given in the margin.[1]

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[1] Treasury of the Department of Sonora, 1844.

Title of sale, transfer and adjudication of agricultural lands which include the four leagues of the fundo legal of the deserted pueblo of Tumacácori and the two sitios of its estancia (stock ranch) of Calabazas and the other places thereto annexed, the same being situated in the jurisdiction

Statement of the Case.

The Court of Private Land Claims rejected the claim on the ground that the sale in question was void for want of power on the part of the officer attempting to make it.

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of the District of San Ignacio, issued by the said departmental Treasury in compliance with the supreme decree of the 10th of February, 1842, in favor of Don Francisco Alejandro Aguilar, a resident of the port and village of San Fernando de Guaymas.

Second Seal. Seal. Four Dollars.

Eighteen hundred and forty-four and eighteen hundred and forty-five.

Ignacio Lopez, captain of cavalry retired to the infantry, honorary intendant of the army and treasurer of the Department of Sonora.

Whereas the supreme decree of February 10, 1842, provides for the sale, on account of the critical condition of the public treasury, of the properties pertaining to the department of temporalities, of which class are the farming lands and the lands for breeding cattle and horses respectively of the four leagues of the townsite of the depopulated town of Tumacácori and the two sitios of the stock farm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano and Calabazas, whose areas, boundaries, monuments and coterminous tracts are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned surveyor, Don Manuel de Leon, veteran ensign and late commandant of the presidio of Tubac, according to the information obtained in relation thereto at the instance of this departmental Treasury, said temporal farming and grazing lands being valued in the sum of five hundred dollars, as provided in article 2d of the aforesaid supreme decree of February 10, 1842; and complying punctually therewith I have ordered the formation of the corresponding expediente by the Court of First Instance and of the Treasury of the District of San Ignacio, during which proclamations (pregones) no bidder appeared; therefore, and in compliance with article 73 of the law of April 17, 1837, as the sale in question on account of the national Treasury does not exceed five hundred dollars, this said Treasury proceeded to the public sale of the aforementioned lands of the depopulated Tumacácori and the lands of its stock farm, Calabazas, and other annexed points, all belonging to the department of temporalities, on the 16th, 17th and 18th of the current month of April, in solicitation of bidders, without there being any other than Don Francisco Alejandro Aguilar, a merchant and resident of this port and village of San Fernando de Guaymas, for said sum of five hundred dollars, the appraised value at which said temporalities have been sold, as appears from the third and last offer, which literally is as follows:

"Third Seal. One dollar. Years 1844 and 1845.

"In the port and village of San Fernando de Guaymas, on the eighteenth of April, eighteen hundred and forty-four, I, the undersigned, departmental Treasurer, being in the office of this Treasury under my charge, with my attendant witnesses, Don Jose Maria Mendoza and Don Vicente Irigoyen, in the absence of a Notary of the Treasury and of a Notary Public, in compli-

Counsel for Parties.

Mr. Francis J. Heney for appellant.

Mr. Special Assistant Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

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ance with the provisions of Article 73 of the law of April 17, 1837, since the price or value of the temporalities to which these proceedings relate do not exceed five hundred dollars, ordered that the third and last offer be made for the final sale of the temporal lands of Tumacácori and Calabazas referred to in this expediente and that to that end a proclamation be made to the public at the sound of the drum, as, in effect, the public crier, Florentino Baldizan, made in a high and clear voice, saying: 'The Treasury of the Department is going to sell, on account of the national Treasury and in accordance with the supreme decree of February 10, 1842, the agricultural lands and lands for raising cattle and horses which comprise the four leagues of the townsite of the depopulated town of Tumacácori and the two sitios of the depopulated stock farm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano and Calabazas, situated in the District of San Ignacio, the areas, monuments, boundaries and coterminous tracts of which are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned surveyor, Don Manuel de Leon, veteran Ensign and late Commandant of the presidio of Tubac, as appears from the information obtained at the instance of said departmental Treasury, from which it also appears that the original titles of grant and confirmation of said temporalities still exist, which temporalities have now been valued at five hundred dollars in accordance with Article 2d of said supreme decree of February 10, 1842.

"Whoever desires to make a bid come forward and make it to this departmental Treasury, where it will be received in conformity with the laws, with the understanding that the final sale is to be made now to whomever should be the highest bidder."

In which act Don Francisco Alexandro Aguilar, a merchant and resident of this port, appeared and made the bid of five hundred dollars, at which said temporalities are appraised; and no other bidder having appeared and the hour for midday prayer of this day having already struck, the public crier finally said: "Once, twice, three times; sold, sold, sold; may it do good, good, good to Don Francisco Alejandro Aguilar."

In these terms this act was concluded, the aforesaid farming lands and lands for raising cattle and horses of the depopulated townsite and stock farm of the temporalities of Tumacácori and Calabazas being publicly and solemnly sold to Don Francisco Alexandro Aguilar, a merchant and resident of this port, for the sum of five hundred dollars.

And in due witness thereof and for the usual purposes these proceedings were closed and entered and I signed them together with the party in interest and my undersigned attendant witnesses.

Witness: JOSE MARIA MENDOZA. IGNACIO LOPEZ.

Witness: VICENTE IRIGOYEN. FRANCISCO A. AGUILAR.

Opinion of the Court.

MR. CHIEF JUSTICE FULLER, after stating the case as above, delivered the opinion of the court.

In order to the confirmation of any claim, the Court of

In which legal terms was concluded the sale of the farming lands and lands for raising cattle and horses, which comprise the four leagues of the depopulated townsite of Tumacácori and the two sitios of its stock farm, Calabazas, and other annexed points, all temporalities, situated in the jurisdiction of the District of San Ignacio, the original expediente remaining deposited in the archives of this Treasury as perpetual evidence, with the understanding that when the original titles of Tumacácori and Calabazas are obtained, they shall be aggregated to the present one.

Whereas the agricultural lands and lands for raising cattle and horses, which comprise the four leagues of the depopulated town of Tumacácori and the two sitios of its stock farm of Calabazas and other annexed points, all temporalities, in the jurisdiction of the District of San Ignacio, have been sold to Don Francisco Alejandro Aguilar, a resident and merchant of this port, for the sum of five hundred dollars, which sum together with the others pertaining to the Treasury, he has paid into this departmental Treasury, I, therefore, in use of the powers the laws on the matter, as also the supreme decree of the 10th of February, 1842, conceded to me, by the present title and in the name of the Mexican Nation and of the Supreme Government formally cede, sell, give and adjudicate the said farming lands and lands for raising cattle and horses, which comprise the four leagues of the depopulated townsite of Tumacácori and the two sitios of its stock farm of Calabazas and other annexed points already mentioned to the said purchaser, Don Francisco Alejandro Aguilar, by way of sale, and with all the qualities, solemnities, firmness and subsistence the law establishes, for himself, his heirs, children and successors, with all their entrances, exits, lands, timber, groves, shrubs, pastures, centres, circumferences, waters, springs, watering places, uses, customs, servitudes and other things pertaining to said possessions, with their enclosures, metes and bounds for the sum of five hundred dollars, at which they have been sold to said Francisco Alejandro Aguilar, with the precise condition that the said buyer, and his successors in their case, are to maintain the above mentioned agricultural lands and lands for raising cattle and horses that comprise the four leagues of the depopulated townsite of Tumacácori and the two sitios of its stock farm of Calabazas populated, possessed, cultivated and protected, without passing beyond their metes and bounds and without their being totally abandoned; with the understanding that if the said abandonment and depopulation of said farming and grazing lands should take place for the space of three consecutive years, by the neglect or fault of their owners or possessors and there should be any person who denounces them, in such event after verification of the fact, they shall be declared public lands

Private Land Claims, under the act creating that tribunal, (26 Stat. 854, c. 539,) must be satisfied not merely of the regularity in form of the proceedings, but that the official body or person assuming to make the grant was vested with

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and shall be sold at public sale, on account of the National Treasury, to whomever should be the highest bidder, excepting, as is just, those cases where the abandonment, depopulation or lack of protection are on account of the notorious invasion or hostilities of enemies or epidemics or other like causes, and only for the period or periods of such occurrences, cautioning as the aforesaid Don Francisco Alejandro Aguilar and his successors are strictly cautioned that they are to restrict themselves to the belongings, metes and bounds of the aforesaid agricultural and grazing lands of the townsite of Tumacácori and its stock farm of Calabazas, constructing and maintaining on said possessions the necessary monuments of stone and mortar under the penalties established by the laws in case of neglect.

And with the powers, which they and the divers superior provisions that govern the matter, concede and confer on me, I order and require repectively of the Judges, Justices and local authorities that at present are and shall hereafter be in the District of San Ignacio, that, for the sake of the good and prompt administration of justice and in observance of the aforesaid legal provisions they do not permit the said Francisco Alejandro Aguilar nor his successors to be, in any manner, disturbed, annoyed or molested in the free use, exercise, property, dominion and possession of the said agricultural lands and lands for raising cattle and horses of the townsite of Tumacácori and stock farm of Calabazas, but rather shall watch and see with the greatest efficacy that they are always protected and maintained in the quiet and peaceable possession to which they are entitled by legitimate right, so that, in this manner, they may freely have the benefit of, enjoy, possess, sell, exchange, barter, donate, transfer, devise, cede and alienate the aforesaid agricultural lands and lands for raising cattle and horses of the four leagues of the townsite of Tumacácori and its stock farm, Calabazas, and other annexed points, at their free arbitrament and election, as absolute owners and proprietors of said possessions, with the understanding also that just as soon as the original titles of said agricultural and grazing lands are obtained they shall be aggregated to the present ones, and the transmittal and delivery of said original documents are considered as made and verified from this moment in favor of said party in interest, Don Francisco Alejandro Aguilar.

In which terms I have issued this title of formal sale, transfer and adjudication to said Mr. Aguilar, his heirs and successors, delivering it to the former for his security and other convenient uses, after entry thereof in the proper place.

Given in the port and village of San Fernando de Guaymas, on the nineteenth day of the month of April, eighteen hundred and forty-four, authenticated and signed by me, the Treasurer of the Department, sealed with the

authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified; and the same rule applies to this court on appeal. *Hayes* v. *United States*, 170 U. S. 637; *Ely's Administrator* v. *United States*, *ante*, 220.

The titulo shows that Ignacio Lopez, treasurer of the department of Sonora, assumed to make the sale and grant of the lands in question, in the exercise of sole authority, *ex officio*, under the decree of February 10, 1842, and article 73 of the law of April 17, 1837, as being property "pertaining to the department of temporalities," the value whereof did not exceed five hundred dollars. He asserted the power to determine, alone, that the lands were of the temporalities; that their value was not over five hundred dollars; and to sell and grant them independently of other officials than himself.

The Court of Private Land Claims held that if the lands belonged to the class of temporalities it was clear that the treasurer of the department had no power to make a sale by his sole authority, whether the value exceeded five hundred dollars or not; and if the lands did not belong to that class, nevertheless there was the same want of power under the laws of Mexico in relation to the disposition of the public domain.

Many of the laws in this regard have been set forth in *United States* v. *Coe*, 170 U. S. 681; *Hayes* v. *United States*, *supra*; *Ely's Administrator* v. *United States*, *supra*; and other cases, and the statement of so much thereof as particularly bears on the matter in hand involves some repetition.

By the law of January 26, 1831, a general department of revenues was established, under whose control all branches of the treasury were placed, except the general administration of the mail and of the mint. A general director and three auditors were provided for, to be appointed by the government, and the general department was divided into three sec-

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seal which this Treasury uses, before my undersigned attendant witnesses, in the absence of a Notary of the Treasury or a Notary Public, there being none, according to law.

IGNACIO LOPEZ.

Witness: JOSE DIEGO LABANDERA.
Witness: JOSE MARIA MENDOZA.

tions, of each of which an auditor was the chief. 2 Dublan and Lozano Mex. Laws, 308.

May 21, 1831, a law was passed creating commissaries general and commissariats, and on July 7, 1831, regulations were issued under the law of January 26. The first auditor was made chief of the first section, having charge, among other things, of "national property in which is included, under article nine of the law of August 4, 1824, that of the inquisition and temporalities, and all other country or town property belonging to the Federation." 2 Mex. Laws, 329, 341.

The tenth regulation provided that the general department should take an exact account of the number, location, value, condition and present method of administration of all the property and estates of the nation, in which were included those of the inquisition and temporalities, and all others that belong to the public exchequer, in accordance with the law of August 4, 1824; should see to the thorough collection of the proceeds, as provided in the law of January 26 and other laws; and should do whatever it considered most beneficial in regard to the sale, lease or other means of administration that might be advisable, in whole or in part, of the property in question.

Certain regulations were thereafter prescribed, and set forth in a circular of July 20, 1831, 2 Mex. Laws, 351, whereby the commissariats general were located in the capitals of certain enumerated states; and, at designated points in others, that of Sonora being at Arizpe; but the commissaries, if they thought a change would be advantageous, were required to bring it to the notice of the government with their reasons.

Articles 126 and 127 of these regulations read:

"126. All purchases, sales and contracts made on account of the treasury, whatever be their purpose, shall be made by the commissaries general sitting as boards of sale; but before convoking them, it shall be absolutely necessary to receive first the order therefor, either from the supreme government, communicated directly or through the treasury general, or rather from the directory of revenues, when it relates to matters subject thereto.

"127. Said board shall hold its sessions in the room most suitable for the purpose in the commissariats, or in the public place nearest to those offices, and the regular members shall be the commissary or sub-commissary, who shall preside, the senior officer of the treasury, or the one who acts in his stead, and the attorney general, where there is one, and each of these employés shall take the place or seat to which he is entitled in the order in which they are named."

Besides the regular members, it was provided by Article 128 that there should be special members, depending on the character of the sale, purchase or contract being made, as for instance, when it related to the offices or revenues in the federal district subject to the directory general, the auditor in charge should attend; and if subject to any of the other departments, the chief clerk of the bureau of accounts, etc. If it related to supplies for army service, the officer appointed by the proper inspector should be present; if to business pertaining to the artillery arsenals, etc., the chief officer thereof; if to hospital service, the first assistant of the medical corps; if to fortification works, the chief of the corps of engineers; and if, finally, to other matters, the employé of the nearest related department appointed by the commissary general. Timely notice was required to be given to the regular and special members of the day and hour of the sale, which ordinarily should be held at ten o'clock in the morning.

It was also provided that if there was a notary public in the place, he should necessarily be present at the sessions of the board, and that whatever was done therein should be certified to by him, or by two attending witnesses, if there was none; that the sales or purchases intended to be made should be published for at least eight days beforehand by placards put up in the most public and frequented places, and also inserted in newspapers of greatest circulation, if there were any, care being taken that the notices contained the necessary information about the matter and its most essential circumstances; that when the sale was opened, and the customary proclamations made, all lawfully made bids should be received

until the day of final sale, which should be made "to the bidder who offers the most advantages to the treasury, as determined by an absolute majority of the votes of the board, which minute and everything that may have occurred at the sale shall be entered on the book, which the commissary and sub-commissaries shall keep for the purpose, and which the members shall sign with attending witnesses or with the notary, who, besides, shall draw up all other necessary papers. In the absence of a notary, a clerk, whom the commissary shall bring for the purpose, shall draw up the minutes and the conclusions." The proceedings were then to be forwarded with a report thereon to the supreme government, "without whose approval the purchase, sale or contract shall not be carried into effect;" and it was also provided that "when there is evidence that any member of the board has bought or sold at the sale, himself or through a third person, the sale shall be void and he shall be punished with the penalties the laws impose upon those who commit like abuses."

In 1835 the state legislatures were abolished and departmental bodies established; and the bases for a new constitution were adopted, followed by such constitution dividing the country into departments, the interior government of which was entrusted to the governors in subordination to the general government. 3 Mex. Laws, 75, 89, 230, 258.

By a decree of April 17, 1837, the principal officer of the general treasury in each department was designated as the superior chief of the treasury, and on him and his subordinates was conferred by article 92 the powers and duties formerly exercised by the commissary general and sub-commissaries, "in so far as they do not conflict with this decree, for in that respect all existing laws stand repealed." 3 Mex. Laws, 363.

Articles 73, 74, 75 and 76 were as follows:

"73. All the purchases and sales that are offered on account of the treasury and exceed five hundred dollars, shall be made necessarily by the board of sales, which, in the capital of each department, shall be composed of the su-

perior chief of the treasury, the departmental treasurer, the first alcalde, the attorney general of the treasury, and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the superior chief of the treasury, for such purposes as may be necessary and to enable him to make a report to the supreme government.

"74. The superior chiefs shall hold meetings of the boards of the treasury at least twice a month, and when they consider it necessary according to the difficulty and importance of the business. These boards shall be composed of said chief, the departmental treasurer, the attorney general of the treasury, the principal collector of the revenues and the auditor of the treasury, who shall act as secretary thereof.

"75. The object of the board of the treasury shall be to procure the prosperity and increase of the revenues of the treasury, the most easy and prompt collection thereof, to promote the economies that should be made, to expedite such grave matters of difficult solution as the superior chief may bring to its knowledge and to make a report to the latter of bad management, improper conduct, failure to comply with their duties and other omissions of which they may have knowledge, or may have observed in the employés of the treasury of the department.

"76. The minutes of the board shall be spread on the proper book, which shall be signed by all the members thereof, and an authenticated copy transmitted to the superior chief of the treasury to enable him to make a report to the supreme government, when the case requires it."

By a law of December 7, 1837, it was made the duty of the governors, among other things, "to preside over the boards of sale and of the treasury, with power to defer the resolutions of these latter until, in the first or second session thereafter, the matter under consideration is more carefully examined into." 3 Mex. Laws, 443.

By Article 140 of a decree of June 13, 1843, it was made the

duty of the governor of each department to publish the decrees of the president and cause them to be complied with; and by subdivision 10 of Article 142, the governor was made the chief of the public treasury of the department with general supervision of the same. 4 Mex. Laws, 428. And in passing it may be remarked that there is absolutely nothing in this record to indicate that the governor participated in any way in the act of sale, while the terms of the testimonio clearly show that the departmental treasurer proceeded and assumed to proceed upon his own sole authority.

December 16, 1841, the office of the superior chief of the treasury created by the decree of April 17, 1837, was abolished, and it was provided that the departmental treasurers should continue for the present to perform the functions of their office as established by the law creating them, and also to perform those of the discontinued chiefs of the treasury, except such as were assigned to the commandants general, who were to be inspectors and visitors of the treasury offices, and to see that the public revenues were well and faithfully collected, administered and disbursed; and to make timely reports to the supreme government of what they observed, which should be brought to its attention. 4 Mex. Laws, 75.

On February 10, 1842, the following decree was issued:

"Antonio Lopez de Santa Ana, etc.

"Article 1. The boards of sale in the several departments will proceed to sell, at public auction, to the highest bidder, the properties (fincas) situated therein that pertain to the department of temporalities.

"2. No bid will be admitted that does not cover the amount considered to be the value of the property (fincas), computed from the amount of the leases, which shall be considered as the interest thereof, at the rate of five per cent.

"3. The bids shall be made for cash, which shall be paid when the sale is approved, less the amount of the burden imposed on each property (fincas), which the buyers shall continue to recognize with a mortgage thereof.

"4. No action or claim, which the actual lessors of the property (fincas), in question, may intend to set up for im-

provements or under other pretext shall, in any manner, embarrass the proceedings of the board of sale in making the sales, but the right of parties in interest to apply to the supreme government, or to the proper authorities, shall remain intact.

"Therefore I order this to be printed, published and circulated, and demand that it be complied with." 4 Mex. Laws, 114.

Lopez certified that it was in virtue of this decree that he had sold the lands in question as belonging to the class of temporalities, and as being of a value not exceeding five hundred dollars, in which case he assumed that he was authorized to sell irrespective of the board of sales in view of Article 73 of the decree of April 17, 1837. The argument is that as that article provided that all purchases and sales exceeding five hundred dollars should be made necessarily by the board of sales, therefore all property under that value could be sold by the departmental treasurer alone; but the difficulty is, as pointed out by the Court of Private Land Claims, that even if that provision operated in the manner contended for, it had no application to a sale under the decree of February 10, 1842, which specifically directed that the sales should be made by the board, and contained nothing to suggest that the value of the property affected the power and duty of the board in any way.

The decree recognized the existence of the boards of sale as the only proper official organs to accomplish the results desired, and it was this decree that was relied on as justifying the proceedings. If these lands were not of the temporalities, then the basis of the sale utterly failed, as the decree applied only to property of that class, and if of the temporalities the sales were to be made by the board.

In relation to Article 73 of the law of 1837, some further observations may be added.

The regulations of July 20, 1831, and the law of April 17, 1837, treated of the same subject-matter, and must be read together; and prior laws, so far as not conflicting, were expressly saved from repeal by Article 92 of the latter act.

By section 73, the board of sales was necessarily to make sales exceeding five hundred dollars, but nothing was said as to sales for less than that sum. This would seem to have left the law of 1831 in force in respect of the making and the conduct of sales of property having a value below that amount, and whether the board of sales consisted of the membership prescribed by section 73, or was composed in some respects of a different membership, is not material. While these various laws are rather confusing in their number and minuteness, nothing is clearer than that the power to make sales and grants was vested in the treasury department of the nation and governed by strict rules and regulations, none of which contemplated that any single officer could make the sales. It is enough that the departmental treasurer did not possess the power, acting singly and on his own responsibility, to conclusively determine to what class lands belonged, and their value, and having decided these points, thereupon to exercise the sole power of sale.

Tumacácori, Calabazas and Huebabi are said to have been originally separate and distinct pueblos and missions, of which the two latter were abandoned as early as December, 1806, when the native Indians of Tumacácori and the governor of said Indians presented petitions to the governor and intendente Conde to give them title in accordance with the royal instructions of October 15, 1754, and of Article 81 of the royal ordinances of December 4, 1786, (alleging the loss or destruction of their old title papers,) of the lands embraced in the *fundo legal* and the *estancia* of each pueblo and mission, whereupon the grant of 1807 was made.

The titulo refers to some lands acquired by purchase, though the record leaves that matter entirely vague and uncertain, and declares the grant to be made to the pueblo and natives of Tumacácori, that they may "enjoy the use and freely possess at will and for their own benefit in community and individually, and for the decent support of the church of said mission, but under the condition that in no case and in no manner shall they alienate at any time any part of said lands which are adjudicated and assigned to them, since they are

all to be considered as belonging to the Republic and community of natives alone, for their proper use, as well for sowing purposes as for stockraising and the increased prosperity of the same."

This was in accordance with the general rule that the missionaries and Indians only acquired a usufruct or occupancy at the will of the sovereign. *United States* v. *Cervantes*, 18 How. 553.

Prior to 1829, the tribunal of the inquisition had been abolished by the Cortes, and the monastic and other religious orders suppressed, and on the 10th of May of that year it was ordered, through the department of the treasury, that "the property in which consist the funds of the temporalities of the ex-jesuits, and monastics, and the rural and urban estates belonging to the inquisition" be sold at public sale to the best and highest bidder. (2 Mex. Laws, 108.) May 31, 1829, the commissary general of Mexico published a "list of the urban and rural estates relating to the temporalities of the ex-jesuits and suppressed monastics, with a statement of their values, the burdens they carry, and annual revenue," (Ib. 117,) which did not include the lands in question. The departmental treasurer did not claim, and manifestly did not acquire, the power to sell these lands under the order of May 10, 1829, or the regulations of July 7, 1831, bearing on that subject.

By a decree of April 16, 1834, (2 Mex. Laws, 689,) the missions of the Republic were secularized, that is to say, converted from sacred to secular uses, and so far as these lands could have been regarded as temporalities, that is, profane property belonging to the church or its ecclesiastics, that decree changed their condition.

And, as many years before the sale in question, the lands of this pueblo and mission were abandoned, it would seem that they thus became part of the public domain of the nation, and that as such the only laws applicable to their disposal were the laws of the nation in relation to its vacant public lands, to which the proceedings in this instance do not purport to have conformed or to have been made under them.

We concur with the Court of Private Land Claims that in

either view there was a fatal want of power in the departmental treasurer to make the sale, and it is not asserted in the petition, nor was any evidence introduced to show that his action was participated in or ratified by the governor, or by the national government in any manner. And this is not a case in which the sale and grant can be treated as validated by presumption.

Decree affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* SMITH.

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

No. 93. Argued March 21, 1898. — Decided May 31, 1898.

Neither the city of Bismarck, as owner of the town site, nor its grantee Smith, can, under the circumstances disclosed in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending two hundred feet on each side of its said road.

The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial.

By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants.

The precise character of the business carried on by such tenants is not disclosed, but the court is permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action.

This was an action brought by Patrick R. Smith on the 28th day of December, 1891, in the Circuit Court of the United States for the District of North Dakota against the Northern Pacific Railroad Company. The complaint and answer were as follows:

"The complaint of the above-named plaintiff respectfully

shows to this court and alleges that the plaintiff is and ever since the organization of the State of North Dakota has been a citizen thereof, and that prior thereto he was during all the time hereinafter mentioned a citizen of the Territory of Dakota.

"That during all the time hereinafter mentioned the above-named defendant has been and still is a corporation created by and existing under and in virtue of an act of the Congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, by the Northern route,' approved July 2, 1864.

"That on the 14th day of September, A.D. 1876, the plaintiff became and ever since has been and still is duly seized in fee simple and entitled to the possession of the following described real property situated in the city of Bismarck, in the county of Burleigh and Territory of Dakota, (now, and since the organization thereof under a state government, the State of North Dakota,) to wit: Lots numbered five, six, seven, eight, nine, ten, eleven and twelve, in block number eight, according to the recorded plat of the city of Bismarck, D. T., together with the hereditaments, privileges and appurtenances thereof and thereto belonging.

"That said defendant more than six years prior to the commencement of this action wrongfully and unlawfully went into possession of the premises above described. That said defendant ever since said entry has wrongfully and unlawfully retained and withheld, and still does wrongfully and unlawfully retain and withhold, the possession thereof from the plaintiff. And that the use and occupation thereof during said time was worth at least five thousand dollars a year. That the damage to the plaintiff by the wrongful withholding of the possession of the premises as aforesaid is the sum of thirty thousand dollars.

"Wherefore the plaintiff demands judgment against said defendant for the possession of said premises and for the sum of thirty thousand dollars, his damages as aforesaid, together with his costs and disbursements herein."

"The defendant for amended answer to the complaint herein:

"First. For a first defence, alleges —

"That the land mentioned in the complaint is situated within two hundred feet of the centre line of the roadbed of its line of railroad constructed through the State of North Dakota, and has been for more than twenty years in its lawful possession as its right of way, roadbed and depot grounds, and that the same was granted to it as a right of way by the act of Congress described in the complaint.

"Admits that at all times mentioned in the complaint the plaintiff was a resident of the city of Bismarck, in the State of North Dakota, and further admits that the defendant is a corporation created by the said act of Congress. Denies each and every allegation in the complaint not hereinbefore specifically admitted, and it specifically denies that by reason of any of the allegations or things in the said complaint set forth the plaintiff has been damaged in any sum whatever.

"Second. For a second defence —

"That on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial district for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action.

"That at the time of the commencement of this action, said action was pending in said court and is still pending therein.

"Third. For a third defence —

"That on the 31st day of January, 1878, the defendant recovered judgment against the plaintiff for the possession of a portion of the property described in the complaint, to wit, that portion thereof described as lots eleven and twelve, for six cents damages and for $—— costs, and that said judgment was rendered upon the cause of action mentioned in the complaint, which judgment is in full force, unreversed and unsatisfied.

"Wherefore, the defendant demands judgment: 1st. That the complaint be dismissed. 2d. For its costs and disbursements in this action."

Statement of the Case.

The findings of fact and law made by the trial court were as follows:

"The property in controversy, the same being eight lots in the city of Bismarck in North Dakota, described as lots five (5) to twelve (12) both inclusive, in block eight (8), in the city of Bismarck, which was formerly known as Edwinton, and the name of which was changed by act of the legislature of the Territory of North Dakota to 'Bismarck,' was part of an eighty (80) acre tract of land which was entered by John A. McLean as mayor of the city of Bismarck, in behalf of its inhabitants, under the town site act, (Revised Statutes, sec. 2387,) and was patented to him thereunder July 21, 1879.

"The corporate authorities of that city subsequently and more than six years prior to the commencement of the action conveyed these lots to Patrick R. Smith, the plaintiff.

"The eighty (80) acre tract, on which these lots were situated, was selected as the location of a portion of this town site, and surveyed prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior and Puget Sound Land Company — the company that first made this selection — commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

"The Congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

"On February 21, 1872, the Northern Pacific Railroad

Company filed in the Department of the Interior the map of its general route east of the Missouri River. This route passed about three quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line. The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872 there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873 the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant, through its tenants, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

"In the year 1877, the defendant commenced an action in the district court of Burleigh County, Territory of Dakota, (now the State of North Dakota,) in which county the premises next hereinafter described were and are situated against certain parties including the plaintiff herein, to recover the possession of part of the premises here in question, which portion is particularly described as follows: Commencing at

the southeast corner of Main and Third streets in the city of Bismarck, the same being the northwest corner of block eight (8), running thence east along the south line of said Main street, a distance of fifty (50) feet; thence south, parallel with the east line of said Third street, a distance of seventy-five (75) feet to said east line of said Main street, a distance of fifty (50) feet, to said Third street; thence north, along said east line of said Third street, a distance of seventy-five (75) feet to the place of beginning. And such proceedings were duly had in said action in said court (the same being a court of competent jurisdiction of the parties and subject-matter of said action) that the defendant in the action herein (the plaintiff in the action last above referred to) duly recovered in said action a judgment against the defendants in that action including the plaintiff in this action, for the possession of the premises last above described and for nominal damages for the withholding thereof.

"That the value of the use and occupation of the premises in question, for six years prior to December 28, 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars.

"From the foregoing facts I find, as conclusions of law, that the plaintiff is entitled to the possession of the premises above described, and to recover from the defendant the sum of twenty-six thousand dollars with interest thereon from the 28th day of December, A.D. 1891, at the rate of seven per cent per annum, and his costs and disbursements."

Mr. C. W. Bunn, for plaintiffs in error. *Mr. C. W. Halcomb*, by leave of court, filed a brief for same.

Mr. H. F. Stevens for defendant in error.

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

By the second section of the act of July 2, 1864, creating the Northern Pacific Railroad Company, there was granted

to that company, its successors and assigns, the right of way through the public lands to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain.

During the year 1872, there was a line staked out across the tract, a portion of which is in dispute in this case, substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the latter year the railroad was constructed across this tract, and has since remained and been operated upon it. The lots in question are within two hundred feet of the main track of this railroad as actually constructed, and have been occupied by the defendant during the entire period since the construction of the road, excepting lots eleven and twelve, which during about three years were in the adverse possession of the firm of Browing & Wringrose and of Patrick R. Smith, the defendant in error, as the tenant of said firm.

In 1877 an action of ejectment, to recover possession of said lots eleven and twelve, was brought by the Northern Pacific Railroad Company, in the district court of the Territory of Dakota against Browing & Wringrose and said Patrick R. Smith, which action resulted, on January 31, 1878, in a final judgment, still subsisting, against said Smith and the other defendants.

On the trial of the present action, which was brought in the Circuit Court of the United States for the District of North Dakota in 1893, and which brought into question the title and possession of lots five, six, seven, eight, nine and ten, as well as of lots eleven and twelve, the plaintiff, Patrick R. Smith, set up, as the basis of his title and right of possession, a deed of conveyance by the corporate authorities of the city of Bismarck of the said lots as part of a town site plat patented to John A. McLean, as mayor of said city, on July 21, 1879. The record does not disclose a copy of such deed to Smith, nor its date. In his complaint Smith alleged that "on the fourteenth day of September, A.D. 1876, he became and ever since has been and still is duly seized in fee simple and entitled to the possession" of the property in dispute.

In the findings it is stated that the city authorities conveyed these lots to Patrick R. Smith, the plaintiff, *subsequently* to the granting of the patent to the mayor on July 21, 1879.

The defendant, the Northern Pacific Railroad Company, at the trial relied on its grant of a right of way from the United States on July 2, 1864, on its possession of lots six, seven, eight, nine and ten since the construction of the railroad in 1873, and of lots eleven and twelve since their recovery under the action and judgment in 1878, and the company likewise put in evidence the record of said suit and recovery as constituting *res judicata.*

The learned judge of the Circuit Court, after stating the foregoing facts, and some others not necessary to be here mentioned, entered judgment that the plaintiff was entitled to recover the possession of all of said lots and the sum of twenty-six thousand dollars, as the value of the use and occupation of the premises in question, for six years prior to December 28, 1891, the date of the commencement of the action; and that judgment was affirmed by the Circuit Court of Appeals. 32 U. S. App. 573.

When it was made to appear that, by the second section of the act of July 2, 1864, there was granted to the Northern Pacific Railroad Company a right of way through the public lands, to the extent of two hundred feet in width on each side of said railroad; that, in pursuance of said grant, the railroad company had constructed its road in 1873, including in its right of way the land in dispute; that, on November 24, 1873, commissioners, appointed under the fourth section of said act, reported that they had examined the Dakota division of said railroad, (including that portion of the same which covered the land in controversy,) and that they had found its construction and equipment throughout to be in accordance with the instructions furnished for their guidance by the Interior Department, and accordingly recommended the acceptance of the road by the Government; that said report had been, on December 1, 1873, approved by the President; and that the company had maintained and operated said railroad since its said construction to the time of trial, undoubtedly

there was thus disclosed a *prima facie* title and right of possession of the disputed tract.

To overthrow the railroad company's case the plaintiff depended on an alleged conveyance made to him after July 21, 1879, by the city authorities of the city of Bismarck, of the lots in dispute in this suit, and gave evidence that the eighty-acre tract on which these lots were situated was selected as a portion of a town site and surveyed prior to June 20, 1872, by the Lake Superior and Puget Sound Land Company, and that said land company made and, on February 9, 1874, recorded, a plat thereof, and that said town site and plat was afterwards adopted as the town site of the city of Bismarck under the town site act of the United States, (sec. 2387, Rev. Stat.,) and was patented as such town site to John A. McLean, mayor of said city, on July 21, 1879. The Congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof was filed in the General Land Office in March, 1873.

It is evident that, when in 1873, the Northern Pacific Railroad Company took possession of the land in dispute, as and for its right of way, and constructed its road over and upon the same, if the tract so taken was then part of the public lands, only the United States could complain of the act of the company in changing the location of its tracks from that previously selected. But, so far as this record discloses, the United States did not object to such change of location, but rather, by having, through the commissioners and the President, approved and accepted this part of the road when constructed, must be deemed to have acquiesced in the change of location as properly made.

But was the land in question part of the public domain in the spring of 1873? It certainly was, unless the occupation, at that time, of those who afterwards, in 1879, obtained a patent for a tract of eighty acres, including the land in question as part thereof, for a town site, deprived it of that character.

It has frequently been decided by this court that mere occupation and improvement on the public lands, with a

view to preëmption, do not confer a vested right in the land so occupied; that the power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts, in cases where the land has ceased to be Government property by reason of a right vested in some person or corporation; that such a vested right, under the preëmption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser. *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232; *Northern Pacific Railroad* v. *Colburn*, 164 U. S. 383.

If, then, one seeking to appropriate to himself a portion of the public lands cannot, no matter how long his occupation or how large his improvements, maintain a right of possession against the United States or their grantees, unless he has, by entry and payment of purchase money, created in himself a vested right, is one who claims under a town site grant in any better position?

No cases are cited to that effect; nor does there seem to be any reason, in the nature of things, why rights created under a town site settlement should be carried back, by operation of law, so as to defeat the title of a party who had, under color of right, taken possession and made valuable improvements before the entry under the town site act.

It is one of the findings of fact that, in the year 1872, the Lake Superior and Puget Sound Land Company occupied a tract of land, including within its boundaries the land in dispute, but it is also found that no plat thereof was filed in the register's office until February 9, 1874, a year after the railroad company had gone into possession and constructed its road, and that the patent was not granted to the mayor in behalf of the city of Bismarck till July 21, 1879. It is also one of the findings that the corporate authorities did not convey these lots to Patrick R. Smith till *after* the grant of the patent.

The record contains no copy of the deed to Smith, nor statement of any consideration paid by him, nor of the date when, if ever, he went into actual possession.

In such a state of facts will the law overturn the title of the railroad company by imputing to Smith the antecedent possession of the Lake Superior and Puget Sound Land Company? Whatever may be his rights to the land outside of that in possession of the railroad company, must it not be inferred that he bought subject to the public highway? It is found that in the month of June, 1873, the railroad had been constructed across this tract, and has since remained and been operated upon it; and it is hard to imagine what notice more distinct and actual could be given than that afforded by the operation of a railroad. Moreover, this record discloses that Smith on or about November 1, 1876, (more than three years after the completion of the railroad,) went into possession of a portion of the land in dispute as a tenant of other parties, and that he was ousted therefrom by a final judgment in an action of ejectment at the suit of the railroad company on January 31, 1878.

Apart from the legal effect of that judgment as *res judicata*, it is thus quite apparent that Smith thereby was visited with notice of the claim of the railroad company.

But suppose it be conceded, for the sake of the argument, that the Lake Superior and Puget Sound Land Company made the first entry, and that the city of Bismarck and Smith as its grantee could avail themselves of such entry, still the proof is that the railroad company completed its road over the land before the town site was patented, and before Smith obtained his conveyance. To acquire the benefit tendered by the act of 1864 nothing more was necessary than for the road to be constructed. The railroad company by accepting the offer of the Government obtained a grant of the right of way, which was at least perfectly good as against the Government. And be it further conceded, but not decided, that the railroad company when it changed its route, after the filing of its map of definite location, lost its priority of right under the grant of the act of 1864 as against subsequent grantees of the United States who obtained title before the actual construction of the railroad, and that the railroad company could only legally proceed under the exercise of its right of eminent domain, it

still remains, as we think, under the facts of this case, that Smith could not maintain his present action seeking to oust the company from possession of its right of way and railroad constructed thereon.

There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.

Such were the facts in the case of *McAulay* v. *Western Vermont Railroad Company*, 33 Vermont, 311, and where Chief Justice Redfield delivered the opinion of the court, a portion of which we quote:

"It being admitted, as it seems to be, that the plaintiff had full knowledge of the proceedings of the company to locate and construct their road upon his land, before and during all the time of the construction, and that he did not interfere in any way to prevent the occupation of the land for the purposes of the road, otherwise than by forbidding the hands working on the road until his damages were paid, and that only on one occasion, it becomes an important inquiry whether he can maintain ejectment for the land by reason of the nonpayment of his damages. . . . It is undoubtedly true that, according to our general railroad statutes and the special charters in this State, the payment or deposit of the amount of the land damages, assessed or agreed, is a condition precedent to the vesting of the title, or of any right in the company to construct their road, and that if they proceed in such construction without this, they are trespassers, and this has been repeatedly so held by this court.

"This may have led to the misapprehension in the present case, but it certainly is a very serious misapprehension. In

these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire an important interest in its continuance. The party does not, of course, lose his claim or the right to enforce it in all proper modes. He may possibly have some rights analogous to the vendor's lien in England, and here until the legislature cut it off. But it is certain, according to the English decisions, that he cannot stop the work, and especially the trains upon the road, if he has, in any sense, for the shortest period, clearly given to the company, either by his express consent, or by his silence, to understand that he did not intend to object to their proceeding with their construction and operation. . . . If there was then a waiver in fact, either express or implied, by acquiescence in the proceedings of the company, to the extent of not insisting upon payment as a condition precedent, but consenting to let the damages be and remain a mere debt, with or without a lien upon the roadbed, as the law may turn out to be, then it is impossible to regard the defendants in any sense in the light of trespassers or liable in ejectment."

Justice v. *Nesquehoning Valley Railroad*, 87 Penn. St. 28, was a case where a railroad company was a trespasser, and its entry upon land not in conformity with law, and it was held that these irregular proceedings did not operate as a dedication to the landowners of the property of the company, placed upon the land, so as to entitle said landowners to include said property in an assessment of damages under the railroad law, and recover their value as an accession to the value of the land taken by the company. In delivering the opinion of the Supreme Court, Chief Justice Agnew said:

"This is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a

public use — materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *nolens volens*, but it is not so in this case; for though the original entry was a trespass, it is well settled, that the company can proceed, in due course of law, to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon."

In *Provolt* v. *Chicago, Rock Island & Pacific Railroad*, 57 Missouri, 256, it was held that the conduct of a landholder in standing by while a railroad company constructed its road, precluded him from recovering physical possession of the land covered thereby. Judge Wagner, after quoting with approval the language of Chief Justice Redfield in *McAulay* v. *Western Vermont Railway Co.*, hereinbefore cited, said:

"The plaintiff did not attempt to obstruct or in anywise impede the progress of the work. The plain inference was that he waived his right for prepayment of his damages and only intended to follow his remedy on his judgment. His conduct surely led the company to believe such was his purpose and induced them to pursue a course and expend large sums of money which, otherwise, they would not have done. If plaintiff intended to rely on his rights and make present payment a condition precedent, he should have objected and forbidden the company to interfere or to do any work on his land till the question of damage was settled. But this he did not do. He acquiesced in the proceedings of the company to the extent of not insisting upon the prepayment as a condi-

tion precedent; and after having done so, we do not think that he can maintain ejectment.

"If from negotiation in regard to the price of the land, or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the landowner, it would seem wholly at variance with the expectations of the parties and the reason of the case, that the landowner should retain the right to enter upon the land, or to maintain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages were paid from the earnings. (2 Redf. Am. Railw. Cas. 2d ed. 353.) But the only question we are called upon to decide is whether under the facts and circumstances of this case ejectment will lie, and we think it will not."

A similar question was decided in the case of *The Omaha and Northern Nebraska Railway* v. *Redick*, 16 Nebraska, 313. This was an action of ejectment for the possession of a forty-acre tract of land, brought by a landowner against a railroad company, which had constructed its road over said tract. It seems that the plaintiff, as one of the directors of the railroad company, had known that the company was constructing its road across its lands, and had remained quiet. The court said:

"It is true that under the constitution and laws of this State the assessment of damages and payment or deposit of the amount is a condition precedent to the vesting of the title or of any right of the company to construct their road. But these conditions are susceptible of being waived. . . . Whatever right the plaintiff may have against the railroad company, growing out of this right of way question, and whether he is estopped *in pais* to assert any and all of them, it seems clear that he is not entitled to a judgment that would enable him to sever a line of commerce which, by his assent if not through his active agency in part, was constructed over this same property, and has enjoyed free passage over it for at least seven years."

The same conclusion was reached in *Lexington & Ohio Railroad* v. *Ormsby*, 7 Dana, 276; *Harlow* v. *Marquette &c. Railroad*, 41 Michigan, 336; *Cairo and Fulton Railroad* v. *Turner*, 31 Arkansas, 494; *Pettibone* v. *Lacrosse and Milwaukee Railroad*, 14 Wisconsin, 443; *Chicago and Alton Railroad* v. *Goodwin*, 111 Illinois, 273; *Kanaga* v. *Railway Co.*, 76 Missouri, 207; *Dodd* v. *St. Louis & Hannibal Railway*, 108 Missouri, 581; *Evansville & Terre Haute Railroad* v. *Nye*, 113 Indiana, 223.

This subject was fully considered by this court in the case of *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, where, upon the foregoing authorities and others, it was *held* that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

Upon principle and authority we therefore conclude that neither the city of Bismarck, as owners of the town site, nor its grantee Smith, can, under the facts and circumstances shown in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending two hundred feet on each side of its said road. The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants. The precise character of the busi-

ness carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action.

These views dispose of the case, and render it unnecessary to determine whether the trial of the title of lots eleven and twelve, in the action between the railroad company and Smith, as a tenant of Browing & Wringrose, resulting in a final judgment, was well pleaded as *res judicata* in the present action.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to enter a judgment in favor of the defendants.

Mr. Justice Gray and Mr. Justice White concurred in the judgment of the court only on the ground first stated in the opinion of the court, that is, the sufficiency of the title of the railroad company.

Mr. Justice Brewer, concurring specially: I concur in a reversal of the judgments below but not in all the conclusions reached in the foregoing opinion, nor in the direction to enter judgment for the defendant. I think the estoppel relied on goes only to the ground actually occupied by the railroad company with its tracks, station houses and other buildings used exclusively for railroad purposes, and does not extend to the entire four hundred feet of the right of way which the company claims under the Congressional grant. It may be that a large portion of this tract is in only the constructive possession of the company, or it may be occupied by the buildings not used exclusively for railroad purposes, and as to all such ground I do not think any estoppel extends.

I am also of the opinion that the legal title conveyed by the town site patent and the deed to plaintiff must prevail in this action at law over any equities the company may have acquired by occupancy.

Mr. Justice Harlan dissented.

CAMOU *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 28. Argued March 16, 1898. — Decided May 31, 1898.

A valid grant was made in this case, which it was not within the power of a temporary dictator to destroy by an arbitrary declaration.

This government discharges its full duty under the Gadsden treaty, when it recognizes a grant as valid to the amount of the land paid for.

On December 3, 1891, the appellant filed in the Court of Private Land Claims his petition praying to have confirmed to him a certain tract of land situate in the county of Cochise, in the Territory of Arizona, known and designated as the San Rafael del Valle grant. Subsequent proceedings resulted in a trial and a decree in behalf of the government, dismissing the petition and adjudging petitioner's claim and title invalid. The title papers show that on March 12, 1827, Rafael Elias made application to the treasurer general of the state of Sonora for the purchase of "public lands adjacent to the ranch of San Pedro, within the jurisdiction of Santa Cruz, as far as the place called Tres Alamos." On July 1 of that year the treasurer general directed that proceedings be had in accordance with law under the supervision of the alcalde of Santa Cruz. The proceedings appear to have been regular. The survey was of a tract reported by the surveyors to contain four sitios. The property was appraised at $60 a sitio, or $240 altogether. The fiscal attorney approved the proceedings and advised that they "be continued to adjudication according to the forms and requisites in use." At the third auction, on April 18, 1828, the property was struck off to Don Rafael Elias, the petitioner, for the sum of $240. On April 21, the petitioner paid this sum into the treasury. Nothing further was done until April 29, 1833, at which time the then treasurer general of the state of Sonora issued the expediente, or title papers. This expediente opens with this preamble:

"Jose Maria Mendoza, treasurer general of the free, independent and sovereign state of Sonora, Greeting:

"Inasmuch as article 11 of the sovereign decree number 70 of the general congress of the union, dated August 4th of 1824, concedes to the states the revenues which in said law it did not reserve for the federation itself, and one of them being that derived from the lands within their respective territories, which in consequence belongs to them, for the disposition of which the honorable constitutive congress of the state that used to be joined of Sonora and Sinaloa enacted the law No. 30 of May 20th of 1825, as well as the decrees relative thereto passed by other succeeding legislatures, and the citizen Rafael Elias, a resident of this capital, having made due application on the 12th of March of 1827, at the treasury general that was then of the United States, for the lands named San Rafael del Valle, located in the jurisdiction of the presidio of Santa Cruz, which was allowed according to law on the date of July 1st of the same year, and the petition of entry, the order for the commission, and the act of accepting the charge being as follows, to wit;" and after reciting the various steps in the sale closes with this granting clause:

"In which terms I issue the present title of grant in due form in favor of the citizen Rafael Elias, his heirs and successors, delivering it to them for their protection, previous memorandum of the same being entered in the proper book.

"Given at the capital of Arispe on the twenty-fifth day of the month of December of one thousand eight hundred and thirty-two.

"Attested and signed by me, sealed with the seal of the treasury general, before the undersigned witnesses of my assistance, with whom I act in default of clerk, there being none, according to law.

"Jose Maria Mendoza.

"Assistant: Louis Carranco.

"Assistant: Bartolo Miranda.

"[Seal of the Free State of Sonora, Treasury General.]"

The amount of land within the tract as now surveyed, according to the testimony, is 20,034.62 acres. The petition did not state the area applied for, but as has been seen the survey and appraisement called the tract four sitios, or 17,353.85 acres.

Mr. Rochester Ford for appellant.

Mr. Special Attorney Reynolds for appellees. *Mr. Solicitor General* was on his brief.

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

This grant was made in the name of the state of Sonora and by the proper officer of that state, if it had power to make the grant. The first question, therefore, is as to the power of the state. We held in *United States* v. *Coe*, 170 U. S. 681, just decided, that from and after the adoption of the constitution of 1836 no such power was vested in the separate states. But that case called for no determination of the authority those states possessed prior thereto, and in respect to that matter no opinion was expressed. We have in this case, and that immediately following, *Perrin* v. *United States*, *post*, 292, elaborate discussions by counsel as to the title to the public lands within the limits of Mexico and the respective rights thereto of the general government and the separate states. On the one hand it is insisted that, as in the case of the thirteen colonies that formed the United States of America, the vacant lands were the property of the states; that as no express cession was made by any Mexican states to the general government the title to those lands remained in the states until at least the formation of the constitution of 1836, and that each state had therefore the absolute right to dispose of all within its own limits. On the other hand, it is said that, prior to the separation of Mexico from Spain, the lands were the property of the king of Spain, that the separation created a new national government which succeeded to all the rights of the prior sovereign, including therein the ownership of all vacant lands. We

deem it unnecessary to review this discussion or attempt to settle the disputed question as to the location of the title. In this expediente the treasurer general refers to "Article XI of the sovereign decree number 70 of the general congress of the union," as conceding to the states the revenues derived from the sale of lands within their respective limits, and upon that and law number 30 of the congress of the state relies as the sources of his power to make the conveyance. The state having undoubtedly vested its authority in the treasurer general, the inquiry comes back to the effect of said Article XI.

Preliminary thereto we must notice these matters:

The constitutive act of the Mexican federation, adopted January 31, 1824, in Articles 5 and 6, declares:

"ART. 5. The nation adopts for the form of its government a popular representative and federal republic.

"ART. 6. Its integral parts are free, sovereign and independent states, in as far as regards exclusively its internal administration, according to the rules laid down in this act, and in the general constitution." 1 White's New Recopilacion, p. 375.

On October 4, 1824, a constitution was established. In it Article 49 reads:

"The laws or decrees, which emanate from the general congress, shall have for their object:

"1. To sustain the national independence, and to provide for the preservation and security of the nation in its exterior relations.

"2. To preserve the federal union of the states, and peace and public order in the interior of the confederation.

"3. To maintain the independence of the states among themselves, so far as respects their government according to the constitutive act and this constitution.

"4. To sustain the proportional equality of obligations and rights which the states possess in point of law." 1 White, p. 393.

And enumerating in Article 50 the powers possessed by the general congress, subdivision 31 reads:

"To dictate all laws and decrees, which may conduce to

accomplish the objects spoken of in the forty-ninth article, without intermeddling with the interior administration of the states." 1 White, p. 395.

Article 137, defining the attributes of the supreme court, names among others:

"1. To take cognizance of disputes, which may arise between the different states of the union, whenever there arises litigation in relation to the same, requiring a formal decree, and that arising between a state and one or more of its inhabitants, or between individuals in relation to lands under concessions from different states, without prejudice to the right of the parties to claim the concession from the party which granted it." 1 White, 405.

It cannot of course be pretended that these provisions either operated to transfer the title to vacant public lands from the nation to the respective states or amount to a declaration that the title to such lands is vested in the states. All that can fairly be inferred from them is that the supremacy of the several states in matters of local interest was recognized, and further, that conflicting cessions of lands from different states might be expected and that the settlement of disputes respecting them should be by the supreme court of the nation. These inferences are by no means determinative of the question here presented, and yet it must be conceded that they at least point to some control by the states over vacant lands within their limits, and suggest the exercise by those states of the right to make concessions of those lands.

Two prominent laws of the Mexican nation are the colonization law of August 18, 1824, 1 White, 601; Reynolds, p. 121, and the law in respect to general and special revenues of August 4, 1824. Reynolds, p. 118. White's translation of Articles 1, 2, 3, 10, 11 and 16 of the colonization law, differing slightly from that given by Reynolds, is as follows:

"ART. 1. The Mexican nation offers to foreigners, who come to establish themselves within its territory, security for their persons and property; provided they subject themselves to the laws of the country.

"ART. 2. This law comprehends those lands of the nation,

not the property of individuals, corporations or towns, which can be colonized.

"ART. 3. For this purpose the legislatures of all the states will, as soon as possible, form colonization laws or regulations for their respective states, conforming themselves in all things to the constitutional act, general constitution and the regulations established in this law."

"ART. 10. The military who, in virtue of the offer made on the 27th of March, 1821, have a right to lands, shall be attended to by the states, in conformity with the diplomas which are issued to that effect by the supreme executive power.

"ART. 11. If, in virtue of the decree alluded to in the last article, and taking into view the probabilities of life, the supreme executive power should deem it expedient to alienate any portion of land in favor of any officer, whether civil or military of the federation, it can do so from the vacant lands of the territories."

"ART. 16. The government in conformity with the provisions established in this law will proceed to colonize the territories of the republic."

It is not pretended that the grant in question was made under this colonization law, and we only refer to it as showing a recognition by the general government of some authority on the part of the states in reference to the vacant lands. It will be seen that while Article 2 speaks of "the lands of the nation," Article 3 directs the states to enact colonization laws in conformity to the general provisions of the constitution. So that the actual management of colonization affairs was put within the control of the states, subject, of course, to the superior dominion of the general government. Article 10 provides that military rights to lands, though created by the nation shall be attended to by the states, thus implying at least that, for convenience, administration of the vacant lands was entrusted to the states. Obviously the thought here was that there should not be two places in which the administration of the public lands should be carried on, and so in Article 11 it was provided that if in the judgment of the nation it was ex-

pedient to grant to a military or civil officer any public lands, it was to be made from vacant lands in the territories. And, finally, in Article 16, as though to separate the administration of the public lands in the states from those in the territories, it is distinctly declared that the national government will colonize the territories of the public. As heretofore said, all this, of course, amounts only to assigning to the states the administration of the vacant lands for purposes of colonization.

The other act to which we have referred, the one which is relied upon by the treasurer general as giving authority for this expediente, is that in reference to general and special revenues. It commences with the declaration that the following belong to the general revenues of the federation, and then in ten articles are named revenues derived from different sources, such as import and export duties, tobacco and powder, etc. The eighth, ninth, tenth and eleventh articles are as follows, Reynolds, p. 118:

"8. That from the territories of the federation.

"9. National property, in which is included that of the inquisition and temporal property of the clergy, or any other rural or urban property that belongs, or shall hereafter belong, to the public exchequer.

"10. The buildings, offices, and the lands attached thereto, which belong, or have belonged, to the general revenues and those that have been maintained by two or more of what were formerly provinces, are at the disposal of the government of the federation.

"11. The revenues not included in the foregoing articles belong to the states."

The eighth article gives to the national government all the revenues derived from the territories. Obviously the entire management of the affairs of the territories was reserved to the general government, and any revenue derived therefrom passed into the general treasury.

The ninth article is indefinite in that it fails to define what is national property. It assumes that certain things pass within the description of national property, and affirmatively includes within that description the property taken

from the clergy. The language used is broad enough to include all public lands within the limits of the nation, and yet if it was intended to include such lands it would seem scarcely necessary to add the clause including those taken from the clergy. Certain is it that according to our methods of legislation, and our use of language, this article would not be considered as defining the property the revenues from which it assigns to the national government. The tenth article seems to have little significance in this connection, and refers obviously to public buildings and the grounds attached, and not to vacant public lands. While the eleventh article concedes to the states the revenues not included in the foregoing articles, it does not define those revenues, and depends for its scope upon the significance and force of the prior articles. If these articles were all that called for consideration it would be difficult to infer from them that the vacant public lands were given to the states for purposes of sale or for appropriation of the proceeds of such sales. But in the same statute is a provision that "the sum of $3,136,875, estimated as the deficit in the general expenses, shall be apportioned among the states of the federation," and following that is the apportionment. Other sections required delivery by the states every month of their part of the above apportionment and the final adjustment of the amount thereof between the government and the states. Of course this implies that within the limits of the state there were certain matters of revenue reserved, out of which the states were to collect the sums apportioned to them, and to return the same to the general treasury. Subsequent legislation throws light upon the meaning of this revenue law. Thus, on April 6, 1830, a decree was passed, the third article of which is as follows:

"The government shall have power to appoint one or more commissioners to visit the colonies of the frontier states, to contract with their legislatures for the purchase, in the name of the federation, of the lands they may consider suitable and sufficient for the establishment of colonies of Mexican and of other nations, to enter into such arrangements with

the colonies already established as they may deem proper for the security of the republic, to see to the exact compliance with the contracts upon the entry of new colonists, and to examine as to how far those already entered into have been complied with.

"4. The executive shall have the power to take the lands he may consider suitable for fortifications and arsenals, and for new colonies, and shall give the states credit for their value on the accounts they owe the federation." Reynolds, p. 148.

The language of this decree is very significant, and clearly recognizes some title in the states, for why should commissioners be authorized to contract with the legislatures of the states for the purchase of lands which belonged to the nation? It also clearly recognizes the right of the states to sell these vacant lands and apply the proceeds in settlement of the demands made against them by the general apportionment of the revenue law of 1824. It declares that the executive may take the lands he considers suitable for fortifications, arsenals and for new colonies, and at the same time provides that he shall give the states credit on the amount they owe the confederation. But why should any credit be given if these lands so taken by the executive were the property of the nation and the states without authority to sell them or receive the proceeds of sales? If during all these years the lands were the property of the nation, were to be held and sold only by the nation, and the proceeds thereof to be accounted for directly to the nation, why should it be decreed that if the nation takes any part of them for arsenals and other public purposes, credit for the value thereof is to be entered upon the amounts due by the states to the nation? We find it difficult to escape the force of this decree of 1830. It indicates that although the language of the revenue decree of 1824 is indefinite, and does not in terms name vacant public lands, yet both the nation and the states understood that its effect was to grant authority to the states to sell such lands and appropriate the proceeds in settlement of the amounts charged against them by the nation. We see no

other way in which to give reasonable force to the language of this decree of 1830, and it must be held to be a national interpretation of the revenue decree of 1824.

But we are not limited to this authoritative national exposition of the meaning of the revenue law of 1824. The testimony in the several cases of a similar nature now before us, including therein the reports of the officers of this government sent to examine the archives of Mexico, discloses that the state of Sonora, at least, assumed that the revenue act of 1824 authorized its disposal of the vacant public lands, and acting on that assumption did in a multitude of cases make sales thereof. In this connection it may be observed that the constitution of the state of Sonora, or State of the West, declares, article 47, that the right of selling lands belongs to the state. This constitution bears date May 11, 1825. Law No. 30 of that state, of May 20, 1825, the law referred to by the treasurer general in the expediente, recites that "the congress has seen fit to decree the following provisional law for the purchase of the lands of the state." Subsequent legislation of the state is in the same line.

Further, sections 8 and 9 of article 161 of the national constitution of 1824 made it the duty of each Mexican state —

"To present annually to each one of the houses of the general congress a minute and comprehensive report of the amounts that are received and paid out at the treasuries within their limits, together with a statement of the origin of the one and the other, and touching the different branches of agriculture, commercial and manufacturing industries," etc.

And also —

"To forward to the two chambers (of the federal government) and when they are in recess, to the council of the government, a certified copy of their constitutions, laws and decrees."

It may be assumed that these requirements of the national constitution were complied with, and that the constitutions, laws and decrees of the state and the proceedings had in reference to these several sales of land were reported to the congress of the nation. We find no act of that congress set-

ting aside such legislation or sales. This is significant, and it is not inappropriate to refer to *Clinton* v. *Englebrecht*, 13 Wall. 434, 446, in which it was said:

"In the first place, we observe that the law has received the implied sanction of congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

We are not insensible of the fact that the provisions of the act of September 21, 1824, creating the office of commissary general, an act which we had occasion to consider in *Ely's Administrator* v. *United States*, *ante*, 220, seem to make against the idea of the administration of vacant lands by the states, and it is difficult to work out from all the statutes a consistent, continuous and harmonious rule. We must in each case endeavor to ascertain what the Mexican government recognized as valid, and when that is done the duty of respecting and enforcing the grant arises. Other matters are referred to by counsel in their briefs, but it would needlessly prolong this opinion to refer to them. Our conclusion is that at the time of these transactions the several states had authority to make sales of vacant public lands within their limits, and that such sales, unless annulled by the national government, must be considered as grants to be recognized by this Government under the terms of the treaty of 1853.

We pass, therefore, to a consideration of the effect of the decrees of Santa Anna. The lands in controversy were obtained from Mexico under what is known as the Gadsden treaty of 1853. This treaty was concluded on December 30, 1853, and ratified June 30, 1854. At the time of the treaty Santa Anna was supreme executive and virtually dictator in Mexico, and the treaty was negotiated with him. On November 25, 1853, only about a month before the signing of the Gadsden treaty, he published this decree:

"ART. 1. It is declared that the public lands, as the exclusive property of the nation, never could have been alienated under any title by virtue of decrees, orders and enactments of the legislatures, governments or local authorities of the states and territories of the republic.

"2. Consequently, it is also declared that the sales, cessions or any other class of alienations of said public lands that have been made without the express order and approval of the general powers, in the manner prescribed by the laws, are null and of no value or effect.

"3. The officials, authorities and employés upon whom devolve the execution of this decree, shall proceed as soon as they receive it to recover and take possession in the name of the nation, of the lands comprehended in the provisions of article 1, and that may be in the possession of corporations or private individuals, whatever may be their prerogatives or position.

"4. The judicial, civil or administrative authorities shall admit no claims of any kind nor petitions whose purpose is to obtain indemnification from the public treasury for the damages the unlawful holders or owners may allege under the provisions of the preceding article; and they shall preserve their right only against the persons from whom they have the lands they are now compelled to return." Reynolds, p. 324.

On July 5, 1854, he published another decree, which was even more specific, containing these provisions:

"ART. 1. The titles of all the alienations of public lands made in the territory of the republic from September, 1821, till date, whether by the general authorities or by those of the extinguished states and departments, shall be submitted to the revision of the supreme government, without which they shall have no value and shall constitute no right of property.

* * * * *

"5. The alienations of public lands, of whatever nature they be, that have been made by the authorities and officials of the departments without the knowledge and approval of the general government, during the epoch when the central system was in force in the republic, are void.

"6. Those made by said authorities in the epoch of the extinguished federation are likewise void; provided they were not made for the purpose of extending and promoting colonization, which was the purpose proposed by the law of August 18, 1824.

"7. Grants or sales of lands made to private individuals, companies, or corporations under the express condition of colonizing them, and the holders of which have not complied therewith in the terms stipulated, are declared to be of no value." Reynolds, p. 326.

Subsequently, on December 3, 1855, and after Santa Anna had been deposed and while Juan Alvarez was president *ad interim*, a decree containing the following provisions was entered:

"ART. 1. The decrees of November 25, 1853, and July 7, 1854, which submitted to the revision and approval of the supreme government the grants or alienations of public lands made by the local governments of the states or departments and territories of the republic from September, 1821, to that date, are repealed in all their parts.

"ART. 2. Consequently, all the titles issued during that period by the superior authorities of the states or territories under the federal system, by virtue of their lawful faculties, or by those of the departments or territories, under the central system, with express authorization or consent of the supreme government for the acquisition of said lands, all in conformity with the existing laws for the grant or alienation respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the government." Reynolds, p. 329.

And again, on October 16, 1856, a decree was passed while Ignacio Comonfort was president, the first article of which is as follows:

"ART. 1. The decrees of November 25, 1853, and July 7, 1854, are void." Reynolds, p. 331.

The Court of Private Land Claims was divided. Three of the justices were of opinion that as this Government recog-

nized Santa Anna in negotiating with and purchasing from him the territory within the Gadsden purchase, the courts must also recognize his declarations in respect to titles as authoritative, citing in support of these general propositions Wheaton's International Law, secs. 31 and 32, and Halleck's International Law, pages 47 and 62. Without questioning the general propositions laid down in these authorities, we are of opinion that too much weight was given to the decree of Santa Anna of November 25, 1853, the only one announced before the cession, and that that decree should not be considered as absolutely determinative of individual rights and titles.

While it is true that practically Santa Anna occupied for the time being the position of dictator, it must not be forgotten that Mexico, after its separation from Spain in 1821, was assuming to act as a republic subject to express constitutional limitations. While temporary departures are disclosed in her history, the dominant and continuous thought was of a popular government under a constitution which defined rights, duties and powers. In that aspect the spasmodic decrees made by dictators in the occasional interruptions of constitutional government should not be given conclusive weight in the determination of rights created during peaceful and regular eras. The divestiture of titles once legally vested is a judicial act. In governments subject to ordinary constitutional limitations a mere executive declaration disturbs no rights that have been vested, and simply presents in any given case to the judicial department the inquiry whether the rights claimed to have been vested were legally so vested. Undoubtedly this Government dealing with Mexico, and finding Santa Anna in control, rightfully dealt with him in a political way in the negotiation of a treaty and the purchase of territory, and the judicial department of this Government must recognize the action of its executive and political department as controlling. But when the courts are called upon to inquire as to personal rights existing in the ceded territory, a mere declaration by the temporary executive cannot be deemed absolutely and finally controlling. It is un-

necessary to rest this case upon the fact disclosed that these decrees of Santa Anna were immediately thereafter revoked. It is not significant that the substance of them was thereafter reëstablished. We are compelled to inquire whether prior to such decree there were rights vested, rights which the Mexican government recognized, and then determine whether those rights were by such decree absolutely destroyed.

Turning to the decree of November 25, 1853, the first and second articles are mere declarations of law. The third article directs the officials to proceed to the execution of the decree and to recover and take possession of the lands coming within the scope of the prior articles. It does not appear that any steps were taken by any officials to carry into execution this decree. Whether this particular grant came within the scope of the two declarations of law was a question to be considered and determined. On that question the grantee never was heard. There never was a judicial adjudication that his grant came within the scope of the first two articles. He was never dispossessed. His property was never taken possession of. It is going too far to hold that the mere declaration of a rule of law made by a temporary dictator, never enforced as against an individual grantee in possession of lands, is to be regarded as operative and determinative of the latter's rights.

As for the reasons heretofore mentioned, we are of opinion that a valid grant was made in this case, we think this arbitrary declaration by a temporary dictator was not potent to destroy the title. The decree of the Court of Private Land Claims must therefore be reversed. As shown by the statement of facts the survey of the land claimed in the petition is in excess of the four sitios granted and paid for. While the excess is not so great as in many cases, yet we think the rule laid down in *Ely's Administrator* v. *United States*, *ante*, 220, should control, and that this Government discharges its full duty under the treaty when it recognizes a grant as valid to the amount of land paid for.

The decree of the Court of Private Land Claims will be reversed, and the case remanded for further proceedings.

PERRIN *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 30. Argued March 16, 17, 1898. — Decided May 31, 1898.

Camou v. *United States*, *ante*, 277, followed.

THE case is stated in the opinion.

Mr. Byron Waters and *Mr. John T. Morgan* for appellant.

Mr. J. H. Meredith filed a brief for same.

Mr. Special Assistant Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

MR. JUSTICE BREWER delivered the opinion of the court.

So far as the question of title is concerned this case is similar to the one immediately preceding, *Camou* v. *United States*, *ante*, 277. For reasons therein stated the decree of the Court of Private Land Claims will be reversed and the case remanded for further proceedings. It is true, as suggested in its opinion, the Court of Private Land Claims thought that there was no sufficient location of the tract in controversy, and that probably the grant was void for uncertainty in the description of the property. It may be that this conclusion was right. At the same time, in view of what has been recently said by this court in respect to boundaries, description and area, we think that justice requires that we reverse the judgment and remand the case for further proceedings. Perhaps the claimants may be able to satisfactorily identify a tract not larger than the area purchased and paid for which should equitably be recognized as the tract granted.

Reversed

WALRATH *v.* CHAMPION MINING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT.

No. 230. Argued April 22, 1898. — Decided May 31, 1898.

On the 28th of April, 1871, on a previous location made in 1857, the Providence Gold and Silver Mining Company obtained a patent in which it was recited that it was "the intent and meaning of these presents to convey" to the company "the vein or lode in its entire width for the distance of 3100 feet along the course thereof." Under that act a patent could be issued for only one vein; but the act of May 10, 1872, c. 152, gave to all locations theretofore made, as well as to all thereafter made, all veins, lodes and ledges, the top or apex of which lies inside of the surface lines. September 29, 1877, the Champion Mining Company made a location upon the Contact Vein, which overlapped the Providence location, both as to surface ground and lode. In 1884 a dispute took place, which brought about relocation of the lode line of the Champion Company; but eventually the conflicting claims resulted in this suit. *Held*,

(1) That the extent of the rights passing under the act of 1866 was decided by this court in *Mining Co.* v. *Tarbet*, 98 U. S. 463, viz.: that "the right to follow the dip of the vein is bounded by the end lines of the claim;"

(2) That that right stops at the end line of the lode location, terminated by vertical lines drawn downward;

(3) That the original location and lode determined those end lines.

The following propositions, announced in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, *ante*, 55, are affirmed with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries: "*First*, the location as made on the surface by the locator determines the extent of rights below the surface. *Second*, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. *Third*, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. *Fourth*, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he

Statement of the Case.

called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location."

There is no merit in the contention that by agreement, by acquiescence, and by estoppel, the line *f–g* on the plan has become the end line of the two claims.

It is the end lines alone which define the extralateral rights, and they must be straight lines, not broken or curved lines, and to such the right on the vein below is strictly confined.

THIS action, brought in the Superior Court of Nevada County, California, involves title to a triangular shaped section of what is known as the "Contact," "Ural" or "Back" ledge of gold-bearing ore, situated in the same county, claimed by appellant to be a portion of the Providence Mine, to which complainant has title through a patent from the United States, and by appellee, a corporation, to be a part of the New Years Extension Mine owned by it.

The relative situation of the two properties and the portion of the ledge in controversy is shown by Figure No. 1 on page 295; the disputed section being contained between the lines thereon marked "Line claimed by Providence" and "Line claimed by Champion."

The figures marked "New Years" and "New Years Extension" represent the surface of the mining properties owned by defendant, while that marked "Providence Mine" represents the surface of the patented ground of the plaintiff.

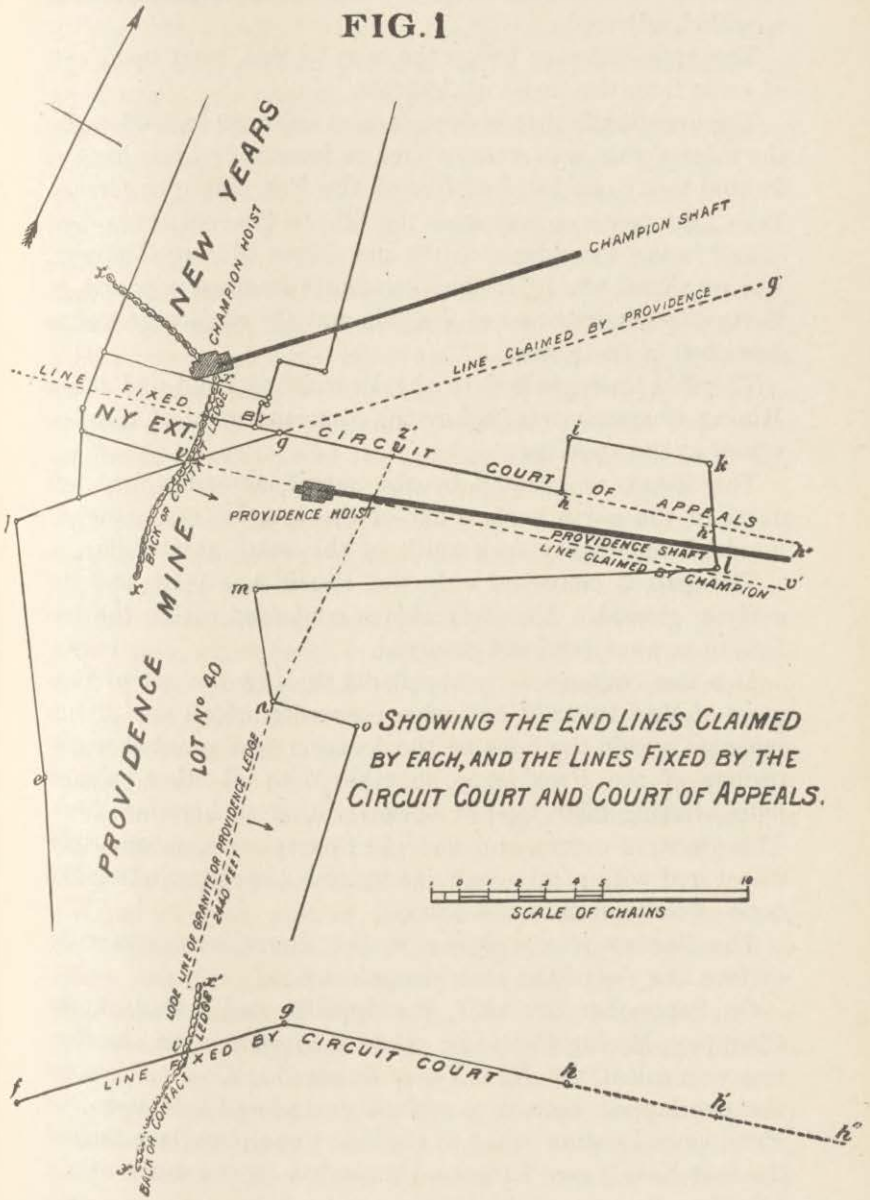
The action was brought May 24, 1892, to recover $300,000 damages for ore extracted from the ledge and carried away by the defendant, and for an injunction against further trespasses thereon.

Upon motion of appellee the action was removed to the United States Circuit Court, as involving a Federal question, where the complainant recast his pleadings so as to separate the action into a bill in equity, upon which the action is now proceeding, and an action at law for the damages alleged.

The suit in equity was tried in the Circuit Court and decided mainly in favor of the appellee.

From this decree the appellant appealed to the Court of

FIG. 1


NEW YEARS
CHAMPION HOIST
CHAMPION SHAFT
LINE CLAIMED BY PROVIDENCE
LINE FIXED BY N.Y EXT.
CIRCUIT COURT OF APPEALS
PROVIDENCE HOIST
PROVIDENCE SHAFT
LINE CLAIMED BY CHAMPION
PROVIDENCE MINE
LOT No 40
SHOWING THE END LINES CLAIMED BY EACH, AND THE LINES FIXED BY THE CIRCUIT COURT AND COURT OF APPEALS.
SCALE OF CHAINS
LINE FIXED BY CIRCUIT COURT

Appeals for the Ninth Circuit, where it was modified, and, as modified, affirmed.

The appellant now brings the case to this court upon writ of error from the Court of Appeals.

The appellant's title is deraigned as follows: In 1857, under the miners' rule and customs then in force, thirty-one locators located thirty-one hundred feet of the Providence or Granite lode. By mesne conveyances the title to this location became vested in the Providence Gold and Silver Mining Company, and on April 28, 1871, that company obtained a patent to thirty-one hundred feet of the lode and for surface ground as described in the patent.

The title thus granted to the Providence Gold and Silver Mining Company was, before the commencement of this suit, vested in the appellant.

The ledge, as granted by the patent, extends thirty feet north of the north surface line of the location and some six hundred and eighty feet south of the south surface line.

The patent conveyed only the Providence ledge and the surface ground. All other ledges contained within the surface lines were expressly reserved.

It is also contended by appellants that, by the act of Congress of May 10, 1872, exclusive possession of all the surface included within the lines of the location was granted to the owners of the Providence, together with all other lodes or ledges having their tops or apexes within such surface lines. This grant, of course, included the Contact vein, subsequently discovered within said boundaries, and now constituting the bone of contention in this action.

The Contact vein is shown in the figure, and crosses the surface line *f–g* of the Providence location.

On September 29, 1877, the appellee and defendant, the Champion Mining Company, made a location upon the Contact vein called the New Years Extension Mine. This location overlapped, both as to surface ground and lode, upon the Providence location; that is, the lode line and surface lines of the said New Years Extension extended to the south of the boundary line *f–g* of the Providence location.

Statement of the Case.

The New Years Extension Mine is shown in Figure No. 2, on page 298, together with the conflict caused by the overlap; the conflicting surface portions being shaded, and showing the Contact vein passing through it.

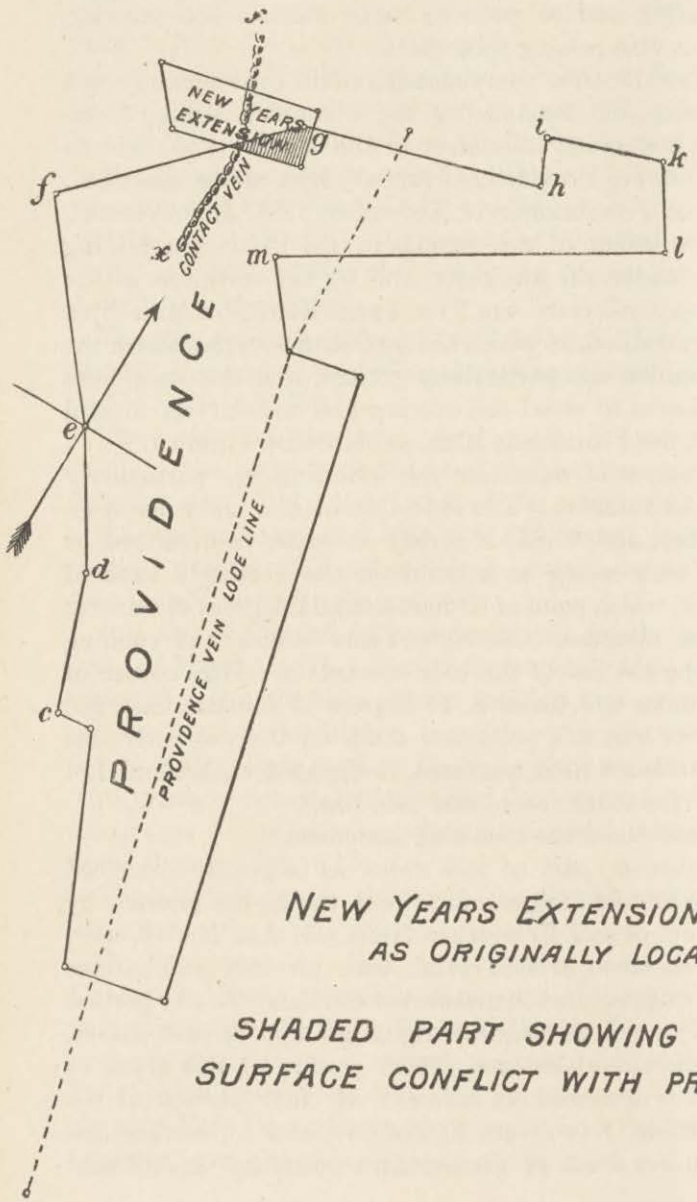
In the year 1884 the complainant and his coöwners objected to the overlap, and demanded of the Champion Mining Company that it abandon all claims to the surface and lode to the south of the Providence boundary line, above described. Thereupon, in the month of November, 1884, John Vincent, the superintendent of the defendant, the Champion Mining Company, under the authority and by the direction of the said company, relocated the New Years Extension Mine by a notice of relocation, in which the fact of the overlap under the original location was particularly recited, and the lines were readjusted so as to avoid the overlap and to conform to said line *f–g* of the Providence Mine, as shown on Figure 1.

In the notice of relocation the lode line was particularly described as follows: "The lode line of this claim as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer Creek, which point is 60 feet south, 11 degrees 45 minutes east of the mouth of the New Years tunnel, and running thence along the line of the lode towards the N.E. corner of the Providence mill, about S. 46 degrees 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence Mine, patented, designated as Mineral Lot No. 40 for the south end of said lode line."

It also contained the following statement:

"And whereas, part of this claim, as originally described and as hereby relocated, conflicts with the rights granted by letters patent of said Providence Mine, said Lot No. 40, now, therefore, so much of this claim, both for lode and surface ground, as originally conflicted or now conflicts with any portion of the surface or lode claims or rights granted by said patent, is and are hereby abandoned, which portion of this claim so abandoned is described as follows: All that portion of the above described New Years Extension Claim for surface and lode which lies south of the northern boundary line of said

FIG. 2.



NEW YEARS EXTENSION
AS ORIGINALLY LOCATED.

SHADED PART SHOWING LODE AND SURFACE CONFLICT WITH PROVIDENCE.

Statement of the Case.

Providence Mine, which runs north 43 degrees 10 minutes east, across the southeastern corner of this claim."

The New Years Extension, as relocated, is coterminous with the Providence Mine on the northerly boundary line, designated as the line *f*–*g*, running south 43 degrees west. (Fig. 1.)

That line is the only boundary between the two properties, and the only boundary of the Providence location which is crossed by the Contact ledge.

The first workings of the appellee involved no conflict with appellant. The shaft ran parallel with the Providence line, and none of the levels crossed that line until about three months before this suit was begun, when the 1000 foot level was driven across it into the ground in dispute. Subsequently the eighth and ninth levels were driven across.

The work done by the Providence was carried on through a shaft sunk on the Providence or Granite ledge, from which shaft a crosscut was run back to the Contact vein on the 600 foot level, and another on the 1250 foot level, and much of the ground now in controversy was thereby prospected and opened up by complainant and his coöwners. (See Fig. 1.)

The claims of the respective parties will be readily understood by reference to Fig. 1, which shows the relative position of all the mining properties belonging to both, with the lines claimed by them.

The portion of the Contact vein in dispute is that upon the dip of the ledge lying between the line marked "Line claimed by Providence" and the line marked "Line claimed by Champion."

The apex of the Contact vein is represented by the dotted line x–x^1, and shows the vein as far as exposed in both the Champion and Providence ground. South of x the course of the vein in the Providence ground is unknown.

The line *f*–*g* is the same line as that designated A–B by some of the witnesses.

Upon the trial the Circuit Court held that there could be but one end line for each end of the Providence location, and that the lines *g*–*h* and *a*–*p* constituted such end lines; that

Counsel for Appellant.

such lines constituted the end lines of not only the originally discovered Providence lode, but also of every other vein that might be discovered within the surface lines of the location. But, notwithstanding this holding, in entering the decree the line *f–g* was also established as an end line of the Contact vein, but for its length only, and then that from "*g*" the line *g–h*, and that line extended indefinitely eastwardly, constituted another end line for the same end of the lode, and constituted the line through which the plane determinative of all extralateral rights in the vein must be drawn.

From this decree the appellant here was allowed an appeal to the Circuit Court of Appeals.

The latter court established the line *g–h–h*[1] as the sole end line of the Contact vein, and reversed the decree of the Circuit Court in so far as it fixed the line *f–g* as an end line.

As a result of this decree the complainant was not only shut out of all extralateral rights in the Contact vein north of the line *g–h–h*[1], but also of that portion of the vein lying vertically beneath the surface lines of the Providence which extend north of that line, and which are marked upon the figures as constituting the parallelogram *h–i–k–h*[1], which was awarded to the Champion. (See Fig. 1, showing the end line fixed by the Circuit Court, and that line as subsequently fixed by the Court of Appeals, with the latter line extended in its own direction both eastwardly and westerly.)

From the judgment of the Circuit Court of Appeals the appellant has appealed to this court.

There are nine assignments of error. The first eight attack so much of the decree as establishes the line *g–h* as an end line, for the purpose of determining the extralateral right, or fails to establish the line *f–g*, and that line produced indefinitely in the direction of *g*[1] as such end line. The last two assail so much of the decree as awards to appellee the right to pursue the vein on its downward course underneath the parallelogram *h–i–k–h*.[1]

Mr. R. R. Bigelow for appellant. *Mr. Daniel Titus* and *Mr. James F. Smith* were on his brief.

Mr. Curtis H. Lindley for appellee.

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

There are two questions presented by the assignment of errors:

(1.) What are the extralateral rights of the appellant on the Contact vein?

(2.) Is appellant entitled to that portion of the Contact vein within the Providence boundaries which lies north of the north end line fixed by the court, and which is described upon Fig. 1 as the parallelogram bounded by the lines marked *h–i–k–h*?

(1.) The appellant contends that the patent of the Providence ledge was conclusive evidence of his title to thirty-one hundred feet in length of that vein. If true, this carried the northern end of the ledge thirty feet beyond the line fixed by either the Circuit Court or the Circuit Court of Appeals. It was truly said at bar: "If it is not the end line of the Providence location, then certainly there is no reason for holding it to be the end line of the Contact vein."

The language of the patent is: "It being the intent and meaning of these presents to convey unto the Providence Gold and Silver Mining Company, and to their successors and assigns, the said vein or lode in its entire width for the distance of thirty-one hundred (3100) feet along the course thereof."

The patent was issued under the act of 1866, and it is necessary, therefore, to some extent to consider that act. By it, the appellant urges, the principal thing patented was the lode, and that the northern limit of that, and hence of his rights on that was thirty feet north of the line fixed by the Circuit Court of Appeals; and hence it is further contended that as the northern and southern surface line (*g–h* and *a–p*) did not determine or limit his right to the lode under the act of 1866 — in other words, did not become end lines — they do not become end lines upon the Contact ledge ($x'-x''$) acquired under the act of 1872, but that the surface line which crosses

the strike of that ledge must be held to be the end line, and the line which fixes the rights of the parties. This line is *f–g*, Fig. 1, and, if appellant is correct, determines the controversy in his favor.

The extent of the right passing under the act of 1866 has been decided by this court.

In *Mining Co.* v. *Tarbet*, 98 U. S. 463, known as the *Flagstaff case*, the superficial area of the Flagstaff Mine was one hundred feet wide by twenty-six hundred feet long. It lay across the lode, not with it, and the company contended, notwithstanding that, it had a right to the lode for the length of the location. In other words, the contention was that it was the lode which was granted, and that the surface ground was a mere incident for the convenient working of the lode. The contention was presented and denied by the instructions which were given and refused by the lower court. That court instructed the jury that if they found Tarbet "was in possession of the claim, describing it, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute are within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways — by the length of the course of the vein within the surface; and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff

surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

And the following instructions propounded by the owner of the Flagstaff:

"By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of his surface area; and the patentee under that act takes a fee simple title to the lode, to the full extent located and claimed under said act."

Commenting on the instructions, Mr. Justice Bradley, speaking for the court, said:

"These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction."

And after stating that the act of 1872 was more explicit than that of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, he proceeded as follows:

"We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of

these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

"As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, pp. 56–58 and pp. 274–275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it."

This law was followed and applied in *Argentine Mining Co.* v. *Terrible Mining Co.*, 122 U. S. 478; in *Iron Silver Mining Co.* v. *Elgin Mining Co.*, 118 U. S. 196; and in *King* v. *Amy & Silversmith Min. Co.*, 152 U. S. 222. The locations passed upon in these cases were made under the act of 1872,

but we have seen that the intent of that act and the act of 1866, "as it respects end lines and side lines," was the same.

But appellant urges that "those cases are not in point here." We think that they are. The patent in the *Flagstaff case* appears to have been the same as here, and besides whatever the patent here it must be confined to the rights given by the statute which authorized it.

In the *Flagstaff case* the lode was claimed, and hence the right to follow it beyond the surface boundaries of the location was claimed. Here the lode is claimed and the right to follow it outside of the surface boundaries, that is, beyond the line *f–g* to the point *x*[1]. In that case the right contended for was denied on the principle applicable to end and side lines. In this case the right contended for must be denied by the application of the same principle.

But, appellant asks, admitting for the argument's sake that it (the line *g–h*) does constitute an end line of the location within the meaning of the law of May 10, 1872, does it constitute the end line of the Contact vein? And in answering the question he says: "The end line of a lode is the boundary line which crosses it regardless of whether it was originally intended as an end line or side line. Four times has this principle been sustained by this court." He then cites the cases we have cited, and claims that they "are of course conclusive of this controversy if they are in point."

Under the law of July 26, 1866, c. 262, a patent could be issued for only one vein. 14 Stat. 251. The act of 1872 gave to all locations theretofore made, as well as to those thereafter made, all veins, lodes and ledges the top or apex of which lie inside of the surface lines. Section 3 of the act, which is also section 2322 of the Revised Statutes, is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with the state, ter-

ritorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Act of May 10, 1872, c. 152, § 3; Sec. 2322, Rev. Stat.

Appellant's right upon the Contact vein is given by this statute. What limits this right extralaterally? The statute says vertical planes drawn downward through the end lines of the location. What end lines? Those of and as determined by the original location and lode, the Circuit Court of Appeals decided. Those determined by the direction of the newly discovered lodes, regardless whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The Court of Appeals was right. Against the contention of appellant the letter and spirit of the statute oppose, and against it the decisions of this court also oppose.

The language of the statute is that the "outside parts" of the veins or ledges "shall be confined to such portions thereof as lie between vertical planes drawn downwards . . . through the end lines of their locations. . . ." And Mr. Justice Field, speaking for the court, said, in *Iron Silver Mining Co.* v. *Elgin Mining Co.*, 118 U. S. 196, 198:

"The provision of the statute, that the locator is entitled

throughout their entire depth to all the veins, lodes or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins if they are not identical."

The court, however, did not mean that the end lines, called such by the locator, were the true end lines, but those which "are crosswise of the general course of the vein *on the surface.*"

This court in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, decided at the present term, *ante*, 55, reviewed the cases we have cited, and, speaking for the court, Mr. Justice Brewer said:

"Our conclusion may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this, upon the proposition that it was the intent of Congress to give

to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Mining Company* v. *Tarbet*, 98 U. S. 463–468.

These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries.

The appellant contends that by agreement, by acquiescence and by estoppel the line *f–g* has become the end line between the two claims.

This contention is attempted to be supported by; (*a*), a relocation of the New Years Extension Claim, by which it is asserted it recognized and designated the line *f–g* as the northerly end line of the Providence claim; (*b*), the testimony of the superintendent as to what took place between him and the directors before sinking the Champion shaft, and afterwards between him and a cotenant of complainant (appellant).

(*a.*) The relocation does not in terms recognize the line *f–g* as the northern end line of the Providence. Its recitals are:

"And whereas, part of this claim as originally described and as hereby relocated, conflicts with the rights granted by the letters patent of said Providence Mine, said Lot No. 40, now, therefore, so much of this claim, both for lode and surface ground, as originally designated, conflicting, or now conflicts, with any portion of the surface or lode, claims or rights granted by said patent, is and are hereby abandoned."

"Which portion of this claim so abandoned is described as follows: All that portion of the above described New Years Extension Claim for surface and lode which lies south of the northern boundary line of said Providence Mine, which runs north 43 degrees, 10 minutes east, across the southeastern corner of this claim."

It will be observed by reference to Fig. 1 that the northern

boundary of the Providence is not one line, but two lines, and it is the one which runs north 43° 10′ east across the southern corner, which is designated in the relocation of the New Years claim.

In the notice of relocation, however, the northerly line of the Providence is called the south end line of the relocated ground. The description is as follows:

"The lode line of this claim as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer Creek, which point is 80 feet S., 11 deg. 45 minutes east of the mouth of the New Years tunnel and running thence along the line of the lode towards the N.E. corner of the Providence Mill, about S. 46 deg. 15 minutes east, 200 feet more or less, to a point and stake on the northerly line of the Providence Mine, patented, designated as Mineral Lot No. 40 for the south end of said lode line. And that the Contact vein crosses in its onward course the southerly end line of said New Years Extension Claim and enters the lands and premises of plaintiff described in said bill of complaint."

It is hence contended that if the line *f–g* is the southerly end line of the New Years extension it must necessarily be the northern end line of the Providence Mine. This does not follow, nor is there any concession of it. Coincidence of lines between claims does not make them side lines or end lines. Whether they shall be so regarded depends upon the legal considerations which we have already sufficiently entered into and need not repeat. We do not say that there may not be an agreement settling end lines. One example of such an agreement was exhibited in *Richmond Mining Co.* v. *Eureka Mining Co.*, 103 U. S. 839.

(*b.*) The testimony relied on was admitted against the objection of defendants (appellees). It was as follows:

"Q. Then you may go on, Mr. Vincent, and state how you started that work, and how you planned it, and what communications you had, if any, with the board of directors of the Champion Mining Company.

* * * * *

"A. Well, I was sent up by the board of directors to do whatever work I thought was for the best of the company. I started that shaft down and had it down about 40 feet, and I reported to the board of directors in session about what work I had done, and they calculated to go to work and put up hoisting works and run that shaft down further.

"Q. What, if any, communication did you make, or was there any communication from the board to you concerning the direction of the shaft, and why any given direction was adopted for the shaft?

"A. There was none, but then I reported to the board that such was the case, that the shaft was laid out so it would never interfere with this line."

The witness further testified that he sank the shaft 540 feet and was discharged on the 1st of August, 1889, and he was further questioned as follows:

"Q. State whether at the time you were sinking that shaft you were called upon by Mr. Walrath, the complainant in this action, or his brother Mr. Richard Walrath, to make any inquiry of you concerning the construction of that shaft and what the intention was, whether to cross the Providence line or not, as marked on the map?

* * * * *

"A. Well, Mr. Walrath he happened to come along, and he made a remark to me that he wished for us, of course, to keep his line and not to cross it as he didn't want any more trouble as he did have with some other mining properties adjoining; that he didn't want any more holes in his ground, and so I answered him that I would respect his line as long as I am here.

"The Court. — That you would respect his line as long as you were there?

"A. As long as I was superintendent of the mine.

"Q. Where did this conversation take place?

"A. Right on the premises.

"Q. You were then acting as superintendent, were you?

"A. Yes, sir.

"Q. What line was referred to at that time as the Providence line; can you point it out on the map?

Opinion of the Court.

"A. Yes, sir; it is the line marked 'A B' on the map, Exhibit 4."

This testimony does not establish an equitable estoppel, nor is the corporation bound by the declarations of the superintendent. They were without the scope of his agency or authority.

(2.) The right of that portion of the Contact ledge within the boundaries of the parallelogram h–i–k–h^1 presents an interesting question. It does not appear to have been submitted to either of the lower courts, but the right by the decree of the Circuit Court is given to appellee by adjudging to it that portion of the vein on its dip which lies northeasterly of the line g–h and its continuation.

The question is a new one in this court, but we think it is determined by the principles hereinbefore laid down. It may be true that under the act of 1866 the patenting of the Providence Mine in its irregular shape was in all respects legal and proper, and that the act did not require the location to be made in the form of a parallelogram or in any particular form, and that there was no requirement that the end lines should be parallel. It is also true that under that act only one vein could be included in a location, no matter how much surface ground was included in the patent, but that under the act of 1872 possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, were given.

But rights on the strike and on the dip of the original vein and rights on the strike and on the dip of the other veins, we have decided, are determined by the end lines of the location. In other words, it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones. The appellant, under his contention, would get the right such lines would give him and something more besides outside of them. To specialize, he would get all within a plane drawn through the line g–h, and all within the planes drawn through the sides of the parallelogram h–i–k–h^1 (Fig. 1).

It may be that the end lines need not be parallel under the act of 1866; may converge or diverge, and may even do so as to new veins, of which, however, we express no opinion, but they must be straight — no other define planes which can be continuous in their own direction within the meaning of the statute. It may be that there was liberty of surface form under that act, but the law strictly confined the right on the vein below the surface. There is liberty of surface form under the act of 1872. It was exercised in *Iron Silver Mining Co.* v. *Elgin Mining Co.*, *supra*, in the form of a horseshoe; in *Montana Co. Limited* v. *Clark*, 42 Fed. Rep. 626, in the form of an isosceles triangle.

The decree is affirmed.

NEW ORLEANS *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 1. Argued January 3, 4, 1898. — Decided May 31, 1898.

Where an undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent; but when the act of one is not necessary to the act of the other, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to the performance of the other.

It being shown by the record that the railway terminus from which the extension along Claiborne street was to be made was never constructed, and that the crossing from Westwego to the land in front of the park was also never established, but, on the contrary, that the company extended its road down the river to Gouldsboro, where it made its main crossing, the right to the extension and the right to the use of the batture no longer obtains.

The suspensive condition, by which the rights of the company under the original ordinance were held in abeyance, operates also upon the lease, and the mere payment of rent did not change the nature of the suspensive condition, or work an estoppel.

Statement of the Case.

The ends of justice will be best subserved by not passing upon the third assignment of error, but the rights of both parties in relation thereto may be left open for further consideration in the court below.

THE New Orleans Pacific Railway Company became duly incorporated under the general laws of the State of Louisiana on June 29, 1875. By Article I, of its charter, it was given corporate existence for the term twenty-five years from that date. By Article III it was empowered among other things: "To lay, construct, lease, own, and use a railroad with one or more tracks and suitable turntables upon such course or route as may be deemed by a majority of the directors of said company most expedient, beginning at a point on the Mississippi River at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay via Vermilionville, in the parish of Lafayette, and Opelousas, in the parish of St. Landry, or from any of said points, or from any point within the limits of this State, and running thence toward and to the city of Shreveport, or the city of Marshall or Dallas, in the State of Texas, in such direction and route or routes as said company shall fix, and with such connecting branches in the State of Louisiana as may be deemed proper; to locate, construct, lease, own, maintain and use such branch railroads and tracks as the majority of the directors of said company may from time to time deem proper and expedient and for the interest of said company to own and to use, and lease, with the right to connect their main line with any other line or lines in other States, which shall authorize the exercise of said privilege within their limits; to establish and maintain in the city of New Orleans proper freight and passenger depots, and to connect them by tracks and ferries with the left bank of the Mississippi River, at such point or points as may be deemed most convenient for the public interest, and to use in such ferries, steamboats and other vessels, and for the purposes of such depots, tracks and ferries to acquire property by expropriation; to acquire, construct, maintain and use suitable wharves, piers, warehouses, yards, steamboats, harbors, depots, stations and other

works and appurtenances connected with and incidental to said railway and its connections, and to run and manage the same as the directors of the said company may deem to be most expedient and to the welfare of said corporation; to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, water courses, river, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana which the course of said railways may intersect, touch or cross, provided that said company shall preserve any watercourse, street, highway, turnpike or canal which its railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; to obtain by grant or otherwise from any parish, city or village within the State any rights, privileges or franchises that any of said parishes, cities or villages may choose to grant in reference to the construction, maintenance, management and use of the railroads of said company, its depots, cars, locomotives and its business within the limits of such or any of said parishes, cities and villages; to purchase or lease from any railroad company or corporation, at any authorized sale, any railroad and the charter, franchises, property and appurtenances thereof and to maintain and use the same as a part of the property of said company."

On February 19, 1876, the General Assembly of the State of Louisiana passed Act No. 14 of 1876, to confirm said charter of the railway company, with amendments thereto, which among other things declared: "That the term of existence of the said New Orleans Pacific Railway Company shall be so extended that said company by its name and under the aforesaid mentioned articles of incorporation, shall have perpetual succession and that Shreveport in Louisiana shall be the northwestern terminus of said New Orleans Pacific Railway Company, and that the main line shall be completed to Shreveport before any branches shall be constructed."

The City Council of New Orleans on November 9, 1880, adopted Ordinance No. 6695, entitled "An ordinance granting to the New Orleans Pacific Railway Company or its

assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus with one extension for passenger purposes and another one for freight purposes into and through certain streets and places in the city of New Orleans."

This ordinance read:

"Whereas, the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana state laws, is vested with authority under an act approved February 19, 1876, as follows, to wit: 'To locate, construct, lease, own and use a railroad, with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient,' and to and between the points and places mentioned and implied in said act, and is hereby authorized 'to establish and maintain in the city of New Orleans proper freight and passenger depots,' and to construct wharves, piers, warehouses, yards, depots and stations; and to 'construct and maintain its said railroads or any part of the same, and to have the right of way therefor across and along and upon any street, highway, turnpike or canal in the State of Louisiana which the course of said railways may intersect, touch or cross. Provided the said company shall preserve any street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily;' and,

"Whereas it is for the interest of the city of New Orleans that the southern terminus of said railroad shall be fixed and established within the city limits; and,

"Whereas the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the east bank of the Mississippi, from a crossing near Baton Rouge to some point in the city of New Orleans, between the new canal and Melpomene street, and to establish its terminus at such point, on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street, for passenger purposes; and

shall also grant the right to extend its tracks from such terminus north of Claiborne street by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt railroad on St. Joseph street, and on the levees by other railroad companies in the city of New Orleans.

"Now, therefore, for the purpose of permanently securing to the city of New Orleans the advantages that will result from locating and maintaining the terminus of the said New Orleans Pacific Railway within the city limits:

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans Pacific Railway Company be, and it is hereby, authorized and empowered to locate, construct and maintain a railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, to and from such point as shall be selected by such company as its terminus, between the new canal, Claiborne canal and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, yards, warehouses and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers within the city limits.

"SEC. 2. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street; and to operate the same by steam or otherwise for the transportation of passengers; Provided, That should it become necessary for the building of

depot or laying of tracks to remove the Claiborne market, then the said New Orleans Pacific Railway Company obligate themselves to rebuild the same at their own expense on such lots to be purchased by the company as the city shall designate. The said market to be rebuilt under the supervision and instructions of the administrator of waterworks and public buildings.

"SEC. 3. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby, authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad upon lines and levels to be furnished by the city surveyor, across Claiborne canal into and through such street as may hereafter be lawfully selected to the river front, with the right to extend its tracks through Front street, Water and Jackson streets, connecting with the depots of the Louisville and Nashville Railroad Company, Morgan's Louisiana and Texas Railroad, and the Chicago, St. Louis and New Orleans Railroad, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate by steam or otherwise any railway or railway tracks now existing in the streets of the city of New Orleans.

"SEC. 4. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period said right of way privileges shall last, and should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus within the city limits, then this grant shall cease and terminate, and be without force and effect from the date of such abandonment, and the further condition that all construction work within the city limits shall be executed under

the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to its terminus in this city within two years from the promulgation of this ordinance.

"SEC. 5. Be it further ordained, That the rights herein granted on Claiborne street shall apply only to a railroad for passenger purposes; that the rights to be granted from north of the Claiborne canal to the river front and hereby granted along the river front and in parallel streets, shall apply to a railroad for freight purposes only, and shall not be used as a thoroughfare for the transportation of passengers without consent of this council."

On December 3, 1880, the following ordinance, numbered 6732, was adopted:

"Whereas, on the ninth day of November, 1880, the Ordinance No. 6695 (administration series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus; with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans; and it was contemplated by said ordinance that a street should be duly selected whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front through a street to be selected; now, therefore,

"SECTION 1. Be it ordained by the City Council of the City of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and it and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor across Claiborne canal, into and through Thalia street, to the river

front, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans; provided, that there shall be but one track laid on Thalia street, from Claiborne to Water street.

"SEC. 2. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and to maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus within the city limits, then this grant shall cease and terminate and be without force or effect from the date of such abandonment; and upon the further condition that the said company, at the time of laying their track upon Thalia street, shall pave said street, from Pilie street to Rampart street, including all intersections of said Thalia street, with blocks of the best hard Boston granite, oblong in shape, not less than eleven inches and not more than fourteen inches in width, and not less than sixteen inches nor more than twenty-four inches in length, and from nine to ten inches in thickness; they shall be well quarried, having parallel sides and ends, and the upper side free from lumps. The blocks adjoining the gutterstones shall be cut at an angle of forty-five degrees with the sides, so as to be laid diagonally, and said pavement shall extend from curb to curb; and the said company shall at the time of laying their track pave with round or cobblestone pavement, laying with gutterstones the gutters of said street, from the end of the block paving at Rampart street to Claiborne street, with the privilege of using for the pavement the cobblestones removed from that part of the street to be paved with square block — the rails to be laid in the pavement so that the top of the rails shall be flush with the

surface of the pavement; and upon the further condition that said railway company shall at all times keep said pavement from curb to curb in repair; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

"SEC. 3. Be it further ordained, That upon the failure of said company to comply within three days with any notice of the department of improvements to repair any portion of the street or streets through which said company shall lay its tracks, they shall be fined twenty-five dollars for each and every day they fail to comply with said notice; said fine to be recoverable before any court of competent jurisdiction."

In 1881 the New Orleans Pacific Railway Company purchased a railroad already constructed by the New Orleans, Mobile and Texas Railroad Company on the west bank of the Mississippi River, extending from Bayou Goula, a point near Baton Rouge on the west bank, to Westwego, also on the west bank, and just opposite New Orleans. Subsequently on March 29, 1881, the city council passed an ordinance, No. 6938, as follows:

"Whereas the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile and Texas Railroad Company, on the west bank of the Mississippi River, between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of Ordinance No. 6695, Administration Series, passed on the ninth day of November, 1880; such line to cross the Mississippi River from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Foucher property; thence to extend by the best and most

practicable route to the designated terminus, between the new canal, Claiborne canal and Carrollton avenue:

"Now, therefore, for the purpose of securing to the city of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as hereinabove recited:

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and are hereby, authorized and empowered to locate and maintain a railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient, useful and appurtenant to said railroad, from such point on the river front as its crossings from Westwego shall be located at in the vicinity of the Upper City Park, along the western border of the said city park, and from thence by the best and most practicable route to its designated terminus east of Carrollton avenue.

"SEC. 2. Be it further ordained, etc., That the city of New Orleans agrees to lease unto the New Orleans Pacific Railway Company, its successors and assigns, for the period of ninety-nine years, and at the price of five hundred dollars per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City Park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said grounds such ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company, its successors or assigns, and all vessels lying at or using said wharves with such consent, shall be exempt from the payment of levee or wharf dues to the city of New Orleans; the proceeds of such lease

shall be applied by the city to the improvement of said park.

"SEC. 3. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right to extend its tracks from the said ground so leased between the Upper City Park and the river front, easterly along said river front to connect with the Belt road at Louisiana avenue, and to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by section 3 of Ordinance 6695, Administration Series, adopted November 9, 1880, and by Ordinance No. 6732, same series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street the trains of said company shall be run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of the company.

"SEC. 4. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred for the term of its charter and from and after the expiration of the existing lease of the city wharves, to enclose and occupy for its purposes and uses, that portion of the levee, batture and wharf in the city of New Orleans in front of the riparian property, acquired or to be acquired, between Thalia and Terpsichore streets, and to erect and maintain thereon at its own expense such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such consent and on the business of the company shall be exempt from the payment of levee or wharf dues to the city of New Orleans.

"Said wharves and other structures shall be lighted and policed by said company at its own expense.

"Any vessel lying at these wharves with the consent of the

company, but not on its business, or not for the purpose of discharging or receiving freight or passengers to or from said company as a carrier, shall be liable to the city for usual wharf or levee dues.

"Any vessel using said wharf to receive any freight not coming to or going from said company as a carrier shall pay usual wharfage dues to the city.

"In consideration of the permission herein given the company will build three hundred feet of new wharf at such point between Terpsichore and Jackson streets, for the city, as the administration of commerce may indicate, and will pave Pilie street between Thalia and Terpsichore streets, and Terpsichore street between Pilie and Front with square blocks of granite or with blocks of compressed asphalt, and keep the same in good order.

"The rights conferred by this section shall not be held to interfere with the rights of the city to police any part of the river front.

"SEC. 5. Be it further ordained, etc., That the mayor be, and he is hereby, authorized and directed to enter into a proper notarial contract of lease for the purpose of carrying out the provisions of the second section of this ordinance.

"SEC. 6. Be it further ordained, etc., That the right of way, franchises and privileges herein and heretofore granted to the New Orleans Pacific Railway Company are and were granted on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company, at any time hereafter, remove its terminus from within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of public improvements and the administrator of commerce; and the

further condition that said railway company shall construct or control a line of road, ready for public use, from a crossing of the Mississippi River to its designated terminus in this city, within two years from the promulgation of this ordinance."

The New Orleans Pacific Railway Company, on June 20, 1881, entered into a written agreement with the Texas and Pacific Railway Company, a corporation organized under the laws of the United States, by the terms whereof the New Orleans Pacific Railway Company consolidated itself with the Texas and Pacific Railway Company on the terms and conditions specified in the agreement, "by granting, bargaining, selling," etc., "unto the Texas and Pacific Railway Company all the franchises, corporate rights or privileges of the New Orleans Pacific Railway Company, together with its track, roadbed, buildings, rolling stock, engineer's tools, bonds, stocks, grants, privileges, property (real and personal) and every right, title and interest in and to any franchises or property, real or personal, and all rights of every name and kind in which the New Orleans Pacific Railway Company had any right, privilege or interest, situated and being in the State of Louisiana or in the State of Texas, or elsewhere, it being declared by the agreement that the object of the agreement was to so merge the rights, powers and privileges of the New Orleans Pacific Railway Company into the Texas and Pacific Railway Company that the Texas and Pacific Railway Company, under its own chartered name and organization should, without impairing any existing right, exercise in addition thereto, all the powers, rights, privileges and franchises and own and control all the properties that the New Orleans Pacific Railway Company then exercised and owned, or by its charter and by-laws it had the right to exercise, own or control."

Thereafter, on July 11, 1882, the City Council adopted Ordinance No. 7946, as follows:

"An ordinance supplementary to Ordinances 6695, 6732 and 6938, Administration Series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market.

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"Whereas, by section 2, of Ordinance 6695, Administration Series, a right was given to the New Orleans Pacific Railway Company, or its assigns, to locate, construct and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a proviso that should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same at their own expense on such lots as the city shall designate; and

"Whereas, by Ordinances Nos. 6732 and 6938, Administration Series, certain rights have also been granted to said company and its assigns with reference to the said Claiborne street and to Thalia street, and the company has built its road from Baton Rouge to New Orleans, crossing Thalia street, and established its terminus in the city limits at Thalia street and the levee, and is preparing also to cross from Westwego to the City Park, and thence to Claiborne street; now, therefore,

"Section 1. Be it ordained by the Council of the City of New Orleans, That the Administrator of Improvements, the Administrator of Commerce, and the Administrator of Waterworks and Public Buildings, be, and they are hereby, authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a proces-verbal thereof in the office of the Administrator of Waterworks and Public Buildings.

"Sec. 2. Be it further ordained, That whenever said company or its assigns shall find it necessary to remove said building it shall be rebuilt on said lots so selected and as prescribed in said original ordinance.

"Sec. 3. Be it further ordained, That in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper drawbridge."

Statement of the Case.

The company also sent its officers with certain city officers in the summer of 1882 to inspect lots thought suitable at that time for the Claiborne market, when the removal of the market might be decided upon; and stated by its officers that the lots would be purchased, the market taken down and another market put up, but that if this was not satisfactory to the city, the city should remain silent for a while, because if it were known the railroad wanted the lots, too much would be asked for them. In the summer of 1883, the company demanded from the city surveyor lines and levels for a track on the river front from Louisiana avenue to Jackson street, and the city surveyor not furnishing them, instituted suit June 11, 1883, in the civil district court for the Parish of Orleans, where the same is still pending, to compel the city surveyor by writ of mandamus to furnish such lines and levels. The company also paid $1000 rent for the two years ending March 8, 1882, and 1883, under an alleged lease of the batture in front of the Upper City Park and made a tender of $500 for rent under said alleged lease for the year ending March, 1884; and acquired by private ownership four squares of ground adjoining the Upper City Park, two squares fronting the river and two in the rear thereof.

The record showed that the railroad company did not establish its terminus in the rear of the city of New Orleans at the place designated by Ordinance 6695 of November 9, 1880, and referred to in Ordinance 6732 of December 3, 1880; that the company did not as stated or required in Ordinance 6938 of March 29, 1881, make its terminus on the west bank of the Mississippi River at Westwego, and there erect its wharves, inclines and structures, necessary for the purpose of crossing the river at that point so as to reach the east bank on the batture in front of the City Park; and that the company did not build its road from the batture along the edge of the park through the designated streets to the point in the rear of the city where the proposed terminus was to be located, under and in accordance with the provisions of the city ordinances, which have already been stated. And the record also disclosed that instead of making Westwego its terminus on

the west bank of the river, the railroad was prolonged nine miles further down the bank of the river to a point designated as Gouldsboro; and this latter point being approximately opposite the foot of Thalia street on the east bank of the river, wharves and inclines were constructed at Gouldsboro, whence the traffic of the road was carried across the river to the foot of Thalia street in the City of New Orleans, where depots and structures have been established by the company.

On the 15th of April, 1884, the City Council adopted an ordinance, No. 685, Council Series, as follows:

"An ordinance repealing certain sections of the Ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.

"Be it ordained, That sec. two (2) of the Ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be, and the same is, hereby repealed and revoked."

June 16, 1886, the City Council adopted an ordinance, No. 1828, Council Series, as follows:

"An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under Ordinance 6695, A. S., adopted November 9, 1880; No. 6732, A. S., adopted December 3, 1880; No. 6938, adopted March 29, 1881; No. 7946, adopted July 11, 1882; and

"Whereas the city of New Orleans granted to the Pacific Railway Company the right to extend its tracks through Claiborne street to Canal, to erect a passenger depot on Claiborne street near Canal street, construct tracks from Claiborne street to and through Thalia street to the river; and

"Whereas the original grantee company has merged its identity with that of an alien corporation, which itself is now in the hands of a receiver appointed on the prayer of an alien corporation; and

"Whereas such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

"Whereas by the acts of said New Orleans Pacific Railway

Company such rights have been abandoned, and it is necessary for the public good that Claiborne street, between Common street and the Old Basin, shall be used for steam and horse railway and depot purposes:

"Therefore, be it ordained by the Council of the City of New Orleans, That all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, or to erect any depot thereon, whether acquired through or by the ordinances above enumerated or through or by any other ordinance of the council of the city of New Orleans, be and the same are hereby repealed and revoked."

July 2, 1886, the receivers of the Texas and Pacific Railway Company, and the Fidelity Insurance Trust and Safe Deposit Company, filed a bill of complaint in the Circuit Court of the United States for the Eastern District of Louisiana, which alleged the incorporation of the Texas and Pacific Railway Company under certain acts of Congress, the acquisition by the Texas and Pacific Railway Company of all the property and franchises of the New Orleans and Pacific Railway Company, the appointment of receivers of the Texas and Pacific Railway Company, the adoption by the city of New Orleans of Ordinance No. 6695, on November 9, 1880; of Ordinance No. 6732, on December 3, 1880; of Ordinance No. 6938, on March 29, 1881; the full and fair compliance by said New Orleans and Pacific Railway Company and the Texas and Pacific Railway Company with the conditions imposed by said ordinances; the adoption of Ordinance No. 7946; the repealing ordinances, No. 685, Council Series, adopted April 24, 1884, and No. 1828, Council Series, adopted June 8, 1886; the violation by the adoption of said ordinances of the contract created by Ordinances Nos. 6695, 6732 and 6938, Administration Series, and prayed that Ordinances No. 685 and No. 1828, Council Series, be adjudged and decreed to be illegal and injurious to complainants, and be cancelled, and the right of the Texas and Pacific Railway Company, under Ordinance No. 6695, to lay its tracks and build a passenger depot on the

neutral ground of Claiborne street, near Canal street, and to remove the Claiborne market, be declared and decreed, and its right to the lands of said park batture, under the second section of Ordinance No. 6938, be declared and decreed; and its right to have lines furnished by the proper official of the city for its route from Louisiana avenue to Jackson street, along the river front, under the third section of said ordinance, be declared and decreed and specifically enforced.

That the city of New Orleans be enjoined and restrained from in anywise executing Ordinance No. 685 and Ordinance No. 1828, Council Series, and from granting to any other person or corporation the rights sought to be taken away by said Ordinances Nos. 685 and 1828.

The city of New Orleans filed its answer, November 1, 1886, which admitted the incorporation of the Texas and Pacific Railway Company; the incorporation of the New Orleans Pacific Railway Company; the contract entered into between the New Orleans Pacific Railway Company and the Texas and Pacific Railway Company, averring, however, the effect of said contract to be that the Texas and Pacific Railway Company was held and bound to all the obligations imposed upon the New Orleans Pacific Railway Company, and was affected by all the equities existing between the New Orleans Pacific Railway Company and the city of New Orleans; the appointment of the receivers; the adoption of Ordinance No. 6695, on the 9th of November, 1880; Ordinance No. 6732, on December 3, 1880; Ordinance No. 6938, on March 29, 1881; the failure on the part of complainants to comply with the obligations imposed by said ordinances; the nullity of the lease of the batture in front of the Upper City Park, purported to be granted by Ordinance No. 6938, and the nullity of the grant of the right to build a depot on the neutral ground of Claiborne street, said batture in front of said park and said neutral ground being dedicated to public use; and the legality of the repealing Ordinances 685 and 1828, Council Series.

On the 3d of February, 1887, complainants filed a supplemental bill, which alleged that under the ordinance set forth in the original bill of complaint, the wharf of the Texas and

Counsel for Parties.

Pacific Railway Company, its transfers and incline between Thalia and Terpsichore streets, at New Orleans, had been duly constructed and used for about five years, and in like manner and during the same time the tracks of said railway, connecting its transfer facilities and its depots and sheds at its Thalia street terminus, had been laid and used in Pilie and Water streets, and along the river front from Thalia street up to about Race street; that it had become necessary for the business of said railway to lay a small spur track to connect said wharf above the transfer slip with the said tracks on Pilie and Water streets; that the complainants had applied to the city surveyor for lines and levels of said spur track; that the city surveyor refused to grant said lines and levels under a certain resolution of the council of September 15, 1885, prohibiting him from giving any lines for such work in the street without submitting the question to the council; that said resolution was illegal and a breach of complainants' contract, and that interference by the mayor of the city with complainants' building said spur track was apprehended.

Upon these allegations a writ of injunction was prayed for, restraining the city from interfering with complainants in the work of building said spur track to connect the wharf above the transfer incline between Thalia and Terpsichore streets with the tracks of the railway between Thalia and Water streets, along the river front, and in the work of strengthening and filling up said wharf and driving piling to reach the same with said spur, and for a decree as prayed for in their original bill.

Upon this supplemental bill a restraining order was granted which, by agreement, was to stand as an injunction pending suit.

On the 23d day of June, 1891, a final decree in favor of complainants, granting in full the prayer of their bill, was rendered.

From this decree the city of New Orleans appealed.

Mr. Samuel L. Gilmore for appellant.

Mr. W. W. Howe for appellee. *Mr. John F. Dillon* was on his brief.

Opinion of the Court.

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

The assignments of error relate to three subjects: First, the batture or space in front of the City Park, embraced in the lease made by the city to the railroad company in execution of the terms of the city ordinance; second, the construction of a track on Claiborne and Canal, and the building on Claiborne near Canal of a passenger depot; and, lastly, the wharfage rights claimed by the railroad company at the foot of Thalia street in virtue of section 4 of Ordinance No. 6938.

The argument as to the first and second assignments is, that the right granted to the railroad company by Ordinances 6695, 6732 and 6938, to extend its track from the point designated as its terminus, in the rear of the city along Claiborne to Canal, and there to build a passenger depot, as also the lease, which, to carry out the ordinance, empowered the railroad company to use the batture in front of the park, and to construct its railroad along the edge thereof through certain designated streets to the rear of the city, were all granted to the railroad company as accessory rights, depending for their existence upon the crossing at Westwego and the location by the railroad company of its terminus in the rear of the city. In other words, that these rights were given to the railroad company, subject to conditions precedent, or to use the language of the law of Louisiana, subject to suspensive conditions. It is further contended: First, that in consequence of the failure of the railroad company to cross at Westwego and to locate its terminus as aforesaid, and its election, on the contrary, to continue its road down the river to Gouldsboro and there cross the river, it never acquired the right to enjoy the privileges above mentioned, and hence that the repealing ordinances are valid. Second, that even if the rights in favor of the company above mentioned were not granted to it on a suspensive condition, they were clearly subject to a resolutory or dissolving condition, arising from the obligation to cross at Westwego and to locate the terminus in the rear of the city at the point designated in the original

ordinance, the contention being that the failure to do so within the period named in the ordinance authorized the city to treat the contract as dissolved and pass the repealing ordinances in question. The railroad company meets these propositions by denying that crossing at Westwego and the location of the terminus in the rear of the city, at the point named in the original ordinance, was made a condition suspending the operation of the grant of the rights above stated, and argues that even if it be conceded that the location of the terminus at the point originally pointed out created a condition, it was not a suspensive but a resolutory one. Although it is admitted that the happening of a resolutory condition dissolves the contract, yet such consequences, it is asserted, do not arise from the mere happening of the condition, and cannot be availed of by one of the contracting parties of his own will, since before the resolutory condition can be invoked it must be established by a suit brought that such condition has arisen and that the effect of its existence has been to dissolve the contract. That is, the claim is that under the law of Louisiana a dissolving or resolutory condition does not operate upon the contract *proprio vigore*, but requires the judgment or decree of a court to give it effect, and that before finding a contract dissolved in consequence of a resolutory condition, the court has the power to obviate the effect of the condition by giving further time to perform the act from which the condition is claimed to have arisen, if, in its judgment, the equities of the case so require.

The question which first arises is, was the right of the railroad company to the property in front of the park and to the track on Claiborne street, including the construction of a passenger depot on Claiborne near Canal, subject to suspensive conditions. The Louisiana Civil Code provides as follows:

"ART. 2021. Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.

"ART. 2022. Conditions, whether suspensive or resolutory, are either casual, potestative or mixed."

"ART. 2024. The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder."

In defining the suspensive condition the Louisiana Code says:

"ART. 2043. The obligation contracted on a suspensive condition, is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties."

These provisions of the Louisiana Code are like those of the Code Napoleon on the same subject. Articles 1168, 1170, 1181.

In *Cornell* v. *Hope Insurance Company*, 3 Martin, N. S. 223, 226, the Supreme Court of Louisiana said, in respect of conditions precedent:

"They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional, when it depends on a future or uncertain event, says our Code. The event then must be shown to make the obligation binding on the party against whom it is presented. For until it takes place, he is not bound to perform what he has promised. C. Code, 272, Art. 68. There is an exception to this rule in regard to the dissolving condition. But in relation to all others it is true, and it is a matter of no moment whether we say the obligation is suspended until the condition is performed — or that the performance of the condition must precede the execution of the obligation. C. Code, 274, Art. 81 and 3; Toullier, Droit Civil Francaise, liv. 3, tit. 3, chap. 4, No. 472; Pothier, Traité des Ob., No. 202."

"The effect of a suspensive condition, as its name necessarily implies, is to suspend the obligation until the condition is accomplished or considered as accomplished; till then nothing is due; there is only an expectation that what is undertaken will be due; *pendente conditione nondum debetur sed spes est debitum iri.*" (Pothier, Traité des Ob., 218.)

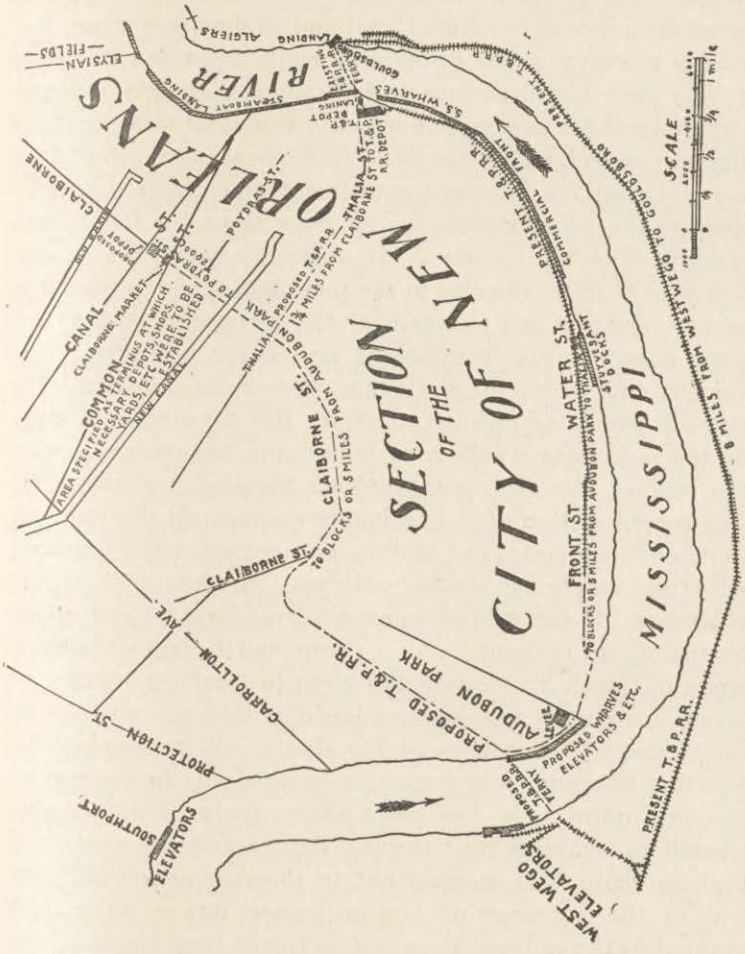
The suspensive condition under the Louisiana Code is the equivalent of the condition precedent at common law.

The general principles in respect of conditions precedent are set forth sufficiently for the purposes of this case by Chief Justice Shaw in *Mill Dam Foundry* v. *Hovey*, 21 Pick. 440, cited by appellant. Where the undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been understood by the parties and is to be collected from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. See *Cutter* v. *Powell*, 2 Smith's Leading Cases, 17, and notes.

In examining the contract embodied in the ordinances it is essential to have in mind the particular territory to which the ordinances relate, and we, therefore, insert on page 335 an outline sketch extracted from a map of the city of New Orleans contained in the record.

The original Ordinance 6695 contemplated that the proposed railroad would be built upon the west bank of the Mississippi River, New Orleans being upon the east bank, and that the road would cross that river to the east bank some

hundred or more miles above New Orleans, coming to that city on the east bank, and entering in the rear of the city, that is, in that portion of the city lying a considerable distance back from the river. The purpose of the ordinance was



clearly indicated by its title, which declared that it was intended to grant "to the New Orleans Pacific Railway Company or its assigns the right to establish its terminus within the city limits and to construct, maintain and operate a railroad

to and from such a terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans." The preamble to the ordinance recited the desire of the railroad to enter the city at about a certain point, and to construct its terminus between the New Canal and Melpomene street, providing the city would grant the right to extend its tracks "*from such terminus* into and through Claiborne street to Canal street for passenger purposes; and shall also grant the right to extend its tracks *from such terminus* north of Claiborne Canal by the most convenient and practicable route through the public streets to the river front for freight purposes." The first section of the ordinance grants the railroad the right to enter the city to the point stated in the preamble, and to construct and maintain at the terminus necessary depots, shops, yards, warehouses and other structures, convenient and useful for the transaction of its business. The point at which the right to construct this terminus was given by the ordinance is embraced within the triangular space in the rear of the city as marked on the sketch above given. The second section of the ordinance empowered the company to "locate, construct and maintain *an extension of* its railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, . . . into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street." A glance at the sketch will make clear the fact that Claiborne street thus designated was in the rear of the city, quite near the point where the railroad had contracted to establish its terminus, depots and structures, and that the route thus mapped out in the very nature of things and in the language of the ordinance was a mere right granted to the railroad to *extend* its tracks from the terminus, which the railroad was under the obligation to build, to and along the designated route to the point indicated on Claiborne and Canal. The third section of the ordinance obligated the city to designate a street from the point where the terminus

was selected, and where the company was to establish itself, through which it could build an extension for the purposes of its freight business to the river front. On the face of this ordinance it is apparent that the rights thus given the railroad to extend along Claiborne to Canal for passenger purposes, and along a street to be designated to the river for freight purposes, were mere accessories to the obligation imposed by the ordinance upon the railroad to build its depots, structures, warehouses, etc., at the point indicated, and that the incidental rights of extension from the terminus to the other points could have no existence, if no terminus was established from which the extensions could be made. Reading the provisions of the ordinance with the preamble and the title, it cannot reasonably be controverted that the rights of extension were granted upon the suspensive condition that the railroad should terminate at the point indicated, and there build the shops and depots from which the right to extend its tracks was conceded. And this is, if possible, made more certain by considering the fourth section, which, in express words, provides that the privileges of extension granted were dependent upon the establishment of the terminus at the point indicated, and would cease to exist if, after the establishment of the terminus, the railroad company should abandon it. The language of the fourth section is as follows:

"That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus within the city limits, then this grant shall cease and terminate, and be without force or effect from the date of such abandonment; . . . and it is still made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to

its terminus in this city within two years from the promulgation of this ordinance."

The words "the terminus of said road" and "said terminus" used in this fourth section, clearly refer to the terminus fixed by the ordinance, and where the railroad agreed to establish its shops, roundhouses, etc. It follows, then, that the ordinance granted a right to the railroad company to enter the city to reach a designated point, and imposed upon the company the obligation to erect its depots, shops, warehouses, etc., at that point; that in consideration of this obligation assumed by the company, to be performed within two years, a right was given to it to *extend* from the depot so designated a passenger track to a given point, and a freight track to another point; that the two rights of extension were the mere resultants of the principal obligation imposed upon the company, in consideration of which the rights to the extensions were conceded; and that the ordinance, in addition, in order to remove all question that the incidental rights of extension were dependent upon the principal obligation to establish a terminus at the point named, provided that, even after the fixed terminus was established, if it were abandoned, the company should cease to enjoy the right of extension along Claiborne to Canal which the original ordinance granted. Thus there were plainly created, first, a suspensive, and, after the work was done, a resolutory condition.

Nor is there anything in Ordinance 6732, adopted on December 3, 1880, which changed the rights of the parties. That ordinance reiterated and reasserted the nature of the privilege covered by the concession made by the previous ordinance, and designated Thalia street, which is marked on the sketch, as the one through which the railroad company should build the track for freight purposes in compliance with the obligations assumed by it under the first ordinance.

This brings us to the consideration of the ordinance numbered 6938, passed in March, 1881. The purpose of that ordinance, and the change in condition which rendered its adoption necessary, is stated with great clearness in the preamble thereof:

"Whereas, the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile and Texas Railway Company on the west bank of the Mississippi River, beyond Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of Ordinance No. 6695, Administration Series, passed on the 9th day of November, 1880; such line to cross the Mississippi River from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Foucher property; thence to extend by the best and most practicable route to the designated terminus between the New Canal, Claiborne canal and Carrollton avenue:

"Now, therefore, for the purpose of securing to the city of New Orleans, the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as herein above recited."

The ordinance then proceeds in section one to authorize the railroad to maintain wharves, inclines, etc., on the river front at the Upper City Park from such point on the river front "as its crossings" from Westwego shall be located at, and from this point to build a track along the western border of said City Park, and from thence by the best and most practicable route to "its *designated terminus* east of Carrollton avenue." The second section grants to the railroad land in front of the City Park belonging to the city, on the borders of the river, for the purpose of establishing the crossing of the road as recited in the first section. The third section gives the company the right to lay certain tracks down the river front, in other words, to connect the newly authorized tracks with those existing at or near Thalia street. The fourth section granted the company the right to make certain structures at the foot of Thalia street, the point to which the extended freight track referred to in the previous ordinances was to terminate, and at which, as we shall hereafter see, the company actually made its crossing from the west bank, and

where it now maintains its terminal facilities. The rights covered by this section are those to which the third assignment of error relates and are not involved in the inquiry now being pursued. The fifth section authorized the mayor of the city to enter into a contract of lease with the railroad for the piece of ground in front of the City Park referred to in the ordinance, and the sixth section declared that the grant referred to was made upon the condition of the establishment of "its terminus within the city limits."

Referring to the sketch, and considering the record and the terms of this ordinance, the situation was this: The railroad company having obtained a concession from the city of a right to enter the city on the east bank in a particular direction and to build its terminus at a point designated, and having received authority, if it did the foregoing things, to make certain extensions, found it necessary, in consequence of its change of route, to obtain a further consent from the city. The change of line was this: Instead of building its road on the west bank to a point one hundred or more miles above New Orleans, and there crossing the river and coming thence into the city in the rear thereof, as designated in the original ordinance, the company having bought a road on the west bank, the terminus of which was Westwego, about opposite the City Park, asked and was allowed that it be exempted from reaching its designated terminus by entering the city in the rear thereof, and that it be granted the right to establish a crossing from Westwego to the land in front of the City Park, so that from the land thus conceded the railroad might reach the point where it had contracted that it would make its permanent establishment. The argument that this ordinance gave the railroad the power to establish a new or different terminus from that referred to in the original ordinance, because the place where the terminus was to be is referred to indefinitely in the ordinance as between the New Canal, Claiborne canal and Carrollton avenue, is untenable. Indeed the ordinance contains not a word relieving the railroad from the obligation to establish and maintain the terminus indicated in the previous ordinances. On the contrary, the preamble de-

clares that the new route was granted to the railroad to enable it to reach "the designated terminus between the Claiborne canal and Carrollton avenue," which is the situation originally described. It further recites that it is passed for the purpose of enabling the railroad to locate and permanently maintain "the terminus . . . within the limits of the city of New Orleans, *as hereinabove* recited."

In stating the purpose of the grant of the new right of way from the point of landing at the City Park opposite Westwego along the line of the park over the route indicated, the first section in the ordinance declares it to be given to afford the railroad the "most practicable route to its designated terminus east of Carrollton avenue." True it is that in section six, in referring to the previous obligations of the company to establish its terminus, the words used are that the grantee shall permanently establish "its terminus within the city limits." But, manifestly, the words "its terminus" as used there refer to its terminus as defined not only in the ordinance in question but in the prior ordinances by which the grant was made.

It being shown by the record that the terminus from which the extension along Claiborne street to Canal was to be made was never constructed, and that the crossing from Westwego to the land in front of the park was also never established, but, on the contrary, that the company extended its road down the river to Gouldsboro where it made its main crossing, it needs no reasoning to demonstrate that the right to the extension down Claiborne street and the right to the use of the batture in front of the City Park no longer obtains. The claim of the corporation really amounts to this: That, having had certain accessory rights conferred upon it in the event it discharged particular obligations, it can disregard the obligations, escape the burdens resulting therefrom, and yet hold on to all the rights which depended for their existence upon the performance of the obligations which the company has disregarded. The ordinances cannot be properly construed as authorizing an extended track to be built when the point from which the extension was to be made has never come into existence. They cannot be read as dedicating to the use of the

railroad, under the terms of the ordinances, the land in front of the City Park, when such use was accorded to the railroad solely to enable it to accomplish a purpose which it has declined to effectuate by carrying its main crossing to another and a far distant point. In reaching these conclusions we are not unmindful of the argument predicated on the supposed effect of ordinance numbered 7946 A. S. The title of this ordinance indicates its purpose. It is as follows:

"An ordinance supplementary to ordinances 6695, 6732 and 6938, Administration Series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market."

The preamble of this ordinance recites the two ordinances conferring the right to build the extension on Claiborne street and states this right to be one of maintaining "an extension of its railroad through Claiborne street," and after reciting the fact that the railroad had crossed at Thalia street, and established its terminus there, declares that the railroad is preparing also to cross from Westwego to the City Park, and thence to Claiborne street. The ordinance then proceeds to provide for arrangements for removing the market from Claiborne street in order to allow the extension on that street to be built. The argument which is based upon this ordinance is this, that, as at the time this ordinance was passed, the railroad had crossed from Gouldsboro to Thalia street and established its terminus there, as is recited in the ordinance, hence it is asserted the ordinance recognizes the fact that the railroad was entitled to the extension on Claiborne street despite the fact that it had not established its terminus as required by the ordinances from which the right to the extension on Claiborne street arose. But this overlooks the fact that in the very sentence upon which reliance is placed reference is made to the ordinance giving the corporation the right to build from the City Park to the "designated" terminus. One portion of the sentence cannot be separated from the other. The most that can be said of the argument advanced, from the text of this ordinance, is that it seeks by implication and remote deduction to absolve the company from the obligation imposed

upon it when the accessory right of extension down Claiborne street was granted, and thus to enable the company to retain the incidental right, when it had relieved itself of the obligation upon which the right rested. It is not to be doubted that the rule is that contracts are not to be so violently construed as to destroy rights in consequence of suspensive conditions, but it is also equally obvious that they are not to be so interpreted as to relieve one of the parties to a contract from the obligations resulting therefrom and thereby destroy the suspensive condition plainly written therein. Corporations do not take public grants and privileges by implication, and where express and positive obligations are imposed in making a grant, these obligations cannot without violating an elementary canon of interpretation be frittered away in consequence of loose implications made by way of reference in subsequent municipal ordinances. The formal contract of lease executed by the city of the batture in front of the City Park took its origin from and was sanctioned by the ordinance granting the right to cross the river from Westwego to the land covered by the lease in order to enable the corporation to carry its tracks from thence to the terminus which it contracted to establish under the original ordinance. It follows, therefore, that the suspensive condition by which the rights of the company under the original ordinance were held in abeyance operates also upon the lease in question.

The mere payment of rent did not change the nature of the suspensive condition or work an estoppel. The right to use the property was limited to the destination stated in the contract. (La. Civil Code, 2711.) But this right to use was covered by the suspensive condition, and the contract of lease only evidenced the agreement to use the property for the purposes stated, when the suspensive condition ceased to operate by the discharge of the obligations on which it rested, that is, the establishment of the terminus at Westwego, the crossing therefrom, and the location of the shops, etc., at the place fixed in the original ordinance. The case is aptly illustrated by *Roy De L'Ecluse et autres*, Cour de Cassation, 4 Jan. 1858; Journal du Palais, 1858, 452. There a promise to sell on a sus-

pensive condition was entered into, but the prospective buyer was allowed to take possession pending the condition. The claim was that this fact destroyed the suspensive nature of the condition. But the court held to the contrary, considering that the fact of possession was subject to the suspensive condition, as it was upon such condition that the contract had been entered into. Laurent, vol. 17, No. 33, p. 53.

Concluding that the rights on Claiborne street and to the batture in front of the park were subject to suspensive conditions, it is manifest from the facts which we have stated that the railroad company was not entitled to possess or enjoy the same. This renders it unnecessary to consider the resolutory condition and leaves only for consideration the subject-matter of the third assignment of errors. This asserts that the rights conveyed by the fourth section of Ordinance No. 6938 to wharfage, etc., at Thalia street are not validly held by the corporation. This is based not on the claim of a condition either suspensive or resolutory, but because it is asserted that the grant was *ultra vires*. The repealing ordinances, however, do not embrace this grant, and except for the argument at bar it does not appear that the city has repudiated the grant. Since this case was argued a suggestion has been made that this grant has been, in effect, ratified by a provision of a new constitution said to have been recently adopted by the State of Louisiana. As we must reverse the decree rendered for the reasons above stated, we deem that the ends of justice will best be subserved by not passing on this assignment, thus leaving the rights of both parties in relation thereto open for further consideration in the court below.

Decree reversed and cause remanded for further proceedings consistent with this opinion.

PATAPSCO GUANO COMPANY *v.* NORTH CAROLINA BOARD OF AGRICULTURE.

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

No. 9. Argued March 3, 4, 1898. — Decided May 31, 1898.

The act of the legislature of North Carolina of January 21, 1891, must be regarded as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton as intended merely to defray the cost of such inspection ; and as it is competent for the State to pass laws of this character, the requirement of inspection and payment of its cost does not bring the act into collision with the commercial power vested in Congress, and clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and the same principle must apply to interstate commerce.

THE case is stated in the opinion.

Mr. Thomas N. Hill and *Mr. John W. Hinsdale* for appellant.

Mr. R. H. Battle, Mr. J. C. L. Harris and *Mr. F. H. Busbee* for appellees.

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

This was a bill filed in the Circuit Court of the United States for the Eastern District of North Carolina, April 1, 1892, seeking to enjoin the collection of an inspection charge of twenty-five cents per ton on commercial fertilizers, as prescribed by an act of the general assembly of North Carolina of January 21, 1891, and from taking any steps whatever to enforce that act, on the ground of its unconstitutionality.

The court entered a restraining order, but, on the coming in of the answer, a motion to continue the injunction until the

hearing was heard on bill, answer, affidavits and exhibits, and denied, and the temporary injunction dissolved. The opinion of the Circuit Court by Seymour, J., is reported in 52 Fed. Rep. 690. Proofs were taken, and a final hearing had at June term, 1893, at Raleigh; the bill was dismissed; and complainants thereupon prosecuted this appeal.

By section fourteen of article nine of the constitution of North Carolina of 1875–76, it was provided that, as soon as practicable after the adoption of that instrument, the general assembly should "establish and maintain, in connection with the University, a Department of Agriculture, of Mechanics, of Mining and of Normal Instruction."

By an act of March 12, 1877, (Laws N. C. 1876–77, 506, c. 274,) such a department was established, and, among other things, the subject of commercial fertilizers dealt with. By the eighth section, manipulated guanos, superphosphates or other commercial fertilizers were forbidden to be sold or offered for sale, until the manufacturer or person importing the same had obtained a license therefor on payment of a privilege tax of five hundred dollars per annum for each separate brand or quality.

By section nine, every bag, barrel or other package of such fertilizer offered for sale was required to have thereon a label or stamp setting forth the name, location and trade-mark of the manufacturer; the chemical composition of the contents, and the real percentage of certain specified ingredients; and that the privilege tax had been paid. By section ten, the board was empowered to collect samples for analysis; by section eleven, to require railroad and steamboat companies to furnish monthly statements of the quantity of fertilizers transported; and by section twelve, to establish an agricultural experiment and fertilizer central station in connection with the chemical laboratory of the University, and the trustees of the University, with the approval of the board, were directed to employ an analyst, skilled in agricultural chemistry, whose duty it should be "to analyze such fertilizers and products as may be required by the Department of Agriculture, and to aid as far as practicable in suppressing fraud in the sale of com-

mercial fertilizers;" and whose salary was to be paid "out of the funds of the Department of Agriculture."

The sections bearing on this subject were carried forward in the code of 1883, volume II, c. 1, §§ 2190 *et seq.*

In August, 1890, the Circuit Court for the Eastern District of North Carolina, Bond and Seymour, JJ., held that section 2190 of the code, declaring that no commercial fertilizers should be sold or offered for sale until the manufacturer or importer obtained a license from the treasurer of the State, for which should be paid a privilege tax of five hundred dollars per annum for each separate brand, was in violation of the Federal Constitution and void. *American Fertilizing Co.* v. *Board of Agriculture of North Carolina*, 43 Fed. Rep. 609.

Thereupon, by the act of January 21, 1891, Laws 1891, 40, c. 9, volume II, c. 1 of the code was amended, and sections 2190, 2191 and 2193 were made to read as follows:

"SEC. 2190. For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials in this State there shall be a charge of twenty-five cents per ton on such fertilizers and fertilizing material for each fiscal year ending November thirtieth, which shall be paid before delivery to agents, dealers or consumers in this State: *Provided*, the board shall [have] the discretion to exempt certain natural material as may be deemed expedient. Each bag, barrel or other package of such fertilizers or fertilizing materials shall have attached thereto a tag stating that all charges specified in this section have been paid, and the state Board of Agriculture is hereby empowered to prescribe a form for such tags, and to adopt such regulations as will enable them to enforce this law. Any person, corporation or company who shall violate this chapter, or who shall sell or offer for sale any such fertilizers or fertilizing material contrary to the provisions above set forth, shall be guilty of a misdemeanor, and all fertilizers or fertilizing materials so sold or offered for sale shall be subject to seizure and condemnation in the same manner as provided in this chapter for the seizure and condemnation of spurious fertilizers, subject, how-

ever, to the discretion of the Board of Agriculture to release the fertilizers so seized and condemned upon the payment of the charge above specified and all costs and expenses incurred by the department in such proceeding: *Provided*, that tags shall be attached by manufacturers, agents or dealers to all fertilizers now in the State; those protected under license previously issued shall be furnished free of charge.

"SEC. 2191. Every bag, barrel or other package of such fertilizers or fertilizing materials as above designated offered for sale in this State shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the Commissioner of Agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, at or before delivery to agents, dealers or consumers in this State and which shall be uniformly used and shall not be changed during the fiscal year for which tags are issued, and the said label or stamp shall truly set forth the name, location and trade-mark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present, to wit, soluble and precipitated phosphoric acid, which shall not be less than eight per cent; soluble potassa, which shall not be less than one per cent; ammonia, which shall not be less than two per cent, or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of the law have been complied with; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth as above provided shall be liable to seizure and condemnation as hereinafter prescribed, and when condemned shall be sold by the board of agriculture for the exclusive use and benefit of the department of agriculture."

Section 2192 refers to the proceedings to condemn.

"SEC. 2193. Any merchant, trader, manufacturer or agent who shall sell or offer for sale any commercial fertilizer or fertilizing material without having such labels, stamps and tags as hereinbefore provided attached thereto, or shall use the required tag the second time to avoid the payment of the

tonnage charge, or if any person shall remove any such fertilizer, (he) shall be liable to a fine of ten dollars for each separate bag, barrel or package sold, offered for sale or removed, to be sued for before any justice of the peace and to be collected by the sheriff by distress or otherwise, one half less the costs to go to the party suing and the remaining half to the department; and if any such fertilizer shall be condemned as herein provided it shall be the duty of the department to have an analysis made of the same and cause printed tags or labels expressing the true chemical ingredients of the same put upon each bag, barrel or package, and shall fix the commercial value thereof at which it may be sold; and any person who shall sell, offer for sale or remove any such fertilizers, or any agent of any railroad or other transportation company who shall deliver any such fertilizer in violation of this section shall be guilty of a misdemeanor."

Section 2196, which corresponded to section 12 of the act of March 12, 1877, was amended by the substitution of the word "control" for the word "central," and read as follows:

"SEC. 12. The department of agriculture shall establish . . . an agricultural experiment and fertilizer control station, and shall employ an analyst, skilled in agricultural chemistry. It shall be the duty of said chemist to analyze such fertilizers and products as may be required by the department of agriculture, and to aid as far as practicable in suppressing fraud in the sale of commercial fertilizers. He shall, also, under the direction of said department, carry on experiments on the nutrition and growth of plants, with a view to ascertain what fertilizers are best suited to the various crops of this State; and whether other crops may not be advantageously grown on its soil, and shall carry on such other investigations as the said department may direct. He shall make regular reports to the said department, of all analyses and experiments made, which shall be furnished, when deemed needful, to such newspapers as will publish the same. . . . His salary shall be paid out of the funds of the department of agriculture."

The following was substituted for section 2205: "Whenever

any manufacturer of fertilizers or fertilizing materials shall have paid the charges hereinbefore provided his goods shall not be liable to any further tax whether by city, town or county."

Section 2208 remained unamended, and provided: "All moneys arising from the tax on licenses, from fines and forfeitures, fees for registration and sale of lands not herein otherwise provided for, shall be paid into the state treasury and shall be kept on a separate account by the treasurer as a fund for the exclusive use and benefit of the department of agriculture."

The various errors assigned question the decree on the grounds, in general, that the court should have held the act of January 21, 1891, to be in violation of the third clause of section eight, and of the second clause of section ten, of article one of the Constitution of the United States; that the charge required to be paid was so excessive that the act could not be sustained as a legitimate inspection law; or as a valid exercise of the police power; and that it was neither, because it was not limited to articles produced in the State, and because it did not relate to the health, morals or safety of the community.

The second clause of section 10 of article I of the Constitution reads: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The words "imports" and "exports," as therein used, have been held to apply only to articles imported from, or exported to, foreign countries. *Woodruff* v. *Parham*, 8 Wall. 123; *Pittsburg & Southern Coal Company* v. *Louisiana*, 156 U. S. 590, 600.

The clause recognized that the inspection of such articles may be required by the States, and that they may lay duties on them to pay the expense of such inspections, but as it

would be difficult, if not impossible, to determine the necessary amount with exactness and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of Congress, it has been suggested that whether inspection charges are excessive or not might be for Congress to determine and not the courts, which would also be so where inspection laws operate on interstate as well as foreign commerce. *Neilson* v. *Garza*, 2 Woods, 287; *Turner* v. *Maryland*, 107 U. S. 38.

Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on importations as well as exportations; and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce. Counsel for plaintiff in error insists that this result is deducible from the legislation of North Carolina making appropriations from the funds of the department of agriculture received from the charge on fertilizers or fertilizing materials; as also from the evidence submitted on the hearing.

It will be more convenient to first dispose of the latter contention.

By section 2206 of the code of 1883, the board of agriculture was directed to "appropriate annually, of the money received from the tax on fertilizers, the sum of five hundred dollars for the benefit of the North Carolina Industrial Association, to be expended under the direction of the board of agriculture."

By chapter 308 of the laws of 1885, Laws, N. C. March 11, 1885, 553, the establishment of an industrial school was provided for, to the establishment and maintenance of which the board was directed by the fourth section to apply their surplus funds, not exceeding five thousand dollars annually.

By chapter 410 of the laws of 1887, Laws, N. C. March 7,

1887, 718, the name of the industrial school was changed to "The North Carolina College of Agriculture and Mechanic Arts," and the board was required by section six to turn over to that institution annually "the whole residue of their funds from licenses on fertilizers remaining over and not required to conduct the regular work of that department."

But by chapter 348 of the laws of 1891, Laws, N. C. March 6, 1891, 404, the provision last above given was stricken out, and by section five of the act $10,000 for the year 1891 and $10,000 for the year 1892 were appropriated to the college; and by chapter 426 of the laws of 1891, Laws, N. C. March 7, 1891, 491, an annual appropriation of five hundred dollars was made to the North Carolina Industrial Association. These appropriations were made from the state treasury, and both acts contained the usual repealing clauses.

By section 2198 and subsequent sections of the act of 1883, the geological survey of the State, the geological museum, the appointment of the state geologist, and matters pertaining thereto, were dealt with, and various expenditures connected therewith were authorized to be paid out of the general fund of the agricultural department, the sources of which were apparently not confined to what might be derived from the license tax in respect of fertilizers.

By chapter 409 of the laws of 1887, (Laws, 1887, 714,) so much of the sections of the act pertaining to the state geologist as required the department to fix the compensation, to regulate the expenditures, or pay out of their funds the salary and expenses of the state geologist, was repealed.

Section fourteen of this act empowered the department to expend from the amount arising from the tax on fertilizers for 1887–88, the expenses for the completion of the oyster survey; but by chapter 338 of the laws of 1891, (Laws, 1891, 369,) provision was made for defraying the expenses of the regulation of the oyster industries of the State from other sources.

We agree entirely with the Circuit Court that the legislation of 1891 not only amended the code in the matter of the requirement of the privilege tax of five hundred dollars,

but repealed all laws making any substantial diversion of the money to be derived from the charge on fertilizers of twenty-five cents per ton, to any other purposes than those connected with the necessary expenses of inspection. It is ingeniously argued that as section 6 of chapter 410 of the laws of 1887 repealed by substitution section 4 of chapter 308 of the laws of 1885, the repeal thereof by chapter 348 of the laws of 1891 revived the latter section, and hence that $5000 of the amount arising from the present charge on fertilizers became appropriated to the industrial school, it being asserted that the funds of the department were in fact derived therefrom; and also that the appropriation out of the state treasury of five hundred dollars to the industrial association by chapter 426 of the laws of 1891 was an additional appropriation, and did not repeal section 2206 of the code, which directed the board of agriculture to appropriate that sum to that association.

These positions do not commend themselves to our judgment. As to the appropriation of five hundred dollars, we think, under the circumstances, that it was intended to be in lieu of the former appropriation of that amount; and as to the revival of the act of 1885 by the repeal of the repealing act of 1887, we regard the doctrine that the repeal of a repealing act revives the first act as wholly inapplicable. In our opinion such a conclusion would be opposed to the obvious legislative intention in the enactment of the law of 1891. This act imposed a charge of twenty-five cents per ton on commercial fertilizers, and the purpose of the charge was declared to be to defray the expenses of inspection only. The previous laws had imposed a tax of five hundred dollars per brand upon every brand and description of fertilizer, and declared the same to be a privilege tax. It is impossible to impute to the general assembly the intention, in repealing parts of the code which had been declared unconstitutional, to revive earlier laws which might render the amended law liable to the same objections.

Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money

collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge. But treating the question whether the charge of twenty-five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question we are satisfied that comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith and change the character of the act.

Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a State.

Clause two of section ten expressly allows the State to collect from imports as well as exports the amounts necessary for executing its inspection laws, and Chief Justice Marshall expressed the opinion in *Brown* v. *Maryland* that imported as well as exported articles were subject to inspection.

The observations of Mr. Justice Bradley, on circuit, in *Neilson* v. *Garza*, are quite apposite on this and other points under discussion, and may profitably be quoted.

That case involved the validity of a law of the State of Texas, providing for the inspection of hides, and Mr. Justice Bradley said:

"If the state law of Texas, which is complained of, is really an inspection law, it is valid and binding unless it interferes

with the power of Congress to regulate commerce, and if it does thus interfere, it may still be valid and binding until revised and altered by Congress. The right to make inspection laws is not granted to Congress, but is reserved to the States; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several States; and if any State, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question, whether a duty is excessive or not, is to be decided, may be doubtful. As that question is passed upon by the state legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the Constitution which prescribes the limit goes on to provide that 'all such laws shall be subject to the revision and control of Congress,' it seems to me that Congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until Congress shall see fit to alter it.

"Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc., duties which belong to the entry of goods, and not their inspection.

"No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in *Gibbons* v. *Ogden*, says: 'The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be, for domestic use.' 9 Wheat. 203; Story on the Const., § 1017. But in *Brown* v. *Maryland*, he adds, speaking of the time when inspection takes place: 'Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land.' 12 Wheat. 419; Story on the Const., § 1017. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation.

"All housekeepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article. Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict. *verb.* 'Inspection.' The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. *Brown* v. *Maryland*, *supra;* Story on the Const., § 1024. 'The object of the inspection laws,' says Justice Sutherland, 'is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets.' *Clintsman* v. *Northrop*, 8 Cowen, 46. It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well." 2 Woods, 287, 289.

But in *Turner* v. *Maryland*, 107 U. S. 38, which related only to the laws of Maryland so far as providing for the prep-

aration for exportation of tobacco grown in the State, any opinion as to the provisions of those laws referring to the inspection of tobacco grown out of Maryland was expressly reserved.

In *Voight* v. *Wright*, 141 U. S. 62, 65, a statute of Virginia relating to the inspection of flour brought into that Commonwealth was held to be unconstitutional, because it required the inspection of flour from other States when no such inspection was required of flour manufactured in Virginia, an objection to which the act under consideration is not open, for the inspection and payment of its cost are required in respect of all fertilizers, whether manufactured in the State or out of it, and it is conceded that fertilizers are manufactured in North Carolina, as, indeed, their many laws incorporating companies for the purpose of so doing plainly indicate. Mr. Justice Bradley in that case remarked that the question was "still open as to the mode and extent in which state inspection laws can constitutionally be applied to personal property imported from abroad, or from another State, — whether such laws can go beyond the identification and regulation of such things as are strictly injurious to the health and lives of the people, and therefore not entitled to the protection of the commercial power of the government, as explained and distinguished in the case of *Crutcher* v. *Kentucky*, *ante*, 47, just decided."

Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. *Minnesota* v. *Barber*, 136 U. S. 313. And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally.

In *Plumley* v. *Massachusetts*, 155 U. S. 461, it was decided that a statute of Massachusetts "to prevent deception in the

manufacture and sale of imitation butter," in its application to the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, was not in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several States. That decision explicitly rests on the ground that the statute sought to prevent a fraud upon the general public. It is true that an article of food was involved, but the sole ground of the decision was that the State had the power to protect its citizens from being cheated in making their purchases, and that thereby the commercial power was not interfered with. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope.

It is apparent that there is no article entering into common use in many of the States, and particularly the Southern States, the inspection of which is so necessary for the protection of those citizens engaged in agricultural operations, as commercial fertilizers. Certain ingredients, as ammonia or nitrogen, phosphoric acid and potash, make up the larger part of the value of these fertilizers, and without the aid of scientific analysis, the amount of these ingredients cannot be ascertained nor whether the fertilizer sold is of a uniform grade. The average farmer was compelled, without an analysis, to depend on his sense of smell, or his success, or failure, during the previous year with the same brand or name, to determine the relative amounts of the essential ingredients, and the value of the materials. To protect agricultural interests against spurious and low grade fertilizers was the object

of this law, which simply imposed the actual cost of inspection, necessarily varying with the agricultural condition of the various years. The label or tag could only be furnished after an analysis, the result of which was therein stated. In that light, the law practically required an analysis in every case, and was sustained as so doing by the Supreme Court of North Carolina in *State* v. *Norris*, 78 N. C. 443.

The act of 1877, requiring the obtaining of a license to sell fertilizers on the payment of a privilege tax of five hundred dollars, was considered in that case, at January term, 1878, of that court, and held valid under the state constitution as intended to protect the public from being imposed on by adulterated fertilizers, and to keep the traffic in the hands of responsible parties, making the means to that end self-sustaining by the license tax. And it was also decided that the law was not in conflict with the Federal Constitution on the authority of *Woodruff* v. *Parham*, 8 Wall. 123, and *Hinson* v. *Lott*, 8 Wall. 148.

As before remarked, the sections of the act of 1877 relating to this subject were carried forward into the code of 1883, and section 2190 required the license and imposed the privilege tax.

In *Stokes* v. *Department of Agriculture*, 106 N. C. 439 (1890), the Supreme Court held that section 2190, in prohibiting the sale, or the offering for sale, of fertilizers in North Carolina until the manufacturer or person importing the same should obtain a license, did not prohibit the use of them in the State, nor the purchase of them in another State, to be used for fertilizing purposes by the purchaser himself in North Carolina; and that, where a person acting for himself and others, resident farmers of the State, ordered from a non-resident manufacturer a number of bags of fertilizer, a given number being ordered for each purchaser, and the same was shipped in separate parcels, addressed to different purchasers separately, and separate bills sent to each purchaser, there being no intent to evade the statute, the transaction did not come within the inhibition of section 2190, and the goods were not liable to seizure at the instance of the department of agriculture.

Similar laws of other States, regulating the sale of fertilizers, have been sustained on the same ground.

In *Steiner* v. *Ray*, 84 Alabama, 93, it was held that a statute regulating the sale of commercial fertilizers, when its controlling purpose was to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, and to furnish to buyers cheap and reliable means of proving the deception and fraud, should such be attempted, was strictly within the pale of police regulation and was constitutional. And this case was cited with approval in *Kirby* v. *Huntsville Fertilizer &c. Co.*, 105 Alabama, 529, where it was ruled that the sale of commercial fertilizers was void unless each sack, parcel or package was tagged as required by statute at the time the right of property passed from the vendor to the vendee.

In *Vanmeter* v. *Spurrier*, 94 Kentucky, 22, an act of Kentucky, "to regulate the sale of fertilizers in this Commonwealth, and to protect agriculturists in the purchase and use of the same," was sustained; and it was held that the statute could not be fairly construed to authorize the levy of an impost on interstate commerce beyond what was necessary to inspection. The court said: "The statute, as its title indicates, was enacted for protection of farmers of this Commonwealth against fraud and imposition of those having for sale commercial fertilizers. To accomplish that object, each one selling, or offering for sale, any fertilizer is required to submit a sample for analysis and test of its quality at the Experimental Station. For that purpose only can the fees collected by the director be used, and in that way and to that extent only can farmers of the Commonwealth be benefited by the statute. In our opinion the law is valid in every respect."

In *Faircloth* v. *De Leon*, 81 Georgia, 158; *Goulding Fertilizer Company* v. *Driver*, 25 S. E. Rep. 922, and other cases, the Supreme Court of Georgia has held that the seller of commercial fertilizers, which had not been inspected as the law required, could not maintain against the buyer an action for the price; but in *Martin* v. *Upshur Guano Company*, 77

Georgia, 257, that the statute was not applicable where sale and delivery were without the State.

The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton as intended merely to defray the cost of such inspection. It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce.

In any view, the effect on that commerce is indirect and incidental, and "the Constitution of the United States does not secure to any one the privilege of defrauding the public."

Decree affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

SMYTH *v.* AMES.

SMYTH *v.* SMITH.

SMYTH *v.* HIGGINSON.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPLICATION FOR REHEARING AND MODIFICATION OF JUDGMENTS.

Nos. 49, 50, 51. Submitted May 9, 1898. — Decided May 31, 1898.

The decrees in the several cases are modified by striking from them the words referred to in the application of the appellants, and set forth in the opinion of the court.

Opinion of the Court.

THIS case was decided at the present term, and is reported in 169 U. S. at page 466 *et seq.* The appellants made application for a modification of the decrees of the Circuit Court in the respective cases, as is more fully set forth in the opinion below.

Mr. C. J. Smyth for the applications.

Mr. J. M. Woolworth opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

These cases were determined in this court during the present term and are reported in 169 U. S. 466. The decree in each case was affirmed. The cases are now before us upon an application by the appellants — the attorney general of Nebraska and his colleagues constituting the state board of transportation and its secretaries — for a modification of the decree of the Circuit Court in the respective cases.

The decree in *Smyth* v. *Ames*, No. 49, which this court affirmed, was 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 rates 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 railway 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 be-

half. It is further ordered, adjudged and decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The appellants now ask that the decree of the Circuit Court in that case be modified by striking therefrom the words, "and below those now charged by said companies or either of them or their receivers," and the words "and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act."

The decree of the Circuit Court in *Smyth* v. *Smith*, No. 50, and the decree in *Smyth* v. *Higginson*, No. 51, are substantially the same as the decree in the case of *Smyth* v. *Ames*. The appellants in *Smyth* v. *Smith* now ask that the words in the decree "and below those now charged by said companies or either of them," and the words "and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act," be stricken out; and the appellants in *Smyth* v. *Higginson* ask that the words "and below those now charged by said company," and the words "and particularly from reducing its present rates of charges for transportation of freight to those prescribed by said act," be stricken from the decree in that case.

The court is of opinion that the present application by the appellants in each of the above cases should be granted. The general question argued before us on the original hearing was, whether the rates established by the Nebraska statute, looking at them *as an entirety*, were so unreasonably low as to prevent the railroad companies from earning such compensation as would be just, having due regard to the rights both of the public and of the companies. In our examination of that question it was appropriate and necessary to inquire as to the earnings of the respective companies under the rates which they had established — looking at those rates, also, as an entirety. In this way we ascertained the probable effect of the statute in question. We did not intend, by an affirmance of the several decrees, to adjudge that the railroad companies should not, at any time in the future, if they saw proper, reduce the rates, or any of them, under which they were con-

ducting business at the time the final decrees were rendered, nor that the state Board of Transportation should not reduce rates on specific or particular articles below the rates which the companies were charging on such articles when the decrees were entered. It may well be that on some particular article the railroad companies may deem it wise to make a reduction of the rate, and it may be that the public interests will justify the state board of transportation in ordering such reduction. We have not laid down any cast-iron rule covering each and every separate rate. We only adjudged that the enforcement of the schedules of rates established by the state statute, looking at such rates as a whole, would deprive the railroad companies of the compensation they were legally entitled to receive. We did not pass judgment upon the reasonableness or unreasonableness of the rates on any particular article prescribed by the statute or by the railroad companies. If the State should by statute, or through its board of transportation, prescribe a new schedule of rates, covering substantially all articles, and which would materially reduce those charged by the companies respectively, or should by a reduction of rates on a limited number of articles make its schedule of rates, as a whole, produce the same result, the question will arise whether such rates, taking into consideration the rights of the public as well as the rights of carriers, are consistent with the principles announced by this court in the opinion heretofore delivered. Of course, the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation.

The decrees in the several cases are hereby modified by striking therefrom the words referred to in the application of the appellants.

The decree in each case being thus modified, is affirmed.

WHITE *v.* BERRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 539. Argued March 21, 22, 1898. — Decided May 31, 1898.

A court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal.

The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute.

If the assignment of some one to duty as gauger at the Hannis distillery, in the place of the plaintiff, did not work his removal from office, a court of equity ought not to assume to control the discretion which under existing statutes the Executive Department has in all such matters; as interference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs.

This suit in equity was brought by H. C. Berry in the Circuit Court of the United States for the District of West Virginia against A. B. White, United States collector of internal revenue for that district, A. L. Hoult, John D. Sutton, Anthony Staubley and Franklin T. Thayer.

The bill alleged that in 1893, the plaintiff Berry was duly appointed by the Secretary of the Treasury to the position of United States gauger, and from that time to the commencement of this suit he had acted in that capacity at the Hannis distillery at Martinsburg, West Virginia;

That he was appointed through the recommendation of E. M. Gilkeson, late collector of internal revenue for the above-named district;

That he was paid at the rate of one hundred dollars per month directly from the Treasury Department, and was an officer of the United States Government, having taken the required oath of office and executed bond as required by law;

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That his oath of office and bond continued good and in force regardless of the personnel of the collector of internal revenue, and he did not hold his position at the discretion of that officer;

That he had honestly, faithfully and impartially discharged his duties, being especially well equipped and qualified to discharge all the duties appertaining to his office;

That the defendant White, collector of internal revenue, had declared his intention to appoint a gauger and three storekeepers to fill the place of the plaintiff and others employed at the distillery at an early date;

That the defendants Hoult, Sutton, Staubley and Thayer had been reinstated, or would be appointed and commissioned, and one of them would be assigned to duty in place of the plaintiff at the Hannis distillery, through White, who had openly declared his intention to reinstate the defendants in place of the plaintiff and others;

That the plaintiff is a Democrat in politics, was assigned to said office as a Democrat, and had voted the ticket of that political party, while the defendant White was a Republican;

That White had declared his intention to place one of the other four defendants in plaintiff's position, because of the latter's political affiliation, and for no other reason, and to appoint and recommend Republicans to fill such places for no other reason than that they were of that political faith;

That the plaintiff's office is in the classified service, and belongs to what is known as the Civil Service, and as such he could not be removed, except for cause shown and proved;

That by a circular issued by the Secretary of the Treasury, it was provided that no removals should be made from any position subject to competitive examination except upon just cause and upon written charges filed with the head of the department or the appointing officer, of which the accused should have full notice and opportunity to make defence;

That in department circular No. 119, which was an executive order, the same provisions were made together with others, and were signed by the acting commissioner of

internal revenue and approved by the Secretary of the Treasury;

That the plaintiff was one of the employés of the Treasury Department, was included in the classified service, and was protected from removal for political or religious reasons under the Civil Service laws and rules of the United States, as fully appears from a communication received from the acting president of the Civil Service Commission of date September 10, 1897;

That if the defendant White be permitted to remove the plaintiff from his office and position or supplant him by others, the same would be illegal and in violation of law;

That rule two of section three of the Civil Service rules provides that "no person in the executive Civil Service shall dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or position of any other person therein because of his political or religious affiliations;" while section one of those rules provides that any person in the executive Civil Service of the United States who should wilfully violate any provision of the Civil Service Act or of the rules established by the Civil Service Commission should be dismissed from office;

That under the law the plaintiff had a vested interest in his office, and if White should remove him therefrom or assist in so doing it would be in violation not only of the Civil Service rules but of the plaintiff's vested interest in his office, for which he would not have an adequate remedy at law;

That he is able, competent and willing to discharge the duties of his office, and is unwilling to be summarily dismissed therefrom for no other reason than that he is of opposite politics to those of the defendant White, collector of internal revenue;

That the said collector has no power, right or authority to remove the plaintiff from his office, or to appoint any other to take his place and thereby effect his removal; that the defendants Hoult, Sutton, Staubley and Thayer have no right or authority to take the oath of office and otherwise qualify and appear to take the position, and thereby assist in the

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removal of the plaintiff, and as there were no vacancies created either by removals or resignations, and there being fifteen per cent now commissioned more than sufficient to perform the duties of storekeepers and gaugers in that district, if they were permitted so to do it would be in violation of law as well as of the rights and vested interests of the plaintiff; and,

That unless White be enjoined from so doing he will remove the plaintiff, and unless his codefendants are enjoined from qualifying as officers of the United States to take the place of the plaintiff at the distillery they would in that manner effect the removal of the plaintiff from his office, they having expressed their intention to accept such appointment and assignments.

The relief asked was an injunction restraining and prohibiting the defendant White, collector, and all others by and through him, "from removing him from the position of gauger until a vacancy is created according to law, as an officer of the United States aforesaid, and also from recommending, assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with your complainant;" and also, that Hoult, Sutton, Staubley and Thayer and all other persons be enjoined, restrained and prohibited "from qualifying as gauger to take the place of your complainant at said distillery, or in any other way aid or assist in the removal of your said orator, or performing or discharging any of the duties of said office," and for such other and general relief as to equity might seem just and right.

In conformity with the motion by the plaintiff for a temporary restraining order, it was adjudged, ordered and decreed "that A. B. White, United States collector of internal revenue for the District of West Virginia, be and is hereby restrained, enjoined and inhibited from recommending, appointing or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley or any other person, to said position, and from removing the said complainant Berry aforesaid, until a vacancy therein is created by law, and from assigning and ap-

pointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with the said complainant Berry in the said office, as aforesaid." It was further adjudged, ordered and decreed "that A. L. Hoult, John D. Sutton, Anthony Staubley and all other persons be, and they are hereby, enjoined and prohibited from acting as gauger in the place and stead of the said complainant Berry, as aforesaid, or in discharging any of the duties of the said office, until the further order of this court."

The answer of the defendants states that on the 30th day of September, 1897, the Commissioner of Internal Revenue made an order relieving plaintiff from assignment to duty as gauger at the Hannis distillery, and on the same day telegraphed the plaintiff to that effect; that on the same day the Commissioner telegraphed defendant Thayer, assigning him to duty as gauger at that distillery, and on the 1st day of October, 1897, he took charge as such gauger, and was in charge when defendant White, collector, visited the distillery on that day; that Thayer took charge before 8 o'clock in the morning of October 1st, and before the granting of the injunction, and before any service upon or other notice of any kind of the granting of or application for the injunction to Thayer, White or any of the defendants; that the recommendation of defendant White to the Commissioner, that the plaintiff be relieved from duty as aforesaid, was made prior to the institution of this suit; that it has been the general policy of the Internal Revenue Bureau to rotate the assignments of storekeepers and gaugers for the purpose of securing to such storekeepers and gaugers a fair proportion of employment and for the purpose of preventing collusion between distillery officials, and otherwise protecting the interests of the Government; that plaintiff having been on duty for a long time prior to the 30th day of September, 1897, as gauger, it was deemed by the Commissioner fair and right among the several gaugers, and for the best interests of the public service, to relieve plaintiff from assignment to duty at the Hannis distillery.

Admitting in their answer that the plaintiff was an officer

of the United States, duly appointed and commissioned, and that he did not hold his position at the discretion of the collector of internal revenue, the defendant White denied that the plaintiff was well equipped and qualified to discharge all the duties of gauger, but that from the records of his office and of the Department for the previous three months, during which he has been collector, the plaintiff was not a first-class gauger, and was culpably careless in his work, and that it was largely because of information he had received that defendant White recommended to the Commissioner that the plaintiff be relieved from duty as gauger at that distillery; that the defendant White, as collector, had never declared his intention to appoint any one of the other defendants or any one else a storekeeper or gauger, knowing full well and recognizing the fact that storekeepers and gaugers are and can be appointed by the Secretary of the Treasury only; that the Secretary of the Treasury reinstated Hoult as gauger, Staubley as storekeeper, and Thayer as gauger in 1897, in accordance with the laws of the United States and in accordance with the Civil Service law, each having first been certified as eligible to such reinstatement by the Civil Service Commission; and that Hoult, Sutton, Staubley and Thayer had all been duly commissioned and executed bonds and qualified prior to the institution of this suit; and that defendant White never declared his intention to reinstate any of said officers or assign them to duty in the place of the plaintiff, recognizing fully that he had no such authority, and that neither Hoult nor Staubley had been assigned to duty since their reinstatement.

The defendant White admitted that he was a Republican in politics, and the defendants admitted that the plaintiff was a Democrat in politics. White denied that he ever signified or declared his intention to remove the plaintiff from office or put the defendants or any one else in his place, for the reason that the plaintiff was a Democrat in politics, and for no other reason to appoint or recommend in his stead a Republican; that in fact and in law he could have nothing to do with the removal or appointment of a storekeeper or a gauger unless it be to recommend the same; that in short the appointments

of storekeepers and gaugers and their removals could be made only by the Secretary of the Treasury.

The defendants alleged that the revocation of assignment complained of by the plaintiff was made by the Commissioner, whom the defendants understood was a Democrat.

The defendants admitted that the office of gauger held by the plaintiff was in the classified service, and belonged to what was known as the Civil Service; but alleged that so far as they knew the plaintiff had not been removed, but on the contrary still held the position of United States gauger; that the fact that he had been relieved from assignment to duty at the Hannis distillery did not remove him from office; that he might be assigned to duty or transferred or non-assigned at any time by the Commissioner of Internal Revenue; that the plaintiff could not in this manner question the right of the Commissioner to assign a United States gauger at a distillery or relieve one who has already been assigned; that the Commissioner had the right to assign to duty a United States gauger, and to determine how long he shall remain on duty under such assignment; and that no law, executive order, or rule or regulation of the Civil Service Commission was violated by the Commissioner doing as he had done in this case in exercising the authority conferred upon him by the acts of Congress by assigning a gauger to duty at the said distillery and relieving from duty the plaintiff, who had been theretofore assigned to duty at the same distillery by the Commissioner and by the same act of Congress.

The defendants admitted that the plaintiff was willing to continue in office, but the defendant White charged that he was a careless officer, and that if any attempt was or should be made to remove or dismiss him from the service, it would not be for the reason that he was of opposite politics to those of the collector.

The answer concludes:

"Replying to allegation No. 13 in plaintiff's bill, the defendants again say that the defendant White claims no right or authority to remove the said plaintiff from office or to appoint any one in his place, and that he never has claimed

any such authority. The defendants say that the defendants Hoult, Sutton, Staubley and Thayer, having been duly appointed to the positions respectively held by each of them by the Secretary of the Treasury the right to hold said positions cannot be questioned in this or any other collateral proceeding; that the question of whether there were or were not vacancies at the time these appointments were made cannot be determined in this suit. Neither of said defendants Hoult, Sutton, Staubley or Thayer was appointed in place of the plaintiff. The appointment of neither could affect the plaintiff, and whether the Secretary of the Treasury has more of these officers in commission than he is entitled to have under the law is not a question which can be raised by the plaintiff in this suit. It cannot be ascertained in this proceeding whether or not 15 per cent or any other number of officers are now in commission more than are sufficient to perform the duties of storekeepers or gaugers in this collection district. This court, it is respectfully suggested, will not undertake to ascertain the number of distilleries in operation and to be placed in operation in said collection district and the number of storekeepers and gaugers to be placed on duty at such distilleries. It is submitted that these are questions to be determined by the Treasury Department, and must be supposed to have been determined before such appointments were made, and the appointments made in conformity to the interests and requirements of the public service. Defendants therefore deny that by the appointment of the defendants Hoult, Sutton, Staubley and Thayer more storekeepers and gaugers were placed in commission than were sufficient to perform the duties of such officers in said district.

"The defendants deny that the appointment and qualification of said Hoult, Sutton, Staubley and Thayer will make necessary the removal of the plaintiff. The defendants, further answering, say that the defendant Hoult was on the —day of ——, 1889, appointed a United States gauger; that on the —day of ——, 1893, after having served about four years, and there having been a change of administration, he was removed from said position through no delinquency or

misconduct of his; that during the late war of the rebellion he served in the military service of the United States, and was honorably discharged therefrom; that availing himself of Rule IX of the Civil Service regulations, he made application to the Secretary of the Treasury to be reinstated to the position from which he had been removed; that defendants are informed that said petition, together with the requisition of the proper officer of the Treasury Department, were referred to the Civil Service Commission, and his eligibility having been properly certified by said Commission, he was reinstated and reappointed by the Secretary of the Treasury. Said petition was originally filed with E. M. Gilkeson, late collector of internal revenue, and, together with the recommendation of said collector, forwarded to the Commissioner of Internal Revenue. The defendants insist that in making said appointment or reinstatement the Secretary of the Treasury acted in strict conformity with the acts of Congress and the rules and regulations of the Civil Service Commission. The defendants Sutton, Staubley and Thayer were similarly reinstated and reappointed as storekeepers and gauger. The defendant A. B. White says that the recommendation made by him to the Commissioner of Internal Revenue relative to the plaintiff was made prior to or on the 29th day of September, 1897, and the said recommendation was made in part because the said plaintiff had been on duty for some time, and in part for the reasons hereinbefore stated. Said defendants further say that they believe and charge that the reinstatement and appointment of said defendants Hoult, Sutton, Staubley and Thayer were not made by the Secretary of the Treasury for political reasons, nor was the plaintiff relieved from duty as aforesaid at the Hannis distillery by the Commissioner of Internal Revenue for political reasons, nor the said Thayer assigned to duty at the said distillery for political reasons."

The cause having been heard upon the bill, the demurrer to the bill, the answer and a general replication thereto, the affidavits filed by the parties, and upon the plaintiff's motion to perpetuate the injunction theretofore granted, a final order was made "restraining and inhibiting the defendant White,

the collector of the district, the appointing power, the defendant Thayer, and all others, from in anywise interfering with the plaintiff H. C. Berry in the possession of his office and in the discharge of his duty as gauger at the Hannis distillery, located in the town of Martinsburg, W. Va., until he shall be removed therefrom by proper proceedings had under the Civil Service Act and the rules and regulations made thereunder or by judicial proceedings at law; and the said collector having applied heretofore to the court for leave to the Commissioner to appoint temporarily a gauger pending this litigation, he, the said collector, is required and directed to recommend and the Commissioner of Internal Revenue to transfer the temporary gauger heretofore assigned, and to permit the said gauger Berry undisturbed to discharge the duties of his office as gauger, unless hereafter removed as hereinbefore provided."

Mr. Assistant Attorney General Boyd and *Mr. Joseph H. Gaines* for appellants.

Mr. Charles J. Faulkner for appellee.

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

In the opinion delivered by the learned District Judge, who heard this and other cases involving the same questions as those now presented, it was held: 1. That the act known as the "Civil Service Act" was constitutional. 2. That Congress has not delegated to the President and the Commission legislative powers. 3. That by rule 3, section 1, the internal revenue service has been placed under the Civil Service Act and rules made in pursuance of it. 4. That the plaintiffs in these actions are officers of the Government in the internal revenue service. 5. That they cannot be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the Civil Service Act and the rules promulgated under it,

which, under the act of Congress, became a part of the law. 6. That the attempt to change the position and rank of the officers in these cases was in violation of law. 7. That a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the Civil Service Act. 83 Fed. Rep. 578.

On behalf of the Government it is insisted that the Circuit Court of the United States, sitting in equity, was without jurisdiction to entertain this suit and to grant the relief asked in the bill. If this position be well taken, it will be unnecessary to consider the other questions discussed in the able and elaborate opinion of the District Judge.

In *Sawyer's case*, 124 U. S. 200, 223, Chief Justice Waite, in a dissenting opinion, said that he was not prepared to hold that an officer of a municipal government could not, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without authority of law; that there might be cases when the tardy remedies of quo warranto, certiorari and other like writs would be entirely inadequate. In that view of the jurisdiction of equity the writer of this opinion concurred at the time the court disposed of that case.

But the court in its opinion in that case observed that under the Constitution and laws of the United States the distinction between common law and equity, as existing in England at the time of the separation of the two countries, had been maintained, although both jurisdictions were vested in the same courts, and held that a court of equity had no jurisdiction over the appointment and removal of public officers, and that to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers would invade the domain of the courts of common law, or of the executive and administrative departments of the government.

After referring to numerous authorities, American and English, in support of the general proposition that a court of chancery had no power to restrain criminal proceedings, unless they had been instituted by a party to a suit already

pending before it, and to try the same right that was in issue there, the court proceeded: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal, or by mandamus, prohibition, quo warranto or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow School within its undoubted jurisdiction over public charities was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: 'This court, I apprehend, has no jurisdiction with regard either to the election or a motion of corporators of any description.' *Attorney General* v. *Clarendon*, 17 Ves. 488, 491. In the courts of the several States the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases," — citing *Tappan* v. *Gray*, 3 Edw. Ch. 450, reversed by Chancellor Walworth on appeal, 9 Paige, 507, 509, 512, whose decree was affirmed by the Court of Errors, 7 Hill, 259; *Hagner* v. *Heyberger*, 7 Watts & Serg. 104; *Updegraff* v. *Crans*, 47 Penn. St. 103; *Cochran* v. *McCleary*, 22 Iowa, 75; *Delahanty* v. *Warner*, 75 Illinois, 185; *Sheridan* v. *Colvin*, 78 Illinois, 237; *Beebe* v. *Robinson*, 52 Alabama, 66; and *Moulton* v. *Reid*, 54 Alabama, 320.

The rule established in *Sawyer's case* was applied in *Morgan* v. *Nunn*, 84 Fed. Rep. 551, in which Judge Lurton said that "a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another." Similar decisions have been made in other Circuit Courts of

the United States; by Judges Pardee and Newman, in *Couper* v. *Smyth*, Northern District of Georgia, 84 Fed. Rep. 757; by Judge Kirkpatrick, in *Page* v. *Moffett*, District of New Jersey, 85 Fed. Rep. 38; by Judge Jenkins, Northern District of Illinois, in *Carr* v. *Gordon*, 82 Fed. Rep. 373, 379, and by Judge Baker, District of Indiana, in *Taylor* v. *Kercheval*, 82 Fed. Rep. 497, 499.

If the assignment of some one to duty as gauger at the Hannis distillery, in the place of the plaintiff, did not work his removal from office, a court of equity ought not to assume to control the discretion which under existing statutes the Executive Department has in all such matters. Interference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs.

But the plaintiff contends that the assignment of some one to duty in his place at the Hannis distillery is, in effect, a removal of him from his office in violation of law, and that the object of the proceedings against him was to bring about that result. But, under the authorities cited, such proceedings cannot be restrained by a court of the United States, sitting in equity, and therefore the court below erred in passing the final decree which has been brought here for review.

Without expressing any opinion upon other questions so fully discussed by counsel, we hold that the Circuit Court, sitting in equity, was without jurisdiction to grant the relief asked.

The decree below is reversed, and the cause is remanded with direction to dismiss the bill.

Mr. Justice McKenna took no part in the decision of this case.

WHITE *v.* BUTLER.

WHITE *v.* RUCKMAN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Nos. 540, 541. Argued March 21, 22, 1898. — Decided May 31, 1898.

White v. *Berry*, *ante*, 366, affirmed and followed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Boyd and *Mr. Joseph H. Gaines* for appellants.

Mr. Charles J. Faulkner for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

Butler, the appellee in the first of the above cases, was a storekeeper of the United States at the Hannis distillery at Martinsburg, West Virginia.

Ruckman, the appellee in the second case, was also a storekeeper at the same distillery.

The bill in each case is substantially like that in *White* v. *Berry*, *ante*, 366, just decided. The relief asked by Butler and Ruckman is the same as that asked by Berry, and the decree rendered in behalf of each was the same as that rendered in *Berry's case.*

For the reasons stated in the opinion just delivered in *White* v. *Berry*, the decree in each of the above cases must be

Reversed, and the causes remanded with directions to dismiss the bills.

THOMPSON *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 623. Submitted April 21, 1898. — Decided May 31, 1898.

The act of the legislature of Missouri of April 8, 1895, Missouri Laws 1895, page 284, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," is not *ex post facto*, under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage.

THE case is stated in the opinion.

Mr. Charles F. Joy and *Mr. Marion C. Early* for plaintiff in error.

Mr. Edward C. Crow for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The record suggests many questions of law, but the only one that may be considered by this court is whether the proceedings against the plaintiff in error were consistent with the provision in the Constitution of the United States forbidding the States from passing *ex post facto* laws.

Thompson was indicted in the St. Louis Criminal Court at its November term 1894 for the murder, in the first degree, of one Joseph M. Cunningham, a sexton at one of the churches in the city of St. Louis. Having been tried and convicted of the offence charged, he prosecuted an appeal to the Supreme Court of Missouri, and by that court the judgment was reversed and a new trial was ordered. *State* v. *Thompson*, 132 Missouri, 301. At the second trial the accused was again convicted; and a new trial having been denied, he prosecuted another appeal to the Supreme Court of the State. That court affirmed the last judgment, and the present appeal

brings that judgment before us for reëxamination. *State* v. *Thompson*, 42 S. W. Rep. (Missouri) 949.

The evidence against the accused was entirely circumstantial in its nature. One of the issues of fact was as to the authorship of a certain prescription for strychnine, and of a certain letter addressed to the organist of the church containing threatening language about the sexton. The theory of the prosecution was that the accused had obtained the strychnine specified in the prescription and put it into food that he delivered or caused to be delivered to the deceased with intent to destroy his life. The accused denied that he wrote either the prescription or the letter to the organist, or that he had any connection with either of those writings. At the first trial certain letters written by him to his wife were admitted in evidence for the purpose of comparing them with the writing in the prescription and with the letter to the organist. The Supreme Court of the State, upon the first appeal, held that it was error to admit in evidence for purposes of comparison the letters written by Thompson to his wife, and for that error the first judgment was reversed and a new trial ordered. 132 Missouri, 301, 324.

Subsequently, the general assembly of Missouri passed an act which became operative in July, 1895, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Laws Missouri, April 8, 1895, p. 284.

This statute is in the very words of section 27 of the English Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125. And by the 28 Vict. c. 18, §§ 1, 8, the provisions of that act were extended to criminal cases.

At the second trial, which occurred in 1896, the letters written by the accused to his wife were again admitted in evidence, over his objection, for the purpose of comparing them with the order for strychnine and the letter to the

organist. This action of the trial court was based upon the above statute of 1895.

The contention of the accused is that as the letters to his wife were not, *at the time of the commission of the alleged offence*, admissible in evidence for the purpose of comparing them with other writings charged to be in his handwriting, the subsequent statute of Missouri changing this rule of evidence was *ex post facto* when applied to his case.

It is not to be denied that the position of the accused finds apparent support in the general language used in some opinions.

Mr. Justice Chase, in his classification of *ex post facto* laws in *Calder* v. *Bull*, 3 Dall. 386, 390, includes "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender."

In *Kring* v. *Missouri*, 107 U. S. 221, 228, 232, 235, the question arose as to the validity of a statute of Missouri under which the accused was found guilty of the crime of murder in the first degree and sentenced to be hung. That case was tried several times, and was three times in the Supreme Court of the State. At the trial immediately preceding the last one Kring was allowed to plead guilty of murder in the second degree. The plea was accepted, and he was sentenced to imprisonment in the penitentiary for the term of twenty-five years. Having understood that, upon this plea, he was to be sentenced to imprisonment for only ten years, he prosecuted an appeal, which resulted in a reversal of the judgment. At the last trial the court set aside the plea of guilty of murder in the second degree — the accused having refused to withdraw it — and, against his objection, ordered a plea of not guilty to be entered in his behalf. Under the latter plea he was tried, convicted and sentenced to be hanged. By the law of Missouri at the time of the commission of Kring's offence, his conviction and sentence under the plea of guilty of murder in the second degree was an absolute acquittal of the charge of murder in the first degree. But that law having been changed before the final trial occurred, Kring contended that the last

statute, if applied to his case, would be within the prohibition of *ex post facto* laws. And that view was sustained by this court, four of its members dissenting.

In the opinion of the court in *Kring's case* reference was made to the opinion of Mr. Justice Chase in *Calder* v. *Bull*, and also to the charge of the court to the jury in *United States* v. *Hall*, 2 Wash. C. C. 366, 373. In the latter case Mr. Justice Washington said: "An *ex post facto* law is one which, in its operation, makes that criminal or penal which was not so at the time the action was performed; or which increases the punishment; or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage." He added: "If the enforcing law applies to this case, there can be no doubt that, so far as it takes away or impairs the defence which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative." Considering the suggestion that the Missouri statute under which Kring was convicted only regulated procedure, Mr. Justice Miller, speaking for this court, said: "Can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called the law of procedure? We think it cannot." In conclusion it was said: "Tested by these criteria, the provision of the constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States."

A careful examination of the opinion in *Kring* v. *Missouri* shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree — the accused being charged with murder in the first degree — was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that protection against punishment for

murder in the first degree which was given him at the time of the commission of the offence. The right to such protection was deemed a substantial one — indeed, it constituted a complete *defence* against the charge of murder in the first degree — that could not be taken from the accused by subsequent legislation. This is clear from the statement in *Kring's case* that the question before the court was whether the statute of Missouri deprived "the defendant of any right of *defence* which the law gave him when the act was committed so that as to that offence it is *ex post facto*."

This general subject was considered in *Hopt* v. *Utah*, 110 U. S. 574, 588, 589. Hopt was indicted, tried and convicted of murder in the Territory of Utah, the punishment therefor being death. At the time of the commission of the offence it was the law of Utah that no person convicted of a felony could be a witness in a criminal case. After the date of the alleged offence, and prior to the trial of the case, an act was passed removing the disqualification as witnesses of persons who had been convicted of felonies. And the point was made that the statute, in its application to *Hopt's case*, was *ex post facto*.

This court said: "The provision of the Constitution which prohibits the States from passing *ex post facto* laws was examined in *Kring* v. *Missouri*, 107 U. S. 221. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held that a provision of the constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of the offence — under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed — was in conflict with the Constitution of the United States. That decision proceeded upon the ground that the state constitution deprived the accused of a substantial right which the law gave him when the offence was committed, and therefore, in its application to that offence and its consequences, altered the situation of the party to his disadvantage. By the law as

established when the offence was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offence was committed. But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." The court added: "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence, or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and

which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged."

At the present term, in *Thompson* v. *Utah*, 170 U. S. 343, this court observed, generally, that a statute is *ex post facto* which, by its necessary operation and in its relation to the offence or its consequences, alters the situation of the accused to his disadvantage. But it took care to add: "Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.'" c. 9, p. *272.

Applying the principles announced in former cases — without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined — we adjudge that the statute of Missouri relating to the com-

parison of writings is not *ex post facto* when applied to prosecutions for crimes committed prior to its passage. If persons excluded, upon grounds of public policy, at the time of the commission of an offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offence criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offence. Nor can the new rule introduced by it be characterized as unreasonable — certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require "less proof, in amount or degree," than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the State, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strychnine, or the threatening letter to the church organist, was left for the jury, and the duty of the jury, in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the State and the accused upon an equality; for the rule established by it gave

to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine. Each side was entitled to go to the jury upon the question of the genuineness of the writing upon which the prosecution relied to establish the guilt of the accused. It is well known that the adjudged cases have not been in harmony touching the rule relating to the comparison of handwritings: and the object of the legislature, as we may assume, was to give the jury all the light that could be thrown upon an issue of that character. We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offence.

Of course, we are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the *ex post facto* clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land.

The judgment of the Supreme Court of Missouri is

Affirmed.

BALDY *v.* HUNTER.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 241. Argued April 29, 1898. — Decided May 31, 1898.

Transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority.

Opinion of the Court.

Within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so called Confederate States.

What occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union established by the National Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame "except when proved to have been entered into *with actual intent* to further invasion or insurrection."

Judicial and legislative acts in the respective States composing the so called Confederate States should be respected by the courts if they were not "hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

Applying these principles to the present case, the court is of opinion that the mere investment by Hunter, as guardian, of the Confederate funds or currency of his ward in bonds of the Confederate States should be deemed a transaction in the ordinary course of civil society, and not, necessarily, one conceived and completed with an actual intent thereby to aid in the destruction of the Government of the Union.

The case is stated in the opinion.

Mr. Pope Barrow for plaintiff in error. *Mr. S. R. Church* and *Mr. F. H. Stephens* were on his brief.

Mr. P. W. Meldrine for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

William H. Baldy, a citizen of Georgia, died in that State prior to the civil war, leaving several children, one of whom was Marianne J. Baldy who became of full age on the 21st day of February, 1875.

In 1857 Dr. E. H. W. Hunter was appointed her guardian,

and after duly qualifying as such took possession of the estate of his ward.

By an act of the legislature of Georgia, passed on the 16th day of December, 1861, guardians, trustees, executors and administrators were authorized to invest any funds held by them in the bonds issued by the Confederate States, or in lands and negroes — an order to that effect being first obtained from a judge of the Superior Court, who was empowered to consider and pass such applications, either in term time or vacation. Georgia Laws, 1861, p. 32.

On the 25th day of April, 1863, the Superior Court of Jefferson County, Georgia, passed an order granting leave to the guardian of Miss Baldy to invest certain funds then in his hands in Confederate bonds. This order was granted upon the petition of the guardian, who expressed the opinion that such funds should be so invested. On the same day the investment was made.

The legislature of Georgia, by an act approved March 12, 1866, No. 124, entitled "An act for the relief of administrators, executors, guardians and trustees, and for other purposes," declared that all administrators, executors, guardians and trustees, who, in pursuance of an order, judgment or decree of any court having jurisdiction, or of any law of that State, *bona fide* invested the funds of the estate they represented in the bonds, notes or certificates of the State of Georgia or of the Confederate States, "be and they are hereby relieved from all the penalties of mismanagement, misappropriation or misapplication of the funds of the estates they represent, by reason of such investments;" and that all administrators, executors, guardians and trustees, claiming the benefit of the provisions of that act, should, before their final settlement, make oath before the Ordinary of the county in which they had theretofore made their returns, "showing what funds of the estates they represent they have so invested, and shall also swear that the notes, bonds or certificates, so held by them, are the same kind of currency which they received for the estates they so represent." Laws Georgia, 1865–66, p. 85.

On the 2d day of July, 1866, the guardian made a return

to the proper court of his acts for the years 1864 and 1865, showing the amount in his hands, and also made oath before the Ordinary of Jefferson County, Georgia, "that in 1863, in pursuance of an order, judgment or decree of the Superior Court of said county as guardian of M. J. Baldy, a minor, he did *bona fide* invest twelve hundred dollars of the funds of said minor in the eight per cent bonds of the Confederate States, and that the bonds so held by him are the same kind of currency which he received for said minor's estate."

In 1876 Hunter received from the Ordinary of Jefferson County letters of dismissal as guardian of the several children of William H. Baldy. He died nine years thereafter, in 1885, and this suit was brought in 1893 against his executor in the name of Marianne J. Baldy by her next friend, she having become of unsound mind as far back at least as 1875, and being at the time this suit was brought in a lunatic asylum.

At the trial below the plaintiff asked the court to instruct the jury that "an investment by a guardian of money of his ward during the Confederate war, and while both guardian and ward were residing within the Confederate territory, in bonds of the Confederate States, was unlawful, and the guardian is responsible to the ward for the sum so invested;" and that no act of the legislature of the State "passed during the late war, authorizing the guardian to invest the funds of his ward in Confederate bonds, and no order of any court of the State granted in pursuance of said act of the legislature, would authorize such investment." Both of these instructions were refused.

It is not contended that the case involves any question as to the statute of limitations.

It was agreed at the trial that the only matter in issue was as to the liability of Hunter's estate by reason of his having invested the ward's money in 1863 in bonds of the Confederate States. This appears from the charge to the jury in which the trial court, after observing that its duty was to follow the decisions of the Supreme Court of Georgia, said: "In the present case I am authorized to say that it is agreed between counsel that the investment was made *bona fide*, and

the only question is whether it was lawful or unlawful for the guardian to make this investment; and, further, that as I may decide the legal question, I shall instruct a verdict for plaintiff or defendant, as upon that would depend his right to have credit for that amount in his settlement with his ward. Following the decision of the Supreme Court of Georgia, I charge you that the investment by Dr. Hunter, the guardian, in Confederate bonds was a lawful investment. You are therefore instructed to find a verdict for the defendant." A verdict was accordingly returned for the defendant.

The verdict was made the judgment of the trial court, and that judgment was affirmed by the Supreme Court of Georgia. The latter court, after referring to some of its former decisions, held that "a guardian who, during the war between the States, in good faith invested the funds of his ward in bonds of the Confederate States, under an order of the judge of the Superior Court properly obtained under then existing laws, was protected thereby, and is not liable to the ward for the value of the money invested."

The case is now before this court on writ of error to the Supreme Court of Georgia.

The plaintiff in error contends that the principles to be deduced from our former decisions require the reversal of the judgment. As this proposition is disputed, it is necessary to examine the cases heretofore determined by this court.

Referring to the government established in 1862 in Texas in hostility to the United States, and which at that time was in the exercise of the ordinary functions of administration, this court in *Texas* v. *White*, 7 Wall. 700, 773, said: "It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanat-

ing from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

In *Thorington* v. *Smith*, 8 Wall. 1, 7, 10–12, the question arose whether a contract for the payment of Confederate notes, which was made during the civil war between parties residing within the so called Confederate States, could be enforced in the courts of the United States. Upon that question, which was recognized as by no means free from difficulty, the court said: "It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the Government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?" After referring to *United States* v. *Rice*, 4 Wheat. 246, 253, relating to the occupancy of Castine, Maine, in the war of 1812 by the British forces, and *Fleming* v. *Page*, 9 How. 603, 614, relating to the occupancy, during the Mexican war, of Tampico, Mexico, by the troops of the United States — they being described as "cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part," and during which possession, the obligations of the inhabitants to their respective countries were held to have been suspended, although not abrogated — this court said: "The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think it must be classed among the governments of which these are examples. It is to be observed that the rights and obliga-

tions of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be the enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the reëstablishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity, but a duty. Without such obedience civil order was impossible. It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, those notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only 'after the ratification of a treaty of peace between the Confederate States and the United States of America.' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded therefore as a currency, imposed on the community by irresistible force. It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded for that reason only as made in aid of the foreign invasion in the

one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with *actual intent* to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation."

In *Delmas* v. *Insurance Co.*, 14 Wall. 661, 665, upon writ of error to the Supreme Court of Louisiana, one of the questions presented was whether a judgment, which was otherwise conceded to be a valid prior lien for the party in whose favor it was rendered, was void because the consideration of the contract on which the judgment was rendered was Confederate money. This court said: "This court has decided, in the case of *Thorington* v. *Smith*, 8 Wall. 1, that a contract was not void because payable in Confederate money; and notwithstanding the apparent division of opinion on this question in the case of *Hanauer* v. *Woodruff*, 10 Wall. 482, we are of opinion that on the general principle announced in *Thorington* v. *Smith*, the notes of the Confederacy actually circulating as money at the time the contract was made may constitute a valid consideration for such contract." So, in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 499, it was a question whether Confederate treasury notes had and received by the defendants for the use of the plaintiffs were a sufficient consideration for a promise, expressed or implied, to pay anything; and it was held upon the authority of *Thorington* v. *Smith*, above cited, that "a promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, cannot be considered a *nudum pactum* or an illegal contract."

Horn v. *Lockhart*, 17 Wall. 570, 573, 575, 580, was a suit for an accounting as to funds in the hands of an executor, and to enforce the payment to legatees of their respective shares. One of the questions in the case was whether the defendant

was entitled to credit for a certain sum in Confederate notes which, in March, 1864, he had deposited "as executor in the Confederate States Depository Office, at Selma, Alabama, and received a certificate entitling him to Confederate States four per cent bonds to that amount." The receiving of money by the executor in Confederate notes, and the investment of such notes in Confederate bonds, were, it was said, in strict accordance with laws passed by the legislature of Alabama in November, 1861, and November, 1863, when that State was engaged in rebellion against the United States. The Circuit Court held that the executor could not exonerate himself from liability for the balance adjudged to be due the legatees by paying the same in Confederate bonds; that, as a general rule, all transactions, judgments and decrees which took place in conformity with existing laws in the Confederate States between the citizens thereof during the late war, "except such as were directly in aid of the rebellion, ought to stand good;" and that the exception of such transactions was a political necessity required by the dignity of the Government of the United States and by every principle of fidelity to the Constitution and laws of our common country. Upon these grounds it adjudged that the deposit by the executor of money of the estate in a depository of the Confederate States could not be sustained, as it was a direct contribution to the resources of the Confederate government. The decree, therefore, was that the executor should pay to plaintiff the sum so deposited by him in lawful money of the United States. Upon appeal the decree of the Circuit Court was affirmed, three of the members of this court dissenting. This court said: "We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was

to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution. The validity of the action of the probate court of Alabama in the present case in the settlement of the accounts of the executor we do not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States."

In the *Confederate Note case*, 19 Wall. 548, 555–557, in which it was held that parol evidence was admissible to prove that the word "dollars" in a contract made during the civil war meant, in fact, Confederate notes, the court said: "The treasury notes of the Confederate government were issued early in the war, and, though never made a legal tender, they soon, to a large extent, took the place of coin in the insurgent States. Within a short period they became the principal currency in which business in its multiplied forms was there transacted. The simplest purchase of food in the market, as well as the largest dealings of merchants, were generally made in this currency. Contracts thus made, not designed to aid the insurrectionary government, could not, therefore, without manifest injustice to the parties, be treated as invalid between them. Hence, in *Thorington* v. *Smith* this court enforced a contract payable in these notes, treating them as a currency imposed upon the community by a government of irresistible force. As said in a later case, referring to this decision, 'It would have been a cruel and oppressive judgment, if all the transactions of the many millions of people composing the inhabitants of the insurrectionary States, for the several years

of the war, had been held tainted with illegality because of the use of this forced currency, when those transactions were not made with reference to the insurrectionary government.' *Hanauer* v. *Woodruff*, 15 Wall. 448." Again: "When the war closed, these notes, of course, became at once valueless and ceased to be current, but contracts made upon their purchasable quality, and in which they were designated as dollars, existed in great numbers. It was at once evident that great injustice would in many cases be done to parties if the terms used were interpreted only by reference to the coinage of the United States or their legal tender notes, instead of the standard adopted by the parties. The legal standard and the conventional standard differed, and justice to the parties could only be done by allowing evidence of the sense in which they used the terms, and enforcing the contracts thus interpreted."

Sprott v. *United States*, 20 Wall. 459, 460, 462, was a suit against the Government in the Court of Claims under the Captured and Abandoned Property Act of March 12, 1863, c. 120, 12 Stat. 820, one of the provisions of which was that a claimant, before being entitled to recover the proceeds of the property, must prove that he had never given aid or comfort to the rebellion. It appeared that the cotton in question was sold to the claimant by an agent of the Confederate States as "cotton belonging to the Confederate States, and it was understood by the claimant at the time of the purchase to be the property of the rebel government, and was purchased as such." After observing that the cotton had been in the possession and under the control of the Confederate government, with claim of title, and that it was taken by the Union forces during the last days of the existence of that government, sold, and the proceeds deposited in the Treasury, this court said: "The claimant now asserts a right to this money on the ground that he was the owner of the cotton when it was so captured. This claim of right or ownership he must prove in the Court of Claims. He attempts to do so by showing that he purchased it of the Confederate government and paid them for it in money. In doing this he gave aid and assistance to the rebellion in the most efficient manner he possibly could.

He could not have aided that cause more acceptably if he had entered its service and become a blockade runner, or under the guise of a privateer had preyed upon the unoffending commerce of his country. It is asking too much of a court of law sitting under the authority of the Government then struggling for existence against a treason respectable only for the number and the force by which it was supported, to hold that one of its own citizens, owing and acknowledging to it allegiance, can by the proof of such a transaction establish a title to the property so obtained. The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, and to undermine or destroy the safeguards of the social fabric, is too well settled to admit of dispute. That any person owing allegiance to an organized government, can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its existence, and then in a court of that Government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts. A clearer case of turpitude in the consideration of a contract can hardly be imagined unless treason be taken out of the catalogue of crimes." The court further said: "The recognition of the existence and the validity of the acts of the so called Confederate government, and that of the States which yielded a temporary support to that government, stand on very different grounds, and are governed by very different considerations. The latter, in most, if not in all, instances, merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or the false Federal power. They were the fundamental principles for which civil society is organized

into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only when in the use of these powers substantial aid and comfort was given or intended to be given to the rebellion, when the functions necessarily reposed in the State for the maintenance of civil society were perverted into the manifest and intentional aid of treason against the Government of the Union, that their acts are void."

From these cases it may be deduced —

That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so called Confederate States;

That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame "except when proved to have been entered into *with actual intent* to further invasion or insurrection;" and,

That judicial and legislative acts in the respective States composing the so called Confederate States should be respected by the courts if they were not "hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

Applying these principles to the case before us, we are of opinion that the mere investment by Hunter, as guardian, of the Confederate funds or currency of his ward in bonds of the Confederate States should be deemed a transaction in the ordinary course of civil society, and not, necessarily, one conceived and completed with an actual intent thereby to aid in the destruction of the Government of the Union. If contracts between parties resident within the lines of the insurrectionary States, stipulating for payment in Confederate notes issued in furtherance of the scheme to overturn the authority of the United States within the territory dominated by the Confederate States, were not to be regarded, for that reason only, as invalid, it is difficult to perceive why a different principle should be applied to the investment by a guardian of his ward's Confederate notes or currency in Confederate bonds — both guardian and ward residing at that time, as they did from the commencement of the civil war, within the Confederate lines and under subjection to the Confederate States.

As to the question of the intent with which this investment was made, all doubt is removed by the agreement of the parties at the trial that the investment was *bona fide*, and that the only question made was as to its legality. We interpret this agreement as meaning that the guardian had in view only the best financial interests of the ward in the situation in which both were placed, and that he was not moved to make the investment with the purpose in that way to obstruct the United States in its efforts to suppress armed rebellion. We are unwilling to hold that the mere investment in Confederate States bonds — no actual intent to impair the rights of the United States appearing — was illegal as between the guardian and ward.

It is said, however, that any such conclusion is inconsistent with the decision in *Lamar* v. *Micou*, 112 U. S. 452, 476. That was a suit in the Circuit Court of the United States for the Southern District of New York, having been removed thereto from the Supreme Court of that State. One of the questions arising in that case was as to the liability of a guardian for moneys belonging to his wards which were invested by him during the civil war in bonds of the Confederate States. This court said: "Other moneys of the wards in Lamar's hands, arising either from dividends which he had received on their behalf or from interest with which he charged himself upon sums not invested, were used in the purchase of bonds of the Confederate States, and of the State of Alabama. The investment in bonds of the Confederate States was clearly unlawful, and no legislative act or judicial decree or decision of any State could justify it. The so called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington* v. *Smith*, 8 Wall. 1; *Head* v. *Starke*, Chase, 312; *Horn* v. *Lockhart*, 17 Wall. 570; *Confederate Note case*, 19 Wall. 548; *Sprott* v. *United States*, 20 Wall. 459; *Fretz* v. *Stover*, 22 Wall. 198; *Alexander* v. *Bryan*, 110 U. S. 414. An infant has no capacity by contract with his guardian, or by assent to his unlawful acts to affect his own rights. The case is governed in this particular by the decision in *Horn* v. *Lockhart*, in which it was held that an executor was not discharged from his liability to legatees by having invested funds, pursuant to a statute of the State, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate States, which became worthless in his hands."

It was, of course, intended that this language of the court

be taken in connection with the history of the guardian's transactions as disclosed in the full and careful statement of the case that preceded the opinion. It appears from that statement that the guardian was appointed prior to the war by the Surrogate of Richmond County, New York, in which State he, at that time, 1855, resided; that immediately upon his appointment he received, in New York, several thousand dollars belonging to each of his wards, and invested part of it in 1856 in the stock of a New York bank and a part in 1857 in the stock of a Georgia bank, each bank then paying good annual dividends; that in 1861 he had a temporary residence in New York; that upon the breaking out of the rebellion he removed all his property and voluntarily left New York, passing through the lines to Savannah where he took up his residence, sympathizing with the rebellion and doing all that was in his power to accomplish its success, until January, 1865; and that he took up his residence again in New York in 1872 or 1873, after which time he lived in that city. It further appeared that of the money of his wards accruing from bank stocks he, in 1862, invested $7000 in bonds of the Confederate States and of the State of Alabama, and afterwards sold the Alabama bonds and invested the proceeds in Confederate States bonds. It thus appears that *Lamar* v. *Micou* was a case in which the guardian, becoming such under the laws of New York, in violation of his duty to the country, and after the war became flagrant, voluntarily went into the Confederate lines, and there gave aid and comfort to the rebellion; and yet he asked that the investment of his wards' money in Confederate States bonds receive the sanction of the courts sitting in the State under the authority of whose laws he became and acted as guardian.

Besides, it is distinctly stated in the opinion in that case that the sums which Lamar used in the purchase of bonds of the Confederate States were moneys of the wards in his hands "arising either from dividends which he had received in their behalf, or from interest with which he charged himself upon sums not invested," 112 U. S. 476, which is a very different thing from reinvesting (as in the present case) in

Syllabus.

Confederate currency moneys previously received in the like kind of currency. The present case is governed by considerations that do not apply to that case. We do not doubt the correctness of the decision in *Lamar* v. *Micou*, upon its facts as set out in the report of that case; but we hold, in the present case, for the reasons we have stated, that the judgment of the Supreme Court of Georgia must be

Affirmed.

KING *v.* MULLINS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 157. Argued March 22, 23, 1898. — Decided May 31, 1898.

The system established by the State of West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the constitution of the State.

As neither the plaintiff nor those under whom he claims title availed themselves of the remedy provided by the statutes of West Virginia for removing the forfeiture arising from the fact that, during the years 1884, 1885, 1886, 1887 and 1888, the lands in question were not charged on the proper land books with the state taxes thereon for that period or any part thereof, the forfeiture of such lands to the State was not displaced or discharged, and the Circuit Court properly directed the jury to find a verdict for the defendants. The plaintiff was entitled to recover only on the strength of his own title. Whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain this action of ejectment.

Reusens v. *Lawson*, 91 Virginia, 226, approved and followed to the point that "In an action of ejectment the plaintiff must recover on the strength of his own title, and if it appear that the legal title is in another, whether that other be the defendant, the Commonwealth, or some third person,

it is sufficient to defeat the plaintiff. If it appears that the title has been forfeited to the Commonwealth for the non-payment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or regranted by the Commonwealth, the presumption is that the title is still outstanding in the Commonwealth."

THE case is stated in the opinion.

Mr. Maynard F. Styles for plaintiff in error.

Mr. Z. T. Vinson and *Mr. Holmes Conrad* for defendants in error.

Mr. W. E. Chilton and *Mr. James H. Ferguson* filed briefs for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action of ejectment was brought to recover that part lying in the State of West Virginia of a tract of 500,000 acres of land patented by the Commonwealth of Virginia in 1795 to Robert Morris, assignee of Wilson Cary Nicholas.

The persons sued were very numerous, but M. B. Mullins, Alexander McClintock and John McClintock having elected to sever in their defence from other defendants, the case was tried only as between them and the plaintiff King.

At the trial in the Circuit Court the plaintiff introduced in evidence the patent to Morris showing that the lands therein described were granted without conditions. Evidence was also introduced tending to show that by sundry mesne conveyances and legislative and judicial proceedings the title of Morris became vested, in 1866, in Robert Randall, trustee; in John R. Reed, trustee, on the 29th day of June, 1886; and through sundry mesne conveyances by Reed, trustee, David W. Armstrong and John V. LeMoyne in the plaintiff King on the 27th day of December, 1893.

The defendants resisted the claim of the plaintiff upon the general ground that prior to the date of the deed from LeMoyne, the lands embraced in the patent were absolutely forfeited to the State, and were so forfeited when the present action was instituted.

Opinion of the Court.

To show an outstanding title in the State to the lands in dispute by forfeiture, the defendants read in evidence a certificate of the auditor of the State, dated October 29, 1895, showing that neither Randall, trustee, nor Reed, trustee, nor LeMoyne, King, Armstrong and others named, had entered on the land books of Wyoming, McDowell, Logan, Boone or Mingo counties, or either of them, for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893 and 1894, or either of them, a tract of 500,000 acres of land, nor paid taxes upon the land for any of those years. The certificate further stated that the tract of 500,000 acres was not entered on the books of the assessor in any of those counties for any of the years named; that no land was entered on the assessor's book in the name of any of said parties for any of those years; and that none of the above persons are charged on the land books with state taxes on any part of those lands.

We assume from the record that the greater part at least of the lands in West Virginia embraced in the Morris patent are in the above-named counties.

The defendants, further to maintain the issues on their part, offered in evidence —

1. A certified copy of the order of the Circuit Court of Wyoming County, West Virginia, (in which county part of the original tract was situated,) showing the appointment and qualification, on the 18th day of April, 1890, of E. M. Senter, commissioner of school lands for that county.

2. Also the annual report made by that officer to the Circuit Court of Wyoming County, March 31, 1894, and filed, of all tracts and parcels of land liable to be sold for the benefit of the school fund, as required by section 5 of chapter 105 of the Code of West Virginia, as amended by the act of the legislature of 1893, chapter 24. That report gives the list of various tracts in the county of Wyoming "heretofore purchased for the State at sales thereof for delinquent taxes and not redeemed within one year or within the time required by law, made up from the records in the auditor's office and certified by the auditor to the clerk of the Circuit Court to be sold by the commissioner of school lands." The report also

states: "Said commissioner of school lands would further report that in the annual report of the commissioner of school lands for the year 1889 there was reported for sale for the benefit of the school fund 50,000 acres, forfeited in the name of the Pittsburgh National Bank of Commerce, and sold on the — day of —— for the non-payment of the taxes due thereon for the years 1883 and 1884, and purchased by the State. . . . The commissioner of the Circuit Court who was appointed to report upon proceedings heretofore instituted to sell the lands of said Pittsburgh National Bank of Commerce and Smith and Fougeray reported them a part of 500,000 acre survey, Robert Morris patent, known as the 'Robert E. Randall land,' and that a suit was pending in the Circuit or District Court of the United States for the District of West Virginia, and that proceedings to sell the same under said formal proceedings had been enjoined. Said commissioner is advised that an error was made in said matter, and that no suit was pending in said United States court with reference to said 500,000 acre survey. The said commissioner of school lands would further report that it has come to his knowledge from Henry C. King, the present owner and claimant thereof, that a tract of 500,000 acres of land, lying partly in this county and partly in the counties of Logan and McDowell, and the greater portion in the States of Virginia and Kentucky, was at the April term, 1883, of the Circuit Court of this county redeemed from a former forfeiture by Robert E. Randall, trustee, and all the taxes thereon paid prior to and including the year 1883; that since said redemption the said land has been omitted from the land books of this county for five consecutive years, to wit, for the years 1884, 1885, 1886, 1887 and 1888, and thereby the same has been forfeited to the State in the name of Robert E. Randall, trustee. The said commissioner of school lands further reports that each of said tracts hereinbefore mentioned are liable to be sold for the benefit of the school fund of this State on account of the forfeiture herein stated; all of which is respectfully submitted."

3. A certified copy of an order of the Circuit Court of

Logan County, West Virginia, made April 1, 1889, showing the appointment of U. B. Buskirk as commissioner of school lands of that county, and his annual report, as such commissioner, of all tracts and parcels of land in Logan County theretofore reported for sale for the benefit of the school fund to the clerk of the Circuit Court of that county under sections 1 and 2 of chapter 105 of the Code of West Virginia, and all lands in that county not theretofore reported, which in his opinion were liable to sale for the benefit of that fund.

4. A certified copy of an order of the Circuit Court of Logan County, West Virginia, ordering suit to be brought in the name of the State for the sale of the lands mentioned in the report of Commissioner Buskirk.

The defendants having rested their case, the plaintiff to prove that no forfeiture of the land or outstanding title thereto existed or was claimed by the State of West Virginia, and that there was no record of any forfeiture where the same would be found if it existed, introduced and read in evidence a certificate of the auditor of the State, dated October 30, 1895, certifying that he had carefully examined the record books of forfeited lands returned and kept in his office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, West Virginia, from and including the year 1883 to date, and there did not appear on such books a tract of 500,000 acres of land, or any part thereof, or any other tract forfeited for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee, A. D. Maupertures, John R. Reed, John R. Reed, trustee, John V. LeMoyne, David W. Armstrong, or Henry C. King; that there were no lands from any of those counties entered on the record of forfeited lands of his office for either of those years, in the name of either or any of those parties; that he had carefully examined the record books of delinquent lands returned and kept in his office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, West Virginia, from and including the year 1883 to date, and there did not appear on such record books a tract of 500,000 acres of land or any part thereof or any other tract delinquent for

any cause in the name of either Robert E. Randall, Robert E. Randall, trustee, A. D. Maupertures, John R. Reed, John R. Reed, trustee, John V. LeMoyne, David W. Armstrong or Henry C. King; and that there were no lands from any of those counties entered on the record of delinquent lands of his office for either or any of those years in the name of either or any of those parties.

The plaintiff further offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claimed title, and proved further that plaintiff was a purchaser of said tract for a valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in West Virginia, or of any of the facts set out in the auditor's certificate, shown and referred to in plaintiff's bill of exceptions, except such notice as the land books and records duly kept disclosed.

At the instance of the defendants the court instructed the jury "that the title to the land claimed by the plaintiff, granted to one Robert Morris by the Commonwealth of Virginia, by patent dated June 23, 1795, was (prior to the date of the deed made by John V. LeMoyne to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

To this instruction the plaintiff objected upon the ground that the provisions of the constitution of West Virginia for the forfeiture of lands were repugnant to the Fourteenth Amendment of the Constitution of the United States, and to Article 3, sections 4, 5, 9, 10, 20, and Article 5, section 1, of the state constitution; and upon the further ground that if there were a forfeiture of said land to and an outstanding title in the State, such title could not be set up against the plaintiff in this action, he being a purchaser for value without

knowledge or notice of such forfeiture or of such outstanding title.

The plaintiff's objection having been overruled, and a verdict having been rendered by direction of the court for the defendants, judgment was entered that the plaintiff take nothing by his action.

The controlling question in this case relates to the validity under the Constitution of the United States of certain provisions in the constitution and statutes of West Virginia for the forfeiture of lands by reason of the failure of the owners during a given period to have them placed upon the proper land books for taxation.

The constitution of West Virginia provides that all private rights and interests in lands in that State derived from or under the laws of Virginia, and from or under the constitution and laws of West Virginia prior to the time such constitution went into operation, should "remain valid and secure, and shall be determined by the laws in force in Virginia prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect." Art. XIII, § 1.

In view of this provision it is proper to look at the legislation of Virginia and the decisions of its highest court touching the forfeiture of lands for non-compliance by the owners with the requirements of the law relating to taxation.

By the first section of an act of the General Assembly of Virginia, passed February 27, 1835, further time was given until July 1, 1836, for the redemption of all lands and lots theretofore returned as delinquent for the non-payment of taxes, *west of the Alleghany Mountains*, and which had become vested on the previous 1st day of October in the president and directors of the Literary Fund; saving the title of any *bona fide* occupant claiming under a junior grant, whose rights were protected and secured under prior legislation.

That act further provided:

"And whereas it is known to the general assembly that many large tracts of lands lying west of the Alleghany Mountains which were granted by the Commonwealth before the

first day of April, 1831, never were, or have not been for many years past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has occurred, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

"2. *Be it enacted*, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, 1836, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the Commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March 10, 1832, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the Commonwealth, after the 1st day of July, 1836, except only as hereinafter excepted.

"3. That all right, title and interest which may hereafter be vested in the Commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable, *bona fide* claimed, held or derived from or under any grant of the Commonwealth bearing date previous to the 1st day of April, 1831, who shall have dis-

charged all taxes duly assessed and charged against him, her or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable; *Provided*, That nothing in this section contained shall be so construed as to impair the right or title of any person or persons who have obtained grants from the Commonwealth for the same land and have regularly paid the taxes thereon, but in all such cases the parties shall be left to the strength of their original titles." Laws Va. 1834–35, c. 13, pp. 11–13.

Other acts were passed in Virginia relating to delinquent and forfeited lands and extending the time for redemption, all of them proceeding upon the ground that the State had the power to forfeit lands for failure to have them charged with taxes as well as for failure to pay the taxes so charged.

The first case in which the Supreme Court of Appeals of Virginia had occasion to pass upon the validity of the above statute of 1835, so far as it forfeited lands which the owner failed to have put on the proper land books and pay taxes upon, was *Staat's Lessee* v. *Board*, 10 Gratt. 400, 402, decided in 1853. That court said: "It further seems to the court that, as by the act of March 23, 1836, Sess. Acts, p. 7, time was allowed from the 1st day of November, 1836, for all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the act of February 27, 1835, the forfeiture became absolute from and after the 1st of November, 1836. That the provision of the act of March 30, 1837, giving time for redemption until the 15th of January, 1838, did not release the forfeitures which had accrued, except in such cases where the owner or proprietor availed himself of the privilege of redeeming. And it further seems to the court that such forfeiture became *absolute* and *complete* by the failure to enter and pay the taxes thereon in the manner prescribed by the act of 27th of February, 1835. And *no inquisition or judicial proceedings or inquest, or finding of any kind, was required to consummate such forfeiture.*"

The same principle was announced in *Wild's Lessee* v. *Serpell*, 10 Gratt. 405, 408 (1853). The court said: "That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and, where they have been omitted from the books of the commissioners of the revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law, and, in case of failure so to do, forfeiting to the Commonwealth all right and title whatever of the parties in default, (under the modifications and restrictions provided by the acts,) are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staat's Lessee* v. *Board*, 10 Gratt. 400; *Smith's Lessee* v. *Chapman*, 10 Gratt. 445. The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case, no judgment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, *of their own force and by their own energy*, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the Commonwealth, *without the machinery of any proceeding of record, or anything in the nature of an inquest of office.* And as the title is thus in a proper case divested out of the owner and vested in the Commonwealth by the operation of the statutes, so where the forfeiture enures to the benefit of a third person, claiming under the Commonwealth by virtue of another and distinct right, the transfer of the title to such person is, in like manner, perfect and complete without any new grant from the Commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar condition of things in that part of the State lying west of the Alleghany Mountains, and the serious check to population and the improvement of the country

and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional powers of the legislature to enact them was clear and unquestionable." This case was cited in *Armstrong* v. *Morrill*, 14 Wall. 120, 134, which was an action of ejectment brought prior to the adoption of the Fourteenth Amendment of the Constitution of the United States, and in which therefore the rights of the parties must have been determined without reference to the prohibition in that amendment against the deprivation of property without due process of law.

In *Levasser* v. *Washburn*, 11 Gratt. 572, 580–581, (1854) it was said: "According to the decisions of this court in the cases just referred to, and also in the cases of *Wild* v. *Serpell*, 10 Gratt. 405, and *Smith's Lessee* v. *Chapman*, 10 Gratt. 445, the Circuit Court also erred in its opinion as to the time at which the forfeiture under the Girond grant occurred or became complete. It appears to have proceeded on the notion that some inquest of office, or decree, or other proceeding should have been had in order to declare and perfect the forfeiture. Nothing of the kind was necessary. The act of the 27th of February, 1835, Sess. Acts, p. 11, declaring that lands which had been omitted from the books of the commissioners of the revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same, except such as might be released by law, was intended *by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding or finding of any kind, in order to consummate it.* It was perfectly within the competency of the legislature to declare such forfeiture and divest the title *by the mere operation of the act itself*, and the whole legislation upon the subject of delinquent and forfeited lands plainly manifests the intention to exercise its power in this form." See also *Usher's Heirs* v. *Pride*, 15 Gratt. 190, and *Smith* v. *Tharp*, 17 Gratt. 221.

In this connection it may be well to refer to *Martin* v. *Snowden*, 18 Gratt. 100, 135–136, 139–140, (1868) in which the Supreme Court of Appeals of Virginia had occasion to

determine, as between the parties before it, the effect of the provisions in the acts of Congress of August 5, 1861, 12 Stat. 292, c. 45, and June 7, 1862, 12 Stat. 422, c. 98, relating to the direct taxation of lands. By the latter act it was provided that "the title of, in and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States," and that "upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever." § 4. One of the questions presented in that case was, whether the first of the clauses just quoted worked, *proprio vigore*, a transfer to the United States of the title to the land declared to be forfeited. The court held that the acts of Congress did not and were not intended to create such a forfeiture of the land to the United States as that it ceased *ipso facto* to be the property of the former owner and became the absolute property of the United States; that Congress was without constitutional power to impose the penalty of forfeiture of lands for the non-payment of taxes; that Congress had all the powers for enforcing the collection of its taxes that were in use by the Crown in England, or were in use by the States at the time of the adoption of the Constitution, but forfeiture of the land assessed with the tax was not then in use, either in England or the States, as a mode of collecting the tax. Referring to *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, the state court further said: "Can a forfeiture of the land charged with taxes, such as is contended for in these cases, be regarded as 'due process of law,' upon the principles established by that case? Literally speaking, it is not any process at all, but operates by force of law and without any process or proceeding whatever, except the ascertainment by the commissioners of the sum chargeable on the land. But that is probably immaterial. The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England at any period of its history for enforcing the payment of taxes or other debts to the Crown. If it had been, we should have

found such forfeitures treated of in the English law books; but we nowhere find them mentioned." Again: "These references will show what were the ordinary methods of enforcing the payment of taxes in use in Virginia about the time of the adoption of the constitution. And it may be worth mentioning, that before the adoption of the Constitution of the United States the legislature of Virginia had reënacted the provision of Magna Charta, that no freeman shall be taken or imprisoned, or be deprived of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor shall the Commonwealth pass upon him nor condemn him, but by the lawful judgment of his peers, or by the law of the land. 12 Hening's St. at L. c. 81, p. 186. Looking at the spirit which animated all this legislation, we cannot doubt as to what would have been thought, at that day, of a statute declaring an immediate and absolute forfeiture of the whole land as a penalty for the non-payment of the tax within sixty days after the assessment of it, without notice to the owner, by advertisement or otherwise, of the assessment, and without any, even the least, effort to collect it."

The case of *Martin* v. *Snowden* was brought here and is reported under the title of *Bennett* v. *Hunter*, 9 Wall. 326, 335–337, (1869). This court did not deem it necessary in that case to decide whether the United States could constitutionally take to itself the absolute title to lands merely because of the non-payment of taxes thereon within a prescribed time, and without some proceeding equivalent to office found. Speaking by Chief Justice Chase, it said: "We are first to consider whether the first clause of this section, *proprio vigore*, worked a transfer to the United States of the land declared to be forfeited. The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the act was, undoubtedly, revenue, to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government; a policy which had reference to the suppression of rebellion rather

than to revenue. But this purpose did not affect the operation of the act before sale, for until sale actually made there could be, properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt. And it seems unreasonable to give to the act, considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed and relieve his lands from the lien. The first clause of the act, therefore, is not to be considered as working *an actual transfer of the land to the United States*, if a more liberal construction can be given to it consistently with its terms. *Now, the general principles of the law of forfeiture seem to be inconsistent with such a transfer.* Without pausing to inquire whether, in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 625. In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office. 3 Bl. Com. 258. And so of other instances where the title of the sovereign was derived from forfeiture." Again: "Applying these principles to the case in hand, it seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely, non-payment of taxes, while the second clause was intended to work the actual investment of the title through a public act of the government in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of title. The title, indeed, was forfeited by non-payment of the tax; in other words, it be-

came subject to be vested in the United States, and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale. It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States."

We now come to an examination of the West Virginia constitution and statutory provisions relating to the forfeiture to the State of lands subject to taxation.

By Article XIII of the constitution of West Virginia of 1872 it was provided:

"4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the Circuit Court of the county in which the lands or a part thereof, are situated, be sold to the highest bidder.

"5. The former owner of any such land shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the Circuit Court that decrees the sale, within two years thereafter.

"6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. *When for any five successive years after the year* 1869 *the owner of any tract of land containing one thousand acres or more shall not have been charged on such books with state tax on said land, then by operation hereof the land shall be forfeited and the title thereto vest in the State.* But if, for any one or more of such five

years the owner shall have been charged with a state tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: *Provided*, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited." The duty imposed upon owners of land by the first clause of this section was also prescribed by the statutes of the State.

Such being the provisions of the constitution of West Virginia in relation to the forfeiture of lands, the Supreme Court of Appeals of that State had occasion in *McClure* v. *Maitland*, 24 W. Va. 561, 575–578, to determine their scope and effect. In that case it was said: "In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of the Commonwealth of Virginia now embraced within this State were in a most wretched and embarrassed condition. Many owners of large tracts, covering in some cases almost entire counties, would neither pay their taxes nor settle and improve their lands, thus paralyzing the energy and contravening the prosperity of the people and the advancement and population of the State to an almost inconceivable extent. In this emergency and to remedy this calamitous evil, the general assembly of Virginia inaugurated the system of delinquent and forfeiture laws that form the basis of the provisions of our present constitution on that subject. The whole history of that system shows a most earnest and determined effort on the part of the legislature, the judiciary and the people, speaking through our present constitution, to destroy and annihilate the titles of such delinquent

owners, who should, after every reasonable opportunity had been given them to comply with the laws, continue in default, and to protect actual settlers and these not in default. The purpose of the statutes passed to enforce this system was not merely to create a lien for the taxes on these delinquent and unoccupied lands, but to effect *by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the State without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes.* The constitutional competency of the legislature to pass these laws and thus consummate the forfeiture and perfectly divest all the right, title and interest of the former owner by the mere energy and operation of the statutes themselves, has been repeatedly affirmed by the Court of Appeals of Virginia"— citing *Staats* v. *Board*, 10 Gratt. 400; *Wild* v. *Serpell*, 10 Gratt. 405; *Levasser* v. *Washburn*, 11 Gratt. 572; *Usher* v. *Pride*, 15 Gratt. 190 and *Smith* v. *Tharp*, 17 W. Va. 221.

So in *Coal Co.* v. *Howell*, 36 W. Va. 489, 501, the court referred to its former decisions, above cited, and after observing that they had been adhered to with only a seeming exception, said: "The forfeitures became complete and absolute by operation of law — in the case of delinquent lands on the 1st day of October, 1834, and in the case of omitted lands on November 1, 1836, *and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such forfeiture.*"

Now, the plaintiff contends that the provision in the constitution of West Virginia which forfeits and vests absolutely in the State without inquisition of record, or some public transaction equivalent to office found, the title to lands which for five successive years after 1869 have not been charged with state taxes on the land books of the proper county, is repugnant to the clause of the Fourteenth Amendment of the Constitution of the United States declaring that no State shall deprive any person of his property without due process of law.

In support of this contention numerous authorities have

been cited by the plaintiff, those most directly in point being *Griffin* v. *Mixon*, 38 Mississippi, 424, (1860) and *Marshall* v. *McDaniel*, 12 Bush, 378, 382–5, (1876). In the first of those cases, the High Court of Errors and Appeals of Mississippi, speaking by Judge Harris, held a statute of that State declaring the forfeiture of lands on the failure simply of the owner to pay the taxes due thereon, without notice or hearing in any form, to be in violation of the constitutional provisions prohibiting the taking of private property for public use without just compensation being first made therefor, or the deprivation of property without due process of law. In the other case, the Court of Appeals of Kentucky held to be unconstitutional a provision in a statute of that State declaring "that in all cases where any lands shall hereafter be forfeited for failing to list for taxation, or stricken off to the State, the title of such lands shall vest in this Commonwealth by virtue of this act without any inquest of office found, unless said land shall have been redeemed according to law." That court, speaking by Chief Justice Lindsay, said: "In pursuing this inquiry we need not call in question the power of the legislature to provide for the levy and collection of taxes in the most summary manner. The right of the Commonwealth, through its executive and ministerial officers, to assess property for taxation, to ascertain the sum payable by each taxpayer, and to seize and sell his property in satisfaction of such sum, is not open to doubt. It is equally clear the legislature may impose upon the taxpayer the duty of listing his property for taxation, and may prescribe, for the neglect of the duty so imposed, penalties reaching even to the forfeiture of the estate not listed. But when such laws are enacted, the forfeitures prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made and the commission of the offence ascertained by 'due course of law.' . . . 'To enjoin what shall be done or what left undone, and to secure obedience to the injunction by appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction and inflict the penalty belongs to the judicial function.' *Gaines* v. *Buford*, 1 Dana, 481.

By the Magna Charta it is declared that no citizen shall be disseized of his freehold or be condemned but by the lawful judgment of his peers or by the law of the land. The substance of this declaration is contained in our Bill of Rights. Its meaning and intention is that no man shall be deprived of his property without being first heard in his own defence. . . . We conclude without hesitation that so much of the act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the Commonwealth, is unconstitutional and void."

The question of constitutional law thus presented is one of unusual gravity. On the one hand, it must not be forgotten that the clause of the National Constitution which this court is now asked to interpret is a part of the supreme law of the land, and that it must be given full force and effect throughout the entire Union. The due process of law enjoined by the Fourteenth Amendment must mean the same thing in all the States. On the other hand, a decision of this court declaring that that amendment forbids a State, by force alone of its constitution or statutes, and without inquisition or inquiry in any form, to take to itself the absolute title to lands of the citizen because of his failure to put them on record for taxation, or to pay the taxes thereon, might greatly disturb the land titles of two States under a system which has long been upheld and enforced by their respective legislatures and courts. Under these circumstances, our duty is not to go beyond what is necessary to the decision of the particular case before us. If the rights of the parties in this case can be fully determined without passing upon the general question whether the clause of the West Virginia constitution in question, *alone considered*, is consistent with the national Constitution, that question may properly be left for examination until it arises in some case in which it must be decided.

We come then to inquire whether, looking at the constitution and the statutes of West Virginia together, a remedy

was not provided which, if pursued, furnished to the plaintiff and those under whom he asserts title all the opportunity that "due process of law" required in order to vindicate any rights that he or they had in respect of the lands in question.

We have seen that the lands embraced by the patent to Robert Morris were not put upon the land books of the proper counties during the years 1883 to 1894, both inclusive. They were redeemed in 1883 from forfeiture by Randall, trustee, in whom, as we take it, the title was at that time vested. Let it be assumed that they were again forfeited to the State upon the expiration of the five consecutive years after 1883 during which they were not placed on the land books for taxation; in other words, that for that reason they were forfeited to the State after the year 1888. What, at the time of such forfeiture, were the rights of the owner? Did the statutes of the State give him any remedy whereby he could be relieved from such forfeiture? Was he denied all opportunity to hold the lands upon terms just and reasonable both to him and the State?

We pass by the act of November 18, 1873, providing for the sale of escheated, forfeited and unappropriated lands for the benefit of the school fund, act of W. Va. 1872–73, p. 449, c. 134, and also, for the present, the act of March 25, 1882, on the same subject, acts of W. Va. 1882, p. 253, c. 95, because both of those acts are amendatory of the Code of West Virginia, and their provisions, so far as they directly or indirectly bear upon the present controversy, are preserved and extended in the Code published in 1887, which contained the law of the State in reference to forfeited lands as it was at that time.

From Chapter 105 of the Code of West Virginia, published in 1887, it appears that all lands forfeited to the State for the failure to have the same entered upon the land books of the proper county and charged with the taxes thereon, as provided by law — so far as the title thereof was not vested in junior grantees or claimants under the provisions of the constitution and laws of the State — were *required* to be sold for the benefit of the school fund — the auditor to certify

to the clerk of the Circuit Court a list of all such lands (which, or the greater part of which, were in his county), within sixty days after the title thereto vested in the State. That act made it the *duty* of the commissioner of school lands to file his petition in the Circuit Court and pray for the sale of the lands for the benefit of the school fund. He was required to state in his petition "all the tracts, lots and parts and parcels of any tract or lot of land, so liable to sale, in the Circuit Court of his county, praying that the same be sold for the benefit of the school fund" and, according to the best of his information and belief, "the local situation, quantity or supposed quantity, and probable value of each tract, lot or parcel, and part of a tract of land herein mentioned, together with all the facts at his command, in relation to the title to the same, and to each tract, lot, part or parcel thereof, *the claimant or claimants thereof*, and their residence, if known, and, if not known, that fact shall be stated, and stating also how and when and in whose name every such tract, lot and parcel, and part of a tract or lot, was forfeited to the State." Provision was made for the reference of the petition to a commissioner in chancery, "with instructions to inquire into and report upon the matters and things therein contained, and such others as the court may think proper to direct, and particularly to inquire and report as to the amount of taxes and interest due and unpaid on each tract, lot and parcel, and part of a tract or lot of land mentioned in the petition, in whose name it was forfeited, and when and how forfeited, in whom the legal title was at the time of the forfeiture, and if more than one person claimed adverse titles thereto at the date of the forfeiture, the name of each of such claimants and a reference to the deed book or books in which the title papers of any claimant thereof can be found; what portion or portions, if any, of such lands is claimed by any person or persons under the provisions of section three of article thirteen of the constitution of this State, with the names of such claimants and the amount claimed by each as far as he can ascertain the same." If there were no exception to this report, or if there were any which were overruled, "the court

shall confirm the same *and decree a sale* of the lands, or any part of them, therein mentioned, which are subject to sale, for the benefit of the school fund, upon such terms and conditions, as to the court may seem right and proper; and in any decree of sale made under this chapter, the court may provide that the commissioner of school lands, or other person, appointed commissioner to make such sale, may receive bids for such lands, without any notice of sale; and if the former owner or owners, or person in whose name the land was returned delinquent, and forfeited, or the heirs or grantee of such owner or person, or any person or persons, holding a valid subsisting lien thereon, at the time of such forfeiture, bid a sum sufficient to satisfy such decree and the costs of the proceeding and sale, and such person or persons, so bidding, be the highest bidder, said commissioner shall sell the land on such bid, and report the same to the court for confirmation; but if the commissioner receive no bid from any such person, or if he shall receive a higher bid therefor, from any other person, not so mentioned, then, and in either event, the said commissioner shall sell the land, at public auction to the highest bidder, after first giving such notice, as may be provided by such decree." By the same act it was provided: "The former owner of any such land shall be entitled to recover the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum and the costs of the proceedings, if his claim be filed in the Circuit Court that decrees the sale, within two years thereafter, as provided in the next succeeding section."

But the part of Chapter 105 of the Code which has the most direct bearing on the question under consideration is section 14, which after providing that the owner may, upon his petition to the Circuit Court, obtain an order for the payment to himself of the excess just mentioned, proceeds: "At any time during the pendency of the proceedings for the sale of any such land as hereinabove mentioned, such former owner, or any

creditor of such former owner of such land, having a lien thereon, may file his petition in said Circuit Court as hereinbefore provided, and asking to be allowed *to redeem such part or parts of any tract of land so forfeited, or the whole thereof*, as he may desire, and upon such proof being made as would entitle the petitioner to the excess of purchase money hereinbefore mentioned, such court may allow him to redeem the whole of such tract if he desire to redeem the whole, or such part or parts thereof, as he may desire, less than the whole, upon the payment into court, or to the commissioner of school lands, all costs, taxes and interest due thereon, as provided in this chapter, if he desire to redeem the whole of such tract; or if he desire to redeem less than the whole of such tract, upon the payment, as aforesaid, of so much of the costs, taxes and interest due on such tract as will be a due proportion thereof for the quantity so redeemed. But if the petition be for the redemption of a less quantity than the whole of such tract, it shall be accompanied with a plat and certificate of survey of the part or parts thereof sought to be redeemed. Whenever it shall satisfactorily appear that the petitioner is entitled to redeem such tract, or any part or parts thereof, the court shall make an order showing the sum paid in order to redeem the whole tract or the part or parts thereof which the petitioner desires to redeem, and *declaring the tract, or part or parts thereof, redeemed from such forfeiture*, so far as the title thereto was in the State immediately before the date of such order; which order, when so made, *shall operate as a release of such forfeiture so far as the State is concerned*, and of all former taxes on said tract, or part or parts thereof so redeemed, and no sale thereof shall be made. If the redemption be of a part or parts of a tract, the plat or plats and certificate of the survey thereof hereinbefore mentioned, together with a copy of the order allowing the redemption, shall be recorded in a deed book in the office of the clerk of the county court. *Provided*, That such payment and redemption shall in no way affect or impair the title to any portion of such land transferred to and vested in any person, as provided in section three of article thirteen of the constitution of this State."

Opinion of the Court.

It thus appears that when the lands in question and others embraced in the Morris patent were, as is contended, forfeited to the State for the failure of the owner during the five consecutive years after they were redeemed by Randall, trustee, in 1883, to have them entered upon the land books of the proper county and charged with the taxes thereon, it was provided by the statutes of West Virginia:

That all lands thus forfeited to the State should be sold for the benefit of the school fund;

That the sale should be sought by petition filed by the commissioner of school lands in the proper Circuit Court, to which proceeding all claimants should be made parties, and be brought in by personal service of summons upon all found in the county, or by publication as to those who could not be found;

That the petition should be referred to a commissioner in chancery, who should report upon the same and upon such other things as the court might direct, and particularly as to the amount of taxes due and unpaid upon any lands mentioned in the petition, in whose name and when and how forfeited, and in whom the legal title was at the time of the forfeiture;

That if there were no exceptions to the report, or if there were exceptions which were overruled, the court was required to confirm the same and decree a sale of the lands for the benefit of the school fund; and,

That at any time during the pendency of the proceedings instituted for the sale of forfeited lands for the benefit of the school fund, the owner, or any creditor of the owner having a lien thereon, might file his petition in the Circuit Court of the county for the redemption of his lands upon the payment into court, or to the commissioner of school lands, of all costs, taxes and interest due thereon, and obtain a decree or order declaring the lands redeemed so far as the title thereto was in the State immediately before the date of such order.

These provisions were substantially preserved in Chapter 105 as amended and reënacted in 1891 and 1893. Code of West Va. 1891, p. 731; acts of West Va. 1893, p. 57. But in the Code of 1891, act of March 12, 1891, will be found this additional and important provision, Acts 1891, c. 94:

"§ 18. In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine *all questions of title*, possession and boundary which may arise therein, as *well as any and all conflicting claims whatever to the real estate in question arising therein.* And the court, in its discretion, may at any time, regardless of the evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which, in the opinion of the court, is proper to be tried by a jury. And if any such issue be as to the question of title, possession or boundary of the land in question, or any part of it, it shall be tried and determined in all respects as if such issue was made up in an action pending in such court. And every such issue shall be proceeded in, and the trial thereof shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant a new trial therein as in other cases tried by a jury." And this provision was preserved, substantially, in the act of 1893, amendatory of Chapter 105 of the Code of West Virginia.

If, as contended, the State, without an inquisition or proceeding of some kind declaring a forfeiture of lands for failure during a named period to list them for taxation, and by force alone of its constitution or statutes, could not take the absolute title to such lands, still it was in its power by legislation to provide, as it did, a mode in which the attempted forfeiture or liability to forfeiture could be removed and the owner enabled to retain the full possession of and title to his lands. We should therefore look to the constitution and statutes of the State together for the purpose of ascertaining whether the *system* of taxation established by the State was, in its essential features, consistent with due process of law. If, in addition to the provisions contained in the constitution, that instrument had itself provided for the sale of forfeited lands for the benefit of the school fund, but reserved the right to the owner, before sale and within a reasonable period, to pay the taxes and charges due thereon, and thereby relieve his land from forfeiture, we do not suppose that such a system would

be held to be inconsistent with due process of law. If this be true it would seem to follow necessarily that if the statutes of the State, in connection with the constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.

Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. This subject was fully considered in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 280, 281, 282, which arose under the act of Congress of May 15, 1820, providing for the better organization of the Treasury Department. The account of a collector of customs having been audited by the first auditor and certified by the first comptroller of the Treasury, a distress warrant for the balance found to be due was issued by the solicitor of the Treasury, in accordance with the act of Congress, and levied upon the lands of the collector. The question presented was whether such a proceeding was consistent with due process of law — the objection to it being that it was judicial in its nature and that it operated to deprive the debtor of his property without a hearing or trial by jury and without due process of law. This court said, among other things: "Tested by the common and statute law of England prior to the emigration of our ancestors and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the Government from a collector of customs, unless there exists in the constitution some other provision which restrains Congress from authorizing such proceedings. For, though 'due process of law' generally

implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, 2 Inst. 47, 50; *Hoke* v. *Henderson*, 4 Dev. N. C. Rep. 115; *Taylor* v. *Porter*, 4 Hill, 140, 146; *Van Zandt* v. *Waddel*, 2 Yerger, 260; *State Bank* v. *Cooper*, 2 Yerger, 599; *Jones's Heirs* v. *Perry*, 10 Yerger, 59; *Greene* v. *Briggs*, 1 Curtis, 311, yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings." Again: "The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues. As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know, without objection — for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by

systems of fines and penalties, but always in some way observed and yielded to." In *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 239, it was said that "the process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." This must be so, else the existence of government might be put in peril by the delays attendant upon formal judicial proceedings for the collection of taxes.

In this connection reference may be made to what was said by the Supreme Court of Appeals in *McClure* v. *Maitland*, above cited, touching the rights of the owner of lands forfeited to the State, and for the sale of which proceedings were instituted by the commissioner of school lands. That court said: "The title to the land and all the right and interest of the former owner having thus by his default and the operation of the law become absolutely vested in the State and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem proper, without consulting the former owner or any one else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the State saw proper to transfer and vest her title to so much of said land owned by her, in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same and was not in default for the taxes thereon chargeable to him. . . . The laws, as we have shown, by their own force, transferred to and vested the title to the land absolutely in the State without any judicial inquiry or inquest of any kind. There could,

therefore, be no necessity or reason for proceeding *in rem* against the land. That had already become the absolute property of the State, and she had a perfect right to sell it without further inquiry. All the laws providing for the sale of these lands presuppose the title to have vested in the State prior to the commencement of the proceedings. In fact the whole authority of the commissioner and the jurisdiction of the court are based upon the assumption that the unconditional title is in the State; for unless such is the fact neither has any authority to act. *Twiggs* v. *Chevallie*, 4 W. Va. 463. And all the right, title and interest of the former owner having been completely divested, he has not a particle of interest in the land — no more than if he had never owned it; there is, therefore, no possible reason for making him a party or proceeding against him *in personam* or otherwise. The proceeding is of necessity, then, neither *in rem* nor *in personam;* and as all judicial proceedings properly so styled must belong to either the one or the other of these classes, it follows that this is not and cannot be in any technical sense a judicial proceeding."

It is said that this shows that the taxpayer, after his land is forfeited to the State, is left by the statutes of West Virginia without any right or opportunity, by any form of judicial proceeding, to get it back or to prevent its sale, and, therefore, it is argued, he is absolutely divested of his lands solely by reason of his failure to place them on the proper land books.

An answer to this view is, that what was said in *McClure* v. *Maitland*, on this point, had reference to proceedings under the act of November 18, 1873, acts 1872–73, p. 449, c. 134, which were not judicial in their nature but administrative. But as declared in *Hays, Commissioner*, v. *Camden's Heirs*, 38 W. Va. 109, 110, the act of 1873 was so amended by the act of March 25, 1882, acts W. Va. 1882, p. 253, c. 95, as to make the proceeding in the Circuit Court for the sale of forfeited lands, in which the owners or claimants could intervene and effect a redemption of their lands from forfeiture, a judicial proceeding. This view was reaffirmed in *Wiant* v. *Hays, Commissioner*, 38 W. Va. 681, 684, in which Judge Brannon,

delivering the unanimous judgment of the state court, observed that what was said in *McClure* v. *Maitland* as to the landowner not being entitled of right to be made a party to the proceeding instituted for the sale of forfeited lands for the benefit of the school funds, had reference to the then existing act which was changed by the act of 1882. Answering the suggestion that the proceedings under the new law were not judicial, the court said: "Now, why, with parties plaintiff and defendant, process, pleading, hearing between the parties, decree, etc., it is not, if not technically a chancery suit, yet a suit, I cannot see; a suit under a special statute, it is true, but none the less a suit. So, substantially, it was regarded in *Hays* v. *Camden's Heirs*, 38 W. Va. 109, 18 S. E. Rep. 461. Proceedings at rules take place as in ordinary and common law suits. In some places it is called a 'suit.' But I know that it is said by those holding the other view that the question is not to be tested by the circumstances, such as I have alluded to, the presence of pleading, process, hearing, etc., but it must be tested by the nature of the proceeding; that is, that it is only an administrative process by the State, through an officer and court, to realize money on its own property. But to this I reply that though the State might make the proceeding such, and did in its acts up to 1882, yet by its act in 1882 it changed the proceeding from one *ex parte* to one *inter partes*, and clothed the proceeding with all the habiliments of a suit; and still it did not proceed against the land, taking the act of forfeiture as a concession, and simply at once sell the land, but it subjected its right and title under the supposed forfeiture to question and investigation under the law through a suit, called in all interested adversely to its claim, and gave them leave to contest its right, and made its claim the subject of litigation."

It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands.

It is said that the landowner will be without remedy if the commissioner of the school fund should fail to institute the proceeding in which the statute permitted such owner to intervene by petition and obtain a redemption of his lands from the forfeiture claimed by the State. It cannot be assumed that the commissioner will neglect to discharge a duty expressly imposed upon him by law, nor that the courts are without power to compel him to act, where his action becomes necessary for the protection of the rights of the landowner.

It is further said that a forfeiture may arise under the constitution of West Virginia despite any effort of the landowner to prevent it; that although the owner may direct his lands to be entered on the proper land books, and that he be charged with the taxes due thereon, the custodian of such books may neglect to perform his duty. Thus, it is argued, the lands may be forfeited by reason of the landowner not having been, in fact, charged on the land books with the taxes due from him, although he was not responsible for such neglect. We do not so interpret the state constitution or the statutes enacted under it. If the landowner does all that is reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been "charged on such books" with the state tax. The State could not acquire any title to the lands merely through the neglect of its agent having custody or control of its land books. Any steps attempted to be taken by the officers of the State, based upon such neglect of its agent — the taxpayer not being in default — would be without legal sanction, and could be restrained by any court having jurisdiction in the premises. We go further and say, that any sale had under the statute providing for a sale, under the order of court, for the benefit of the school fund, of lands alleged to be forfeited by reason of their not having been charged on the land books for five consecutive years with the state tax due thereon, would be absolutely void, if the landowner was not before the court, or had not been duly notified of the proceedings, but had done all that he could reasonably do to have his lands en-

tered on the proper books and to cause himself to be charged with the taxes due thereon. If the State was not entitled to treat them *as forfeited lands*, that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected. In the present case, it does not appear that any evidence was offered tending to show that the absence from the land books of any charge of taxes on the lands claimed by the plaintiff during five consecutive years after their redemption by Randall, trustee, in 1883 was due to any neglect of the officers of the State, or that the plaintiff, or those under whom he asserts title, entered or attempted to enter the lands upon the land books, or that he or they caused or attempted to cause the lands to be charged with taxes thereon. But there was evidence tending to show that the requirements of the constitution were not met during any of the years from 1883 to the bringing of this action. So far as the record discloses, it is a case of sheer neglect upon the part of the landowner to perform the duty required of him by the constitution and statutes of the State.

Another point made by the plaintiff in error is, that the provision of the constitution of Virginia exempting tracts of less than one thousand acres from forfeiture is a discrimination against the owners of tracts containing one thousand acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remedied by the constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be pre-

scribed as to small tracts. The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding a denial of the equal protection of the laws.

For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the constitution of the State.

Having discussed all the points suggested by the assignments of error which we deem it necessary to examine, we conclude this opinion by saying that as neither the plaintiff nor those under whom he claims title availed themselves of the remedy provided by the statutes of West Virginia for removing the forfeiture arising from the fact that, during the years 1884, 1885, 1886, 1887 and 1888, the lands in question were not charged on the proper land books with the state taxes thereon for that period or any part thereof, the forfeiture of such lands to the State was not displaced or discharged, and the Circuit Court properly directed the jury to find a verdict for the defendants. The plaintiff was entitled to recover only on the strength of his own title. Whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain this action of ejectment. We concur in what the Supreme Court of Appeals of Virginia said

in a case recently decided: "In an action of ejectment the plaintiff must recover on the strength of his own title, and if it appear that the legal title is in another, whether that other be the defendant, the Commonwealth, or some third person, it is sufficient to defeat the plaintiff. If it appears that the title has been forfeited to the Commonwealth for the non-payment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or re-granted by the Commonwealth, the presumption is that the title is still outstanding in the Commonwealth." *Reusens* v. *Lawson*, 91 Virginia, 226.

The judgment of the Circuit Court of the United States is

Affirmed.

KING *v.* PANTHER LUMBER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 240. Argued April 28, 1898. — Decided May 31, 1898.

King v. *Mullins*, *ante*, 404, followed.

THE case is stated in the opinion.

Mr. Maynard F. Stiles for appellant.

No appearance for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was a suit in equity by the appellant, a citizen of New York, against the appellee, a corporation of West Virginia, and one Kroll, a citizen of the latter State. Its object was to obtain a decree enjoining the defendant from cutting and removing timber from a certain tract of land in West Virginia, of which the plaintiff King claimed to be the owner.

The defendant corporation denied the plaintiff's ownership of the land, and asserted title in itself.

The land in dispute is a part of a tract purporting to contain 500,000 acres, and which was patented in 1793 by the Commonwealth of Virginia to Robert Morris, assignee of Wilson Cary Nicholas. It is the same patent which is referred to in the opinion in *King* v. *Mullins*, just decided, *ante*, 404.

It appeared from the pleadings and exhibits in the cause that the lands in controversy were not entered upon the proper land books for taxation or charged with taxes for any year from 1883 to 1895, inclusive.

The final order in the cause was in these words: "It having been held by this court in the case of *H. C. King* v. *M. B. Mullins et als.*, recently tried in this court, the honorable Circuit Judge presiding, that such omission of said land from the land books operated to forfeit and divest the title to said tract of land and vest the same absolutely in the State of West Virginia, under the provisions of the constitution of said State, before the purchase of the same by complainant, and that therefore complainant has no title to said land, the court is of the opinion to dissolve said injunction, reserving the right to render and file herein an opinion in writing upon said motion. It is therefore ordered, adjudged and decreed that the said injunction be, and the same is hereby, dissolved, and that the said bills be dismissed, and that the defendants recover of the complainant their costs."

The controlling questions in this case are the same as those decided in the case of *King* v. *Mullins*, *ante*, 404. For the reasons therein given, the judgment of the Circuit Court is

Affirmed.

CASES ADJUDGED

AT

OCTOBER TERM, 1898.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1898.

CALIFORNIA NATIONAL BANK *v.* THOMAS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 36. Submitted May 4, 1898. — Decided October 17, 1898.

A judgment of the highest court of a State reversing the judgment of the state court below, upon the ground that the case made out by the findings was a different case from that presented by the pleadings, and that the variance was fatal to the validity of the judgment, and on the further ground that as the defendants in error were sued jointly for a tort, a withdrawal of the action in favor of two of them also operated to release the third, presents no Federal question for the consideration of this court.

This was an action sounding in tort, but styled a bill of complaint in equity, for an accounting and settlement of a trust by Richard P. Thomas, Robert R. Thompson and Robert A. Wilson. The action was instituted in the Superior Court of San Francisco by John Chetwood, Junior, for himself and as the representative of all the stockholders of the California National Bank, which bank had failed and was at the time in the hands of a receiver.

The bill alleged that the failure was due to the negligence of Richard P. Thomas, president; Robert R. Thompson, vice

president; and Robert A. Wilson, a director, composing the executive committee of the corporation, who had as such committee contrived together to injure and deceive the said corporation by neglecting to conform to its by-laws; and as such committee had made worthless loans, whereby the money of the corporation was wasted, misused and lost to the amount of about $200,000.

Among the duties and powers of the committee, as set forth in the by-laws adopted by the bank, were an immediate supervision of all the officers and business of the bank; auditing all bills for current and other expenses; discounting and purchasing bills, notes and other evidences of debt; and reporting to the directors at each regular meeting all bills, notes and other evidences of debt discounted or purchased by them for the bank. It was further provided by the by-laws that the president should have general control and supervision of the bank, and be responsible for its condition to the directors. The vice president was to assist the president in the discharge of his duties.

The bill alleged that "it was the duty of each of said members of the executive committee to exercise, concurrently with his associates on said committee, diligence and fidelity in performing the duties of said committee," but that "they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit and without consulting or in anywise informing said defendants," and that by reason of the negligence of said defendants, and the acts and misconduct of the cashier, negligently permitted as aforesaid, the bank suddenly failed on December 15, 1888, owing about $450,000, and the Comptroller of the Currency had placed a receiver in charge of said bank and its affairs, and thereafter levied an assessment of $75,000 upon the stockholders, which sum was all paid except $20,000 assessed against Richard P. Thomas, the president of the bank.

The prayer of the bill was that a decree might be entered holding Richard P. Thomas, Robert R. Thompson and Robert A. Wilson to an accounting of their trust, and that a joint and several money judgment be entered against them for the sum

of $400,000, with legal interest thereon from the time of such loss.

The defendants answered the bill, denying the allegations as to negligence on their part.

Upon the cause being submitted to the court, a judgment was "entered in favor of the plaintiff and against Richard P. Thomas, Robert R. Thompson and Robert A. Wilson," and the case was referred to a master, who found the actual loss of the bank to be $166,919. Before a final judgment was rendered by the court, however, the suit was dismissed by the plaintiff as to Robert R. Thompson and Robert A. Wilson, from whom had been collected the sum of $27,500, thus leaving a net loss to the bank of $139,419, and judgment for this amount was rendered against Richard P. Thomas.

Thereupon, Thomas appealed to the Supreme Court of the State of California, by which court the judgment was reversed, and the case remanded to the trial court, with directions to enter a judgment in favor of the defendant Thomas. 113 California, 414.

The plaintiff thereupon sued out a writ of error to this court, assigning as the principal ground to give this court jurisdiction that the judgment of the Supreme Court of the State was rendered without due or any process of law, and deprived the plaintiff of its property without due process of law, contrary to the Constitution, etc., and Rev. Stat. § 5136, relating to national banks.

The defendant in error in this court moved to dismiss the case for want of jurisdiction.

Mr. A. H. Ricketts for the motion.

Mr. E. G. Knapp, *Mr. Robert Rae* and *Mr. John Chetwood, Jr.*, opposing.

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

Unless the plaintiff in error was denied some right under the Constitution or statutes of the United States, "specially

set up and claimed" by it, this writ of error must be dismissed.

The bill of complaint, filed in the Superior Court of San Francisco by a stockholder of the California National Bank, sought to charge three directors of the bank with negligence in the performance of their trust, and particularly in failing to comply with certain by-laws of the bank, by which large amounts of money were lost to the bank, which the bill prayed that the defendants might be decreed to make good and restore. The bank was chartered under the National Banking Act and the by-laws were adopted in pursuance of Revised Statutes, section 5136, which authorizes associations incorporated under the act to define the duties of the president and other officers and to regulate the manner in which its general business shall be conducted. Certain transactions of the directors are also alleged to be infractions of Revised Statutes, section 5200, for which the directors are made liable in section 5239, although no violations of this section are specifically alleged in the bill.

Demurrers were interposed by the several defendants and overruled; when answers were filed denying in general the allegations of the bill. The court subsequently entered judgment against the three directors, but, being unable to determine the proper amount, appointed a referee to take proof of the amount appearing to be due and owing to the bank from certain named individuals. Upon such report having been made, a stipulation was entered into between the plaintiff stockholder and the defendants Thompson and Wilson, whereby the plaintiff renounced and withdrew his action against such defendants, and the court, upon such stipulation, entered a judgment dismissing the action as against them. The court thereupon made a finding of all the facts in the case, among which was one to the effect that there had been collected of the two defendants Thompson and Wilson the sum of $27,500, leaving a net loss to the bank of $139,419, for which judgment was entered against the defendant Thomas. Thomas thereupon appealed to the Supreme Court of the State from the judgment so entered.

Opinion of the Court.

That court was of opinion that the complaint, though entitled "a bill in equity for the accounting and settlement of a trust," contained nothing more than a charge *ex delicto* against the directors for a breach and non-performance of their duties. It did not consider it necessary to dispose of the objections to the complaint; but assumed, without deciding, that the complaint was sufficient to state a cause of action in its averments of misconduct. It then proceeded to decide (1) that the complaint was one sounding in tort, and that the defendants were charged as joint tortfeasors; that their negligence was pleaded as their joint neglect to perform duties not individually imposed upon them, but collectively undertaken as members of the executive committee; that in the findings of fact no mention was made of any dereliction of duty on the part of Thompson and Wilson, and that there was an absolute failure by the court to find upon the most material issues of the case —the joint negligence of the three defendants, which alone, it was alleged, had occasioned loss to the bank. "Such," said the court, "is the cause of action pleaded in the complaint. The findings, if it be conceded that they give evidence of a meritorious cause of action against the defendant Thomas, do so because of a showing that he was negligent, not with the other defendants and as member of the executive committee, but that he was individually and separately negligent in the performance of his duties as president. But this is not the cause of action pleaded against him, and it is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and a variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment." The court further held (2) that, as the defendants in error were sued jointly for a tort, a withdrawal of the action in favor of Thompson and Wilson operated also to release the defendant Thomas. This was in fact the main reason given for its conclusion. The court thereupon ordered the judgment to be reversed, and the cause remanded with directions to enter judgment in favor of the defendant Thomas.

In all this record there was no Federal right specially set up or claimed by the plaintiff in error until after the judgment in the Supreme Court, when a petition for writ of error was filed by the California National Bank, a co-defendant with Thomas in the original action, in which various allegations were made of a denial of Federal rights. But assuming that a Federal question might be extorted from the allegations of the complaint, it is sufficient to say that the case was not disposed of upon the merits of such complaint, which was treated as sufficient, but upon a variance between its allegations and the proofs, and upon the settlement made with the defendants Thompson and Wilson, and the withdrawal of the action against them. These were purely questions under the law of the State, as to which the opinion of the Supreme Court was conclusive. Not only was no suggestion of a Federal question made to the trial court or to the appellate court, but there was nothing to indicate that the judgment rendered could not have been given without deciding a Federal question. Indeed, the opinion shows that the cause was decided, as it might well have been, solely upon grounds not involving such question.

Whether a judgment should be ordered in favor of Thomas for a dismissal of the action against him or simply for a new trial, involved merely a question of the procedure under the law of the State. The court might have been, and probably was, of the opinion that an action would lie upon the separate liability of Thomas, and have reserved for future consideration the question whether the dismissal of this action upon a joint liability would operate as an estoppel against a new action upon his individual liability.

There was no Federal question involved in the disposition of this case, and the writ of error is, therefore,

Dismissed.

CALIFORNIA NATIONAL BANK *v.* STATELER.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 37. Submitted May 4, 1898. — Decided October 17, 1898.

This case is dismissed because the judgment below was not a final judgment; the settled rule being that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final.

THIS was an intervening petition by Stateler in the case just decided, of the *California National Bank* v. *Thomas* (*ante*, 441), to obtain the possession of the sum of $27,500 paid to the plaintiff Chetwood by the defendants Thompson and Wilson in the settlement of the suit of Chetwood against them as co-defendants with Thomas.

Pending the insolvency and winding-up proceedings of the California National Bank, and subsequent to the appointment of a receiver by the Comptroller of the Currency, the petitioner Stateler was elected "agent" by the stockholders pursuant to the act of Congress of August 3, 1892, c. 360, 27 Stat. 345. As this act provided that the person so elected agent "shall hold, control and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association," Stateler applied by affidavit to the Superior Court of the city and county of San Francisco, in which the Chetwood action was then pending, for an order upon the plaintiff Chetwood to appear and show cause why the moneys collected of Thompson and Wilson, as well as certain stock and other securities, should not be turned over to the affiant as such agent.

The motion was opposed upon the ground that of the whole number of 2000 shares, 1020 shares only were voted to elect Stateler as agent of the bank, and that they were either owned or controlled by Richard P. Thomas, the former president, against whom there was a judgment outstanding in

favor of the stockholders in the amount of $139,419, besides an unpaid assessment of $20,000, levied upon him as a stockholder by the Comptroller of the Currency.

Upon affidavits read at the hearing of the motion the court denied the order prayed for, whereupon Stateler appealed to the Supreme Court of the State. That court held that the regularity of the appointment of the agent could not be questioned in a proceeding of this kind, inasmuch as it had been approved by the Comptroller of the Currency, and that the agent's demand to have the money paid over to him should have been granted. The court thereupon reversed the order "with directions to the trial court to enter the order prayed for, after making reasonable allowance to the plaintiff Chetwood for his costs, disbursements and attorney's fees in said action as contemplated by law." An application for a hearing *in banc* was made and denied by the Supreme Court, whereupon the bank and Chetwood, as representative stockholder, and the party upon whom the order was made, sued out a writ of error from this court, which the defendants in error moved to dismiss.

Mr. William M. Pierson, *Mr. Robert Brent Mitchell* and *Mr. Robert A. Friedrich* for the motion.

Mr. Robert Rae and *Mr. E. G. Knapp* opposing.

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

Motion is made to dismiss this writ of error upon the ground that no Federal question is involved in the case.

Without, however, expressing an opinion upon this, we think the case will have to be dismissed upon the ground that the order appealed from is not a final order within the decisions of this court. The affidavit of Stateler, which is the basis of this proceeding, sets forth not only the payment of $27,500 in cash by Thompson and Wilson, but avers upon information and belief that there was also transferred to the

plaintiff, by said defendants, a large block of stock belonging to them in the California National Bank, which is the property of its stockholders, and the prayer is for an order turning over to the petitioner the moneys above mentioned and "all stock and other securities of every sort, nature and description, received by him from defendants Thompson and Wilson in this action."

While the opinion of the court deals only with the moneys paid by Thompson and Wilson, the order appealed from directs the trial court to *enter the order prayed for* "after making reasonable allowances to the plaintiff Chetwood for his costs, disbursements and attorney's fees in said action as contemplated by law." This order lacks finality in two particulars. It would still be competent to prove that Chetwood had received the block of stock set up in Stateler's affidavit, and it would certainly be necessary for Chetwood to prove up his costs, disbursements and attorney's fees before the amount for which he is ultimately made liable could be ascertained.

The settled rule is that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final. *Craighead* v. *Wilson*, 18 How. 199; *Beebe* v. *Russell*, 19 How. 283; *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91; *Lodge* v. *Twell*, 135 U. S. 232; *McGourkey* v. *Toledo and Ohio Central Railway*, 146 U. S. 536; *Union Mutual Life Ins. Co.* v. *Kirchoff*, 160 U. S. 374; *Hollander* v. *Fechheimer*, 162 U. S. 326.

The writ of error is, therefore, dismissed.

THE G. R. BOOTH.

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

No. 10. Argued December 17, 1897. — Decided October 17, 1898.

A provision in a bill of lading, that the carrier "shall not be liable for loss or damage caused by the perils of the sea," or by "accidents of navigation," does not exempt the carrier from liability for damage to part of the cargo by sea water under these circumstances: While the ship was being unloaded at the dock in her port of her destination, a case of detonators in her hold exploded, without fault of any one engaged in carrying or discharging the cargo, and the explosion made a large hole in the side of the ship, through which the water rapidly entered the hold, and damaged other goods.

Upon an appeal from a decree of the District Court of the United States for the Southern District of New York, dismissing a libel in admiralty by the American Sugar Refining Company against the steamship G. R. Booth, for damage to cargo (64 Fed. Rep. 878), the Circuit Court of Appeals certified to this court the following statement of facts and question of law:

"On July 14, 1891, the steamship G. R. Booth, a large seaworthy steel vessel, was lying at the dock in the waters of the harbor of New York, discharging a general cargo, which had been laden on board at Hamburg for transportation to and delivery at New York City. Part of the cargo laden on board at Hamburg consisted of twenty cases of detonators.

"Detonators are blasting caps used to explode dynamite or gun-cotton, and consist of a copper cap packed with fulminate of mercury. In use, the cap is placed in contact with dynamite; a fuse is pushed into the cap until it meets the packing; the fuse is lighted, and when the fire reaches the fulminate it explodes it, thus exploding the dynamite. The detonators were made in Germany, and were packed according to the regulations prescribed by German law, adopted and enforced for the purpose of eliminating risk of danger in hand-

ling and transporting them. When thus packed, the immunity from danger of an accidental explosion is supposed to be complete, and they are transported and handled like ordinary merchandise by carriers and truckmen without the use of any special precautions to avoid risk. They do not explode when subjected to violent shock, as when thrown from such a height above the ground as to shatter in fragments the cases in which they are packed. They were customarily stowed and transported in vessels like ordinary merchandise, indiscriminately with the other cargo; and until the present occurrence, although millions of cases had been shipped and carried to all parts of the world, no accident had happened, so far as is known.

"The detonators were stowed with other cargo in afterhold No. 4. While the steamship was being unladen, one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, besides doing other damage. In consequence of the opening thus made in the ship's side, sea water rapidly entered in the No. 4 hold, beyond the control of the capacity of the pumps, and passed from the No. 4 hold through the partition into No. 3. hold. In No. 3 hold there was cargo belonging to the libellant, consisting of sugar, which had not as yet been discharged. The sea water thus entering the hold damaged the sugar extensively. The boxes of detonators were stowed and handled in the usual way; and the explosion occurred purely by accident, and without any fault or negligence on the part of any person engaged in transporting them or in discharging the cargo.

"The bill of lading under which the sugar of the libellant was carried contained the following clause: 'The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters; by fire, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers or people; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances; by collision, stranding or other accidents of navigation, of whatsoever kind.'

Opinion of the Court.

"Upon these facts the court desires instructions upon the following question of law, viz.: Whether the damage to libellant's sugar caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by the perils of the sea or other waters,' or by an 'accident of navigation of whatsoever kind,' within the above-mentioned exceptions in the bill of lading."

Mr. Harrington Putnam for appellant.

Mr. J. Parker Kirlin for appellee.

Mr. Justice Gray delivered the opinion of the court.

This was a libel against the steamship G. R. Booth, for damage done to sugar, part of her cargo, under the following circumstances: Another part of the cargo consisted of twenty cases of detonators, being copper caps packed with fulminate of mercury for exploding dynamite or gun-cotton. While she was being unladen at the dock in her port of destination, one of the cases of detonators exploded, purely by accident, and without any fault or negligence on the part of any one engaged in carrying or discharging the cargo. The explosion made a large hole in the side of the ship, through which the sea water rapidly entered the hold, and greatly damaged the sugar.

The bill of lading of the sugar provides that "the ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters," or "by collision, stranding or other accidents of navigation, of whatsoever kind."

The question certified by the Circuit Court of Appeals to this court is whether the damage to the sugar is within these exceptions in the bill of lading.

The case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was "occasioned by the perils of the sea"; or, in other words,

whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim *causa proxima non remota spectatur.*

The many authorities bearing upon this point, fully cited and discussed in the learned arguments at the bar, have been carefully examined. But only a few of them need to be referred to, because judgments heretofore delivered by this court afford sufficient guides for the decision of this case.

In an early case, in which the action was upon a bond, given under the embargo act of December 29, 1807, c. 5, § 2, 2 Stat. 453, to reland goods in some port of the United States, "the dangers of the seas only excepted," the vessel was irresistibly driven by stress of weather into Porto Rico, and the cargo was there landed and sold by order of the governor, with which the master was obliged to comply. It was argued for the United States, that the goods arrived in Porto Rico in safety, and the party had the full benefit of them, and probably at a higher price than if he had landed them in the United States; and that the sea was not the proximate cause of the loss. But this court held that the case was within the exception in the bond, because the vessel, as said by Chief Justice Marshall in delivering judgment, "was driven into Porto Rico, and the sale of her cargo, while there, was inevitable. The dangers of the sea placed her in a situation which put it out of the power of the owners to reland her cargo within the United States. The obligors, then, were prevented, by the dangers of the seas, from complying with the condition of the bond; for an effect which proceeds, inevitably, and of absolute necessity, from a specified cause, must be ascribed to that cause." *United States* v. *Hall*, 6 Cranch, 171, 176.

In *Waters* v. *Merchants' Ins. Co.*, 11 Pet. 213, the Circuit Court certified to this court the question whether a policy of insurance upon a steamboat on the western waters against the perils of the rivers and of fire covered a loss of the boat by a fire caused by the barratry of the master and crew. This question was answered in the negative, for reasons stated by Mr. Justice Story as follows: "As we understand the first

question, it assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents; or, in other words, that the fire was communicated, and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say, that a loss by fire, caused by the barratry of the master or crew, is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or of rivers, though the flow of the water should coöperate in producing the sinking." 11 Pet. 219, 220.

The maxim has been largely expounded and defined by this court in cases of insurance against fire.

In *Insurance Co.* v. *Tweed*, 7 Wall. 44, cotton in a warehouse was insured against fire by a policy which provided that the insurers should not be liable for losses which might "happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion, earthquake or hurricane." An explosion took place in one warehouse, resulting in a conflagration which spread to a second warehouse, and thence, in the course of the wind blowing at the time, to a third warehouse containing the insured cotton. This court held that the loss of the cotton was caused by the explosion, and therefore the insurer was not liable; and, speaking by Mr. Justice Miller, said: "The only question to be decided in the case is, whether the fire which destroyed plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract. That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have cited to us a general review of the doctrine of proximate and remote causes,

as it has arisen and been decided in the courts in a great variety of cases." "One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case, we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstances that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause." "We are clearly of opinion that the explosion was the cause of the fire in this case." 7 Wall. 51, 52. In that case, as has been since observed by Mr. Justice Strong in delivering judgment in a case to be presently referred to more particularly, "it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster." *Insurance Co.* v. *Boon*, 95 U. S. 117, 131.

In *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, a large steamboat on Long Island Sound was insured against fire, excepting fire happening "by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power." The facts, as found by the Circuit Court and stated in the report, were as follows: Another vessel came into collision with the steamboat, striking her on the side, and cutting into her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of her furnace, and generated steam which blew the fire against her woodwork, whereby her upper works were enveloped in flames, and continued to burn for half or three quarters of an hour, when she rolled over and gradually sank in twenty fathoms of water. From the effects of the collision alone,

she would not have sunk below her promenade deck, but would have remained suspended in the water, and could have been towed to a place of safety, and repaired at an expense of $15,000. The sinking of the steamboat below her promenade deck was the result of the action of the fire in burning off her upper works, whereby her floating capacity was decreased and she sank to the bottom, and the amount of the additional damage thereby caused, including the cost of raising her, was $7300. Upon that state of facts, the court, affirming the judgment of the Circuit Court, held the insurers liable for the latter sum. But in the opinion of this court, delivered by Mr. Justice Strong, the rule was recognized and affirmed, that "when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished." And it was added, "And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster, must rank as predominant." 12 Wall. 199. The rule was held to be inapplicable to that case, because the damage resulting from the fire, and that caused by the collision, apart from the fire, were clearly distinguished; and because the policy, exempting the insurers from liability for losses by fire by certain specified causes, covered losses by fire from all other causes, including collisions. But for those distinctions, the decision could hardly be reconciled with the earlier opinions already referred to, or with that delivered by the same able and careful judge in the later case of *Insurance Co.* v. *Boon*, 95 U. S. 117.

In *Insurance Co.* v. *Boon*, a policy of insurance against fire, issued during the war of the rebellion, for one year, upon goods in a store in the city of Glasgow in the State of Missouri, provided that the insurers should not be liable for "any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power." The city of Glasgow, being occupied as a military post by the United States forces, was attacked by a superior armed force of the rebels and defended by the

United States forces; and during the battle the commander of these forces, upon its becoming apparent that the city could not be successfully defended, and, in order to prevent military stores, which had been placed in the city hall, from falling into the hands of the rebels, caused them to be destroyed by burning the city hall; and the fire, spreading from building to building, through three intermediate buildings, to that containing the goods insured, destroyed them. This court held that the loss was within the exception in the policy, because the rebel military power was the predominating and operating cause of the fire; and in the opinion of the court, delivered by Mr. Justice Strong, and strongly supported by authority, the true rule and its application to that case were stated as follows:

"The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." 95 U. S. 130. "The conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power." 95 U. S. 132. "The court below regarded the action of the United States military authorities as a sufficient cause inter-

vening between the rebel attack and the destruction of the plaintiffs' property, and therefore held it to be the responsible proximate cause. With this we cannot concur. The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, we said, in considering what is the proximate and what the remote cause of an injury, 'The inquiry must always be whether there was any intermediate cause, *disconnected from the primary fault*, and self-operating, which produced the injury.' In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town — a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power — events so linked together as to form one continuous whole." 95 U. S. 133.

In general accord with the opinions above quoted are two cases in this court upon the meaning and effect of the term "dangers of navigation," or "perils of the sea," in a bill of lading. *The Mohawk*, 8 Wall. 153; *The Portsmouth*, 9 Wall. 682.

In *The Mohawk*, a steamboat, carrying wheat under a bill of lading containing an exception of "dangers of navigation," grounded on the flats, and, in the effort to get her off, became disabled by the bursting of her boiler, and afterwards sank. It was argued, among other things, on the one side, that the explosion was not a danger incident to navigation; and, on the other, that the sinking of the vessel was the immediate cause of the damage to the wheat. The question at issue was whether the vessel was entitled to freight *pro rata itineris*. This court, speaking by Mr. Justice Nelson, said that "the explosion of the boiler was not a peril within the exception of the bill of lading," and therefore the case fell within that class in which the ship is disabled or prevented from forwarding the goods to the port of destination by a peril or accident not

within the exception in the bill of lading. 8 Wall. 162. Although this statement was perhaps not absolutely necessary to the decision, it was upon a point argued by counsel, and shows clearly that the court was of opinion that the explosion, and not the sinking, was the proximate cause of the loss.

In *The Portsmouth*, it was decided that a jettison made to lighten a steamboat, which had been run aground by her captain's negligence, was not within an exception of "the dangers of lake navigation" in a bill of lading; and Mr. Justice Strong, in delivering judgment, said: "A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present, and enter into the case. This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss. And there is, perhaps, greater reason for applying the rule to exceptions in contracts of common carriers than to those in policies of insurance, for, in general, negligence of the insured does not relieve an underwriter, while a common carrier may not, even by stipulation, relieve himself from the consequences of his own fault." 9 Wall. 684, 685.

Generally speaking, the words "perils of the sea" have the same meaning in a bill of lading, as in a policy of insurance. There is a difference, indeed, in their effect in the two kinds of contract, when negligence of the master or crew of the vessel contributes to a loss by a peril of the sea; in such a case, an insurer against "perils of the sea" is liable, because the assured does not warrant that his servants shall use due care to avoid them; whereas an exception of "perils of the sea" in a bill of lading does not relieve the carrier from his primary obligation to carry with reasonable care, unless prevented by the excepted perils. But when, as in the present case, it is

distinctly found that there was no negligence, there is no reason, and much inconvenience, in holding that the words have different meanings in the two kinds of commercial contract. *The Portsmouth*, above cited; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322–325; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 438, 442; *Compania La Flecha* v. *Brauer*, 168 U. S. 104; *The Xantho*, 12 App. Cas. 503, 510, 514, 517.

In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage — the explosion of the detonators, and the inflow of the water — without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause

of damage; but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion — events so linked together as to form one continuous whole.

The damage was not owing to any violent action of winds or waves, or to the ship coming against a rock or shoal or other external object; but it was owing to an explosion within the ship, and arising out of the nature of the cargo, which cannot be considered, either in common understanding, or according to the judicial precedents, as a peril of the sea.

As was observed by this court in *Insurance Co.* v. *Boon*, above cited, "Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames; yet, it is not doubted, all that destruction is caused by the fire, and insurers against fire are liable for it." 95 U. S. 131. If damage done by water thrown on by human agency to put out a fire is considered a direct consequence of the fire, surely damage done by water entering instantly, by the mere force of gravitation, through a hole made by an explosion of part of the cargo, must be considered as a direct consequence of the explosion.

Upon principle and authority, therefore, our conclusion is that the explosion, and not the sea water, was the proximate cause of the damage to the sugar, and that this damage was not occasioned by the perils of the sea, within the exceptions in the bill of lading.

Nor can the damage to the sugar, attributable, not to a peril of the sea, but to the explosion of part of the cargo after the ship had ended her voyage, and had been finally and intentionally moored at the dock, there to remain until her cargo was taken out of her, be considered as "occasioned by accidents of navigation." *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D. 342; *The Accomac*, 15 Prob. Div. 208; *Thames & Mersey Ins. Co.* v. *Hamilton*, 12 App. Cas. 484; *The Mohawk*, above cited.

Much reliance was placed by the appellee upon a recent English case, in which the House of Lords, reversing the de-

cision of Lord Esher and Lords Justices Bowen and Fry in the Court of Appeal, and restoring the judgment of Lord Justice Lopes in the Queen's Bench Division, held that damage to goods by sea water which, without any neglect or default on the part of the shipowners or their servants, found its way into the hold of a steamship through a hole which had been gnawed by rats in a leaden pipe connected with the bath room of the vessel, was within the exception of "dangers or accidents of the seas" in a bill of lading. *Hamilton* v. *Pandorf*, 12 App. Cas. 518; 17 Q. B. D. 670; 16 Q. B. D. 629. There is nothing in the report of any stage of that case to show that the sea water entered the ship immediately upon the gnawing by the rats of the hole in the pipe; and any such inference would be inconsistent with one of the opinions delivered in the House of Lords, in which Lord Fitzgerald said: "The remote cause was in a certain sense the action of the rats on the lead pipe; but the immediate cause of the damage was the irruption of sea water from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage." 12 App. Cas. 528. However that may have been, that case differs so much in its facts from the case now before us, that it is unnecessary to consider it more particularly.

Question certified answered in the negative.

THE SILVIA.

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

No. 5. Argued March 8, 1898 — Decided October 17, 1898.

A ship, whose port holes between decks are fitted with the usual glass covers and the usual iron shutters, and have no cargo stowed against them, is not unseaworthy by reason of beginning a voyage in fair weather with the glass covers tightly closed, and the iron shutters left open for the admission of light, but capable of being speedily got at and closed if occasion should require; and any subsequent neglect in not closing the iron covers is a "fault or error in navigation or in the management

of the vessel," within the meaning of section 3 of the act of Congress of February 13, 1893, c. 105, known as the Harter Act.
Section 3 of the Harter Act applies to foreign vessels.

THE case is stated in the opinion.

Mr. Charles C. Burlingham and *Mr. Harrington Putnam* for the Franklin Sugar Refining Company.

Mr. J. Parker Kirlin for the Silvia.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a libel in admiralty, filed June 14, 1894, in the District Court of the United States for the Southern District of New York, by the Franklin Sugar Refining Company, a corporation organized under the laws of the State of Pennsylvania, against the steamship Silvia, of Liverpool, owned by the Red Cross Line of Steamers, to recover damages for injuries to a cargo of sugar, owned by the libellant, which had been shipped on or about February 15, 1894, upon the Silvia at Matanzas, Cuba, for Philadelphia, under a bill of lading, by which the sugar was "to be delivered in the like good order and condition at the port of Philadelphia (the dangers of the seas only excepted)," upon payment of agreed freight, "and all other conditions as per charter party dated New York 31st January, 1894."

The charter party, which had been made and concluded at New York January 31, 1894, provided that the Silvia, then at Tucacas, Venezuela, should proceed as soon as possible in ballast to Matanzas for a voyage thence to Philadelphia, New York or Boston; and contained these provisions: "The vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned (the act of God, adverse winds, restraint of princes and rulers, the Queen's enemies, fire, pirates, accidents to machinery or boilers, collisions, errors of navigation and all other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever during the said voyage al-

ways excepted). The said party of the second part doth engage to provide and furnish to the said vessel a full cargo, under deck, of sugar in bags. The bills of lading to be signed without prejudice to this charter."

The Silvia, with the sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks next the forecastle had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five eighths of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken — whether by the force of the seas or by floating timber or wreckage, was wholly a matter of conjecture — and the water came in through the port, and damaged the sugar.

The decree of the District Court dismissed the libel, and was affirmed by the Circuit Court of Appeals. 64 Fed. Rep. 607; 35 U. S. App. 395. The libellant applied for and obtained a writ of certiorari from this court.

It was adjudged by this court at the last term that the act of Congress of February 13, 1893, c. 105, known as the Harter Act, has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage. *The Carib Prince*, 170 U. S. 655.

But the contention that the Silvia was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.

The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing. *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 82, 90, 91; *Hedley* v. *Pinkney Steamship Co.*, (1892) 1 Q. B. 58, 65, and (1894) App. Cas. 222, 227, 228; *Gilroy* v. *Price*, (1893) App. Cas. 56, 64.

The third section of the Harter Act provides that "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." 27 Stat. 445.

This provision, in its terms and intent, includes foreign vessels carrying goods to or from a port of the United States. *The Scotland*, 105 U. S. 24, 30; *The Carib Prince*, above cited.

Not only had the owners of the Silvia exercised due diligence to make her seaworthy, but, as has been seen, she was actually seaworthy when she began her voyage.

Syllabus.

This case does not require a comprehensive definition of the words "navigation" and "management" of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Association*, L. R. 6 C. P. 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D. 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D. 342; *The Ferro*, (1893) Prob. 38; *The Glenochil*, (1896) Prob. 10.

In the case, cited by the appellant, of *Dobell* v. *Steamship Rossmore Co.*, (1895) 2 Q. B. 408, 414, the ship was unseaworthy at the time of sailing, by reason of the cargo having been so stowed against an open port that the port could not be closed without removing a considerable part of the cargo; and Lord Esher, M.R., upon that ground, distinguished that case from the decision of the Circuit Court of Appeals in the present case.

Judgment affirmed.

BRIGGS *v.* WALKER.

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

No. 260. Submitted April 25, 1898. — Decided October 17, 1898.

Under an act of Congress, entitled "an act for the relief of the estate" of a certain person deceased, and conferring upon the Court of Claims jurisdiction to hear and determine "the claim of the legal representatives" of that person for the proceeds in the treasury of his property taken by the United States, the executor is the legal representative, and any sum recovered by him by suit in that court is assets of the estate and subject

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to the debts of the testator; and a decision of the highest court of a State in favor of creditors against the executor presents a Federal question, as to which it may be reviewed by this court upon a writ of error sued out by the executor.

THE controversy in this case was between the executor and two creditors of Charles M. Briggs, and arose as follows:

On April 18, 1862, during the war of the rebellion, Charles S. Morehead, of Kentucky, executed and delivered to his nephew, Charles M. Briggs, a bill of sale of cotton in Mississippi, in these terms:

"For and in consideration of money loaned and advanced heretofore by C. M. Briggs, and further valuable consideration by way of suretyship for me by said Briggs, I hereby sell and transfer to said C. M. Briggs all the cotton on my two plantations in Mississippi near Eggspoint and Greenville. Said cotton so sold embraces all I have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about 2000 bales."

At the same time, Briggs executed and delivered to Samuel J. Walker, Morehead's son in law, a writing in these terms:

"In consideration of the sale and transfer this day made to me by C. S. Morehead of all the cotton on his two plantations near Eggspoint in the State of Mississippi, as specified in said sale and transfer in writing, I hereby assume and agree to pay to Samuel J. Walker the sum of forty thousand dollars due and owing to said Walker by said C. S. Morehead, upon condition, however, that I realize sufficient amount from any cotton on or from said plantations or proceeds of same, together with about twenty-five thousand dollars due me from said C. S. Morehead for moneys advanced and liability for him as surety; also about ten thousand dollars, more or less, being a claim of A. S. Shotwell as he may hereafter establish against said C. S. Morehead; but in case I should not realize sufficient to pay all of said claims or amounts above named in full, then I am to pay or divide the amount that may be realized from said cotton, proportionately or *pro rata* according to the respective amounts named, to the parties above named, first,

however, paying and refunding any moneys paid by the respective parties for or on account of expenses pertaining to same; and in case more should be realized than sufficient to pay said amounts, with interest thereon to the time of realization and payment, then any surplus to be divided, one half to said Shotwell and C. M. Briggs jointly for any services, and the remaining one half to said Samuel J. Walker, but no other consideration to be paid to said Shotwell and Briggs for their service."

Briggs at once took steps to get possession of the cotton, but was prevented by the Federal forces and the Confederate forces in the vicinity. This cotton, amounting to four hundred and fifty bales, was finally seized, together with other cotton, by Captain G. L. Fort, assistant quartermaster general in the United States Army, in behalf of the United States, and was by him sold and the proceeds paid into the Treasury of the United States.

Briggs died in 1875, after repeated and unsuccessful efforts, through his attorneys, to obtain the proceeds of the cotton in question; and his executor continued the efforts, and, through the same attorneys, procured the passage of the act of Congress of June 4, 1888, c. 348, copied in the margin.[1]

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[1] An act for the relief of the estate of C. M. Briggs, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims is hereby given, subject to the proviso hereinafter mentioned, like jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs, deceased, for the proceeds of four hundred and fifty-five bales of cotton, now in the Treasury of the United States, alleged to have been owned, in whole or in part, by said Briggs, as is given to said court by the acts of March twelfth, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four, upon petition to be filed in said court at any time within two years from the passage of this act, any statute of limitations to the contrary notwithstanding: Provided, however, that unless the said court shall, on a preliminary inquiry, find that said Briggs was in fact loyal to the United States Government, and that the assignment to him hereinafter mentioned was *bona fide*, the court shall not have jurisdiction of the case, and the same shall, without further proceedings, be dismissed: And provided further, that if the court shall find that the alleged assignment from one Morehead to said Briggs, of date April eighteenth, eighteen

Under the provisions of that act, Briggs's executor brought suit in the Court of Claims and therein recovered the sum of $88,000. See *Briggs* v. *United States*, 25 C. Cl. 126; 143 U. S. 346; 27 C. Cl. 564. Half of that sum was paid to the attorneys, pursuant to a contract between them and Briggs; and the rest, being the sum of $44,000, came to the hands of the executor.

Thereupon the executor, in a suit previously brought against him for the settlement of Briggs's estate, in the chancery division of the circuit court for the county of Jefferson and State of Kentucky, set up, by amended answer, that he had collected this sum of $44,000; and prayed that Walker's widow (to whom Walker had assigned his claim) and Shotwell's administrator might be made parties to the suit, and be required to set up their claims to this sum. And Mrs. Walker and Shotwell's administrator filed petitions in the cause, claiming the sums mentioned as due to Walker and to Shotwell, respectively, in the writing signed by Briggs, April 18, 1862, and above set forth.

To these petitions the executor of Briggs filed supplemental answers, in which, among other things, he set up the act of Congress of June 4, 1888, and the proceedings in the Court of Claims; and alleged that "in pursuance to the said act this defendant, through his said counsel, instituted an action against the United States in the Court of Claims to recover the proceeds of sale of the cotton aforesaid, and in and by said action it was finally determined and adjudged that the said

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hundred and sixty-two, under which said Briggs claimed said cotton, was intended only as security to said Briggs for indebtedness, and against contingent liabilities assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs to secure which said assignment was given: Provided, said judgment shall not be paid out of the general fund in the Treasury arising from the sale of captured and abandoned property, but shall be paid out of the special fund charged to and accounted for by Captain G. L. Fort, assistant quartermaster at Memphis, arising from the sale of the two thousand two hundred and nine bales of cotton, received by him, with which claimant's cotton was intermingled, said claimant to receive only the proportion which his cotton bears to the net proceeds accounted for by said Fort. 25 Stat. 1075.

testator was loyal to the United States, and that the assignment made by said Morehead to defendant's testator was *bona fide* and founded on a valuable consideration; but this defendant was, by the act aforesaid, as well as the final judgment of the Court of Claims, limited in his recovery to such sum as would satisfy the debts and claims of his testator, to secure which the said assignment was given; and this defendant says that by the final judgment of said Court of Claims he only received and recovered from the United States such sum as was owing directly to his testator by said Morehead, and did not recover anything whatsoever for or on account of anything that may have been owing by said Morehead to A. L. Shotwell or Samuel J. Walker;" and further alleged that "the passage of the act aforesaid was an act of grace on the part of the United States for the sole benefit of this defendant, and to permit this defendant to assert a claim against the proceeds of said cotton to the extent that said Morehead was indebted to his testator; that long prior thereto all claim that had existed in favor of said testator as against the United States for any part of the proceeds of said cotton had been barred by limitation, and said claim was outlawed and worthless;" and that "it was not intended by said act that this defendant should recover anything for the benefit, directly or indirectly, of any other person."

The circuit court of Jefferson County sustained demurrers of the petitioners to the supplemental answers of the executor; and, upon a hearing, found that there was due to Walker the sum of $40,000 and to Shotwell the sum of $6681.21; and adjudged that the sum of $44,000, in the hands of the executor, after deducting his commissions, be applied *pro rata* to the payment of these two sums, and of the further sum of $25,000 due from Morehead to Briggs. The executor appealed to the Court of Appeals of Kentucky, which affirmed the judgment. 43 Southwestern Reporter, 479. Thereupon he sued out this writ of error.

The case was submitted to this court upon a motion by the defendants in error to dismiss the writ of error for want of jurisdiction, or to affirm the judgment.

Opinion of the Court.

Mr. James P. Helm, *Mr. Helm Bruce* and *Mr. Samuel B. Vance* for the motion.

Mr. William Stone Abert, *Mr. Charles H. Gibson*, *Mr. John Marshall* and *Mr. D. W. Sanders* opposing.

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

The motion to dismiss must be overruled. An executor represents the person of the testator, and is charged with the duty of resisting unfounded claims against the fund in his hands. Co. Lit. 209*a*; *McArthur* v. *Scott*, 113 U. S. 340, 396. The record, therefore, does present the Federal question whether the right given by the act of Congress to the "legal representatives" of Charles M. Briggs was for the benefit of his next of kin to the exclusion of his creditors.

But we are of opinion that this question, which is the only Federal question in the case, must be answered in the negative, and consequently that the judgment of the Court of Appeals of Kentucky must be affirmed.

The primary and ordinary meaning of the words "representatives," or "legal representatives," or "personal representatives," when there is nothing in the context to control their meaning, is "executors or administrators," they being the representatives constituted by the proper court. *In re Crawford's Trust*, 2 Drewry, 230; *In re Wyndham's Trusts*, L. R. 1 Eq. 290; 2 Jarman on Wills, c. 29, § 5, (5th ed.) 957, 966; Williams on Executors, pt. 3, bk. 3, c. 2, § 2 (7), (9th ed.) 992; *Cox* v. *Curwen*, 118 Mass. 198; *Halsey* v. *Patterson*, 10 Stew. (37 N. J. Eq.) 445.

In *Stevens* v. *Bagwell*, 15 Ves. 139, 152, a claim by the next of kin of a naval officer to the share awarded him in a prize condemned after his death, and ordered by treasury warrant to be paid to his "representatives," was rejected by Sir William Grant, who said that the intention of the Crown in all cases of this kind is to put what is in strictness matter of bounty upon the footing of matter of right, and not to exercise any kind of judgment or selection with regard to the persons

to be ultimately benefited by the gift; that the representatives to whom the Crown gives are those who legally sustain that character; but the gift is made in augmentation of the estate, and is to be considered as if it had been actually part of the officer's property at the time of his death.

In this court, it is well settled that moneys received by the United States from a foreign government by way of indemnity for the destruction of American vessels, and granted by act of Congress to the owners of those vessels, without directing to whom payment shall be made in case of death or insolvency, pass to the assignees in bankruptcy for the benefit of the creditors of such owners, although such assignees have been appointed before the act of Congress making the grant. *Comegys* v. *Vasse*, 1 Pet. 193; *Erwin* v. *United States*, 97 U. S. 392; *Williams* v. *Heard*, 140 U. S. 529.

In *Emerson* v. *Hall*, 13 Pet. 409, cited by the plaintiff in error, in which money paid by the United States to the heirs at law, as "the legal representatives of William Emerson," under the act of March 3, 1831, c. 102, 6 Stat. 464, was held not to be assets in their hands for the payment of his creditors, the act, in its title, was expressed to be "for the relief of the heirs of William Emerson, deceased;" and it granted the money as a reward for services, meritorious indeed, but voluntarily rendered by Emerson, not under any law or contract, and imposing no obligation, legal or equitable, upon the government to compensate him therefor; and the money was therefore held to have been received by his heirs as a gift or pure donation.

In the provision of the appropriation act of March 3, 1891, c. 540, concerning the French Spoliation Claims, the words "personal representative" and "legal representative" were used to designate the executor or administrator of the original sufferer; and money awarded by the Court of Claims to such a representative was held by this court to belong to the next of kin, to the exclusion of assignees in bankruptcy, upon the ground that the act expressly so provided. 26 Stat. 897, 908. *Blagge* v. *Balch*, 162 U. S. 439.

The words "legal representatives" or "personal representa-

tives" have also been used as designating executors or administrators, and not next of kin, in acts of Congress giving actions for wrongs or injuries causing death. Act of April 20, 1871, c. 22, § 6, 17 Stat. 15; Rev. Stat. § 1981; act of February 17, 1885, c. 126; 23 Stat. 307; *Stewart* v. *Baltimore & Ohio Railroad*, 168 U. S. 445, 449.

The act of June 4, 1888, c. 348, now before the court, is entitled "An act for the relief of the estate of C. M. Briggs, deceased," and confers upon the Court of Claims "jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs, deceased," for the proceeds, in the Treasury of the United States, of cotton owned by him. The only conditions which the act imposes upon the right of recovery are that the petition shall be filed in the Court of Claims within two years; that that court shall find that Briggs was in fact loyal to the United States, and that Morehead's assignment of the cotton to Briggs was made in good faith; and that if it shall find that the assignment "was intended only as security to said Briggs for indebtedness, and against contingent liabilities assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs to secure which said assignment was given." The "debts and claims," in this last clause, manifestly include both classes of debts previously mentioned, namely, the direct "indebtedness" of Morehead to Briggs, and the "contingent liabilities assumed by him for said Morehead," including the claims of the defendants in error, specified in the written agreement executed by Briggs contemporaneously with the assignment, and the amount of each of which has been ascertained by the court below.

The act of Congress nowhere mentions heirs at law, or next of kin. Its manifest purpose is not to confer a bounty or gratuity upon any one; but to provide for the ascertainment and payment of a debt due from the United States to a loyal citizen for property of his, taken by the United States; and to enable his executor to recover, as part of his estate, proceeds received by the United States from the sale of that property.

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The act is "for the relief of the estate" of Charles M. Briggs, and the only matter referred to the Court of Claims is the claim of his "legal representatives." The executor was the proper person to represent the estate of Briggs, and was his legal representative; and as such he brought suit in the Court of Claims, and recovered the fund now in question, and consequently held it as assets of the estate, and subject to the debts and liabilities of his testator to the defendants in error.

Judgment affirmed.

HUBBARD, Assignee, *v.* TOD.

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

No. 24. Argued April 22, 25, 1898. — Decided October 17, 1898.

On the hearing of a case, brought by certiorari from a Circuit Court of Appeals on petition of one of the parties, in which the judgment of that court is made otherwise final, this court will pass only upon the errors assigned by the petitioner, and does not feel at liberty to decide whether there was error in the decree below, of which the other party might have complained.

Under the circumstances disclosed in the statement of the case and in the opinion of the court in this case, the Union Trust Company cannot be allowed to set up its alleged title to the stock and bonds in controversy, as against third parties taking in good faith and without notice, and the same principle is applicable to its assignee, and to creditors seeking to enforce rights in his name; and, so far as this case is concerned, there is nothing to the contrary in the statute of Iowa regulating assignments for the benefit of creditors, as expounded by the Supreme Court of that State.

This court concurs in the conclusion reached by the Circuit Court and the Circuit Court of Appeals on the fact that the respondents' right to the securities was superior to that asserted by the petitioner.

The New York statutes against usury cannot be interposed by a corporation, or pleaded by endorsers of its paper.

The Manhattan Trust Company of New York filed its bill, on September 28, 1893, in the Circuit Court of the United States for the Northern District of Iowa, against the Sioux City & Northern Railroad Company of Iowa, praying for

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the appointment of a receiver to take possession of the railroad and its properties and to operate and preserve the same, under and by virtue of the terms of a trust deed made and executed by the Sioux City & Northern Railroad Company to the Manhattan Trust Company, January 1, 1890, to secure an issue of bonds to the amount of $1,920,000.

October 5, 1893, receivers were appointed, and on the same day E. H. Hubbard, as assignee of the Union Loan & Trust Company, a corporation of Iowa, filed in said cause an intervening petition against the members of the banking firm of J. Kennedy Tod & Co. of New York, praying in respect of 10,600 shares of the capital stock of the Sioux City & Northern Railroad Company, and $2,340,000 in first mortgage bonds of the Sioux City, O'Neill & Western Railway Company, a corporation of Nebraska, held by J. Kennedy Tod & Co., an injunction against the disposition thereof; an accounting of what sums J. Kennedy Tod & Co. had advanced in good faith on said securities; and the surrender by them of the collateral to the intervening petitioner on the ascertainment of the sums so advanced and constituting a lien thereon.

J. Kennedy Tod, W. S. Tod and Robert S. Tod, composing the firm of Tod & Co. objected to the jurisdiction, but answered November 16, 1893, and about the first of January, 1894, petitioner filed an amended petition, to which defendants filed a supplemental answer, and petitioner, a replication.

The intervening petition and amendments averred that the Union Loan & Trust Company was a corporation of the State of Iowa, organized in the year 1885, and thereafter engaged in carrying on a loan and trust business up to and until April 25, 1893, when it made a general assignment of all its property and assets to E. H. Hubbard of Sioux City, Iowa.

That on July 3, 1889, A. S. Garretson, John Hornick, J. D. Booge, Ed. Haakinson and D. T. Hedges entered into an agreement in writing, referred to as a railroad syndicate agreement, for the construction of the Sioux City & Northern Railroad, which construction was proceeded with, and from time to time the individual members of the syndicate executed and

delivered their respective notes to the Union Loan & Trust Company in various sums, which notes that company sold to various bankers and brokers throughout the United States; that there existed an understanding or agreement between the syndicate and the company that the syndicate should deposit with the company as collateral security for said notes the stock and bonds of the Sioux City & Northern Railway Company when issued; that the syndicate caused the corporation to issue the mortgage described in the original bill; and that the bonds and stock of the corporation were held by the company "as collateral security for the payment of the notes with the proceeds whereof the said railroad has been constructed and equipped as aforesaid."

That afterwards the syndicate lent its aid to the Wyoming Pacific Improvement Company, a Wyoming corporation engaged in the construction of the Nebraska & Western Railroad, a line of road extending westward from Sioux City to the town of O'Neill, in the State of Nebraska, and that said syndicate also extended its aid and assistance to other corporations in and about Sioux City, such as the Pacific Short Line Bridge Company, the Union Stock-Yards Company, the Sioux City Terminal Railroad & Warehouse Company, and the Sioux City Dressed Beef & Canning Company, with a like understanding between the syndicate and the Union Loan & Trust Company that the securities of the respective companies coming into the possession of the syndicate should be deposited with the Union Loan & Trust Company as collateral to the notes which the members of the syndicate might give to that company on behalf of the enterprises respectively.

And also that the syndicate organized the corporation known as the Pacific Short Line Bridge Company to construct a bridge across the Missouri River at Sioux City for the purpose of connecting said railroads, the stock of said company to belong to the Nebraska Company.

It was further averred that the syndicate acquired the ownership of all the bonds of the Nebraska & Western Railway Company, and that they became subject to the lien of the Union Loan & Trust Company; yet that A. S. Garretson,

on or about October 1, 1891, without any apparent record or other authority from the Union Loan & Trust Company, caused all of the Nebraska & Western bonds and 7200 shares of Sioux City & Northern Railroad stock to be transferred to Tod & Co. as security for a loan of one million dollars, but that Tod & Co. were chargeable with notice of Garretson's want of authority.

That the Nebraska & Western Railway was built by the Wyoming & Pacific Improvement Company, which was practically owned and controlled by the Manhattan Trust Company, and that the Improvement Company received stock and bonds of the Nebraska & Western Company, and delivered them to the Manhattan Trust Company, by which they were pledged, or held in trust, as security for loans negotiated and advanced by it to the Improvement Company, including a loan of $500,000 by Belmont & Co., all of which were outstanding when, on November 1, 1890, the Improvement Company collapsed, to the knowledge of Tod & Co.

That to relieve itself from impending loss, the Manhattan Trust Company, by untruthful representations as to the amount of the indebtedness of the Nebraska & Western Railway Company, induced Garretson to purchase said loans; that Garretson thereupon deposited $750,000 of the Sioux City & Northern bonds with the Manhattan Trust Company as security for relief of the maturing obligations to Belmont & Co.; and that about the same time Tod & Co. began to make advances to Garretson on the security of the Nebraska and Western bonds; that Garretson was obliged to sell all the Sioux City and Northern bonds at a sacrifice price of seventy-five per cent, and to pledge all the Nebraska & Western bonds and half of the Sioux City & Northern stock substantially for the value of the purchase price of the Nebraska & Western bonds.

That the mortgage covering said bonds was foreclosed and the property conveyed to a new corporation called the Sioux City, O'Neill & Western Railway Company, in exchange for the issue of $2,340,000 of first mortgage bonds, and 36,000 shares of stock; and that in the latter part of 1892, or early

in 1893, Garretson, without any apparent record or other authority from the Union Loan & Trust Company, caused all of the bonds of the Sioux City, O'Neill & Western Railway Company, and substantially all of the stock of the Sioux City & Northern Railroad Company, to be vested in the Pacific Short Line Bridge Company, and the notes of the latter company, to the amount of $1,500,000, to be given to himself, and the payment thereof to be secured by the pledge of all said bonds and stock, and transferred the notes and securities to J. Kennedy Tod & Co., who, acting as trustees, but chargeable with notice, negotiated or bought the greater part of the said notes for different holders or purchasers thereof, $500,000 being taken by the Great Northern Railway, which desired to acquire the Sioux City & Northern Railroad, and with which Tod & Co. were allied.

That after the failure of the Union Loan & Trust Company, a committee of its creditors, Tod & Co. having advertised the sale of the collateral pursuant to the terms of the $1,500,000 loan, there having been default in payment of interest for thirty days, offered to pay the overdue interest on certain conditions, which were refused, and the collateral was sold and bought in by Tod & Co. for $1,000,000.

The petition and amended petition contained an averment that petitioner, "as assignee of said Union Loan & Trust Company, is entitled to the immediate surrender of all and singular of said securities by said J. Kennedy Tod & Co. to your petitioner without any payment of principal or interest upon said alleged loan, or any other consideration whatsoever."

The prayer of the amended petition was: That Tod & Co. surrender to petitioner, without any terms or conditions, the collateral held by them as aforesaid, and that they be enjoined from selling or disposing of the same; for an accounting of sums advanced by Tod & Co. in good faith and without notice on account of the securities, and the disposition made by them of any other collateral held by them under the loan agreement of December 31, 1892; the surrender of the certificates to the petitioner upon an accounting, and the

ascertainment of what sums, if any, constituted a lien thereon; and the appointment of a receiver *pendente lite.*

The answers of Tod & Co. traversed the allegations of the petition and amended petition on which petitioner based his claim to the securities, and particularly denied all charges of fraud, want of good faith or notice; and set forth at length the transactions in respect of said securities on which they claimed the title thereto or right to hold the same. After much of the testimony had been taken petitioner moved for leave to further amend his petition, which motion was held over to the hearing.

The case was heard on the merits, and, in the final decree, leave to further amend was granted. This second amended petition made the Manhattan Trust Company a party, and averred among other things, that the loan of one million dollars and the loan of one million and a half were usurious, and prayed that each be declared void, and that the securities be surrendered to petitioner free and clear of any claim, right, interest or lien of Kennedy Tod & Co.

The evidence may be sufficiently summarized as follows:

I. The Union Loan & Trust Company was organized in 1885 with a capital stock of $100,000, which was afterwards increased to $1,000,000. The purposes of its incorporation, as stated in its certificate of organization, were the loaning of money on real and personal security; the purchase and sale of securities; the negotiation of loans; and the execution of trusts; but the company was not to "purchase, nor loan its funds on the securities of any railroad company." It had a board of five directors, a president, vice president and secretary, and by its by-laws a committee of three members on applications for loans was provided for.

November 2, 1885, George L. Joy was elected president, A. S. Garretson, vice president, and E. R. Smith, secretary, subsequently also made treasurer, and these three persons were appointed the committee on loans. They continued to hold these offices and to constitute that committee up to and until April 24, 1893, when the company made an assignment to E. H. Hubbard.

The practical management of the company's affairs was

left to E. R. Smith, secretary and treasurer, and he accepted, endorsed and discounted notes as if he were solely in charge of the business.

When individual members of the syndicate presented notes to the company, Smith accepted the notes without collateral, but claimed that this was on the understanding that securities were to be or would be thereafter deposited; and when securities, whether bonds or stock, did come to the hands of Smith as secretary and treasurer, he parted with them to Garretson, or transmitted them as requested by Garretson, constantly recognizing Garretson's right to sell or rehypothecate the same. Garretson testified to the right of the syndicate to sell or pledge the securities on the market; and its financial management was entrusted to him.

The so-called Railroad Syndicate agreement was entered into July 3, 1889, by A. S. Garretson, John Hornick, J. E. Booge, Ed. Haakinson and D. T. Hedges, for the purpose of building and equipping the Sioux City & Northern Railroad, and provided that all money borrowed and contracts made for the building and equipment of the road should be borne equally by the parties; that where notes were executed by one for the purposes expressed, each should be equally liable therefor; that all money borrowed should be placed to the credit of John Hornick, trustee, at the office of the Union Loan & Trust Company; and that the contract should continue until the railroad should be completed and its debts paid; and be lodged with the company.

The agreement contained no provision that the money borrowed for the uses of the copartnership should be borrowed from or through the Union Loan & Trust Company; nor any stipulation for the depositing with that company of the stock and bonds of the Sioux City & Northern Railroad, as security for any money the syndicate might borrow.

It appeared that when the Union Loan & Trust Company desired to rediscount or sell notes, it sent out a circular offering them at a considerable discount, and reciting "in every case we hold good and sufficient security from the maker"; but it did not appear that the holders of notes, the creditors repre-

sented by the assignee, took them on the faith of any pledge of the securities in question. Nor was any reference thereto made in the notes themselves. The understanding between the syndicate and the Union Loan & Trust Company, that railroad securities should be deposited to secure syndicate paper, rested on conversations between the parties, and did not involve the liberty of the syndicate to borrow elsewhere; nor did the understanding permit securities held for moneys advanced to one enterprise to be held as security for any other.

The Sioux City & Northern Railroad was constructed by the syndicate, some of the money being raised on notes of its members, which were discounted by the Union Loan & Trust Company, the proceeds credited to Hornick, trustee, and drawn against as provided in the agreement.

The road was completed in January, 1890, and the syndicate acquired its first mortgage bonds for $1,920,000, secured by mortgage to the Manhattan Trust Company as trustee, and its capital stock of about 14,400 shares. None of the shares of this stock ever stood in the name of the Union Loan & Trust Company, nor did any of the bonds; nor did the books of the company contain entries referring to the collateral in controversy as pledged to secure syndicate paper or the company's indorsement thereof.

The bonds came into the custody of the Union Loan & Trust Company before they were certified by the Manhattan Trust Company, and on February 24, 1890, Smith, secretary, transmitted them to the Manhattan Trust Company to be certified, but did not request that they should be returned. On the same day Garretson directed the Manhattan Trust Company to certify the bonds and hold them subject to his order; and on March 12, 1890, Smith, secretary, directed the Manhattan Trust Company to issue its receipt for said bonds to A. S. Garretson, individually, which was accordingly done.

Efforts to sell the bonds were made, and, in furtherance thereof, August 26, 1890, Garretson directed the Manhattan Trust Company to ship the bonds to the Boston Safe Deposit and Trust Company, Boston, to be held subject to the order of F. V. Parker & Co., and the bonds were so shipped.

Subsequently, Garretson hypothecated portions of these bonds to secure his own notes given for loans made for the purpose of acquiring control of the Nebraska & Western Railroad, forming part of the "Pacific Short Line" enterprise, promoted to build a road from a point on the Missouri River opposite Sioux City westward to Ogden, Utah.

In the latter part of December, 1890, or early in January, 1891, Garretson and Hedges offered the Sioux City & Northern bonds to Tod & Co. at 90 cents, but no purchase was made, Tod & Co. offering 66⅔. A few weeks later, Tod & Co. were again applied to and they purchased the bonds at 75 cents. The evidence tended to show that out of the proceeds Garretson's notes to the aggregate of $690,000, secured by 920 Sioux City & Northern bonds, were taken up, and $750,000 were paid over to the Union Loan & Trust Company and credited to the syndicate.

II. The Nebraska & Western Railway Company was organized in 1889, and on the first day of July of that year made and executed its mortgage to the Manhattan Trust Company to secure its issue of bonds to the amount of $2,583,000.

It then contracted with the Wyoming Pacific Improvement Company to construct and equip the road, which was to receive therefor the bonds of the railway company, to be delivered by the Manhattan Trust Company as issued and certified to by it, and in this way the Improvement Company became the owner of the bonds. On February 1, 1890, the Improvement Company entered into an agreement with the Manhattan Trust Company, under which the latter procured for the former, on its notes, loans to the amount of $1,050,000, secured by bonds held in trust in the ratio of two dollars in bonds to one dollar in money loaned. At the same time an underwriter's agreement was entered into between the Improvement Company and the subscribers thereto, by which if the loans were not paid the bonds were to be taken at fifty cents on the dollar.

Of this loan Belmont & Co. took $500,000, and Garretson and Hedges $125,000 each.

Garretson, Hornick and Booge had previously become sub-

scribers to the enterprise to the extent of $100,000 for certificates of the Improvement Company, and they, and Hedges and Haakinson, executed an agreement February 15, 1890, agreeing that, for the purpose of securing the "construction of the Pacific Short Line from Sioux City westward to O'Neill," they would raise $350,000, $250,000 to be loaned the Improvement Company on the security of $500,000 first mortgage bonds of the Nebraska & Western Railway Co., held by the Manhattan Trust Company, and $100,000 certificates of the Improvement Company to be assigned to the syndicate by the original subscribers.

The Manhattan Trust Company held $2,100,000 of the Nebraska & Western bonds to secure the $1,050,000 loan and, subsequently, $483,000 more to secure other loans.

About November 1, 1890, it became necessary to provide for the payment of the loan by Belmont & Co.

On that date Garretson borrowed through the Manhattan Trust Company $500,000 on his individual notes secured by $750,000 Sioux City & Northern bonds, and took up the Belmont loan of $500,000. He at the same time negotiated with the officers of the Manhattan Trust Company touching other loans to the Improvement Company under the underwriter's agreement to the effect that the Manhattan Trust Company should cause said loans to be renewed or placed elsewhere, and that the Nebraska & Western bonds in possession of the Manhattan Trust Company should be used as collateral.

And, January 28, 1891, Garretson entered into a written agreement with the Manhattan Trust Company for the taking up of the then outstanding notes and receiving the collateral held as security therefor.

Among the transactions, Garretson borrowed in February $190,000 secured by 170 Sioux City & Northern bonds, and the equity in the 750 bonds held to secure the $500,000 loan. These loans were paid out of the proceeds of the sale of the whole issue of the Sioux City & Northern bonds, as before stated.

The testimony of Garretson was relied on to sustain the

charge that the Manhattan Trust Company perpetrated a fraud on him at the time he entered into negotiations to assume or take up the obligations of the Improvement Company, in the acquisition of the Nebraska & Western road, in that it misrepresented the amount of that company's indebtedness. The officers of the Manhattan Trust Company positively denied any such misrepresentation; and the eighth paragraph of Garretson's contract with the Manhattan Trust Company of January 28, 1891, declared: "This agreement and the settlement herein made is in full adjustment and settlement of all questions heretofore arising between the parties hereto, in reference to the said Improvement Company or the construction of the Nebraska & Western Railway, and the first party agrees that his note for $500,000 heretofore given on taking up certain loans shall be paid at or before maturity." The evidence did not show that if there had been any misrepresentation, Tod & Co. had any knowledge in fact thereof, though at one time a member of the firm, now deceased, was a director of that Trust Company, and its counsel was also Tod & Co.'s.

After Garretson had become the holder of the obligations of the Improvement Company and the Nebraska & Western bonds, he caused the bonds to be sold on May 27, 1891, and June 24, 1891, pursuant to a demand made on the Manhattan Trust Company as trustee and to notice given, and at the sale purchased all the bonds of the Nebraska & Western Railway Company.

In June, 1891, Tod & Co. loaned Garretson $75,000 on $200,000 Nebraska & Western bonds as collateral.

III. October 1, 1891, Garretson entered into a contract with Tod & Co. to borrow one million dollars, which recited that Garretson was the holder of $2,500,000, or thereabouts, of Nebraska & Western bonds; of 25,000 shares of the stock of the Nebraska & Western Railway Company, and of 7200 shares of the stock of the Sioux City & Northern Railroad Company; that proceedings were pending for the foreclosure and sale of the Nebraska & Western Railway; and that Garretson desired to borrow money, purchase the road, form a new corporation, and obtain a new issue of bonds and stock;

and Tod & Co. agreed to make or procure him a loan on these terms: Garretson to deliver to Tod & Co. his two hundred promissory notes of $5000 each, dated October 1, 1891, and payable on demand, and to deposit as security for the equal and common benefit of all who should become holders thereof the Nebraska & Western bonds, the shares of Nebraska & Western stock, and the shares of Sioux City & Northern stock; Tod & Co. to procure the sale of the notes at par, and to advance thereon at once $200,000, if required in obtaining title, the collateral to be held by Tod & Co. for the equal benefit of the holders of the notes; on the reorganization of the Nebraska & Western Railway Company under the foreclosure, a new mortgage to be executed to the Manhattan Trust Company to secure a new issue of bonds at the rate of $18,000 per mile, and the whole amount of such issue, $2,340,000 and one half of the capital stock of the new company to be delivered to Tod & Co. in the place of the Nebraska & Western bonds and stock. If the Nebraska & Western bonds were required to be deposited in court, the road was to be purchased in the name of trustees, and until the new corporation was formed and new bonds and stock delivered, no more than $600,000 was to be paid over to Garretson, the balance to remain to his credit with the banking company.

The new bonds were also to be further secured by all the stock of the Pacific Bridge Company except such part not exceeding fifty shares as should be necessary to qualify directors. The note holders were also given certain options, and Tod & Co. were to receive one per cent commission for their services.

The notes representing this million dollar loan were not executed October 1, 1891, but were thereafter prepared and sent to Garretson at Sioux City, were there executed by him, and were received by Tod & Co. October 26, Garretson being credited with the principal and twenty-five days' interest.

One million of the Nebraska & Western bonds were delivered to Tod & Co. October 19, 1891, $800,000 by the Manhattan Trust Company and $200,000 by Tod & Co.'s cashier, which had been pledged to them to secure the loan of $75,000,

and these bonds were sent that day to Wickersham, Tod & Co.'s attorney and agent at Omaha, to be used in the purchase under the foreclosure. One hundred and fifty thousand dollars of the bonds had been delivered to the St. Charles Car Company, and were received by Tod & Co. October 27, and forwarded to Wickersham that day.

Of the remainder of the bonds, 500 were held by the Manhattan Trust Company as collateral to the $250,000 subscribed by Garretson and Hedges to the underwriter's agreement, and had been shipped to the Union Loan & Trust Company by the Manhattan Trust Company by direction of Garretson, December 2, 1890.

And $933,000, which had been lodged in Tod & Co.'s custody by Garretson, had been sent to the company in August, 1891, on his instructions, which contained nothing to indicate that the Union Loan & Trust Company had any claim of lien thereon, or right thereto, while Tod & Co. testified that they supposed they were transmitted as a mere matter of safety deposit.

These bonds for $1,433,000 were sent to Garretson at Omaha by the Union Loan & Trust Company, and delivered by him to Wickersham.

The railroad was sold under the foreclosure decree October 23, 1891, and bought in by Garretson and Wickersham as trustees for the holders of the first mortgage bonds of the Nebraska & Western Railway Company, and on October 30 the entire issue, $2,583,000, was deposited by Wickersham with the clerk of the court, and the sale thereupon confirmed.

The road was reorganized under the name of the Sioux City, O'Neill & Western Railway Company, and Wickersham and Garretson as trustees conveyed the property to the new company in exchange for the issue of the bonds and stock.

Pending the issue of the engraved bonds of the Sioux City, O'Neill & Western Railway Company, a temporary bond was issued and delivered to Tod & Co., and afterwards exchanged for the engraved bonds.

All the bonds of the company were thus pledged to secure the $1,000,000 loan with the full knowledge and participation

of Garretson, and of Smith, secretary and treasurer of the Union Loan & Trust Company.

Some of the notes issued under this loan were sold to various parties and some retained by Tod & Co.

It having been intimated that payment of the one million dollar loan would be required, Garretson applied to Tod & Co. for the negotiation of a loan of $1,500,000. It was contemplated that the notes of the Sioux City, O'Neill & Western Railway Company for that amount should be given, to be secured by the bonds of that company and the stock of the Sioux City & Northern Company, then in pledge with Tod & Co. But Tod & Co. were advised by their counsel that the railway company was not authorized under the law of Nebraska to contract so large an indebtedness in excess of its outstanding bonds, and thereupon it was suggested that Garretson should sell the securities to the Pacific Short Line Bridge Company and receive back the notes of that company for $1,500,000, to be secured by a pledge of said securities, and that Tod & Co. should negotiate a sale of these notes on the strength of the securities thus pledged.

The Pacific Short Line Bridge Company was a corporation of Iowa, organized for the purpose of constructing a bridge across the Missouri River at Sioux City, as a part of the Nebraska and Western enterprise. Its stock was divided into 20,000 shares of $100 each, which were issued November 13, 1891, in four certificates of 5000 shares each, in the name of "A. S. Garretson, trustee," and these certificates were delivered by Garretson, November 19, 1891, to Tod & Co., who, on December 14, delivered them to the Manhattan Trust Company as trustee under the mortgage of the Sioux City, O'Neill & Western Railway Company, pursuant to the million dollar loan agreement of October 1, 1891. The Bridge Company had executed a mortgage to secure $1,500,000 of bonds, but of these only $500,000 had been certified by the trustee, and it did not affirmatively appear that any had been negotiated. Garretson testified that the purpose of the $1,500,000 loan was to take up the million dollar loan and to get "additional funds with which to carry on the construction of the bridge to a

point where we could get money from the bonds of the bridge to complete it."

December 26, 1892, the Pacific Short Line Bridge Company, at a meeting of its board of directors, passed a series of resolutions by which it agreed to purchase the bonds of the Sioux City, O'Neill & Western Railway Company, and 10,200 shares of the capital stock of the Sioux City & Northern Company, and to give therefor its promissory notes in the sum of $1,500,000 to the order of Garretson, dated December 30, 1892, and to pledge said bonds and stock to Garretson as security. Accordingly on December 31, 1892, a contract was entered into between Garretson, Hedges, Hornick and Haakinson (the remaining member of the syndicate, Booge, having failed and dropped out), and the Pacific Short Line Bridge Company, by which the Bridge Company purchased the securities and agreed to give its notes therefor, payable to Garretson's order, February 1, March 1 and April 1, 1894, bearing date December 30, 1892, to be forwarded to Tod & Co. to be delivered to Garretson or his order, or held by Tod & Co. as trustees to secure the payment of said notes. The notes were to provide, and when issued did provide, that on thirty days' default, in payment of interest, the principal was to become due and payable at the option of Tod & Co., on behalf of the holders, to be exercised on the written request of a majority.

Tod & Co. negotiated a sale of the notes through the Union Debenture Company, a corporation of the State of New Jersey, which was evidenced by a contract under date of December 30, 1892, between Garretson and that company, which recited that the notes were to be secured by the 2340 Sioux City, O'Neill & Western bonds and 14,200 shares of the Sioux City & Northern stock, by an indenture of trust with Tod & Co. December 31, Garretson entered into this indenture of trust whereby he pledged the said bonds and stock to Tod & Co. as trustees for the equal and pro rata benefit and security of all the holders of the notes, it being provided that if default should be made in the payment of the principal or interest of any of the notes, the trustee, on request, might de-

clare the principal and interest due and sell the bonds and stock at public auction, and that the holders might appoint a purchasing trustee, in whom, if he bought at the sale, the right and title to the bonds and stock in trust for all the note holders in proportion to the amounts due them respectively.

The note holders were given certain options, and Garretson agreed to pay the Debenture Company three and a half per cent commission.

As already set forth, Tod & Co. then held the 2340 bonds and 7200 shares of Sioux City & Northern stock. Of the remaining 7000 shares of this stock to be pledged under the agreement, 6190 shares were delivered to Tod & Co. by Garretson in December, 1892, in New York, and certificates for 1000 shares were sent to Tod & Co. by Smith, secretary, January 16, 1893. All these shares were transferred by members of the syndicate. In March, 1893, Tod & Co., as authorized by the indenture of trust, at the request of Garretson, released and delivered to the treasurer of the Great Northern Railroad Company 3600 shares, which Garretson had sold to that company for $350,000 in cash, all of which was received by Garretson. W. S. Tod testified that his firm supposed the proceeds of this sale were to be applied towards the construction of the bridge, and the evidence tended to show that the money was paid over to the Union Loan & Trust Company to be applied in payment of notes of the syndicate.

The notes for the $1,500,000 were executed and endorsed by Garretson and the transaction closed January 30, 1893, and on that date the Union Debenture Company turned over to Tod & Co. $1,507,500, being principal with accrued interest, and thereupon Tod & Co. paid off the million dollar loan with accrued interest, $1,004,833.33. They thus released the $2,340,000 Sioux City, O'Neill & Western bonds, the 18,000 shares of Sioux City & Western Stock, and 7200 shares of Sioux City & Northern stock, and delivered to themselves as trustees under the indenture of trust the bonds, 10,200 shares of Sioux City & Northern stock and also 4000 of the latter stock; and certified and delivered the bridge notes to the Debenture Company.

These notes contained the provision that they might be declared due on default in payment of interest or principal, and that they were secured by the indenture of trust of December 31, 1892, and the deposit of the bonds and stock as collateral.

The Union Debenture Company was a corporation of New Jersey, with a capital stock of $300,000 and over $800,000 of assets, and had issued and had outstanding $500,000 of twenty year debenture bonds, which had been sold mainly in England, Scotland and Holland. Tod & Co. owned one third of the capital stock, and the business of the company was transacted through Tod & Co. as brokers. The notes in question, except about $40,000 retained by the Debenture Company, were sold by them as brokers to various persons, including $590,000 to parties abroad, and $500,000 to the Great Northern Railway Company, but Tod & Co. took no part of the loan.

The commission of three and one half per cent, $52,500, was paid to the Debenture Company by Tod & Co.

The remainder of the proceeds of the $1,500,000 loan, after the discharge of the million dollar loan, the payment of the commissions, and of a temporary loan of $30,000 to Garretson, was paid over on Garretson's drafts, to the Union Loan & Trust Company, to be applied to the payment of bridge estimates and to the credit of Hornick, trustee. About $200,000 was applied on bridge account.

All the members of the syndicate were parties to the agreement by which the bonds and stock in controversy were sold to the Bridge Company and knew of the use Garretson proposed to make of the notes and securities. They did not repudiate the transaction, and never made any complaint or gave any notice to Tod & Co. that Garretson was wrongfully pledging the collateral. Tod & Co. rendered full accounts of the two loans to Garretson, which were sent by him to Smith as they were received.

Garretson was a prominent man in banking, financial and railroad circles when he began his dealings with Tod & Co., and continued to be so until 1893. He had been, or was, an officer of many business corporations or companies; and one

of the chief promoters and builders of the Sioux City & Northern Railway, and organizers of the Union Loan & Trust Company. He was highly recommended to Tod & Co. by the president of the Great Northern Railway Company, of which J. Kennedy Tod was a director. Mr. Tod stated that they believed during the negotiations between their firm and Garretson that he was a man of large wealth.

The Tods testified that they knew nothing of the dealings between the Manhattan Trust Company and the Improvement Company, or of the loan transactions of the Improvement Company, and had no connection therewith; that they had no knowledge or notice of any claims of the Union Loan & Trust Company to these securities at or before the time they were pledged to secure either the loan for $1,000,000, or the loan for $1,500,000, and the first information they had of any such claim was after default had been made in the payment of interest on the latter loan.

The interest on the notes was payable July 1, 1893, and January 1, 1894, and the interest due July 1, 1893, not having been paid, and the default having continued for thirty days, Tod & Co. on a request of a majority of the note holders declared the principal due, and advertised the securities for sale on September 19, in accordance with the indenture of trust, due notice being given, which sale was adjourned to September 26, at the instance of the creditors of the Union Loan & Trust Company, when the sale took place, and Tod & Co. bought the securities as purchasing trustees, thereto duly appointed, and held the same for the benefit of the holders of the notes. Certificates were issued by Tod & Co. as such purchasing trustees that they so held the securities and that each of the note holders was entitled to a three hundredth part interest for every $5000 note deposited.

After the interest had defaulted Tod & Co. were interviewed on behalf of some of the creditors of the Union Loan & Trust Company, and an offer to pay the defaulted interest was made on condition that such creditors should be put in control of the board of directors of the Sioux City & Northern Railroad Company, but with this condition Tod & Co. were with-

out authority to comply, and the creditors' committee declined to pay. No money was tendered.

According to the evidence of the Tods it was then, for the first time, that Tod & Co. received any intimation that their right to hold the securities was questioned by the Union Loan & Trust Company or its creditors.

The Circuit Court entered a final decree authorizing the redemption of the securities by the intervenor on payment to Tod & Co., as trustees, of the sum of $1,500,000, with interest thereon from December 30, 1892, computed with semiannual rests, to the date of payment.

The opinion is reported 65 Fed. Rep. 559, and it appears therefrom that District Judge Shiras, by whom the cause was heard, held that the transactions prior to the million and a half loan could not be passed on, but that the inquiry at issue was to be determined by considering the contracts under which Tod & Co. obtained possession of and claimed title to the 10,600 shares of Sioux City & Northern stock, and the $2,340,000 of Sioux City, O'Neill & Western bonds held by them.

After a brief review of the formation of the syndicate and its dealings with the Union Loan & Trust Company, the conclusion was drawn "that the Trust Company as against the members of the syndicate is entitled to the benefit of the securities which were placed in its possession, and upon the faith of which it may be assumed it endorsed the syndicate paper," but that it was fairly deducible from the evidence that "the Trust Company parted with the possession of the securities, knowing that it was intended to re-hypothecate them," and that "it is not now open to the Trust Company to repudiate the acts of its secretary and treasurer in regard to these securities, by whose action in placing the same in the possession and under the control of Garretson the latter was enabled to repledge the same as security for further advances." That "the fair inference from the entire evidence is that the Trust Company consented to the repledging of these securities, in order that further funds might be procured for carrying on the work in question, but by so doing it did not abandon its

lien upon or equity in the securities, but only subordinated its rights to those created by the repledging of the securities."

That the sale of the securities by Tod & Co. under the provisions of the trust agreement of December 31, 1892, did not divest the Trust Company, or its assignee, of the junior lien on the securities, and that its right to redeem remained because the $1,500,000 of notes were not purchased in the ordinary course of business, nor in fact issued by the Bridge Company in connection with its business, but made at the dictation of the syndicate on the suggestion of Tod & Co., and operated as a fraud on the Bridge Company; that the use of its name was in reality a matter of form merely, and was so understood; and that the transaction must be considered as a loan to the syndicate, secured by a pledge of the collateral, which lien was superior to that existing in favor of the Trust Company.

The suggestion as to usury was dismissed on the ground that in any view equity required the payment of the sums advanced with interest, and no offer to do this was made by the intervenor.

From the decree the intervenor prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, assigning as error, in substance, that the Circuit Court erred in not finding that intervenor had a prior lien; that the securities were wrongfully taken from the Union Loan & Trust Company, and that defendants were not *bona fide* holders and took with notice; that the loans were usurious and void, and defendants, therefore, unable to hold the securities as against the intervenor.

Defendants also appealed from the decree, assigning as error the failure of the court to sustain objections to certain evidence; the allowance in the final decree of leave to intervenor to file his second amended petition; and the award of redemption.

The cause was heard in the Court of Appeals by two Circuit Judges, and the decree affirmed by an equal division; but on a petition for rehearing by the intervenor an opinion was filed from which it appeared that both judges were agreed

that appellee's lien on the securities was paramount to any claim of intervenor, but that they were divided on the question whether or not the right of redemption was cut off by the auction sale under the loan agreement.

The intervenor then applied to this court for a writ of certiorari, which was granted.

Mr. Henry J. Taylor and *Mr. John C. Coombs* for Hubbard, Assignee. *Mr. William Faxon, Jr.*, was on the brief.

Mr. John L. Webster and *Mr. George W. Wickersham* for Tod and others. *Mr. Francis B. Daniels* was on the brief.

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

It is provided by the judiciary act of March 3, 1891, c. 517, § 6, 26 Stat. 826, 828, that any case in which the judgments or decrees of the Circuit Court of Appeals are thereby made final, may be required, by certiorari or otherwise, to be certified to this court "for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This case belongs to the class of cases in which the decree of the Circuit Court of Appeals is made final by the statute, and having been brought up by certiorari on the application of petitioner below, is pending before us as if on his appeal.

And as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner.

These errors as assigned in the brief of counsel are, in short, that the Circuit Court erred, (1) in not establishing the priority of petitioner's lien or right in and to the securities; (2) in subordinating that lien or right, and decreeing foreclosure unless payment was made as prescribed; (3) in not entering a decree giving priority to petitioner because respondents set up absolute title by purchase, which was not sustained by the court; (4) in not restraining respondents by injunction and not ordering the surrender of the securities to petitioner.

The supposed errors in decreeing foreclosure, and that respondents were entitled to hold as pledgees notwithstanding their title by purchase was so far defective as to let in redemption, may readily be disposed of.

This was not a proceeding by Tod & Co. to obtain foreclosure. It was petitioner who sought the aid of the court, and this by an application which was, in effect, a bill to reclaim the securities absolutely and free from incumbrance. The Circuit Court treated the pleading as if framed in the alternative, and allowed redemption on conditions stated, the right thus accorded being necessarily declared to be extinguished if the conditions were not complied with as prescribed. And no error is assigned to the particular terms imposed.

Nor is there any tenable basis for the proposition that respondents' failure to sustain their purchase at the sale as a defence affected their rights as pledgees. Respondents stood on all their rights and were not put to an election. If the purchase was valid, the equity of redemption was wiped out. If invalid, the original lien remained. If superior, its superiority was not displaced by the claim of absolute title derived through the pledge as set forth in the pleadings.

Assuming that, as between the Union Loan & Trust Company and the syndicate, the company or its assignee had a lien on the securities in question, did the Circuit Court err in holding that the rights of respondents in respect thereof were paramount to those asserted by the intervening petitioner?

If not, then although the Circuit Court may have erred in holding that the sale of the securities did not absolutely cut off the claim of the company or its assignee, that would be an error of which petitioner could not, of course, complain.

Petitioner contends that his alleged lien or right was entitled to priority, because the securities "were wrongfully and fraudulently abstracted and diverted from said Trust Company in subsequent re-hypothecation with respondents;" and respondents did not hold them as received in good faith, in due course of business, for value and without notice, but acquired possession through transactions known to be

fictitious, usurious, *ultra vires*, fraudulent and void, and with notice.

The Circuit Court and the Circuit Court of Appeals agreed that respondents' right to the securities was superior to that asserted by petitioner, and we entirely concur in that conclusion.

So far from the securities being wrongfully abstracted from the Trust Company, we think that, whatever the agreement between the Trust Company and the syndicate, the Trust Company must be held to have parted with such of the securities as were ever in its custody, with full knowledge that they were to be hypothecated by Garretson; that indeed the evidence fairly shows that those which at any time came into the possession of the Trust Company were either deposited there by Garretson or by his order and direction, with the understanding on his part that he was authorized to withdraw them for the purpose of sale, pledge or otherwise, and that he always acted on that theory, with the consent and participation of Smith, as secretary and treasurer; and that in any view Smith's acts in the company's behalf must be held to have been performed with the actual or implied authority of the directors.

Smith, as secretary and treasurer, was the person who was actively engaged in the management of the affairs of the Union Loan & Trust Company, and held out to the public as having unlimited authority to manage its business and dispose of any of its securities. He endorsed in the company's name every note it put out, signed every letter that it wrote, and was, as respected the public, the Trust Company itself. Throughout all the transactions his conduct conceded that Garretson was the lawful holder of the stock and bonds tendered by him as collateral to the loans he negotiated. As such officer, he directly transmitted the securities of the Sioux City & Northern Railroad Company to New York, and likewise the $1,433,000 of Nebraska & Western bonds to Garretson at Omaha, to be delivered to the agent of Tod & Co., under the contract for the million dollar loan, and to be turned into court in carrying out the reorganization scheme

in accordance with which the Sioux City, O'Neill & Western bonds were to be issued.

It appears to us indisputable on the face of this record that Garretson was entrusted, according to the understanding of all parties, with the right to sell the Sioux City & Northern bonds; that the Union Loan & Trust Company received the proceeds of a million dollars of those bonds, thus ratifying the transaction; and that the proceeds of the balance were applied with Smith's knowledge, without objection on his part, or that of any other officer or director of the Trust Company, to taking up notes secured thereby, which had been given by Garretson to acquire the Nebraska & Western bonds, which he afterwards pledged to Tod & Co., and which were exchanged for the bonds of the Sioux City, O'Neill & Western Railroad in controversy.

None of the securities ever stood in the name of the Union Loan & Trust Company. And they were delivered in such form as to enable Garretson to hold himself out as the owner or lawful holder thereof, with full power of disposition.

The District Judge well said: "It is entirely clear that E. R. Smith, the secretary and treasurer of the company, dealt with these securities as though he had full authority from the company so to do, and he obeyed Garretson's instructions in regard to the same without demur; and it does not appear that the Trust Company, or any officer thereof, ever objected to such disposition of the securities; and, furthermore, so far as the evidence in this case discloses, the general management of the business of the Trust Company was entrusted to Smith, with very little, if any, supervision on the part of the directors or other officers of the corporation." 65 Fed. Rep. 564.

The truth of the matter seems to be, as the Circuit Court held, that, in order that the various properties represented by the stock and bonds should become valuable, it was necessary that the enterprises on which they were based should be carried through, and this required additional funds, to procure which the Trust Company consented to Garretson's negotiations with Tod & Co. and the Debenture Company, and the pledging of the securities.

The presumption on the facts is that the securities were delivered by the company to Garretson for use, and, if they had ever been pledged to the company, that the pledge was discharged by the voluntary parting with possession. There is nothing to show an intention to limit the use to a hypothecation in subordination to a prior pledge, let alone the question whether any such pledge existed, and the absence of evidence of any assertion thereof.

Certainly, under the circumstances, the company could not be allowed to set up its alleged title as against third parties taking in good faith and without notice. And the same principle is applicable to its assignee and to creditors seeking to enforce rights in his name. So far as this case is concerned there is nothing to the contrary in the statute of Iowa regulating assignments for the benefit of creditors as expounded by the Supreme Court of the State. Code Iowa, Tit. 14, c. 7; *Schaller* v. *Wright*, 70 Iowa, 667; *Mehlhop* v. *Ellsworth*, 95 Iowa, 657.

Section 2127 of the Code provides: "Any assignee, as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover, in the name of such assignee, everything belonging or appertaining to said estate, and, generally, do whatsoever the debtor might have done in the premises."

Conveyances by insolvent debtors in fraud of their creditors may be attacked by their statutory assignees, though equity would not aid the debtors themselves to recover the property, for the property transferred would, in the eye of the law, remain the debtors' and pass to the assignees, who would not be subject to the rule that those who commit iniquity have no standing in equity to reap the fruits thereof. But equities or rights belonging to particular creditors are not, by operation of law, transferred to such assignees.

The Trust Company did not own these securities, and did not transfer them in fraud of its creditors, prior to the assignment, so as to entitle the assignee to treat the transfers as void and the securities as belonging to the company.

Opinion of the Court.

And it must be remembered that this proceeding is an attempt on behalf of the holders of railroad syndicate paper, which constituted only a portion of the liabilities of the Trust Company, to establish equities in the securities on the ground that they were pledged to the company to secure it against liability on its indorsements of such paper, and that these equities, if any, must be worked out through the company.

The difficulty with the contention that the Trust Company was bound to hold the securities for the benefit of the holders of syndicate paper; that they were not duly parted with; and that Tod & Co. took with notice of the alleged interest of the Trust Company, and the equities of those holders, is that it does not appear that any of the syndicate paper was taken on the strength of these particular securities; or that Smith acted otherwise than with the knowledge and assent of the directors; or that Tod & Co. had notice of any claim of the Trust Company or its endorsees, or of any defect in Garretson's right to dispose of the securities.

The securities were railroad bonds, payable to bearer, and certificates of stock in the names of Garretson and his associates, with transfers endorsed by them in blank; and they were, in large part, sent to Tod & Co. by the Trust Company, at Garretson's request, with presumably full knowledge that they were to be used as collateral to loans he was procuring, without anything to indicate that the Trust Company had any interest in them, or any intimation of such interest. The securities did not stand in the name of the Trust Company, and Garretson did not, in any of his dealings with Tod & Co., assume to act for the company. The mere fact that he was one of its officers was not in itself sufficient to call for an inference that he was acting as such in these transactions, nor did he make his requests of Smith in that capacity, nor were they complied with by Smith as on that theory.

There was no actual notice, and as the visible state of things was consistent with Garretson's right to deal with the securities as he did, such notice cannot be presumed or implied. Nor do we regard the conduct of Tod & Co. as so negligent as to justify the application of the doctrine of constructive notice.

The circumstances relied on as imputing notice or requiring inquiry which would have resulted in notice are in our judgment inadequate to sustain that conclusion.

Thus it is said that because the Nebraska & Western bonds were overdue, and the mortgage in process of foreclosure, they were not negotiable and were taken subject to the alleged lien of the Trust Company. But they were assignable choses in action susceptible of being pledged, and were pledged to Tod & Co. until through the foreclosure and reorganization the new securities were substituted. As we have seen, the power of disposition had been lodged in Garretson by, or with the assent of, the Trust Company, and no secret equity could be set up by the latter.

So as to the fact that some of the shares of Sioux City & Northern stock delivered to Tod & Co. under the agreement of December 31, 1892, stood in the name of "A. S. Garretson, Trustee," the evidence disclosed that this stock belonged to Booge, one of the original members of the syndicate, and that he, having failed, had consented it should be put out of his name and held in trust, and that at this time there were no notes furnished by Booge to the syndicate outstanding. The Trust Company had no greater interest in this stock than in any other, and the word "trustee" was not intended to give and did not give notice of any rights claimed by the Trust Company.

Again elaborate argument is devoted to the point that Garretson was induced to assume the Nebraska & Western enterprise by false representations by the Manhattan Trust Company as to the condition of the Improvement Company; and that this led him to pledge the securities which he should have left with the Union Loan & Trust Company.

While we must not be understood as intimating in any degree that this charge of misrepresentation was made out, or, if it were, that Tod & Co. were cognizant thereof, it is enough that we are not satisfied that the transactions complained of involved notice of the claim of the Trust Company now set up.

But we do not feel called on to do more than allude to these

matters. Tod & Co. held the securities under the $1,500,000 loan in trust for the purchasers of the notes thereunder issued, and neither the Debenture Company, through which the transaction was made, and which holds a few of the notes, nor any other of the beneficiaries, was before the court. Nor was Garretson, nor any member of the syndicate, nor any holder of part of the million dollar loan, other than Tod & Co., a party to the record.

The Circuit Court correctly held that the prior transactions could not be overhauled under such circumstances; and applied the same principle to the last loan as well.

By the final decree petitioner was permitted to file a second amended petition, on which no issue could be, or was, joined, or additional testimony taken, and it was then set up, for the first time, that the loans were void because in contravention of the statutes of New York in relation to usury, and that petitioner was, therefore, entitled to reclaim the securities without compensation. The prohibition against usury of the New York laws (N. Y. Rev. Stat. Banks Bros., 7th ed. p. 2253) could not be interposed by corporations as a defence (Id. p. 2256; Laws, 1850, c. 172), nor could the endorsers of their paper plead the statute, *Union National Bank* v. *Wheeler*, 60 N. Y., 612; 96 U. S. 268; *Stewart* v. *Bramhall*, 74 N. Y. 85; *Junction Railroad* v. *Ashland Bank*, 12 Wall. 226; nor did it apply to demand loans of $5000 or upwards, secured by collateral. Laws, 1882, c. 237, § 1; Laws, 1892, c. 689, § 56.

Apart from these considerations, the Circuit Court disposed of this contention on the ground that petitioner, in order to any relief in equity, would be compelled to pay the sums advanced and interest, but had not tendered or made any offer of payment. This assumed that the point might have been passed on, if there had been such tender or offer, notwithstanding the Trust Company was not a party to the contract of loan, and neither the Bridge Company, nor Garretson, nor any member of the syndicate, nor the Debenture Company, nor any other loan holder, was a party to the record. We think the court was right if the question was properly before it. This was not a proceeding to enforce an alleged usurious agreement, but

it was petitioner who sought the affirmative aid of equity, which he could only obtain by doing equity. It is true that by a statute of New York (N. Y. Rev. Stat. 7th ed. 2255; Acts, 1837, c. 430, § 4), it is provided that whenever a borrower files a bill for relief in respect of violation of the usury law, he need not pay or offer to pay "any interest or principal on the sum or thing loaned;" but this act has been rigidly confined to the borrower himself (*Wheelock* v. *Lee*, 64 N. Y. 242; *Buckingham* v. *Corning*, 91 N. Y. 525; *Allerton* v. *Belden*, 49 N. Y. 373), and moreover, is not applicable to suits brought in courts not within the State of New York.

It is further urged that the transaction with the Bridge Company was *ultra vires*, and that, this being so, the securities should have been awarded petitioner free and clear from any condition whatsoever.

The Circuit Court held that the Bridge Company did exceed its powers, and that the matter must be treated as if that company had not been interposed as an actor in the transaction. Relief to the extent of redemption was on that account accorded, yet it was limited to that because there was nothing in the invalidity of the action of the Bridge Company which gave the Trust Company any greater right to the securities than it had before. The Bridge Company was not a party to the proceeding, and, indeed, if it had itself instituted suit for the cancellation of its notes, it could not have demanded possession of the securities. Clearly the Trust Company could not avail itself, in favor of its own alleged claim, of such an infirmity, if it existed, nor could the holders of the notes, which had passed into their hands as strangers, be deprived of the securities on the faith of which they had advanced their money; or have their rights adjudicated in their absence.

However, whatever the contention in the courts below may have been, the errors assigned here merely put forward the theory that the alleged usurious character of the contract by reason of the options granted and commissions paid, and its invalidity for lack of power in the Bridge Company, so took the transaction out of the ordinary course of business as to

charge Tod & Co. and the loan holders with bad faith and notice of the alleged claims of the Trust Company.

But we cannot perceive that the fact of usury between the parties to the contract, if usury there were, or action in excess of power, if that existed, either or both, can be laid hold of to justify the imputation of notice that Garretson was dealing with the securities in derogation of rights of the Trust Company. Doubtless there are cases where commercial paper or securities may be offered for negotiation under circumstances so out of the usual course of business as to throw such grave suspicion on the source of title that lack of inquiry, assuming that it would disclose defects, might amount to culpable negligence. But that doctrine has no application here.

Respondents had possession of all the Sioux City, O'Neill & Western bonds, and 7200 shares of Sioux City & Northern stock, in pledge to secure payment of $1,000,000 of Garretson's notes payable on demand, which amount had been borrowed for the purposes of, and was used in acquiring the Sioux City, O'Neill & Western Railroad for, the syndicate.

The syndicate was engaged in constructing a bridge across the Missouri River to connect the railroad in Nebraska with that in Iowa. The stock of the Bridge Company was all owned by the syndicate, and had been pledged with the bonds of the Sioux City, O'Neill & Western Railway.

Garretson applied for a new loan of $1,500,000, with which to take up the million dollar loan and get additional funds for the construction of the bridge.

As the railroads whose bonds and stock constituted the security were new and the securities were then without market value, the negotiation of the loan was made more attractive to the Debenture Company by the allowance of the commission and certain options. And since there seems to have been a question as to whether the agreements might not be obnoxious to the New York usury statutes and as notes of a corporation were supposed to be more readily salable than those of an individual, it was thought best to make the loan directly to one of the corporations owned by Garretson and his associates. The original suggestion was that the loan

should be made to the Sioux City, O'Neill & Western Railway Company, but objections being raised to this in view of certain provisions of the statutes of Nebraska, it was arranged between Tod & Co. and Garretson and his associates that the Bridge Company, which was equally owned by the syndicate, and to the purposes of which $500,000 of the loan were ostensibly to be devoted, should become the borrower. The sale of the securities, the issue of the notes secured thereby, and the making of the loan followed.

Garretson executed the indenture of trust to Tod & Co., the Debenture Company paid over $1,500,000 and interest to them, and they took up the million dollar loan, thereby releasing the Sioux City, O'Neill & Western bonds and 7200 shares of Sioux City & Northern stock; the balance of the latter stock was sent to Tod & Co. by the Trust Company; Tod & Co., as trustees, certified on the notes that the collateral had been deposited with them, and the notes were sold to various purchasers, who apparently advanced their money in good faith.

If the transactions, thus briefly stated, were unaffected by notice of any want of authority in Garretson in respect of the Trust Company as now alleged, it is not for that company to say that Tod & Co., or the holders of the loan, should be held chargeable with notice simply because the commissions and options might have constituted usury as between the parties to the loan, or the Bridge Company, its stockholders, or judgment creditors might have had cause of complaint of defect of power.

In letting petitioner in to redeem the Circuit Court went at least as far as the record would permit. Whether or not there was error in the decree of which respondents might have complained, we do not feel at liberty to decide.

Decree affirmed.

UNITED STATES *v.* JOINT TRAFFIC ASSOCIATION.

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

No. 84. Argued February 24, 25, 1898. — Decided October 24, 1898.

Thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the Joint Traffic Association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western termini of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest therein over its own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should coöperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were authorized in order to pay expenses, and the agreement was to take effect January 1, 1896, and to continue in existence for five years. The bill, filed on behalf of the United States, sought a judgment declaring that agreement void. *Held*,

(1) That upon comparing this agreement with the one set forth in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the similarity between them suggests that a similar result should be reached in the two cases, as the point now taken was urged in that case, and was then intentionally and necessarily decided ;

(2) That so far as the establishment of rates and fares is concerned there is no substantial difference between this agreement and the one set forth in the *Trans-Missouri case ;*

(3) That Congress, with regard to interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce, by shutting out the operation of the general law of competition.

The bill was filed in this case in the Circuit Court of the United States for the Southern District of New York for the purpose of obtaining an adjudication that an agreement

entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution.

These railroad companies formed most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast, and the object of the agreement, as expressed in its preamble, was to form an association of railroad companies "to aid in fulfilling the purpose of the Interstate Commerce act, to coöperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." To accomplish these purposes the railroad companies adopted articles of association, by which they agreed that the affairs of the association should be administered by several different boards, and that it should have jurisdiction over all competitive traffic (with certain exceptions therein noted) which passed through the western termini of the trunk lines (naming them), and such other points as might be thereafter designated by the managers. The duly published schedules of rates, fares and charges, and the rules applicable thereto, which were in force at the time of the execution of the agreement and authorized by the different companies and filed with the Interstate Commerce Commission, were reaffirmed by the companies composing the association. From time to time the managers were to recommend such changes in the rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic covered by the agreement and for protecting the interests of the parties to the agreement, and a failure to observe such recommendations by any of the parties to the agreement was to be deemed a violation of the agreement. No company which was a party to it was permitted in any way to deviate from or to change the rates, fares, charges or rules set forth in the agreement or recommended by the managers, except by a resolution of the board of directors of the company, and its action was not to affect the rates, etc., disapproved, except to the ex-

tent of its interest therein over its own road. A copy of such resolution of the board of any company authorizing a change of rates or fares, etc., was to be immediately forwarded by the company making the same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon the receipt of such resolution the managers were "to act promptly upon the same for the protection of the parties hereto." It was further stated in the agreement that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

One provision of the agreement was to the effect that the managers were charged with the duty of securing to each company which was a party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as it could be legally done. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which might decline or fail to observe the rates, etc., established under it, and the interests of parties injuriously affected by such action of the managers were to be accorded reasonable protection in so far as the managers could reasonably do so. When in the judgment of the managers it was necessary to the purposes of the agreement, they might determine the divisions of rates and fares between connecting companies who were parties to the agreement and connections not parties thereto, keeping in view uniformity and the equities involved.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be so arranged as to give proper representation to each company party to the agreement. Soliciting or contracting passenger or freight agencies were not to be maintained by the companies, except

with the approval of the managers, and no one that the managers decided to be objectionable was to be employed or continued in an agency. The officials and employés of any of the companies could be examined, and an investigation made when, in the judgment of the managers, their information or any complaint might so warrant. Any violation of the agreement was to be followed by a forfeiture of the offending company in a sum to be determined by the managers, which should not exceed five thousand dollars, or if the gross receipts of the transaction which violated the agreement should exceed five thousand dollars, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such gross receipts. The sums thus collected were to go to the payment of the expenses of the association, except that the offending company should not participate in the application of its own forfeiture.

The agreement also provided for assessments upon the companies in order to pay the expenses of the association, and also for the appointment of commissioners and abitrators who were to decide matters coming before them. No one retiring from the agreement before the time fixed for its final completion, except by the unanimous consent of the parties, should be entitled to any refund from the residue of the deposits remaining at the close of the agreement.

It was to take effect January 1, 1896, and to continue in existence five years, after which any company could retire upon giving ninety days' written notice of its desire to do so.

The bill filed by the Government contained allegations showing that all the defendant railroad companies were common carriers duly incorporated by the several States through which they passed, and that they were engaged as such carriers in the transportation of freight and passengers, separately or in connection with each other, in trade and commerce continuously carried on among the several States of the Union and between the several States and the Territories thereof. The bill also charged that the defendants, unlawfully intending to restrain commerce among the several States and to prevent competition among the railroads named, in respect to all their

interstate commerce, entered into the agreement referred to above, and it charged that the agreement was an unlawful one, and a combination and conspiracy, and that it was entered into in order to terminate all competition among the parties to it for freight and passenger traffic, and that the agreement unlawfully restrained trade and commerce among the several States and Territories of the United States, and unlawfully attempted to monopolize a part of such interstate trade and commerce. The bill ended with the allegation that the companies were preparing to put into full operation all the provisions of the agreement, and the relief sought was a judgment declaring the agreement void and enjoining the parties from operating their roads under the same. The defendant, the Joint Traffic Association, filed an answer (the other defendants substantially adopting it), which admitted the making of the contract, but denied its invalidity or that it is or was intended to be an unlawful contract, combination or conspiracy to restrain trade or commerce, or that it was an attempt to monopolize the same, or that it was intended to restrain or prevent legitimate competition among the railroads which were parties to the agreement. The answer, in brief, denied all allegations of unlawful acts or of an unlawful intent, unless the making of the agreement itself was an unlawful act. The answer then set forth in quite lengthy terms a general history of the condition of the railroad traffic among the various railroads which were parties to the agreement at the time it was entered into, and alleged the necessity of some such agreement in order to the harmonious operation of the different roads, and that it was necessary as well to the public as to the railroads themselves.

The case came on for hearing on bill and answer, and the Circuit Court, after a hearing, dismissed the bill, and upon appeal its decree was affirmed by the Circuit Court of Appeals for the Second Circuit, and the Government has appealed here.

Mr. Solicitor General for appellants.

The agreement violates the anti-trust law, because it creates an association of competing trunk line systems, to which is

given jurisdiction over competitive interstate traffic, with power, through a central authority, aided by a skilful scheme of restrictions, regulations and penalties, to establish and maintain rates and fares on such traffic and prevent competition, thus constituting a contract in restraint of trade or commerce among the several States, as defined by this court in the *Trans-Missouri case*, 166 U. S. 290.

That case was elaborately argued and carefully considered. A petition for a rehearing was presented and denied. The decision has been accepted and acted upon by the Departments of the Government, and by the courts, both state and Federal, as definitively settling the meaning and scope of the anti-trust law when applied to traffic associations among competing interstate railway systems. The decision was not only a just, but an eminently salutary one. I shall not concede that the principles it laid down remain questionable. I shall not admit that it is necessary for me, by argument, to fortify the position taken by this court in that case. The anti-trust law, as there construed, is the law of the land.

The wisdom of Congress in prohibiting *all* agreements in restraint of trade among interstate railway systems is even more manifest now than when the *Trans-Missouri case* was decided. At the time of the argument of the *Trans-Missouri case*, it was still to some extent a mooted question whether the Interstate Commerce Commission was empowered to determine what are fair and reasonable rates, and to enforce such rates. This question is no longer open. *Interstate Commerce Commission* v. *N. O. & Tex. Pac. Railway*, 167 U. S. 479; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144.

If it be urged that any illegality in the agreement is cured by section 3 of article 7, providing that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uni-

formity in the rates, fares, charges and rules established hereunder."

An injunction to construe and exercise powers conferred so as to permit no violation of law, is an admission that the powers may be so construed and exercised as to violate law. If the anti-trust law prohibited only those contracts in unreasonable restraint of trade or commerce there might be saving force in this section. But the anti-trust law prohibits *all* contracts in restraint of trade or commerce. Whether the rates be reasonable or unreasonable, an agreement providing for their establishment and maintenance by an association of interstate railways, is prohibited. The managers can exercise none of the essential powers conferred by the agreement without violating the law. In the matter of the essential powers, it is not a question of method or degree; the powers cannot be exercised, because they are in themselves illegal. The association itself is illegal. It is formed for the purpose of controlling certain competitive traffic. The central authority — the managers — is given the power to establish and maintain rates on that traffic. Take away from the association the power to establish and maintain rates, and it immediately falls to pieces. It ceases to have a *raison d'être.*

The authority of the Government to maintain this suit is sustained in *United States* v. *Freight Association*, 166 U. S. 290, 343, citing *in re Debs*, 158 U. S. 564; *Cincinnati, New Orleans, &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197.

Mr. James C. Carter (with whom was *Mr. Lewis Cass Ledyard* on the brief), for The Joint Traffic Association, appellee.

There are certain observations in relation to the Anti-Trust act which are properly to be made before proceeding to the argument.

There is no doubt that prior to and at the time of the pas-

sage of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited, in some minds, much alarm. Many industries were seen, or supposed, to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of "trusts," and this term came to be employed, in a general way, to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be a rather reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield a greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends and, perhaps, the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed themselves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a "trust" to be legally defined so that a prohibition of it should not include a prohibition of

the exercise of the clearest constitutional rights? Congress, surely, could not prevent the creation of corporations under state laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of States. And was it certain that these so called trusts were, in every instance, necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts," or limit aggregations of capital in any form. The general charge was that these combinations were in some form monopolies, and in restraint of trade, but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies, or restraints upon trade, they should be prohibited from so doing in the future; and this is what Congress did and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined, are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

The first question we design to consider is whether the agreement violates any of the provisions of the act referred to. To this end it is of much importance to have in mind the particular nature of the subject with which this act deals, and how that subject has heretofore been treated in law and legislation.

It is immediately obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

We next observe that it is not contracts only of a certain character which are condemned, but that they are coupled together with certain other acts, presumably of a similar nature or tendency, namely, combinations or conspiracies in restraint of trade, and monopolies, or combinations or conspiracies to monopolize. Contracts, therefore, are dealt with, not so much as contracts, but as one form of acts relating to trade and commerce assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to a sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy upon which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way in which they are treated in the law. One description embraces simply ordinary business transactions, where parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar instances of this character.

Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs therefore to the law of contracts, and the treatises on that law usually embrace a chapter devoted to it.

But there is another and much smaller description of contracts supposed to be injurious to trade of quite a different character. They are not, properly speaking, business transactions. They do not involve the sale, leasing or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a common interest, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers, or employers, unite, in the form of agreement, to regulate hours of labor, or prices, or where merchants, or tradesmen, combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to suppress, or regulate, competition among themselves; or where a class of producers or dealers combine together to control a product, or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

The marked distinction between these cases and the ordinary business transactions first spoken of is, that in the latter there is a difference of interest, sometimes regarded as a hostility of interest between the parties, each seeking to gain the utmost from the other; whereas, in the former, the parties are in the same interest, each seeking the same end. The term "contract" does not well express this sort of agreement. It is a uniting together for a common purpose — a combination — or, when thought to be of an objectionable character, a conspiracy. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but, in giving it this name we should not lose sight of its real character. In reality it is simply an act, and innocent, or guilty, according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for repression, it is not enough to simply declare it illegal. The practice may, nevertheless, be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which law usually takes in respect to such so called contracts is in the form of prohibition and penalty, and the subject belongs not to the law of contracts, but to the criminal law, where it is usually dealt with under the head of conspiracy.

We do not mean by the above observations that there may not be instances which partake, to a greater or less degree, of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust act belongs, is manifestly the one last described. The circumstance that contracts are grouped together with combinations and conspiracies and made the subject of criminal treatment, shows this very plainly.

The ineptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to

reach that class of supposed mischiefs which flow from combinations. But the great bulk of the cases, probably nine tenths, in which courts have felt called upon to say anything about contracts in restraint of trade, has been the business transactions first alluded to in which an agreement has been entered into, not to exercise a particular calling, as where the keeper of a well-patronized tavern sells out his establishment and good will, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but, surely even when void, there was nothing about them calling for the intervention of the criminal law. And yet this statute bunches the valid and the void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed, would be, assuming that the act covers contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were, in fact, in restraint of trade or commerce between the States. That it is, in fact, in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this court, and we expect to be able to show that the agreement is not only not in restraint of trade and commerce, but highly beneficial to both; that Congress has never declared, or intended to declare, it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objection on constitutional grounds, which will be dealt with by other counsel.

Having presented this preliminary matter, *Mr. Carter* argued the following points.

I. The court has no jurisdiction to entertain this suit, unless it can be found in the provisions of some statute.

The bill sets forth simply the commission of a misdemeanor,

and an intention on the part of the defendants to repeat the offence. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary courts of common law, is sufficient for the repression of crime, and exclusive adhesion to it necessary for the protection of the citizen.

II. The Anti-Trust act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and, perhaps, the decision made by this court in the suit of the *United States* v. *The Trans-Missouri Freight Association*, should be regarded as a determination that the Attorney General was at liberty in case of any violation of the provisions of the act to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition, in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication, at least, it is withheld; for in certain cases specially mentioned in sections 6 and 13, jurisdiction is expressly given to courts of equity to grant injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. "*Expressio unius est exclusio alterius.*"

III. A clear understanding should be had at the outset, of the meaning of the terms with which we are dealing. The class of contracts condemned by the Anti-Trust act is defined by the effect they have upon trade or commerce. They are such, and such only, as have the effect of restraining trade or commerce. The actual effect which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

This may seem self-evident, and indeed is so. But the possible suggestion might be made that there is a class of contracts, called, or named, "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect. There is no foundation for such a suggestion. There

is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever, heretofore, the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined by an inquiry as to its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might, or might not, be called or styled a contract in restraint of trade.

Moreover we are dealing with the criminal law, which never classes acts and makes them punishable under arbitrary names, without regard to their supposed effects, as being actually mischievous or otherwise. This would be putting innocence on a par with guilt.

IV. There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To restrain is to hold back, to check, to prevent, and thus to diminish. It is injury to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract injures and thus diminishes, or tends to diminish, trade or commerce, it cannot be deemed as in restraint of trade or commerce.

V. The agreement under which The Joint Traffic Association was formed, and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the act of July 2, 1890.

[Over one hundred pages of appellant's brief are taken up with the discussion of this point. The following synopsis of its reasoning was filed by counsel.]

The bulk of the whole discussion, so far as respects the Anti-Trust act, is contained under this Fifth Point, and the line of argument pursued is substantially as follows: (1) That no restraint is directly, or in terms, imposed upon trade or commerce; that all the members of the association will, as the agreement assumes, continue in business, doing the utmost they can, and in competition with each other; that whatever restraint is imposed by it is imposed simply upon a single feature of this competition; that, competition and trade not being identical with each other, a restraint upon competition is not necessarily a restraint upon trade. It is admitted, how-

ever, that a restraint upon competition may be a restraint upon trade; but it is asserted that whether it is so or not, in any particular case, depends upon the nature and effect of the restraint imposed in such case.

(2) The argument thus reaches one of the main subjects of discussion, namely, what the effects of competition in trade are; when they are good, and when, if ever, they are bad; and how such restraints have been regarded in public economy, law and legislation. This subject is treated at first generally, without reference to the particular effects of competition in the business of railroad transportation.

(3) It is then pointed out that the particular field of discussion in the case has been, by what precedes, fully disclosed, namely, the effects of restraints upon competition as restraining, or not restraining, trade and commerce, and a particular proposition, substantially equivalent to the main one, is stated as follows:

"The agreement in question, as a whole, and, particularly, so much of it as affects competition, is in the highest degree promotive of trade and commerce." The discussion on this head pursues the following course:

(*a*) It begins with a statement of "the origin, development and present condition in this country of the business of railway transportation," and shows that by the deliberate policy of all our governments, state and National, business has been, from the first, subjected to the severest involuntary competition, and it points out the ruinous results to which such competition leads when it takes place on rates, and aims to show that such results can be arrested, or mitigated, only by allowing the competing parties to displace the strife by some form of agreement. (*b*) This discussion is proceeded with by pointing out what the main requisites of a good railway service are, and how they are affected by railway competition in rates. It aims to show that such competition, by making uniformity in rates impossible, makes it impossible to secure any of these essential requisites, and that they can be secured only by some form of concerted agreement between the parties.

(4) The subject of agreements between railway companies and coöperative traffic associations being thus reached, a sketch is made of their origin and development down to the time of the passage of the Interstate Commerce law, and it is shown that the most efficacious form of agreement down to that time had been found to be that of pooling.

(5) The Interstate Commerce law and its effects are then discussed, and it is shown that one of its main objects was to bring about, so far as Federal legislation could accomplish it, uniformity in rates, and thus put an end to the practice of discrimination, and attention is called to the incidental feature of the law which prohibited pooling agreements. It is then shown that the effect of that law was to increase and aggravate the very evils which it was designed to remove. Pooling being prohibited, the most effective method for securing uniformity in rates could no longer be employed, and ruinous competition, with every form of discrimination, followed, and to these evils was added the unendurable aggravation that the practices which the law could not prevent were, nevertheless, converted into crimes.

(6) It is then shown that the necessity was universally felt for some form of concerted action which would put an end to these deplorable conditions and that the present agreement was the result of an earnest effort in this direction.

(7) An analysis of the agreement is then made, and it is pointed out that it is not aimed against competition in general, but assumes that such competition will still continue actively and earnestly on every point except that of rates.

Its precise effect upon competition in rates is dealt with, and it is shown that while its object is to secure uniformity in rates by inducing competing companies to consent to such uniformity, it does not purport to require it or compel it. That it does not really, or in any proper sense, seek to restrain competition at all, but aims to render competition open, honest and lawful, so that the business of railway transportation may be conducted in conformity with the requirements of the Interstate Commerce law, and without the daily commission of crime. It shows that, to this end, it is necessary that each railroad

company should first establish its rates and should adhere to them for a reasonable period, which is fixed at thirty days, in order if it intends a change that it may give reasonable notice of its intention in time to enable the competing parties to meet it, and to shape their own conduct accordingly; that this is absolutely the only restraint upon competition effected by the agreement, and being only slight and temporary, and necessary in order to enable competition to be open and lawful, cannot be regarded as a restraint upon trade. It admits that one of its main objects is to secure what the Interstate Commerce law sought to secure, uniformity in rates, but its method of effecting that result is, not by a compulsory agreement, but by taking away the motives to ruinous, secret and unlawful competition in rates. It also points out the many other beneficial provisions of the agreement by which it is sought to make the railroad transportation of the country regular, orderly, safe and effective.

(8) It further seeks to emphasize the beneficial purposes of the agreement by showing that every great industry in which the coöperation of many different proprietors and agencies is required, necessarily calls for a system of regulation which must be supplied either by the action of government, or, in the absence of such action, by the voluntary action of those who are engaged in it, and it pronounces the association as "an institution for the regulation of transportation business in those respects in which the State, either from lack of jurisdiction, or because it deems that the regulation could be best devised and administered by the railroad systems themselves, has chosen not to regulate it."

(9) Throughout this part of the argument the central proposition is that of the absolute necessity for some agency by which uniformity in rates may be brought about, and a uniformity not only in the case of merchandise shipped from the same point to the same terminus, but also in the case of merchandise shipped from, or to, any points in any way competing. So long as competition in rates exists different men and different places will necessarily be put up, or pulled down, enriched or ruined, as one railroad company may think it to be

for its interest to make lower rates than another, and without regard to comparative skill, industry or other natural advantages which furnish the true and only field for useful competition. Railway transportation is a public function, and absolute neutrality in relation to the multitudinous competitions of life is an essential condition of its just discharge. This neutrality can be secured only by uniformity in rates. If this is not secured by Government it must be brought about by some private agency. It cannot be secured by governmental action, because the Government has committed the business to private hands. The Interstate Commerce law had this uniformity for its prime object; and went to the limit of Congressional power in the effort to accomplish it. The prime object of the present agreement is to supplement the effort, not by compulsorily restricting competition, but by taking away the motives to it. It is asked whether it is possible to regard an organization formed to effect an object which the law and public policy unite in viewing as essential, but which Congress cannot by law reach, as a restraint upon trade? It is believed that when this single subject is considered in all its various relations, it is, of itself alone, decisive of the whole controversy.

(10) The important matter of the classification of freight is taken up and considered, and it is shown that the great end of uniformity in rates cannot be attained without a system of classification; that classification is only a part, although a necessary part, of rate making; that its only object and purpose is to make uniformity in rates possible; that it has never been attempted, except as part of an effort to bring about such uniformity, and can never be perfected, or even preserved, except upon the condition of such uniformity.

(11) The general usefulness of the organization formed by the association is dwelt upon by calling attention to the multitude and variety of subjects upon which it is daily engaged, and especially to its constant occupation with the question, how any particular rates which may happen to have been established, or which may be proposed to be established, affect different places and different merchants or manufacturers en-

gaged in the same business, and who are in competition with each other, whether they may be a few miles or hundreds of miles apart. It is asserted that the association becomes the practical arbitrator in cases where the Interstate Commerce law cannot operate between competing merchants and manufacturers, and between competing places, as to what rates even-handed justice to all requires; that from the nature of the case and the interest of the railroads themselves, no rules can be adopted for decision of such questions except those of justice and equality, and that it is practically impossible that it should be made a medium of monopoly, or for the exaction of anything more than reasonable charges; and that this is proved by a reference to the course of railroad charges during the whole period, embracing many years, in which such agreements have existed, the fact being that they have continually declined from the rate of about three cents a ton or mile to less than one cent a ton or mile, a rate lower than that of railway transportation in any other quarter of the world.

(12) The argument then refers to the matters of fact which were involved or assumed in the foregoing discussion, and justifies whatever assumptions have been made in the following ways: (*a*) That, by the very nature of the case, they are matters which must necessarily be true, because they are the results of the operation of the familiar and well-known laws relating to industrial pursuits. (*b*) Because they have that notoriety which requires a court to take judicial notice of them. (*c*) Because they are fully established by averments in the answer admitted by the appellant in setting down the cause for hearing upon bill and answer. (*d*) By the declarations, repeated in multiplied forms, of the Interstate Commerce Commission, the great public agency which has such supervision and control over the business of railway transportation as Congress can assert. Copious extracts from these declarations are set forth.

(13) These extracts and other proofs thus referred to are again declared to stamp this association as one instance, of which industrial life furnishes a multitude, where industrial

interests of great magnitude are subjected to private regulation, and for the reason that the State recognizes, and always has recognized, the fact that such regulation is far more effective over a large range of subjects than any which the State itself could devise and enforce. This statement is confirmed and illustrated by reference to many different instances. (*a*) To the multitudinous associations among workmen and employés of various descriptions, all based upon agreements far more in restraint of competition than any contained in this instrument. (*b*) Similar unions among the employers of labor. (*c*) To the numerous Commercial, Stock and Produce Exchanges and Boards of Trade, all of which prescribe rates of commission and for compensation for various services, and forbid any departure from them, and are far more restrictive of competition than any provision in the agreement in question.

(14) The question is submitted whether trade is in any way restrained by the agreements between laborers and employés, or those between the employers of labor, and it is answered by saying that the final and general results, notwithstanding occasional abuses, are greatly to increase the efficiency of labor and the amount of work done, and to elevate the character of the laboring classes. The same question is asked in respect to Commercial Exchanges and Boards of Trade, whether they restrain the business with which they are conducted, whether there is less buying or selling of goods in consequence of commissions or other charges being fixed at particular sums. It is answered by saying that, as every one knows, these are all agencies by which the number and magnitude of business transactions is enormously increased.

The same question is put in relation to the operation of the present agreement, or of any agreement tending to secure uniformity in railroad rates and the stability, certainty and safety of railway transportation; and it is asked whether, in consequence of such agreements, the business of railway transportation or the exchange of commodities is in any particular diminished, and whether it is not, on the contrary, prodigiously extended and enlarged.

(15) Under general subdivision V the conclusion to which the foregoing line of argument leads is drawn in these words: "That the agreement which this action seeks to condemn is not by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce, but is on the contrary highly needful to, and promotive of, both."

Its necessity to beneficial purposes, as thus established, is then separately pointed out by way of summing up: (*a*) Its necessity to stability in rates. (*b*) Its necessity to uniformity in rates and to prevent unjust discrimination. (*c*) Its necessity to secure the general benefits of harmonious coöperation in classification and interchange of traffic. (*d*) Its necessity as a supplement to the Interstate Commerce act, and in order to make the objects of that act attainable. (*e*) Its necessity for the prevention of crime, for its punishment when committed, and for the prevention of perjury, committed in order to conceal crime.

VI. If the Anti-Trust act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow. (1) That all railroad transportation be abandoned; or, (2) The consolidation of all competing railroads under a single ownership, either governmental or private; or, (3) That all competing railroad business must be carried on in constant and daily violation of criminal law. Of these alternatives neither the first or the second can be contemplated as possible. Railroad transportation cannot be abandoned, and no governmental ownership can, under present, or any probably near future conditions, be brought about. We have no sovereign government possessing the requisite powers. It is the third alternative which must follow.

VII. These positions are fully supported by the weight of authority.

VIII. The agreement is in no manner in violation of the provisions of the second section of the act. It creates no monopoly, nor is it an attempt, or conspiracy to monopolize.

IX. In the attempt, made by the bill, to array every possible objection to the agreement, there is an evident purpose to

suggest that its eighth article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of section 5 of the Interstate Commerce act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce law.

Mr. E. J. Phelps for the New York Central and Hudson River Railroad Company, appellee.

I. As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken as true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill. The facts on which the case stands are therefore to be found exclusively in the answers, either in the admissions or in the responsive averments which they contain.

II. The denials in the answers completely negative all the charges of illegal intent on the part of the defendants which are contained in the bill, unless they are found to result necessarily from the terms of the agreement itself.

III. Whether the agreement by its terms violates the Federal law, depends entirely on the inquiry whether it conflicts with any statute of the United States. The bill is not based upon any statute, but proceeds apparently upon common law grounds. No statute is referred to, or charged to have been violated.

IV. The only statutes of the United States that are claimed to be infringed by the terms of the agreement, are the Interstate Commerce act, of February 4, 1887, amended by acts of March 2, 1889, February 10, 1891, and February 8, 1895, and the Anti-Trust act of July 2, 1890.

V. The agreement violates no provision of the Interstate Commerce act. The only provision in that act that is claimed to be infringed, is contained in § 5, which prohibits "pooling." "Pooling" means a division of the money earnings of traffic, which this article does not contemplate.

VI. Even assuming that this clause in the agreement can be construed into a violation of the 5th section of the Interstate Commerce act, this suit would not be maintainable, be-

cause it is unauthorized by that act, and precluded by its express provisions. This court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States Government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offence; unless such power is specially conferred by statute. No such power is granted.

VII. The Anti-Trust act of July 2, 1890, does not apply to the business of railway transportation. It will be claimed that the decision of this court in the case of the *Trans-Missouri Association*, 166 U. S. 290, is decisive upon this point, as well as upon the further question whether the agreement here under consideration is a violation of the provisions of the Anti-Trust act. It will be found on comparison that very material differences exist between the agreement shown in that case, and the case that is presented here. So that the decision there is by no means controlling in the present case. These points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated. But we conceive it not to be improper, so far as it may be necessary, respectfully to ask of the court a reconsideration of the conclusions reached by the majority of the judges in that decision, which overrules the judgment of six United States Circuit and District Judges who sat in the different stages of that case and this.

The argument in opposition to it has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it, nor is it necessary to repeat it.

VIII. Assuming for the purposes of the argument, that the Anti-Trust law does apply to railway traffic contracts, no provision of that law is violated by the agreement now under consideration.

The prohibitions of the act are two: 1. Against contracts, combinations or conspiracies in restraint of trade or commerce. 2. The monopoly of, or the attempt or combination to monopolize any part of the trade or commerce of the States, or with foreign nations.

Mr. Phelps' Argument for the New York Central Railroad Company.

The agreement in this case is not "in restraint of trade or commerce." The theory of the bill appears to be that the agreement comes within this description, because it tends to restrict competition, and because any agreement that restrains competition is "in restraint of trade." Both these assumptions are erroneous, the one in fact, the other in law. The agreement does not restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

Assuming, against the fact, that a certain restriction of competition is the necessary result of this agreement if it is allowed to proceed, it plainly appears by its terms to be only such restriction of competition as is necessary to secure "just and reasonable rates."

By the Interstate Commerce act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates, as has been pointed out, are required to be published and kept open to public inspection, and to be filed with the Commissioners; and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners, and the companies are also made subject to the state laws regulating rates.

The precise question, therefore, under this clause of the Anti-Trust act, is whether a contract that produces a result which the Interstate Commerce act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is for that reason a contract for the unlawful restraint of trade. Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce act prohibits.

It is the statutes themselves that have prescribed a defini-

tion of this clause of the Anti-Trust act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of transportation which the Interstate Commerce act contemplates and provides for, are rates that are just and reasonable to the carriers as well as to the carried, cannot be open to doubt. The very words "just and reasonable" employed in that act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered, there can be no comparison. It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other. This is the construction which this court have given to the Interstate Commerce act in this very particular.

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust act taken by itself, but by that language considered in connection with the other statute of the United States which (if this applies) is *in pari materia*, and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect of them. Granting that the Anti-Trust act in terms makes all contracts unlawful that are in anywise "in restriction of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce act as construed by this court recognizes as the right of railway companies to receive, and provides means to secure? It will hardly be claimed that the elaborate provisions of the Interstate Commerce act on the subject of reasonable rates are repealed by the Anti-Trust act. If both are to stand, as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Quite aside from the provisions of the Interstate Commerce act, giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same

result is reached under the principles of the common law. The term "restraint of trade" employed in the Anti-Trust statute has a common law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the agreement an infringement of this statute, it must, therefore, be one that would be void at common law. It is respectfully submitted on this point that in the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well-settled common law definition distinct from its literal meaning, that is assumed to be the meaning intended, unless a different definition is prescribed in the statute. Even the Constitution of the United States, a political document of an entirely unique character, has been from the outset subjected by this court to this rule of construction.

Even if it should be held that the language of the Anti-Trust act forbids any contract in restraint of trade, however just, reasonable and necessary, the agreement here in question would not fall within the prohibition, because it does not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

This view is so fully presented and discussed in the brief of Messrs. Carter and Ledyard, that further argument in support of it is not requisite.

There is no ground whatever for asserting that the agreement infringes the provision of the Anti-Trust act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or at most, of a few. That is the plain meaning of it as employed in the act. No feature of the agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

Its effect will be, if it is successful, not to diminish, but to increase transportation facilities, by preserving roads that might otherwise be driven from the field.

IX. If the construction of the Anti-Trust act which was adopted by the court in the *Trans-Missouri case* is to stand, it is respectfully insisted that the act, so far as thus interpreted and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the *Trans-Missouri case*, because no such construction of the act was anticipated by counsel. Nor was it considered by the court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered, unless raised by the party affected.

The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether the agreement here under consideration is one that may be prohibited by legislation, without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

In the *Trans-Missouri case*, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and the minority opinions of the court, that its substantive character and purpose were such as the answers in the case aver and set forth. It was for this reason believed by the minority of the judges that it could not have been the intention of Congress that such a contract should be made a penal offence. But it was held by the majority that the language of the act admitted of no other construction. Though it was conceded in the opinion of the court that the arguments against that conclusion "bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply

of maintaining those rates which were reasonable and fair." And in the opinion of the minority of the court by Mr. Justice White, he remarks, after stating the general features of the contract, "I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court rests upon that hypothesis."

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust act, as so construed, is thus both established and conceded, and the question distinctly arises, whether legislation having such a result is within the power of Congress.

That the operation of the act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants (whether rightfully or not) of both liberty and property to a very grave and perhaps ruinous extent, is not open to question. A just freedom of contract in lawful business is one of the most important rights reserved to the citizen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment. And when any class in the community is so precluded, it is to that extent "deprived of the equal protection of the laws." These are elementary propositions in constitutional law, and have been often asserted by this court.

In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust act, if it is held applicable to the agreement in this case, we respectfully insist: (1) That the act deprives the defendants of both liberty and property, by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do. That no such contract can be prohibited by law without a violation of the

constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it. And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

(2) That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because (*a*) Those intended to be benefited are not the public, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection. (*b*) Even if such class is held to constitute the public, it is not entitled to the suppression of all restriction upon competition. Because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labor and property without just compensation. (*c*) The legislation in question is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object, is already effectually provided for by full and careful Congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public. (*d*) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity, and would injure rather than benefit the very class in whose behalf it is contended for.

(3) That even if it were admitted that further legislation against restrictions upon competition was both constitutional and necessary, the provisions of this act, in forbidding all such restrictions, are not justly adapted to the only end that is

admissible on public policy. If this one is of that character it must fail, but if not, it cannot be made unlawful because it is unnecessary. Few special contracts would be necessary if all parties concerned in the transactions to which they refer would always do right.

Mr. George F. Edmunds for the Pennsylvania Railroad Company, appellee.

Before the agreement in question was made, the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation.

This is admitted by pleadings.

This being true, these rates could not have been either raised or lowered, under then existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations, as follows:

(1) To aid in fulfilling the purposes of the Interstate Commerce act; to coöperate

(2) with each other and adjacent transportation associations to establish and maintain

(3) reasonable and just rates, fares, rules and regulations on state and interstate traffic; to

(4) prevent unjust discrimination, and to secure the reduction and concentration of agencies

(5) and the introduction of economies in the conduct of the freight and passenger service.

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other

purpose, and no secret or covert design in respect of the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named."

The first six articles of the contract provide for organization and administration, in respect of which no criticism has been suggested, except as to section 5 of Article V in connection with the Solicitor General's contention in regard to Article VII.

Article VII is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law, it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides:

"SECTION 1. The duly published schedules of rates, fares and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares and charges, and the rules applicable thereto."

This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the preëxisting just, reasonable and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain

words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or any sense whatever. In the instance of this first provision of the agreement, they have engaged to do that very thing and that very thing only in the form of specific language referring to a specific and existing just, reasonable and lawful state of things which they were then acting upon.

The second section of Article VII is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer to this is that the pleadings distinctly admit that there was no evasive intention, or other unjust purpose, in any part of the arrangement. It is, therefore, not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this section, it is sufficient to say that the very next section of the same article declares that

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-

operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers, as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce act, or any other law, and so forth; and it commands the managers to coöperate to these ends with the Interstate Commerce Commission.

When the managers come to act, then, under these powers, how do they start? They start with a system of rates established, not by the agreement, but before it was made, and confirmed by the agreement, which were confessedly in conformity with and in promotion of the Commerce act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the second section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all, and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned contained in the Commerce act. Can this be an authority to restrain trade under any definition of the word "restraint"? The only restraint is a restraint against a violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce act. If we assume that the restraint of trade mentioned in the Trust act may be a restraint of innocent and just proceeding, can any one maintain that it makes illegal an agreement not to violate law, but to obey it?

It was obvious when this agreement was made that rates then existing and being in all particulars reasonable and equal, might, in the course of changes in production, trade, and under other conditions over which the railways could have no control,

become unjust, unreasonable and inapplicable to the new conditions, and that in such case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice and law should require under such conditions. It was to provide for this that sections 2 and 3 of the seventh article were inserted. As I have said, they were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbidden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company, or any number of companies affected, could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But it is asked, would not the road thus refusing be subjected to the fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could compel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce act itself in terms requires the same reasonable and just conduct by railways towards each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of Article VII is perfectly valid under any possible construction of the language of the Trust act, as well as in perfect conformity with and in aid of the Commerce act.

I may as well here compare the provisions of Article VII, which contains the great leading feature of the whole agree-

ment, with the agreement in the *Trans-Missouri case.* The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in the first section of Article VII had already been independently established, were, in fact, reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission, and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interests of the country. It was an engagement to stand by that state of things and for the express purpose of continuing that happy state of things — exactly those that the law requires — that this engagement was made. Turn now to the Trans-Missouri agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, etc.; and, in the very words of the agreement, for the purpose of mutual protection, and for nothing else.

The Trans-Missouri agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and did not, evidently, intend to impose the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping up and increasing rates, instead of for the purpose (as in the Joint Traffic agreement) of keeping them just and in conformity with law, whether by reduction, increase or other readjustment.

Other essential differences are stated in my brief which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that

existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a coöperative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the *Trans-Missouri case* alleged — there being, it will be remembered, no previously established rates that were agreed upon — that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated in my brief. The practical construction by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts.

The next principal contention of my learned brother is that Article VIII of the agreement violates the Trust act by restraining trade.

The words of the article are as follows:

"ARTICLE VIII.

"PROPORTIONS OF COMPETITIVE TRAFFIC.

"The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done."

This article provides that the managers shall endeavor so far, and so far only, as obedience to law — that is to say, conformity with the Commerce act and conformity with the Trust act — would permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is a sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than as the law shall permit. If, therefore, the Trust act condemns the effort referred to, then not to make the effort. If the Interstate Commerce act, either in terms or spirit, is adverse to such an effort the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in

the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads, passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads was necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the eighth article then, I submit, was wholesome, lawful and necessary, and it was the very thing that one of the clauses in the Commerce act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a restraint of trade, in one sense or another. It will be seen on examining the agreement that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the association. This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can be established that the thirty days' notice was too long. It is a matter of history that when the Commerce act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should

be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce act for notice was much too short, and that unjust inequalities have arisen, again and again, from changes in rates by particular roads on such short notice that favored customers and favored localities, etc., would get advantages over others, in violation of the spirit and substance of the Commerce act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads and all communities, that this period of thirty days instead of ten was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as it regards the provision I have just spoken of, as well as it regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support of and in promotion of trade. Trade is a general word, and its operations, like all other operations that require cooperating and associating forces and arrangement, are advanced by, and indeed, cannot be carried on truly and honestly for public interests without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain but advance and promote the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics, the safety valve of a locomotive, with its counterweight, regulates and restrains, or gives off, the accumulating steam in the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all

this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of the trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it, even as an incident. Wherever it is practised, it is practised apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various important points to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one State to another.

I refrain from making any observations on the constitutional question arising if the Trust act is to be construed as forbidding innocent contracts promotive of public policy, which I have insisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter is left entirely to my brother Mr. Phelps.

In respect of the meaning of the words of the Trust act, I beg to ask your Honors' careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and, second, to the citations I have made from law writers, showing a distinct and separate classification of the two phrases,

"restraint of trade in general" and "partial restraint of trade." If these writers are correct (as nobody doubts, I think, they are), and the two phrases were known and treated in the law at the time of the passage of the act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the act shall be assigned to the first class, and not carried over into the second.

Mr. Solicitor General, for the United States, in conclusion.

I. It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the Anti-Trust law makes the agreement illegal and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provision of the law declaring the illegality and authorizing injunction proceedings.

II. It is insisted that an agreement in restraint of trade must restrain trade — that is, reduce or diminish it; that *trade* must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the Government and people from the creation of monopolies. It is a question of method rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life.

III. It is said that competition is not trade, but a mere incident of trade; that what prevents competition does not

necessarily injure trade; on the contrary, to restrict competition may benefit trade, that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the mass of the people; that there is a spirit of unrest, of dissatisfaction, and that to avoid the effects of ruinous competition among employers and employés combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it. Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand — a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result not from competition, but the throttling of competition by trusts and combinations, which seek to control production and transportation and dominate both workingmen and consumers. Against these the individual citizen protests. He does not demand *no* competition, but *fair* competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

IV. It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it cannot stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a

valuable plant cannot be withdrawn, nor can labor skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all. There are sections where a number of years ago it was profitable to make iron out of local ores. Millions of dollars were invested in furnaces. Workingmen skilled in iron-making settled there, and with their earnings bought property and built homes. Subsequently, in other sections more accessible to the markets, with cheaper ores, modern furnaces were erected and cheaper iron began to be made. The old furnaces could not meet the competition of the new. They had to be abandoned. Was it possible to withdraw the capital invested in them? Not at all. It was lost. The workingmen, too, suffered. They were thrown out of work, ran up debts, lost their homes.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public, but the person or corporation or region which cannot lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive

business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest. The poorer roads can get the business by putting themselves in shape to do the business. Roads equally fitted to do the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result, naturally, not in ruining the roads, but in building them up. Under competition, the best road fixes the rate; under combination, the poorest road. Is it just to make the public pay rates from Chicago to the East fixed by the poorest system protected by the Joint Traffic agreement?

V. It is contended there is no restraint on trade, because the railways still exist with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate cannot be made except by resolution of the board of a member and after thirty days' notice to the managers.

It is true the railways exist with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the things transported. This operates as a burden upon commerce, and a restraint of trade.

If a State should levy a tax on goods transported through it, this court would hold such an act unconstitutional, because it laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition decreases the business of railroads but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates mean less traffic. It may be to the

interest of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

VI. It is insisted that rates must be stable, not subject to change; that a manufacturer cannot safely make goods nor a dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious that the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter, by land and water, will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the Interstate Commerce law nor the Joint Traffic agreement attempts it. Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to the managers of the association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency towards cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.

VII. Uniformity in rates is declared to be essential, and it is urged that the provisions of the Interstate Commerce law favoring uniformity cannot be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the Interstate Commerce act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction in rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the

association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

The uniformity demanded by the Interstate Commerce act is uniformity in the treatment by *each* railroad of *its own* patrons. The second section prohibits a common carrier from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for an equal distance. The third section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or the places served by *it*. And so, too, with reference to the long and short haul provisions in the fourth section.

The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was forbidden. Competition between railroads was preserved, and to secure the benefits of competition to all patrons of each road it was provided that the competition should be open and above board, so that the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefits of competition to all, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it has to compete. The competition was to be restricted to where it belongs; between the railroads and not between the shippers. If a railroad can afford to carry the freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

VIII. It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in

operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it, each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centres. The argument, then, amounts to this, that the rates on through traffic are to be kept up in order to preserve the weak roads as going concerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of Government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of the land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

IX. It is said that the Interstate Commerce act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition, but to preserve it and secure its benefits to all. Competition between independent lines was preserved and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons were prohibited. Thus the benefits of open competition were insured to all. The policy was — among the patrons of each road uniformity, but between the roads open competition.

X. The point is made that railways are public highways, and the furnishing of railway transportation a governmental function; therefore the Government should eliminate the ad-

vantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the Government may regulate it. Government, state and Federal, has done this, by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable nor desirable. Absolute uniformity, extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolutely arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers, without distinction. Each railroad should be required to treat its patrons — persons and places — with fairness and equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary, it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this not only in rates but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for by Mr. Carter, would logically prevent all competition, whether in rates or service.

If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation of these roads now under the agreement. The public is not interested in consolidation except as it affects competition. The constitution and laws of many States prohibit the consolidation of railroads, but only of *competing* railroads. Lines which do not compete may con-

solidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the antipooling section of the Interstate Commerce act. The pooling of freights and the division of earnings is not bad in itself. It is bad, because used to stifle competition. Equally bad is the Joint Traffic agreement before the court, which operates as effectively as any pooling arrangement ever devised. The people have not stopped to inquire whether consolidation would result of necessity in unreasonable rates; neither have they stopped to inquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade.

The railroads say that if they are not permitted to prevent competition they will compete and in doing so violate the Interstate Commerce law; that they should be permitted to combine for the purpose of preventing violations of law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for law based solely on self-interest is delusive and evanescent.

XI. An attempt is made to distinguish this case from the *Trans-Missouri case* by saying that here the association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies; while in the *Trans-Missouri case* the association was given power to fix rates. But in the Trans-Missouri

agreement the association was only given power to fix reasonable rates, and the fact that the rates fixed by the association during its existence were fair and reasonable was admitted.

In the *Trans-Missouri case*, the association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve authority to keep them up after progress and invention should render them excessive and unreasonable. But in point of fact, as pointed out, the Joint Traffic agreement vests in the association, through the managers, with appeal to the board of control, the authority to change rates. This authority is more coercive than that conferred by the Trans-Missouri agreement.

Under the Trans-Missouri agreement five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting the association voted on all changes proposed. All parties were bound by the decision of the association "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association. . . . Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect upon the same day." Moreover, each member of the Trans-Missouri association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving the chairman notice of its action, so the good faith of the transaction might be passed upon by the association at its next meeting.

Thus, under the Trans-Missouri agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice, make an independent rate, notwithstanding the action of the association. But under the Joint Traffic agreement no company can

deviate from the rates as fixed by the managers, except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with the managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision that "the managers, upon receipt of such notice, shall act promptly upon the same for the protection of the parties hereto."

Mr. Carter, in his argument, explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by the association, through its managers, was required in order that the association might have time to determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of the association protected.

XII. It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give it to a poor road in order to do for it what the public along its line ought to do.

XIII. The provisions of the Interstate Commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without suppressing competition. The tenth article of the Joint Traffic agreement provides that "the managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rates, fares and rules established under this agreement," and it is

contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the third section of the Interstate Commerce act shows that the mischief suggested is fully provided for in its concluding paragraph, which provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, "and shall not discriminate in their rates and charges between such connecting lines."

XIV. It is insisted that if Congress had intended the Anti-Trust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it would have used the language "every contract in *any* restraint of trade," etc., "is hereby declared to be illegal."

It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in any restraint of trade," and much better language. With due respect to the learned counsel, it might be suggested that if his criticism of the language used be a valid one, why may not the next commentator on this section forcefully insist that Congress should have said "every contract in *any and every* restraint of trade is hereby declared to be illegal"?

XV. The reply to Mr. Phelps' attack upon the constitutionality of the Anti-Trust law as construed by this court in the *Trans-Missouri case*, is to be found in the argument of Mr. Carter that railways are public highways, and in the furnishing of public transportation perform in a sense a governmental function. The right of the Government to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The States regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn* v. *Illinois*, 94

U. S. 113, applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the fifth section of the Interstate Commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling or the combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

XVI. *As to the remedy in the case of an unreasonably low rate.* Judge Cooley, in a well-considered opinion, *In re Chicago, St. Paul & Kansas City Railway*, 2 Int. Com. Com. 231, approved by this court in *Interstate Commerce Commission* v. *Cincinnati, N. O. & Texas Pacific Railway*, 167 U. S. 479, 511, held that under the Interstate Commerce law the commission has no power to determine that a rate is unreasonably low and to order the carrier to refrain from charging such rate on such ground.

XVII. *As to the remedy in the case of an unreasonably high rate.*

The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive, he gets so much less for his grain or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the Interstate Commerce act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the Interstate Commerce law.

Mr. James A. Logan and *Mr. John G. Johnson* filed a brief on behalf of the Pennsylvania Railroad Company and eight other railroad companies, appellees.

Mr. Robert W. de Forest and *Mr. David Willcox* filed a brief on behalf of the Central Railroad Company of New Jersey, appellee.

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

This case has been most ably argued by counsel both for the Government and the railroad companies. The suit is brought to obtain a decree declaring null and void the agreement mentioned in the bill. Upon comparing that agreement with the one set forth in the case of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases. The respondents, however, object to this, and give several reasons why this case should not be controlled by the other. It is, among other things, said that one of the questions sought to be raised in this case might have been but was not made in the other; that the point therein decided, after holding that the statute applied to rail-

road companies as common carriers, was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided, while it is plainly raised in this.

Again, it is asserted that there are differences between the provisions contained in the two agreements, of such a material and fundamental nature that the decision in the case referred to ought to form no precedent for the decision of the case now before the court.

It is also objected that the statute, if construed as it has been construed in the *Trans-Missouri case*, is unconstitutional, in that it unduly interferes with the liberty of the individual and takes away from him the right to make contracts regarding his own affairs, which is guaranteed to him by the Fifth Amendment to the Constitution, which provides that "no person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This objection was not advanced in the arguments in the other case.

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention, because, as is stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-Trust statute has been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the *Trans-Missouri case* clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case on the part of the Government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account. If

the agreement did not in fact restrain trade, the Government had no case.

If it did not in any degree restrain trade, it was immaterial whether the statute embraced all contracts in restraint of trade, or only such as were in unreasonable restraint thereof. There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree. Hence, it was necessary to determine the fact as to the character of the agreement before the case was made out on the part of the Government.

The great stress of the argument on both sides was undoubtedly upon the question as to the proper construction of the statute, for that seemed to admit of the most doubt, but the other question was before the court, was plainly raised, and was necessarily decided. The opinion shows this to be true. At page 341 of the report the opinion contains the following language:

"The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

* * * * *

"Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local.

"To that end the association is formed and a body created which is to adopt rates which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is

to put a restraint upon trade or commerce as described in the act. For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it."

The bill of the complainants in that case, while alleging an illegal and unlawful intent on the part of the railroad companies in entering into the agreement, also alleged that by means of the agreement the trade, traffic and commerce in the region of country affected by the agreement had been and were monopolized and restrained, hindered, injured and retarded. These allegations were denied by defendants.

There was thus a clear issue made by the pleadings as to the character of the agreement, whether it was or was not one in restraint of trade.

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court, and was consciously, purposely and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the court did not touch upon the other aspect of the case, in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held im-

material, but only for the reason that the agreement did in fact and by its terms restrain trade.

Second. We have assumed that the agreements in the two cases were substantially alike. This the respondents by no means admit, and they assert that there are such material and substantial differences in the provisions of the two instruments as to necessitate a different result in this case from that arrived at in the other.

The expressed purpose of the agreement in this case is, among other things, "to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic." The companies agree that the schedule of rates and fares already duly published and in force and authorized by the companies, parties to the agreement, and filed, as to interstate traffic, with the Interstate Commerce Commission, shall be reaffirmed, and copies of all such schedules are to be filed, with the managers constituted under the agreement, within ten days after it becomes effective. The managers may from time to time recommend changes in the rates, etc., and a failure to observe the recommendations is deemed a violation of the agreement. No company can deviate from these rates except under a resolution of its board of directors, and such resolution can only take effect thirty days after service of a copy thereof on the managers, who, upon receipt thereof, "shall act promptly for the protection of the parties hereto." For a violation of the agreement the offending company forfeits to the association a sum to be determined by the managers thereof, not exceeding five thousand dollars, or more upon the contingency named in the rule.

So far as the establishment of rates and fares is concerned, we do not see any substantial difference between this agreement and the one set forth in the *Trans-Missouri case*. In that case the rates were established by the agreement, and any company violating the schedule of rates as established under the agreement was liable to a penalty. A company could withdraw from the association on giving thirty days' notice, but while it continued a member it was bound to charge the rates fixed, under a penalty for not doing so. In

this case the companies are bound to charge the rates fixed upon originally in the agreement or subsequently recommended by the board of managers, and the failure to observe their recommendations is deemed a violation of the agreement. The only alternative is the adoption of a resolution by the board of directors of any company providing for a change of rates so far as that company is concerned, and the service of a copy thereof upon the board of managers as already stated. This provision for changing rates by any one company is absent from the other agreement. It is this provision which is referred to by counsel as most material and important, and one which constitutes a material and important distinction between the two agreements. It is said to be designed solely to prevent secret and illegal competition in rates, while at the same time providing for and permitting open competition therein, and that unless it can be regarded as restraining competition so as to restrain trade, there is not even an appearance of restraint of trade in the agreement. It is obvious, however, that if such deviation from rates by any company from those agreed upon, be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that as to that company the agreement might as well be rescinded. This result was never contemplated. In order, therefore, not only to prevent secret competition, but also to prevent any competition whatever among the companies parties to the agreement, the provision is therein made for the prompt action of the board of managers whenever it receives a copy of the resolution adopted by the board of directors of any one company for a change of the rates as established under the agreement. By reason of this provision the board undoubtedly has authority and power to enforce the uniformity of rates as against the offending company upon pain of an open, rigorous and relentless war of competition against it on the part of the whole association.

A company desirous of deviating from the rates agreed upon and which its associates desire to maintain is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. Counsel for the association themselves state that the agreement makes it the duty of the managers, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. By this course the competition is open, but none the less sufficient on that account, and the desired and expected result is to be the yielding of the offending company, induced by the war which might otherwise be waged against it by the combined force of all the other parties to the agreement. Under these circumstances the agreement, taken as a whole, prevents, and was evidently intended to prevent, not only secret but any competition. The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient, in the face of this power of the managers to enlist the whole association in a war upon it. This is not all, however, for the agreement further provides that the managers are to have power to organize such joint freight and passenger agencies as they may deem desirable, and if established they are to be so arranged as to give proper representation to each company, and no soliciting or contracting passenger or freight agency can be maintained by any of the

companies, except with the approval of the managers. They are also charged with the duty of securing to each company, party to the agreement, equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done. The natural, direct and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever.

It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. The distinction is unimportant. It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon and receives its equitable proportion of the traffic.

The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases on any such ground. Indeed, counsel for one of the railroad companies on this argument, in speaking of the agreement in the *Trans-Missouri case*, says of it that its terms, while substantially similar to those of the agreement here, were less explicit in making it just and reasonable.

Regarding the two agreements as alike in their main and material features, we are brought to an examination of the question of the constitutionality of the act, construed as it has

been in the *Trans-Missouri case*. It is worthy of remark that this question was never raised or hinted at upon the argument of that case, although, if the respondents' present contention be sound, it would have furnished a conclusive objection to the enforcement of the act as construed. The fact that not one of the many astute and able counsel for the transportation companies in that case raised an objection of so conclusive a character, if well founded, is strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface and were not then apparent to those counsel.

The point not being raised and the decision of that case having proceeded upon an assumption of the validity of the act under either construction, it can, of course, constitute no authority upon this question. Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat

restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term;

and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins* v. *United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint

of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether the State should itself build them or permit others to do it. The State did not build them, and as their building required, among other things, the appropriation of

land, private individuals could not enforce such appropriation without a grant from the State.

The building and operation of a railroad thus required a public franchise. The State would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise when granted by the State becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine

as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

The prohibition of such contracts may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution or in any of the amendments to that instrument. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312–336; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447–479.

Among these limitations and guarantees counsel refer to those which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer* v. *Louisiana*, 165 U. S. 578, is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in the Fourteenth Amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful, it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie* v. *United States*, 157 U. S. 160.

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the

legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid.

Finally, we are asked to reconsider the question decided in the *Trans-Missouri case*, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri case.*

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clea that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be

secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former decision, or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degrée to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce. Upon that question it is contended that agreements between railroad companies of the

nature of that now before us are promotive instead of in restraint of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while, at the same time, otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached by reason of the peculiar nature of railroad property which must be operated and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is matter of very great uncertainty, depending upon many contingencies and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may and often do continue in existence and engage in their lawful traffic at some profit, although they are competing railroads and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible but probable that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do, in regard to the various questions herein discussed, we think it unnecessary to

further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri case.*

The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are reversed, and the case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with this opinion.

MR. JUSTICE GRAY, MR. JUSTICE SHIRAS and MR. JUSTICE WHITE dissented.

MR. JUSTICE MCKENNA took no part in the decision of the case.

HOPKINS *v.* UNITED STATES.

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

No. 210. Argued February 28, March 1, 1898. —Decided October 24, 1898.

The Kansas City Live Stock Exchange was an unincorporated volunteer association of men, doing business at its stock yards, situated partly in Kansas City, Missouri, and partly across the line separating Kansas City, Missouri, from Kansas City, Kansas. The business of its members was to receive individually consignments of cattle, hogs, and other live stock from owners of the same, not only in the States of Missouri and Kansas, but also in other States and Territories, and to feed such stock, and to prepare it for the market, to dispose of the same, to receive the proceeds thereof from the purchasers, and to pay the owners their proportion of such proceeds, after deducting charges, expenses and advances. The members were individually in the habit of soliciting consignments from the owners of such stock, and of making them advances thereon. The rules of the association forbade members from buying live stock from a commission merchant in Kansas City, not a member of the exchange. They also fixed the commission for selling such live stock, prohibited the employment of agents to solicit consignments except upon a stipulated salary, and forbade the sending of prepaid telegrams or telephone messages, with information as to the condition of the markets. It was also provided that no member should transact business with any person vio-

Statement of the Case.

lating the rules and regulations, or with an expelled or suspended member after notice of such violation. *Held*, that the situation of the yards, partly in Kansas and partly in Missouri, was a fact without any weight; that such business or occupation of the several members of the association was not interstate commerce, within the meaning of the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies;" and that that act does not cover, and was not intended to cover, such kind of agreements.

THIS suit was commenced by the United States attorney for the District of Kansas, acting under the direction and by the authority of the Attorney General of the United States, against Henry Hopkins and the other defendants, residents of the State of Kansas and members of a voluntary unincorporated association, known and designated as the Kansas City Live Stock Exchange. The purpose of the action is to obtain the dissolution of the exchange, and to perpetually enjoin the members from entering into or from continuing in any combination of a like character.

As a foundation for the relief sought it was alleged in the bill that the members of this association, known as the Kansas City Live Stock Exchange, have adopted articles of association, rules and by-laws which they have agreed to be bound by; that the business of the exchange is carried on and conducted by a board of directors at the Kansas City stock yards, which are situated partly in Kansas City in the State of Missouri and partly in Kansas City in the State of Kansas, the building owned by the stock yards company being located one half of it in the State of Missouri and the other half in the State of Kansas, and half of the defendants have offices and transact business in these stock yards and in that part of the building which is within the State of Kansas, and the other half in that part of the building which is in the State of Missouri; that the Kansas City Stock Yards Company is a corporation owning the stock yards, where the business is done by the members of the exchange; that substantially all the business transacted in the matter of receiving, buying, selling and handling their live stock at Kansas City is carried on by the defendants herein and by the other members of the exchange as commission merchants, and that large numbers of the live stock, consisting

of cattle and hogs and sheep bought and sold and handled at the stock yards by the defendants and their fellow members in the exchange, are shipped from the States of Nebraska, Colorado, Texas, Missouri, Iowa, and Kansas, and the Territories of Oklahoma, Arizona and New Mexico; that when this stock is received at the stock yards it is sold by the defendants, members of the exchange, to the various packing houses situated at Kansas City, Missouri, and Kansas City, Kansas, and it is also sold for shipment to the various other markets, particularly Chicago, St. Louis and New York; that vast numbers of cattle, hogs and other live stock are received annually at the stock yards and handled by the members of the exchange.

The bill also alleges that large numbers of the live stock sold at the stock yards by the defendants are incumbered by mortgages thereon, executed by their owners in the various States and Territories, which mortgages have been given to various defendants as security for money advanced by them to the different owners to enable them to feed and prepare the cattle for market, and that when the live stock so mortgaged are ready for shipment, they are sent to the defendants who have advanced the money and received the mortgages, and on the sale of the stock the amount of these advances and interest is deducted from the proceeds of the sale of the cattle by the commission merchants owning the mortgages; that ninety per cent of the members of the exchange make such advances, and that the market is largely sustained by means of the money thus advanced to the cattle raisers by the defendants, and that Kansas City is the only place for many miles about, which constitutes an available market for the purchase and sale of live stock from the large territory located in the States and Territories already named; that it is the custom of the owners of the cattle, many of them living in different states, and who consign their stock to the Kansas City stock yards for sale to draw drafts on the commission merchants to whom the live stock is consigned, which the consignors attach to the bill of lading issued by the carrier, and the money on these drafts is advanced by the local banks throughout the western States

and Territories. These drafts are paid by the consignees and the proceeds remitted to the various owners through the banks.

The business thus conducted is alleged to be interstate commerce, and it is further alleged that if the person to whom the live stock is consigned at Kansas City is not a member of the exchange, he is not permitted to and cannot sell or dispose of the stock at the Kansas City market, for the reason that the defendants, and all the other commission merchants, members of the exchange, refuse to buy live stock or in any manner negotiate or deal with or buy from a person or commission merchant who is not a member of the exchange, and thus the owner of live stock shipped to the Kansas City market is compelled to re-ship the same to other markets, and by reason of the unlawful combination existing among the defendants and the other members of the exchange the owner is prevented from delivering this stock at the Kansas City stock yards, and the sale of stock is thereby hindered and delayed, entailing extra expense and loss to the shipper, and placing an obstruction and embargo on the marketing of all live stock shipped from the States and Territories to the Kansas City market which is not consigned to the stock yards company or to the defendants, or some of them, members of the stock exchange.

It is alleged that the defendants, as members of the exchange, have adopted certain rules, among them being rules 9 and 16, which are particularly alleged to be in restraint of trade and commerce between the States, and intended to create a monopoly, in contravention of the laws of the United States in that behalf.

Rule 9 provides as follows:

"SECTION 1. Commissions charged by members of this association for selling live stock shall not be less than the following named rates."

Sections 2, 3, 4, 5, 6 and 7 relate to the amounts of such commissions, and it is alleged that in some instances the commissions are greater than had theretofore been paid.

Section 8 permits the members to handle the business of

non-resident commission firms when the stock is consigned directly to or from such firm, at half the rates fixed by the rule, provided the non-resident commission firms are established at the markets named in the section.

Section 10 prohibits the employment of any agent, solicitor or employé except upon a stipulated salary not contingent upon the commissions earned, and it provides that not more than three solicitors shall be employed at one time by a commission firm or corporation, resident or non-resident of Kansas City.

Section 11 forbids any member of the exchange from sending or causing to be sent a prepaid telegram or telephone message quoting the markets or giving information as to the condition of the same, under the penalty of a fine as therein stated. The rule, however, permits prepaid messages to be sent to shippers quoting actual sales of their stock on the date made; also to parties desiring to make purchases on the market.

Rule 16 provides, in section 1, "That no member of the exchange shall transact business with any persons violating any of the rules or regulations of the exchange, or with an expelled or suspended member after notice of such violation, suspension or expulsion shall have been issued by the secretary or board of directors of the exchange."

It is alleged that the defendants in adopting these rules and in forming the exchange and carrying out the same have violated and are violating the statute of the United States, approved July 2, 1890, c. 647, 26 Stat. 209, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and it is charged that it was the purpose of the defendants, in organizing the exchange and in adopting the rules mentioned, to prevent the shipment or consignment of any live stock to the Kansas City market unless it was shipped or consigned to the Kansas City stock yards and to some one or other of the defendants, members of the exchange, and to compel the shippers of live stock from other States and from the Territories to pay to the defendants the commissions and charges provided for in rule 9, and to prevent such shippers

from placing their property on sale at the Kansas City market unless these commissions were paid.

The answer of the defendants admitted their forming the exchange and becoming members thereof, and adopting, among others, the rules specially mentioned in complainants' bill. They denied that the exchange itself engaged in any business whatever, and alleged that it existed simply in order to prescribe rules and provide facilities for the transaction of business by the members thereof, and to govern them by such rules and regulations as have been evolved and sanctioned by the developments of commerce, and which are universally recognized to be just and fair to all concerned.

It was further set up in the answer that each member of the organization was in fact left free to compete in every manner, and by all means recognized to be fair and just, for his share of the business which comes to the point at which the members of the organization do business; that in adopting their rules they followed in all substantial respects the provisions which had been made upon the same subject respectively by the exchanges theretofore established at Chicago and East St. Louis, Illinois, and which have been since established at St. Louis, Omaha, Indianapolis, Buffalo, Sioux City and Fort Worth; and that the exchange at no time refused to admit as a member any reputable person who was willing to comply with the conditions of membership and to abide by the rules of the organization.

Various allegations in the bill as to the effect of the organization in precluding any sales or purchases of cattle other than by its members are denied.

The defendants also deny that the exercise of their occupation as commission merchants, doing business as members of the exchange, constitutes or amounts to interstate commerce, within the meaning of the Constitution or laws of the United States. They allege that they have no part in or control over the disposition of the live stock sold by them to others, nor of live stock purchased by them as commission merchants acting for others. They allege that the stock yards company permits any person whatsoever to transact business at its yards who

will pay the established charges of that company for its services, and that in point of fact a very large part of the business done at said yards is transacted by persons who are not members of the exchange, and without the interposition of such members. It is also alleged in their answer that they are under no obligations to extend the privileges of the exchange to a person who is not a member thereof, who has violated its rules and been suspended from membership, and who has voluntarily withdrawn therefrom, and announced his purpose to carry on his business as a competitor of the members of such exchange, to the destruction of said organization and its rules and to the injury of his competitors.

It is also set up that defendants cannot be compelled to deal with a non-member of their organization, or a person violating its rules, or with one who has been suspended for such violation, or who has withdrawn therefrom, or who has announced his intention to destroy said organization and to compete with the members thereof, and the defendants allege that they cannot be compelled to deal with any person whatsoever, and that they had a right to establish said exchange, and now have the right to maintain the same, and to require the observance of its rules and regulations on the part of their associates, so long as they desire to retain the privileges of membership in the body. They allege that their rules are in harmony with the rules and regulations of commercial exchanges which have existed for more than a hundred years, and which are now to be found in every State almost in the United States, and throughout the world, and that such rules and regulations are in all respects legal and binding. They deny all general and special allegations of illegal agreements, combinations or conspiracies to violate any law of the United States, or of the State of Kansas.

The complainants, in addition to their bill, used several affidavits, the tendency of which was to show that by virtue of the adoption of rules 9 and 16, the members of the exchange refused to deal with one who had violated a rule and had been suspended by reason thereof, and that by reason of this refusal to do business, the member thus suspended was

substantially incapacitated from carrying on his business as a commission merchant, and that by this combination defendants, in forming such rule and in adhering to it, have greatly injured the business of such member.

The defendants read counter-affidavits for the purpose of sustaining their answer, which were replied to by the complainants filing affidavits in rebuttal, and upon these affidavits and the pleadings above described an application for an injunction was made to the Circuit Court of the United States for the District of Kansas, First Division. That court, after argument, granted an injunction restraining the defendants from combining by contract, express or implied, so as by their acts, conduct or words to interfere with, hinder or impede others in shipping, trading, selling or buying live stock that is received from the States and Territories at the stock yards in Kansas City, Missouri, and Kansas City, Kansas; also enjoining them from acting under the rules of the exchange known as rules 9 and 16, and from attempting to impose any fines or penalties upon members for trading or offering to trade with any person respecting the purchase and sale of any live stock; and also from discriminating in favor of any member of the exchange because of such membership, and especially from discriminating against any person trading at the stock yards, and from refusing, by united or concerted action, or by word, persuasion, threat or by other means, to deal or trade with persons with respect to such live stock who are not members of the association, because they are not members of such association, or in any manner from interfering with the right and freedom of all and any persons trading or desiring to trade in such live stock at the stock yards, the same as if the exchange did not exist. The defendants were also enjoined from agreeing or attempting to limit the right of any person in business at the Kansas City stock yards to employ labor or assistance in soliciting shipments of live stock from other States or Territories, and from enforcing any agreement not to send prepaid telegrams from the stock yards to any other State or Territory.

The District Judge delivered an opinion upon granting the

injunction, which will be found reported in 82 Fed. Rep. 529. From the order granting it an appeal was taken by the defendants to the United States Circuit Court of Appeals for the Eighth Circuit, which court certified to this court certain questions under the provisions of section 6 of the act of March 3, 1891, and thereupon a writ of certiorari was issued from this court, and the whole case brought here for decision.

Mr. L. C Krauthoff for Hopkins and others.

Mr. John S. Miller filed a brief for same.

Mr. Gustavus A. Koerner filed a brief for same.

Mr. Samuel W. Moore for the United States. *Mr. Solicitor General* was on his brief.

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

The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly spoken of as the Anti-Trust act. 26 Stat. 209.

The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?

Opinion of the Court.

That part of the bill which alleges that no one is permitted to do business at the cattle market at Kansas City unless he is a member of this exchange, does not mean that there is any regulation at the stock yards by which one who is not a member of the exchange is prevented from doing business, although ready to pay the established charges of the stock yards company for its services; but it simply means that by reason of the members of the exchange refusing to do business with those who are not members the non-member cannot obtain the facilities of a market for his cattle such as the members of the exchange enjoy. It is unnecessary at present to discuss the question whether there is any illegality in a combination of business men who are members of an exchange not to do business with those who are not members thereof, even if the business done were in regard to interstate commerce. The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with non-members does not come before us for decision.

We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?

As set forth in the record, the main facts are that the defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction

of the business itself. The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stock yards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.

Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas

City personally, while in the other they are rendered under written instructions from the owner given in another State. This difference in the manner of making the contract for the services cannot alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City, is not engaged in interstate commerce when he makes such sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another State.

The by-laws of the exchange relate to the business of its members who are commission merchants at Kansas City, and some of these by-laws, it is claimed by the Government, are in violation of the act of Congress, because they are in restraint of that business which is in truth interstate commerce. That one of the by-laws which relates to the commissions to be charged for selling the various kinds of stock, is particularly cited as a violation of the act. In connection with that by-law it will be well to examine with some detail the nature of the defendants' business.

It is urged that they are active promoters of the business of selling cattle upon consignment from their owners in other States, and that in order to secure the business the defendants send their agents into other States to the owners of the cattle to solicit the business from them; that the defendants also lend money to the cattle owners and take back mortgages upon the cattle as security for the loan; that they make advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in another State at the time of the shipment. All these things, it is said, constitute intercourse and traffic between the citizens of different States, and hence the by-law in question operates upon and affects commerce between the States.

The facts stated do not, in our judgment, in any degree alter the nature of the services performed by the defendants, nor do they render that particular by-law void as in restraint

of interstate trade or commerce because it provides for a minimum amount of commissions for the sale of the cattle.

Objections are taken to other parts of the by-laws which we will notice hereafter.

Notwithstanding these various matters undertaken by defendants, we must keep our attention upon the real business transacted by them, and in regard to which the section of the by-law complained of is made. The section amounts to an agreement, and it relates to charges made for services performed in selling cattle upon commission at Kansas City. The charges relate to that business alone. In order to obtain it the defendants advance money to the cattle owner; they pay his drafts, and they aid him to keep his cattle and make them fit for the market. All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defendants the business of selling the cattle for him when the owner shall finally determine to sell them. That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it. The competition among the defendants and others who may be engaged in it, to obtain the business, results in their sending outside the city, to cattle owners, to urge them by distinct and various inducements to send their cattle to one of the defendants to sell for them. In this view it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centres at the market at Kansas City, and the charges are for services there, and there only, performed.

The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a

combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other States are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce.

The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another State. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the

facilities given or provided the owner in the course of the movement from the home *situs* of the article to the place and point where it is sold.

The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329, 330; *Kentucky & Indiana Bridge Company* v. *Louisville &c. Railroad*, 37 Fed. Rep. 567.

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely although certainly. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1. Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.

It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among them-

selves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate. *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 158 U. S. 431, 439.

An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct. *Sherlock* v. *Alling*, 93 U. S. 99–103; *United States* v. *E. C. Knight Company*, 156 U. S. 1, 16; *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S. 590, 597; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Ficklen* v. *Shelby County*, *supra*. Reasonable charges for the use of a facility for the transportation of interstate commerce have heretofore been regarded as valid in this court, even though such charges might necessarily enhance the cost of doing the business. *Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Huse* v. *Glover*, 119 U. S. 543; *Ouachita Packet Company* v. *Aiken*, 121 U. S. 444; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92. An agreement among the owners of such facilities, to charge not less than a minimum rate for their use, cannot be condemned as illegal under the act of Congress.

The fact that the above cited cases relate to tangible property, the use of which was charged for, does not alter the

reasoning upon which the decisions were placed. The charges were held valid because they related to facilities furnished in aid of the commerce and which did not constitute a regulation thereof. Facilities may consist in privileges or conveniences provided and made use of or in services rendered in aid of commerce, as well as in the use of tangible property, and so long as they are facilities and the charges not unreasonable an agreement relating to their amount is not invalid. The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not to render those services unless for a certain charge. The services are no part of the commerce in the cattle.

In *Brown* v. *Maryland*, 12 Wheat. 419, Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid.

The same view is enforced in *Emert* v. *Missouri*, 156 U. S. 296.

The right of the cattle owners themselves to sell their own cattle is not affected or touched by the agreement in question, while the privilege of having their cattle sold for them at the market place frequented by defendants, and with the aid of one of them, is a privilege which they are charged for, and which is not annexed to their right to sell their own cattle.

It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge upon commerce itself might have. In a case

like that the remedy would probably be forthcoming. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691. As was said by Mr. Justice Field, in *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 294, 295, "should there be any gross injustice in the rate of tolls fixed, it would not in our system of government, remain long uncorrected."

But whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691. This case does not involve that question.

If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense to those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not illegal as a restraint thereon.

The facilities or privileges offered by the defendants are apparent and valuable. The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective. Each of these defendants has the right to have the cattle which are consigned to him taken to the cattle yards, where, by virtue of the arrangements made by defendants with the owners of the yards, the cattle are placed in pens, watered and fed, if necessary, and a sale effected at the earliest moment. It is these facilities and services which are paid for by a commission on the sale effected by the commission men.

If, as is claimed, the commission men sometimes own the cattle they sell, then the rules do not apply, for they relate to charges made for selling cattle upon commission and not at all to sales of cattle by their owners.

Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile County* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196; *Hooper* v. *California*, 155 U. S. 648, 653; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility.

The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, engaged in interstate commerce? If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or

bonds are not commodities, and that dealers therein are not engaged in commerce. Whether it is an answer to the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a western State to be sold engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commissions? Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other States, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made.

The theory upon which we think the by-law or agreement regarding commissions is not a violation of the statute operates also in the case of the other provisions of the by-laws. The answer in regard to all objections is, the defendants are not engaged in interstate commerce.

But special weight is attached to the objection raised to section 11 of rule 9 of the by-laws, which provides against sending prepaid telegrams as set forth in the statement of facts herein. It is urged that the purpose of this section is to prevent the sending of prepaid telegrams by the defendants

to their various customers in the different States tributary to the Kansas City market, and that the section is a part of the contract between the members of the exchange, and is clearly an attempt to regulate and restrict the sending of messages by telegraph and telephone between citizens of the various States and Territories, and operates upon and directly affects the interstate business of communicating between points in different States by telegraph or telephone.

An agreement among the defendants to abstain from telegraphing in certain circumstances and for certain purposes is so clearly not an attempt to regulate or restrain the general sending of telegrams that it would seem unnecessary to argue the question. An agreement among business men not to send telegrams in regard to their business in certain contingencies, when the agreement is entered into only for the purpose of regulating the business of the individuals, is not a direct attempt to affect the business of the telegraph company, and has no direct effect thereon. Although communication by telegraph may be commerce, and if carried on between different States may be commerce among the several States, yet an agreement or by-law of the nature of the one under consideration is not a burden or a regulation of or a duty laid upon the telegraph company, and was clearly not entered into for the purpose of affecting in the slightest degree the company itself or its transaction of interstate commerce.

The argument of counsel in behalf of the United States, that because none of the States or Territories could enact any law interfering with or abridging the right of persons in Kansas or Missouri to send prepaid telegrams of the nature in question, therefore an agreement to that effect entered into between business men as a means towards the proper transaction of their legitimate business would be void, is, as we think, entirely unsound. The conclusion does not follow from the facts stated. The statute might be illegal as an improper attempt to interfere with the liberty of transacting legitimate business enjoyed by the citizen, while the agreement among business men for the better conduct of their own

business, as they think, to refrain from using the telegraph for certain purposes, is a matter purely for their own consideration. There is no similarity between the two cases, and the principle existing in the one is wholly absent in the other. The private agreement does not, as we have said, regulate commerce or impose any impediment upon it or tax it. Communication by telegraph is free from any burden so far as this agreement is concerned, and no restrictions are placed on the commerce itself.

The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements.

The next by-law which complainants object to is section 10 of the same rule 9, which prohibits the hiring of a solicitor except upon a stipulated salary not contingent upon commissions earned, and which provides that no more than three solicitors shall be employed at one time by a commission firm or corporation.

The claim is that these solicitors are engaged in interstate commerce, and that such commerce must be free from any state legislation and free from the control or restraint by any person or combination of persons. They also object that the rule is an unlawful inhibition upon the privilege possessed by each person under the Constitution to make lawful contracts in the furtherance of his business, and they allege that in this respect these members have surrendered their dominion over their own business and permitted the exchange to establish a species of regency, and that the by-law in regard to the employment of solicitors is one which directly affects interstate commerce.

McCall v. *California*, 136 U. S. 104, is cited for the proposition that the solicitors employed by these defendants are engaged in interstate commerce. In that case the railroad company was itself engaged in such commerce, and its agent in California was taxed by reason of his business in soliciting

for his company that which was interstate commerce. The fact that he did not sell tickets or receive or pay out money on account of it was not regarded as material. His principal was a common carrier, engaged in interstate commerce, and he was engaged in that commerce because he was soliciting for the transportation of passengers by that company through the different States in which the railroad ran from the State of California. In the case before us the defendants are not employed in interstate commerce but are simply engaged in the performance of duties or services relating to stock upon its arrival at Kansas City. We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and until the arrival of the stock at that point and the delivery by the transportation company no duties of an interstate-commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce. Not being engaged in interstate commerce, the agreement of the defendants through the by-law in question, restricting the number of solicitors to three, does not restrain that commerce, and does not therefore violate the act of Congress under discussion.

The position of the solicitors is entirely different from that of drummers who are travelling through the several States for the purpose of getting orders for the purchase of property. It was said in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.

But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to

market for sale they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them and account to them for the proceeds thereof. Unlike the drummer who contracts in one State for the sale of goods which are in another, and which are to be thereafter delivered in the State in which the contract is made, the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business.

Hooper v. *California*, 155 U. S. 648, is another illustration of the meaning of the term "commerce," as used in the Constitution of the United States. In that case, contracts of marine insurance are stated not to appertain to interstate commerce, and cases are cited upon the nature of the contract of insurance generally at page 653 of the opinion.

It is also to be remarked that the effect of the agreement as to the number of solicitors to be employed by defendants can only be remote and indirect upon interstate commerce. The number of solicitors employed has no direct effect upon the number of cattle transported from State to State. The solicitors do not solicit transportation of the cattle. They are not in the interest of the transportation company, and the transportation is an incident only. They solicit a consignment of cattle to their principals, so that the latter may sell them on commission and thus transact their local business. The transportation would take place any way and the cattle be consigned for sale by some one of the defendants or by others engaged in the business. It is not a matter of transportation but one of agreement as to who shall render the services of selling the cattle for their owner at the place of destination.

We say nothing against the constitutional right of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant States and Territories as many solicitors as the business of each will warrant. This

original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing.

The liberty of contract as referred to in *Allgeyer* v. *Louisiana*, 165 U. S. 578, is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited.

We agree with the court below in thinking there is not the slightest materiality in the fact that the state line runs through the stock yards in question, resulting in some of the pens in which the stock may be confined being partly in the State of Kansas and partly in the State of Missouri, and that sales may be made of a lot of stock which may be at the time partly in one State and partly in the other. The erection of the building and the putting up of the stock pens upon the ground through which the state line ran were matters of no moment so far as any question of interstate commerce is concerned. The character of the business done is not in the least altered by these immaterial and incidental facts.

It follows from what has been said that the complainants have failed to show the defendants guilty of any violations of the act of Congress, because it does not appear that the defendants are engaged in interstate commerce, or that any agreements or contracts made by them and relating to the conduct of their business are in restraint of any such commerce.

Whether they refused to transact business which is not interstate commerce, except with those who are members of the exchange, and whether such refusal is justifiable or not,

are questions not open for discussion here. As defendants' actions or agreements are not a violation of the act of Congress, the complainants have failed in their case, and the order for the injunction must be

Reversed and the case remitted to the Circuit Court of the United States for the District of Kansas, First Division, with directions to dismiss the bill with costs.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MCKENNA took no part in the decision of this case.

ANDERSON *v.* UNITED STATES.

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

No. 181. Argued February 25, 28, 1898. — Decided October 24, 1898.

The Traders' Live Stock Exchange was an unincorporated association in Kansas City, whose members bore much the same relation to it, and through it carried on much the same business as that carried on by the members of the Kansas City Live Stock Exchange, considered and passed upon in *Hopkins* v. *United States*, just decided. The main difference was, that the members of the Traders' Exchange, defendants in the present proceedings, were themselves purchasers of cattle on the market, while the defendants in the former case were commission merchants who sold cattle upon commission as a compensation for their service. The articles of association of the Traders' Exchange contained the following preamble: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization." The rules objected to in the bill in this case were the following: "Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange. Rule 11.

Statement of the Case.

When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange. Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange. Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party." *Held:*

(1) That this court is not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act;

(2) That, following the preceding case, in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations;

(3) That where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object;

(4) That the rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and that for such purpose they are reasonable and fair, and that they can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.

THIS suit is somewhat similar to the *Hopkins suit*, just decided, and was brought by the United States against the defendants named, who were citizens and residents of the Western Division of the Western District of Missouri and members of a voluntary unincorporated association known and designated as the Traders' Live Stock Exchange, the suit being brought for the purpose of obtaining a decree dissolving the exchange and enjoining the members thereof from entering into or continuing any sort of combination to deprive any people engaged in shipping, selling, buying and handling

live stock (received from other States and from the Territories, intended to be sold at the Kansas City market), of free access to the markets at Kansas City, and to the same facilities afforded by the Kansas City stock yards, to defendants and their associate members of the Traders' Live Stock Exchange.

The bill was filed under the direction of the Attorney General of the United States by the United States District Attorney for the Western District of Missouri. It alleged in substance that the exchange was governed by a board of eight directors, who carried on the business thereof with the consent and approbation of the defendants, they personally being members of the exchange. It then made the same allegations in relation to the stock yards being partly in Kansas City, Kansas, and partly in Kansas City, Missouri, that are contained in the bill in the *Hopkins case*, just decided, and also as to the sales of herds or droves of cattle which were at the time of the sale partly in one State and partly in another. It is further alleged that the Kansas City stock yards are a public market, and, next to the market at Chicago in the State of Illinois, the largest live stock market in the world, and vast numbers of cattle, hogs and other live stock are received annually at the market, shipped from various States and from the Territories, and are sold at the market to buyers who reside in other States and Territories, and who reship the stock; that the stock is shipped to the market under contracts by which the shipper is permitted to unload the stock at the Kansas City stock yards, rest, water and feed the same, and is accorded the privilege of selling the stock on the Kansas City market if the prices prevailing at the time justify the sale, and many head of such stock are so sold; that prior to the month of March, 1897, as alleged, the defendants herein were engaged as speculators at the Kansas City stock yards, and were buying upon the market and reselling upon the same market and reshipping to other markets in other States the cattle so received at the Kansas City stock yards; that all the live stock shipped to and received at these stock yards is consigned to commission merchants, who take charge of the stock when it is received, and who sell the same

to packing houses located at Kansas City, Missouri, and Kansas City in the State of Kansas, and they sell large numbers of cattle to the defendants herein.

The bill then alleges that the defendants "have unlawfully entered into a contract, combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, in this, to wit, that they have unlawfully agreed, contracted, combined and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market at the Kansas City stock yards as aforesaid; that the commission, firm, person, partnership or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to and cannot sell or dispose of said cattle at the Kansas City market as aforesaid to any buyer or speculator at the Kansas City stock yards unless said buyer or speculator is a member of the Traders' Live Stock Exchange, and these defendants (and each of them), unlawfully and oppressively refuse to purchase cattle, or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle from any speculator at the said Kansas City stock yards who is not a member of the said Traders' Live Stock Exchange; that by and through the unlawful agreement, combination and conspiracy of these defendants the business and traffic in cattle at the said Kansas City stock yards is interfered with, hindered and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the States and Territories aforesaid to the Kansas City stock yards."

It is further alleged that, acting in pursuance of the unlawful combination above described, the board of directors of the exchange have imposed fines upon certain members of the exchange "who had traded with persons, speculators upon the markets, who were not members of the said live stock exchange, and within three months last past have imposed fines upon members of said live stock exchange who have traded with commission firms at said Kansas City stock yards

which said commission firms had bought from, and sold cattle to speculators upon said market who were not members of the said live stock exchange."

It was further stated in the bill that in carrying out the purposes and aims of this exchange and by the conduct of its members engaged in this alleged combination, conspiracy and confederation, they were acting in violation of the laws of the United States, and particularly in violation of section 1 of the act of Congress, approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, and in the prosecution of this unlawful combination they had agreed to hinder and delay the business of buying and selling cattle at the market named and had confederated together in restraint of trade and commerce between the States, and that the object of the defendants in organizing the exchange was to prevent the sale by any commission merchant at the Kansas City stock yards of any cattle to any person who might be a buyer and speculator upon the market who is not a member of the exchange.

Accompanying this bill were several affidavits of individuals not members of the exchange, but who were traders or speculators at the stock yards, and those persons said that they were acquainted with the association in question and with the officers and members, and that they did everything in their power to prevent other persons who were not members from trading at the stock yards, and a number of instances were given in which the affiants who were not members of the exchange were endeavoring to do business with commission merchants and others at the exchange in question, when the affiants were notified that they could not continue in business unless they became members of the association, and where partnerships were engaged in business where one partner was a member of the association, the partner who was a member was notified that he could not continue in the partnership business with the other unless such other also became a member; that they had attempted to buy cattle from a great many commission firms and from their salesmen at these stock yards,

but as soon as they went into the yards where the cattle were that were consigned to commission firms and attempted to purchase them, some of the defendants would appear, call the salesman aside, and, after having a conversation with such salesman, the latter would invariably return to affiant and say that he could not price cattle to the affiant or sell the same to him, as he had been warned by members of the exchange not to do so; that the Traders' Live Stock Exchange would not permit other traders and speculators upon the market, and that the exchange does not permit commission firms at the stock yards to sell cattle consigned to them to any trader or speculator upon the market who is not a member of the exchange, and that commission firms had been notified by the officers of the stock exchange not to sell to speculators on the market who were not members of the Live Stock Exchange, and where commission firms sold cattle to traders and speculators upon the market who were not members of the exchange, the association and members thereof would boycott the commission firm making such sales, and refuse to purchase any cattle from them, and refuse to go into the lots and look at cattle which had been consigned to them.

Upon the bill and affidavits application was made to the Circuit Court for the Western Division of the Western District of Missouri for an injunction as prayed for in the bill, in opposition to which application various affidavits were read on the part of the defendants, and copies of the articles of association and by-laws of the exchange were attached to the affidavit of the president of the exchange and read on the motion.

Among other affidavits was that of the general superintendent of the stock yards company, who said that he had known the organization, the Traders' Live Stock Exchange, since its formation, and that it had been a benefit to the live stock market at Kansas City by furnishing constant buyers for cattle shipped to the market, no matter how large the receipts for any one day or series of days might be, and also by raising the standard of business integrity among its members, because it required every member to comply with his business promises

and verbal agreements; that no embargo was placed upon any one purchasing or desiring to purchase cattle at the yards, but a free and open market was offered to all buyers and sellers; that the members of the organization were engaged in the business of buying and selling cattle on the market, and were competitors among and against each other; that their organization did not restrain or interfere with interstate or local commerce, and the members did not monopolize or attempt to monopolize the business of buying and selling cattle at Kansas City, nor did the organization in any manner tend to limit or decrease the number of cattle marketed at Kansas City, but that it had the contrary effect; that about eighty-five per cent of the total receipts for the years 1895, 1896 and 1897 at the Kansas City market of cattle had been billed to the Kansas City market alone for purposes of sale there.

Other affidavits were presented to the same effect. Also the affidavit of the president of the exchange. The president denied all allegations in relation to conspiracies to prevent other persons than members of the exchange from buying and selling cattle upon the Kansas City market, and on the contrary alleged that in buying cattle the defendants were in competition with each other, with the representative buyers of all the packing houses, with the representatives of the various commission merchants who buy constantly on orders from a distance, and with others who buy on orders on their own account, none of whom are members of the exchange, and that with these various classes of buyers the defendants constantly deal, and that in selling cattle they compete with each other and with shippers and commission merchants offering stock for sale on the market; that the business in which these defendants are engaged is that of buying and selling cattle known as "stockers and feeders;" that the business is purely local to that market; that the defendants do not deal in quarantine cattle subject to government inspection or cattle shipped through to other markets, with or without the privilege of the Kansas City market, nor in fat cattle sold on the local market shipped to other States or to foreign countries; that except in rare instances both purchases and sales made

by the defendants are made from and to persons not members of the exchange, and that in the judgment of the president about ninety-nine per cent of the transactions by the defendants are with persons not members of the exchange.

A copy of the articles of association is annexed to the affidavit, which contains the following preamble:

"We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization."

Rules 10, 11, 12 and 13 are as follows:

"Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange.

"Rule 11. When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange.

"Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange.

"Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party."

These are the rules which are specially obnoxious to the complainants, and are alleged to be in their effect in violation of the Federal statute above mentioned.

Mr. R. E. Ball for Anderson and others. *Mr. I. P. Ryland* and *Mr. John L. Peak* were on his brief.

Mr. John R. Walker for the United States. *Mr. Solicitor General* was on his brief.

Opinion of the Court.

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

There is really no dispute in regard to the facts in the case. Although the bill contains various allegations in regard to conspiracies, agreements and combinations in restraint of trade and in violation of the Federal statute, yet there is no evidence of any act on the part of the defendants preventing access to the yards or preventing purchases and sales of cattle by any one, other than as such sales may be prevented by the mere refusal on the part of the defendants as "yard traders" to do business with those who are also yard traders, but are not members of the exchange, or with commission merchants where such commission merchants themselves do business with yard traders who are not members of the exchange. In other words, there is no evidence and really no charge against the defendants that they have done anything other than to form this exchange and adopt and enforce the rules mentioned above, and the question is whether by their adoption and by peacefully carrying them out without threats and without violence, but by the mere refusal to do business with those who will not respect their rules, there is a violation of the Federal statute.

This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins case* were only commission merchants who sold the cattle upon commission as a compensation for their services.

Counsel for the Government assert that any agreement or combination among buyers of cattle coming from other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce.

The facts first set forth in the complainants' bill upon which to base the claim that the business of defendants is interstate commerce, we have already decided in the *Hopkins case* to be immaterial. The particular situation of the yards, partly in Kansas and partly in Missouri, we there held was a fact without any weight, and one which did not make business inter-

state commerce which otherwise would not partake of that character.

There remain in the bill of the complainants the allegations that the cattle come from various States and are placed on sale at these stock yards which form the only available market for many miles around, and that they are sold by the commission merchants and are bought in large numbers by the defendants who have entered into what the complainants allege to be a contract, combination and conspiracy in restraint of trade and commerce among the several States, which contract, etc., it is alleged is carried out by defendants unlawfully and oppressively refusing to purchase cattle from a commission merchant who sells or purchases cattle from any speculator (yard trader) who is not a member of the exchange; and it is further alleged that by these means the traffic in cattle at the Kansas City stock yards is interfered with, hindered and restrained, and extra expense and loss to the owner incurred, and that thereby the defendants have placed an obstruction and embargo on the marketing of cattle shipped from other States. All these results are alleged to flow from the agreement among the defendants as contained in the by-laws of their association, particularly those numbered ten, eleven, twelve and thirteen, copies of which are set forth in the statement of facts herein.

There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to.

In regard to rule 10, the question is whether, without a violation of the act of Congress, persons who are engaged in the common business as yard traders of buying cattle at the

Kansas City stock yards, which come from different States, may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor will they buy cattle from those who also sell to yard traders who are not members of the association.

It will be remembered that the association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader can become a member of the association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction.

The defendants are engaged in buying what are called "stockers and feeders;" being cattle not intended for any other market, and the demand for which is purely local. They have arrived at their final destination when offered for sale, and there is free and full competition for their purchase between all the members of the exchange, as well as between them and all buyers not members thereof, who are not also yard traders. With the latter the defendants will not compete, nor will they buy of the commission men if the latter continue to sell cattle to such yard traders.

Have the defendants the right to agree to conduct their own private business in this way?

Whether there is any violation of the act of Congress by the adoption and enforcement of the other rules of the association, above referred to, will be considered hereafter.

It is first contended on the part of the appellants that they

are not engaged in interstate commerce or trade, and that therefore their agreement is not a violation of the act. They urge that the cattle, by being taken from the cars in which they were transported and placed in the various pens hired by commission merchants at the cattle yards of Kansas City, and there set up for sale, have thereby been commingled with the general mass of other property in the State, and that their interstate commercial character has ceased within the decisions of this court in *Brown* v. *Houston*, 114 U. S. 622, and *Pittsburg and Southern Coal Co.* v. *Bates*, 156 U. S. 577.

On the other hand, it is answered that the cases cited involved nothing but the general power of the State to tax all property found within its limits, by virtue of general laws providing for such taxation, where no tax is levied upon the article or discrimination made against it by reason of the fact that it has come from another State, and it is maintained that the agreement in question acts directly upon the subject of interstate commerce and adds a restraint to it which is unlawful under the provisions of the statute.

In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

It has already been stated in the *Hopkins case*, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as

not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124 U. S. 465, 473: "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid.

From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary, and the

penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble. In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce. The agreement now under discussion differs radically from those of *United States* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *United States* v. *Coal Dealers Association of California*, 85 Fed. Rep. 252, and *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration, that they form no basis for its decision. This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of

cattle for sale is, therefore, furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof.

The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. If while enforcing the rules those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced, and to that extent the number of competitors limited, yet all this is done, not with the intent or purpose of affecting in the slightest degree interstate trade or commerce, and such trade or commerce can be affected thereby only most remotely and indirectly, and if, for the purpose of compelling this membership, the association refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. The agreement relates to the action of the associates themselves, and it places in effect no tax upon any instrument or subject of commerce; it exacts no license from parties engaged in the commercial pursuits, and prescribes no condition in accordance with which commerce in particular articles or between particular places is required to be conducted. *Sherlock* v. *Alling*, 93 U. S. 99; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Pittsburg and Southern Coal Company* v. *Louisiana*, 156 U. S. 590, 598.

If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible effect of such a course

of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account.

The agreement lacks, too, every ingredient of a monopoly. Every one can become a member of the association, and the natural desire of each member to do as much business as he could would not be in the least diminished by reason of membership, while the business done would still be the individual and private business of each member, and each would be in direct and immediate competition with each and all of the other members. If all engaged in the business were to become members of the association, yet, as the association itself does no business, it can and does monopolize none. The amount and value of interstate trade is not at all directly affected by such membership; the competition among the members and with others who are seeking purchasers would be as large as it would otherwise have been, and the only result of the agreement would be that no yard traders would remain who were not members of the association. It has no tendency, so far as can be gathered from its object or from the language of its rules and regulations, to limit the extent of the demand for cattle or to limit the number of cattle marketed or to limit or reduce their price or to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market. While in case all the yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct, necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid.

This case is unlike that of *Hopkins* v. *Oxley Stave Company*, 83 Fed. Rep. 912, to which our attention has been called. The case cited was decided without reference to the act of Con-

gress upon which alone the case at bar is prosecuted, and the agreement was held void at common law as a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its own judgment. It was also said that the fact could not be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seemed to the court to be one of great utility. No question as to interstate commerce arose and none was decided.

From what has already been said regarding rule 10, it would seem to follow that the other rules (11, 12 and 13) are of equal validity as rule 10, and for the same reasons. The rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and we think that for such purpose they are reasonable and fair. They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.

We are of opinion therefore that the order in this case should be reversed and the case remanded to the Circuit Court of the United States for the Western Division of the Western District of Missouri with directions to dismiss the complainants' bill with costs.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MCKENNA took no part in the decision of this case.

NORTHWESTERN BANK *v.* FREEMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 18. Argued April 15, 18, 1898. — Decided October 24, 1898.

A description in a chattel mortgage of a given number of articles or animals out of a larger number is not sufficient as to third persons with acquired interests; but such a mortgage is valid against those who know the facts.

Statement of the Case.

A purchaser of personal property, which is mortgaged, is charged with knowledge of every fact shown by the records, and is presumed to know every other fact which an examination, suggested by the records, would have disclosed.

Under the rule that the incident covers the principal, a mortgage of domestic animals covers the increase of such animals, though it be silent as to such increase.

THE appellees recovered judgment in the district court, which was affirmed on appeal to the Supreme Court of the Territory, from which an appeal has been taken to this court.

The facts found by the territorial Supreme Court are as follows:

"On July 10, 1890, Harry Fulton, one of the defendants in the court below, executed an alleged chattel mortgage for $7500, payable in one year, in favor of the Arizona Central Bank, one of the appellees herein and plaintiffs in the court below; that the description in said mortgage of the property purporting to be covered by it is as follows: '1200 lambs, marked — ewes with hole in left ear and split in right; wethers, hole in right ear and split in left ear; 1600 ewes marked hole in left ear and split in right ear; 2200 wethers marked hole in right ear and split in left ear, making 5000 sheep in all with the Fulton brand.'

"That on said day said Fulton executed another alleged mortgage for $4000, payable in ninety days, in favor of John Vories, one of the appellees herein and one of the defendants in the court below; that the description in said alleged mortgage is as follows: 'Wethers and dry ewes to the number of 1000, the wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right.'

"That on said day said Fulton owned and possessed 6200 sheep that were herded and run together, and this was all he owned, said sheep being marked as follows: 'Ewes and ewe lambs split in the right ear, hole in the left; wethers and wether lambs reverse;' and both of the said appellees had knowledge of this fact at the time they accepted their alleged mortgages, the one on 5000 head and the other on 1000 head.

200 head not being included in either of said mortgages, all of said sheep having the same mark and running in the same herd, and none of them being capable of identification save only by the ear mark put on them as aforesaid, and that therefore there was no way by which any of said sheep could be distinguished from any of the others.

"That said Fulton continued in the ownership and possession of all of said sheep, save only such as died, were sold by him, consumed or lost, until the 18th of December, 1893. At no time did appellees, or either of them, ever take or ever have possession of said sheep, or any of them, or of the increase thereof, nor were any of said sheep or the increase thereof ever by any one identified, designated or in any way segregated, apportioned or substituted to the or on account of the said pretended mortgages, or of either thereof. From date of said mortgages (July 10, 1890) to January 4, 1893, said Fulton from time to time sold of said sheep as follows: 1700 head, at $3 per head, that were by said Fulton accounted for, and the proceeds of which he deposited with the appellee Arizona Central Bank; that both of said appellees knew of these sales and consented to them.

"On January 4, 1893, said Fulton executed a mortgage for $8885 in favor of Arizona Lumber and Timber Company, one of appellants herein, and one of the defendants in the court below, covering, among other property, the following described sheep: 'About 3000 ewes, 1000 wethers, and 2000 lambs, same being all the sheep now owned by mortgagor, and including all wool and increase which may be produced by said sheep marked — ewes, split in right ear, hole in left; wethers reverse.' At the instance of appellees said appellant, Arizona Lumber and Timber Company, permitted the following recital to be inserted in said last-mentioned mortgage, namely: 'This being subject to a mortgage on 5000 of above sheep to Arizona Central Bank, and one on 1000 head, and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase.' There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear

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to foreclose their mortgages, and should release their claim on the wool clip of 1893, the wool at that time not having been shorn.

"That to August 30, 1893, $3000 of the amount claimed to be due on the mortgage of January 4, 1893, was paid out of wool proceeds, and that on said day said Fulton, for the purpose of securing a $500 advance, and applying the remainder as a payment on said mortgage of January 4, 1893, executed his promissory negotiable note, payable in 90 days, securing the same by a chattel mortgage for the sum of $6000 to the Arizona Lumber and Timber Company.

"That said mortgage was a conveyance, as a security for the payment of said note, of sheep, the same being in said mortgage described as follows, namely: 'About 3200 ewes, more or less; about 1300 wethers, more or less; about 1400 lambs, more or less, being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep — marked, ewes and ewe lambs, split in right ear, hole in left; wethers and wether lambs, reverse.'

"That in said last-mentioned mortgage no recital or reference was made in any way, nor in any manner, to the existence of any other mortgage or mortgages whatsoever.

"That on the 29th day of September, 1893, and prior to the maturity of said last-mentioned note of $6000, said appellant Arizona Lumber and Timber Company, representing that said mortgage was a first and prior lien on said described sheep, and by means thereof, sold, assigned, endorsed and delivered said note and mortgage to the Northwestern National Bank, one of the appellants herein and one of the defendants in the court below, said Northwestern National Bank becoming an innocent purchaser for value.

"That on December 18, 1893, said Fulton, being then indebted to Riordan Mercantile Company, one of the appellants herein and a defendant in the court below, in the sum of $810.91, it brought its action in said district court against said Fulton whereby to collect the same, and at the same time caused to be issued out of the clerk's office of said court a writ of attachment, which was then levied on the property following,

namely: 'All the right, title and interest of the defendant Harry Fulton in and to the following-described sheep: 2926 ewes, marked hole in left ear, split in right; 900 wether sheep, marked hole in right ear, split in left ear; 1287 lambs — ewe lambs marked hole in left ear, split in right; wether lambs marked hole in right ear, split in left; 118 rams,' same being all of the sheep then owned by said Fulton.

"That on 16th March, 1894, judgment was rendered in said suit in favor of said plaintiff company and against said Fulton, for said amount, and said attachment lien was foreclosed; that on the 31st day of March, 1894, the sheriff of said county of Coconino, by virtue of and pursuant to said judgment, sold said property and delivered the same to the appellant Riordan Mercantile Company, who then entered into the possession thereof, was so in the possession thereof when this cause was tried in the lower court, and are still in possession thereof.

"That by virtue of said writ of attachment the sheriff attached all the sheep then owned by said Fulton, and that on said day, to wit, on the 18th day of December, 1893, there were of said sheep only 1000 head of ewes remaining out of all the sheep that existed on July 10, 1890, the date of said alleged mortgages to appellees; that the remainder of said ewes, all the male sheep and the lambs, had by that time died, been consumed, sold or lost.

"That subsequent to the making of said alleged mortgages to said appellees, an oral agreement between them and the said Fulton was made that the securities of appellees were to be kept good out of the increase by substitution, the consideration therefor being that said Fulton might sell and dispose of the said sheep without interference from appellees.

"That Sisson, a witness for appellants in this case, is and was during all of said transactions the treasurer of both the Riordan Mercantile Company and the Arizona Lumber and Timber Company, appellants herein, and that these two corporations have practically the same officers.

"That in said district court said Arizona Central Bank brought its suit as plaintiff against said Fulton, Vories, Donahue as sheriff, the Arizona Lumber and Timber Company, the

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Riordan Mercantile Company and the Northwestern National Bank, as defendants, asking for a foreclosure of its said alleged mortgage, the same being the above-entitled cause.

"That said action was tried and judgment was rendered foreclosing said alleged mortgages of both of appellees herein and also the said mortgage dated January 4, 1893, of said Arizona Lumber and Timber Company and the mortgage owned by said Northwestern National Bank as aforesaid, in which said judgment said court adjudged that appellees have a prior and first lien on said property, viz., the Arizona Central Bank upon 5000 sheep of the Fulton mark by reason of its said mortgage, and the said Vories on 1000 sheep of the Fulton mark by reason of his said mortgage; and said court decreed and ordered that an order of sale issue for the sale of all of said property to the sheriff of said county, and that the proceeds arising therefrom be divided by the sheriff and applied as follows, namely, at the ratio of five dollars to said Arizona Central Bank and one dollar to said Vories; that in case anything should be left after the payment of said two mortgages to said bank and Vories, the same should be applied to the payment of the judgments of said Northwestern National Bank and said Arizona Lumber and Timber Company and Riordan Mercantile Company in the order named."

There are seventeen assignments of errors, which are somewhat confused. They are grouped and presented by counsel under seven heads as follows:

"First. In the first assignment of error it is set forth that the trial court erred in adjudging, and the territorial Supreme Court erred in affirming said judgment, that the mortgages of the appellees were prior liens on *all* of the sheep owned by defendant Fulton at the time of the execution of said mortgages, even though said mortgages had been good and prior liens on the sheep specified therein.

"Second. In the second, third, fifth and eighth assignments of error it is set forth that the trial court, and the territorial Supreme Court in sustaining its holding, erred in admitting in evidence the mortgages from defendant Fulton

to the appellees, marked Exhibit 'A' and 'B,' against the objections of the appellants; and in overruling motion of appellants to strike out of the evidence the said mortgages; and in holding that said mortgages were valid and subsisting liens on all of said property; and in holding and deciding that the description of said property in appellees' said mortgages was a sufficient description.

"Third. In the fourth and seventh assignments it is set forth that the court erred in admitting, over the objection of the appellants, testimony concerning a conversation between J. H. Hoskins, John Vories, F. W. Sisson and Harry Fulton, and evidence relative to an alleged agreement, and evidence tending to prove a breach of contract between the appellees and appellant Arizona Lumber and Timber Company.

"Fourth. The trial court erred, as set forth in the fifteenth and sixteenth assignments, in adjudging that on the date of its decree herein the mortgage of said appellee bank covered five thousand head of sheep of the Fulton herd and mark, such adjudication attempting to substitute five thousand head of sheep after the making of said two mortgages to appellees; the trial court erred in attempting said substitution and then holding it good as to appellants Riordan Mercantile Company and Northwestern National Bank.

"Fifth. The trial court erred, as set forth in the eleventh assignment, in adjudging that said mortgages of appellees were mere securities for debts, the legal title to said sheep remaining in said Fulton notwithstanding said mortgages and in adjudging that said sheep should be sold and the proceeds paid to said Arizona Central Bank and said Vories, in the proportion of five dollars to the former and one to the latter.

"Sixth. The trial court erred, as set forth in the seventeenth assignment, in adjudging that appellant Northwestern National Bank was bound by said pretended agreement of substitution or was bound by said pretended mortgages of appellees, or that said mortgages were prior liens on said property, or on any of it to the mortgage owned by said appellant.

"Seventh. In the sixth, ninth, tenth, twelfth, thirteenth

and fourteenth assignments it is set forth that the court erred in denying and overruling defendants' motion for a new trial of said cause; and in deciding that the mortgage to said appellee the Arizona Central Bank conveyed five thousand head of sheep, marked: ewes with hole in left ear and split in right, wethers with hole in right ear and split in left ear, and that a thousand more of said sheep were conveyed by mortgage to said appellee Vories, with the same marks; and in adjudging that the property included in the said attachment lien of the said Riordan Mercantile Company and sold and delivered to said company thereunder was the same property that is conveyed, or attempted to be conveyed, by the mortgages of said appellees; and in adjudging that the rights, title and interests obtained by said Riordan Mercantile Company, by virtue of said attachment lien and sale, was subject to the alleged rights of said appellees by virtue of their said pretended mortgages; and in adjudging that appellants Riordan Mercantile Company and Arizona Lumber and Timber Company had actual notice of the property conveyed by the said alleged mortgages of said appellees; and in adjudging that F. W. Sisson, as the treasurer of said Riordan Mercantile Company, agreed with said appellees that the number of sheep in said mortgages of appellees should be kept good out of the increase of said sheep, and that the wool was released by said agreement to said company, and that the consideration thereof was an alleged forbearance to foreclose said mortgages of said appellees."

Mr. A. B. Browne for appellants. *Mr. A. T. Britton* and *Mr. E. E. Ellenwood* were with him on the brief.

Mr. Fred. Herrington for appellees. *Mr. Cass E. Herrington* was with him on the brief.

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

The contest is for priority. The territorial Supreme Court awarded it to the mortgages of the appellees. The appellants

contend that this was error because of the fact that the mortgages respectively covered 5000 and 1000 head of sheep, and that Fulton owned 6200 head, and that hence the mortgages were invalid on account of insufficient descriptions. The mortgages do not state that Fulton owned a greater number than those he mortgaged, but the fact is found by the court.

The rule is laid down that, as to third persons who have acquired interests, a description in a mortgage of a given number of articles out of a larger number is not sufficient. Jones on Chattel Mortgages, sec. 56 *et seq.*, and cases cited.

But such a mortgage is valid against those who know the facts. *Cole* v. *Green*, 77 Iowa, 307; *Clapp* v. *Trowbridge*, 74 Iowa, 550.

The mortgage of January 4, 1893, executed by Fulton to the Arizona Lumber and Timber Company was undoubtedly taken by the latter not only with actual notice, but it was expressly made subject to the prior ones to appellees. The finding of the court is: "At the instance of appellees said appellant, Arizona Lumber and Timber Company, permitted the following recital to be inserted in said last-mentioned mortgage, namely: 'This being subject to a mortgage on 5000 of above sheep to Arizona Central Bank, and one on 1000 head, and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase.' There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear to foreclose their mortgages, and should release their claim on the wool clip of 1893, the wool at that time not having been shorn."

The court further finds that on August 30, 1893, Fulton paid to the Arizona Lumber and Timber Company $3000 out of the proceeds of the wool from the mortgaged sheep, secured from the company an advance of $500, and for that and the amount due on his note "executed his negotiable promissory note payable in ninety days, securing the same by a chattel mortgage for the sum of $6000." In this mortgage there was no recital or reference to the existence of any other mortgage. On the 29th of September, 1893, and prior to this

maturity, the "appellant, the Arizona Lumber and Timber Company, representing that said mortgage was a first lien, sold, endorsed and delivered the note and mortgage to the appellant, the Northwestern National Bank." It is this note and mortgage that are in controversy and which are claimed as prior liens to the mortgages of appellees. The bank is found to be an innocent purchaser for value. By this is meant that it had no actual notice of the prior mortgages. Did the law impute notice to it? Certainly not by the record of the mortgages to appellees. Did it by the record of the mortgage of January 4, 1893, to the Arizona Lumber and Timber Company? If the bank was charged with notice of that mortgage it was charged with notice of its contents. "Notice of a deed is notice of its whole contents, so far as they affect the transaction in which notice of the deed is acquired." 2 Sch. & Lef. 315, cited and approved in *Boggs* v. *Varner*, 6 Watts & Sergeant, 469, 473.

A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. Secs. 710 and 710*a*, Devlin on Deeds, and cases cited. The mortgage of January 4, 1893, to the Arizona Lumber and Timber Company was by the same mortgagor as that of August 30, the one sold to the Northwestern National Bank, and covered the same sheep, and hence, under the rule announced, the bank was charged with notice of it and of its recitals. It was not given up or satisfied. It was preserved as an independent lien.

It was not satisfied, appellants say, because it covered other property beside the sheep. This is an insufficient reason. If the debt it secured was paid, there was no reason for retaining the lien on any property. But whatever the reason, it was retained and affected the title. That is the material circumstance, and not in whose name it stood. It was in the chain of the title and affected it. It would have been found if looked for, and would have notified the bank of the transactions which conducted to it and caused it to be made subject to the mortgages of the appellees. We therefore think the

territorial courts committed no error when they assigned priority to those mortgages. Nor was it error to subordinate the attachment and judgment of the Riordan Mercantile Company to them. That company had, according to the finding of the court, actual notice.

The territorial court found that on the 18th of December, 1893, there were one thousand head of ewes remaining out of all the sheep which existed on July 10, 1890, the date of the mortgages to appellees; that the remainder of the ewes, all of the male sheep, and the lambs had died, been consumed, sold or lost. The findings are absolutely silent as to whether there were or were not other sheep in existence at that time, or at the time the decree was entered. We infer from the briefs of counsel that there were others — the increase of those mortgaged — and there is a contention as to whether these are covered by the lien of the mortgages.

Under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase. This court said in *Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U. S. 69, by Mr. Justice Harlan "according to the maxim *partus sequitur ventrem*, the brood of all tame and domestic animals belong to the owner of the dam or mother." 2 Bl. Com. 390. See also *Pyeatt* v. *Powell*, decided by the Circuit Court of Appeals for the Eighth Circuit, 10 U. S. App. 200, and cases cited.

But whatever was doubtful or disputable in the mortgages of appellees as to the increase was resolved and settled by agreement between all who had interests, and was expressed in the mortgage of January 4, 1893. There is nothing in the record to show a substitution except by the increase, and therefore we are not called upon to pass upon some of the interesting questions argued by appellants. Nor are we embarrassed by considerations of the increase being in or having passed out of the "period of nurture." Such considerations are only important when a subsequent purchaser or mortgagee has taken without notice, actual or constructive, which we have seen the Northwestern National Bank did not.

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The objections to testimony assigned as error in the fourth and seventh assignments of error were not well taken. The testimony showed the transactions and the relations of the parties to them.

Decree affirmed.

BROWN *v.* UNITED STATES.

CURLEY *v.* UNITED STATES.

ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

Nos. 249, 250. Submitted April 25, 1898.—Decided October 24, 1898.

This court has no appellate jurisdiction of capital cases from the United States court from the Northern District of the Indian Territory, such appellate jurisdiction being vested exclusively in the United States Court of Appeals in the Indian Territory.

Cyrus A. Brown, plaintiff in error in case No. 249, was indicted in the United States court for the Northern District of the Indian Territory, charged with the crime of murder, which indictment was filed in the United States court for the Indian Territory, Northern District, sitting at Muscogee on the 10th day of December, A.D. 1896.

On the 17th day of December, A.D. 1897, he was convicted of the crime of murder in said court, and the judgment of the court sentencing him to death was made on the 24th day of December, A.D. 1897. On the 1st day of February, A.D. 1898, the plaintiff in error filed a petition in said court for a writ of error from the Supreme Court of the United States, and filed an assignment of errors. On February 8, A.D. 1898, a writ of error was allowed in said cause, and on the same day a citation was issued in said cause, service of which was acknowledged on the 16th day of February, A.D. 1898. Pursuant to the writ of error in said cause a transcript of the record in said cause was filed in the office of the clerk of the Supreme Court of the United States on the 23d day of February, A.D. 1898. The government has filed its motion to

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dismiss the writ of error in said cause, for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

George Curley, alias George Cully, plaintiff in error in case No. 250, was indicted in the United States court for the Northern District of the Indian Territory, sitting at Vinita, charged with the crime of murder, which indictment was filed in open court on the 21st day of October, A.D. 1897. On the same day the defendant took a change of venue to the United States court at Muscogee, and a transcript of the record and the original indictment were forwarded to the clerk of the United States court at Muscogee, Indian Territory. On the 13th day of December, A.D. 1897, at the December term of the United States court for the Northern District of the Indian Territory, at Muscogee, the indictment heretofore found was referred to the grand jury, and upon the same day the grand jury returned into open court at Muscogee, Indian Territory, a new indictment against the defendant for murder. On the 22d day of December, A.D. 1897, the defendant was found guilty of the crime of murder, and on the 24th day of December, A.D. 1897, judgment of the court was pronounced upon said defendant, sentencing him to death.

On February 11, 1898, plaintiff in error, through his attorney, W. H. Twine, filed a petition for a writ of error from the Supreme Court of the United States, and also filed his specification of error. A writ of error was allowed, on the 19th day of February, 1898, and on the 23d day of February, 1898, service of the citation issued out of this court was acknowledged. A transcript of the entire record was filed in the office of the clerk of the Supreme Court of the United States on March 1, 1898. The government has filed its motion to dismiss the writ of error in said case for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

Mr. Solicitor General and *Mr. P. L. Soper* for the motion.

Mr. John H. Koogler and *Mr. John Watkins* on behalf of Brown, and *Mr. W. H. Twine* on behalf of Curley, opposing.

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

By the act of Congress approved March 1, 1889, c. 333, 25 Stat. 783, there was established a United States court for the Indian Territory. The act conferred no jurisdiction over felonies, but by the fifth section exclusive original jurisdiction was conferred over all offences against the laws of the United States committed within the Indian Territory, not punishable by death or by imprisonment at hard labor. Jurisdiction was conferred in all civil cases between citizens of the United States who are residents of the Indian Territory where the value of the thing in controversy shall amount to one hundred dollars or more. The final judgment or decree of the court, where the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court.

On March 1, 1895, Congress passed an act, c. 145, 28 Stat. 693, dividing the Indian Territory into three judicial districts, and providing for the appointment of two additional judges. This act extended the jurisdiction of the United States court in said Territory to capital cases and other infamous crimes, the jurisdiction over which had theretofore been vested in the United States courts at Fort Scott, Kansas, Fort Smith, Arkansas, and Paris, Texas, and provided that all such offences should be prosecuted in the United States court in the Indian Territory after the first day of September, 1896.

The eleventh section is as follows:

"That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission

as chief justice of said court. And said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said Supreme Court of Arkansas as to appeals and writs of error, and as to the trial and decision of cases, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory;

"And appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of Mansfield's Digest, by this act put in force in the Indian Territory."

These enactments clearly provide that writs of error in criminal cases shall be taken to the appellate court of the United States for the Indian Territory, and dispose of the question before us, unless there are other provisions of the acts of Congress which prevent such a conclusion.

The counsel for defendants in error contend that the act of February 6, 1889, c. 113, 25 Stat. 655, gave to the Supreme Court the right to review. The sixth section of that act is in the following words:

"That hereafter, in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reëxamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe."

It will be observed that when this law was passed the United States court for the Indian Territory did not possess jurisdiction in capital cases. That jurisdiction was *subsequently* conferred. But, even if it be conceded that the provisions of the act of February 6, 1889, might have attached or become applicable to the judgments of the United States court for the Indian Territory when jurisdiction in capital cases was ex-

tended to that court, the intention of Congress is manifested to have been otherwise by the provision above cited from the act of March 1, 1895, whereby it is provided that writs of error in capital cases shall be taken to the Court of Appeals of the United States for the Indian Territory.

This court had occasion to consider the effect of the act of February 6, 1889, in respect to the judgments of the Supreme Court of the District of Columbia in capital cases, in the case of *Cross* v. *United States*, 145 U. S. 571, and it was there said:

"It is contended on behalf of the Government that the writ of error will not lie because the Supreme Court of the District of Columbia is not a court of the United States, within the intent and meaning of the section. *McAllister* v. *United States*, 141 U. S. 174, is cited with the decision referred to therein, as sustaining that view, but it is to be remembered that that case referred to territorial courts only; and moreover, if the disposal of the motion turned on this point, the words, 'any court of the United States,' are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of a trial court that may be reëxamined upon the application of the respondent, and it is to that court that the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at *nisi prius*. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error 'shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such

time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.' This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this."

It is true that in the present cases the writs of error were sued out directly to the trial court, whereas in the case of *Cross* the writ of error was taken to the judgment of the Supreme Court of the District affirming the judgment of the trial court, and therefore some of the language quoted from the opinion in the latter case is not strictly applicable. But the reasoning of the court, showing that it was unlikely that Congress intended a review by two other courts than the trial court, is applicable. It is not to be supposed that Congress, when it provided by the act of March 1, 1895, for a review or writ of error in the Court of Appeals for Indian Territory, regarded the sixth section of the act of February 6, 1889, as also applicable.

The counsel for the defendants in error cite in their briefs the fifth and thirteenth sections of the act of March 3, 1891, establishing the United States Circuit Courts of Appeals, providing that appeals or writs of error may be taken from the District or Circuit Courts direct to the Supreme Court of the United States in cases of capital crimes, and providing that appeals and writs of error may be taken from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States.

Of course as, when this act was passed, the United States court in the Indian Territory had no jurisdiction over capital crimes, Congress did not contemplate any appeal or writ of error in such cases. And when, by the act of March 1, 1895, jurisdiction of the United States court in the Indian Territory was extended to capital cases, and a court of appeals was

established, with power to entertain appeals and writs of error, the act of March 3, 1891, cannot be regarded as applicable in such cases. Where a statute provides for a writ of error to a specified court of appeals it must be regarded as a repeal of any previous statute which provides for a writ of error to another and different court.

The decisions of the Court of Appeals of the United States in the Indian Territory are final except so far as they are made subject to review by some express provision of law. In the eleventh section of the act of March 1, 1895, it is provided that "appeals and writs of error from the final decision of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States;" but it is not claimed by the counsel for the plaintiff in error that this provision applies to capital cases; and see the case of *Folsom* v. *United States*, 160 U. S. 121.

It has been held by this court that the court established in the Indian Territory, though a court of the United States, is not a District or Circuit Court of the United States. *In re Mills*, 135 U. S. 263, 268.

We accept the contention of the Solicitor General on behalf of the Government, that the Court of Appeals in the Indian Territory, being a court of the United States, is analogous to the Supreme Court of the District of Columbia, and bears the same relation to the trial court in the Indian Territory as the Supreme Court of the District of Columbia bore to the trial court in the District.

And it was held in *Ex parte Bigelow*, 113 U. S. 328, 329, that no appeal could be taken or writ of error sued out to the Supreme Court of the District of Columbia in a capital case, the court saying: "No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain." *In re Heath*, 144 U. S. 92; *Cross* v. *Burke*, 146 U. S. 82, 84.

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Our conclusion is that we have no appellate jurisdiction of capital cases from the United States court for the Northern District of the Indian Territory, and that such appellate jurisdiction is vested exclusively in the United States Court of Appeals in the Indian Territory.

The motion is allowed and the writs of error in these cases are

Dismissed.

NAEGLIN *v.* DE CORDOBA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 35. Argued October 13, 1898. — Decided October 24, 1898.

An order signed in vacation by the several members of the Supreme Court of the Territory of New Mexico cannot be considered an order of the court.

The statutes of New Mexico provide that, in the absence of legitimate children, illegitimate children inherit.

A natural guardian has no power to release the claim of a ward to an inheritance without the sanction of some tribunal.

ON March 29, 1886, the appellees, Doloritas Martin de Cordoba *et al.*, filed their bill in the district court of the county of Mora, fourth judicial district, Territory of New Mexico, to establish their rights as the children and heirs of one Frederick Metzger. After answer the case was referred to a master, who reported findings of fact and conclusions of law in favor of the plaintiffs. Upon a hearing in the district court a decree was entered adversely to the conclusions of the master and for the defendants. On appeal to the Supreme Court of the Territory that decree was on August 24, 1895, reversed, and one entered remanding the case to the district court, with instructions to enter a decree in conformity with the findings and conclusions of the master. Thereupon the defendants appealed to this court.

At the time of entering the decree, and also of overruling

a petition for rehearing, no statement of facts was prepared by the Supreme Court, and no other determination of the facts than such as appears from the direction to enter a decree in conformity with the findings and recommendations of the master. But after the Supreme Court had adjourned, an application was made to have the findings of fact made by the master incorporated into the record as a statement and finding of facts by that court, for the purpose of an appeal, and upon that application the following order was entered:

"And now the foregoing statement and finding as to the facts proven and established by the evidence in each of said causes are ordered to be incorporated in the record of said Supreme Court as part thereof as fully as we may be thereunto empowered, the July term of the Supreme Court having been adjourned on the 26th day of September, A.D. 1896, and this order made and signed by each of the judges while in his district respectively.

THOMAS SMITH, *Chief Justice.*
NEEDHAM C. COLLIER,
Associate Justice, Supreme Court of New Mexico.

"Signed at Silver City, in the third judicial district.

GIDEON D. BANTZ,
Associate Justice of the Supreme Court of New Mexico and Presiding Judge of the Third Judicial District Court.

"Signed at Santa Fé, N. M., in the first judicial district.

N. B. LAUGHLIN,
Associate Justice of the Supreme Court and Judge of the First Judicial District."

It appears from the bill, answer and findings that Frederick Metzger, though an unmarried man, was the father of several children by different women, and this suit is one between these several illegitimate children to determine their respective rights to share in his estate. The counsel for appellants says in his brief: "The bill of complaint and the testimony present for determination of the court two questions: First, what estate

and property did Metzger own at the time of his death? and, second, who is entitled to that estate?"

Mr. Harvey Spalding for appellants.

No appearance for appellees.

Mr. Justice Brewer delivered the opinion of the court.

No question is made in this record as to the admission or exclusion of testimony. There being no jury the case comes here on appeal, and the only question we can consider is whether the findings of fact sustain the decree. Act of April 7, 1874, c. 80, 18 Stat. 27; *Stringfellow* v. *Cain*, 99 U. S. 610; *Cannon* v. *Pratt*, 99 U. S. 619; *Neslin* v. *Wells*, 104 U. S. 428; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Gray* v. *Howe*, 108 U. S. 12; *Eilers* v. *Boatman*, 111 U. S. 356; *Zeckendorf* v. *Johnson*, 123 U. S. 617; *Sturr* v. *Beck*, 133 U. S. 541; *Mammoth Min. Co.* v. *Salt Lake Foundry & Machine Co.*, 151 U. S. 447.

The order signed in vacation by the several members of the Supreme Court cannot be considered an order of the court. Assuming, however, for the purposes of this case, that, in view of the general language in the opinion of the court, we may take the findings of the master as its statement of facts, we observe that no doubtful question of law is presented for our determination. The master finds that Metzger was the father of the appellees, and that he owned certain property. These are questions of fact, resting upon testimony, concluded, so far as this court is concerned, by the findings, and into which it is not our privilege to enter.

While under the common law illegitimate children did not inherit from their father, the statutes of New Mexico introduced a new rule of inheritance (Comp. Laws, New Mexico, 1884, tit. 20, c. 4, sec. 1435, p. 680): "Natural children, in the absence of legitimate, are heirs to their father's estate, in preference to the ascendants, and are direct heirs to the mother if she die intestate." In other words, under this stat-

Counsel for Parties.

ute, there being no legitimate children, illegitimate children inherit.

It appears that on March 19, 1875, and while Metzger was living, the mother of these plaintiffs, then minors, in her own right and for the minors, receipted and relinquished all claims against him. Without stopping to consider what was meant by that release, and giving to it all the scope which its language may suggest, we remark that a natural guardian has no power to release the claim of a ward to an inheritance without the sanction of some tribunal. Woerner's American Law of Guardianship, p. 185, and following.

The decree is

Affirmed.

PIERCE *v.* SOMERSET RAILWAY.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

No. 12. Argued October 11, 12, 1898. — Decided October 31, 1898.

Eustis v. *Bolles*, 150 U. S. 361, affirmed and followed to the points:

(1) That to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment, as rendered, could not have been given without deciding it;

(2) That where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

THE case is stated in the opinion.

Mr. D. D. Stewart for plaintiffs in error. *Mr. H. B. Cleaves* was with him on the brief.

Mr. Edmund F. Webb and *Mr. Josiah H. Drummond* for

defendants in error. *Mr. Joseph W. Symonds* was with them on the brief.

Mr. Justice Peckham delivered the opinion of the court.

This is a writ of error directed to the Supreme Judicial Court of the State of Maine, for the purpose of reviewing a judgment of that court in favor of the defendant in error, who was plaintiff below. 88 Maine, 86–100. The facts necessary to an understanding of the case are as follows:

The Somerset Railroad Company was organized in 1871, pursuant to an act of the legislature of the State of Maine, for the purpose of building and operating a railroad between Oakland, in the county of Kennebec, and Solon, in the county of Somerset, in that State. In order to obtain the money to build its road, the company, on the first day of July, 1871, executed a mortgage to three trustees, covering its railroad and franchises and all its real estate and personal property then possessed by it or to be thereafter acquired. By the terms of the mortgage the trustees were to hold in trust for the holders of the bonds of the railroad company, to be issued by it, payable as therein mentioned. The company thereupon issued and sold its bonds, secured by the mortgage, to the amount of $450,000, with proper coupons for interest attached, payable semi-annually on the first days of January and July in each year, at the rate of seven per cent, the principal of the bonds becoming due on the first of July, 1891. The proceeds of the sale of these bonds were applied to the building, equipping and operating of the road from Oakland to North Anson, a station between Oakland and the proposed terminus of the road at Solon. In 1876 the road had been completed as far as the village of Anson, twenty-five miles from Oakland, and it was opened and its cars commenced running in that year between those points. The company continued to so operate its road until September, 1883. It had, however, become insolvent some time prior to April 1, 1883, and at that time its coupons for interest on the bonds secured by the above-mentioned mortgage had been unpaid for more

than three years. At the time when this mortgage was given corporations could be formed by the holders of bonds secured by a railroad mortgage in the manner provided for by the statute. Chap. 51, Rev. Stat. Maine, 1871. In 1878, seven years after the execution of the mortgage, the provision for the formation of corporations by the holders of bonds was extended so as to include the case of railroad corporations where the principal of the bonds should have remained overdue for the space of three years, and by an act of March 6, 1883, the provision was still further extended so as to apply to the case in which no interest had been paid thereon for more than three years.

By virtue of the provisions of the Revised Statutes of 1871, as amended and extended by the statutes of 1878 and 1883 (both statutes as will be seen being subsequent to the execution of the mortgage), the holders of bonds of the Somerset Railroad Company, following the method provided by those statutes, on the 15th day of August, 1883 formed a new corporation under the name of the Somerset Railway. The capital stock of this new corporation was $736,648.76, made up of the principal of $450,000 of the unpaid outstanding bonds and $286,648.76 of interest thereon up to the 15th of August, 1883. This was in accordance with the provisions of the statute that the new company should issue the capital stock to the holders of the bonds, secured by the mortgage, in the proportion of one share of stock for each one hundred dollars' worth of bonds and interest. On the 1st of September, 1883, the Somerset Railway took possession of the railroad from Oakland to Anson (which was as far as it had then been completed), and of all the other property embraced in the mortgage, and it has ever since held and operated the same. Its capital stock was divided into shares of one hundred dollars each to the amount of the bonds and overdue coupons as the law provided. The stockholders of the old company had previously on the 13th of July, 1883, at their annual meeting, voted that the bondholders should organize a new corporation under the statutes of the State, and take possession of the railroad, and at the same meeting voted to surrender possession of the road to the new corporation, the Somerset Railway.

The holders of a very large majority of these bonds, including some held by the parties in whose interest the plaintiffs in error now act, participated in the formation of this corporation, but the holders of all the bonds did not so participate, a majority being sufficient under the statute for the regular formation of the corporation. Bonds largely exceeding a majority of those which were issued under the mortgage were surrendered to the Somerset Railway and are now held by it, and the stock issued therefor, the amount being at the time the suit herein was instituted $339,400, and the amount of bonds not surrendered was $110,600, not counting overdue coupons.

From the time the new company took possession of the railroad it has continued to operate it as far as it was then completed, and it has also extended the same some sixteen miles, and as extended it has continued to operate it.

To obtain the funds necessary for the completion of the sixteen miles of extension the new company, under what is claimed to be due authority of law, issued its bonds on the 1st day of July, 1887, to the amount of $225,000, payable in twenty years from their date, and to secure payment of the same mortgaged its entire railroad from Oakland to Bingham, forty-one miles. These bonds were sold by the company and the proceeds applied towards the completion of the road. The mortgage given by the Somerset Railroad Company in 1871 included the roadbed from Oakland to the terminus of the road in Solon. The mortgage given by the new company in 1887 embraced the railroad so far as it had been constructed by the old company, as well as the sixteen miles constructed by the new company after it took possession of the road. The giving of this mortgage in 1887 was a matter of public notoriety, well known to the trustees of the original mortgage, and no objection was made in behalf of any one; on the contrary, the trustees stood by and saw this mortgage of 1887 given and the bonds sold to innocent parties and the money expended in extending the railroad sixteen miles, and it was not until more than five years afterwards, when the road had been built and completed and was in operation to Bingham, that the trustees took action.

In December, 1892, the trustees in the mortgage of 1871 commenced two actions at law, one in each of two counties in which the railroad was situated, in which actions the president of the new corporation, its superintendent, treasurer, accountant and various station agents and conductors were made parties defendant because they were in possession of the road, and the plaintiffs, trustees, claimed to recover from the defendants, as disseizors, the possession of the railroad, and from the defendants, as individuals, the sum of $180,000 as mesne profits.

The ground upon which the trustees based their action was that the new company was never legally organized; that by the terms of the mortgage the trustees alone could take proceedings to foreclose the mortgage, and that the acts of the legislature passed subsequently to the execution of the mortgage, and under which the new company was formed, could and did have no validity as against the contract rights of the plaintiffs, secured to them by the law as it stood at the time of the execution of the mortgage of 1871.

Upon these facts and many others which are not now material to be stated, the new company commenced this suit in equity against the trustees in the mortgage of 1871, who were plaintiffs in the two actions at law, to enjoin the further prosecution of those actions and for other relief as mentioned in their complaint. In this suit the new company alleged (among other things) that the trustees in the mortgage of 1871 and their successors had stood by, allowed and encouraged the formation of the new company and the surrendering of the bonds and the issuing of the stock in lieu thereof, and also the execution of the mortgage by the new company to secure the payment of $225,000 borrowed for the extension of its road; also the contracting of debts and the expending of large amounts of money in useful repairs and improvements, and that all this was done without the trustees making known to the new company that they or those whom they represented as bondholders had any claim or cause of action against the new company, and the complainants therefore averred that the trustees and those whom they represented had been guilty of such delay and laches as to estop them

from denying the validity of the new corporation or its title or possession. The new company also alleged the entire validity of the proceeding resulting in its formation.

Answering that complaint, the trustees denied that the new company was ever established under any law of Maine; they denied that it ever had any legal organization or any legal existence; they denied that the mortgage of July 1, 1871, had ever been legally foreclosed, and they alleged that neither the original board of trustees named in the mortgage, nor their successors, had ever taken any steps towards a legal foreclosure or had ever determined that there had been a breach of the conditions of that mortgage, and that the attempted foreclosure of that mortgage was in violation of the contract rights secured to the trustees thereunder at the time of its execution, and the attempted foreclosure of that mortgage was therefore utterly void; they denied that any statute of the State had been enacted, or could be enacted, which would or could deprive the bondholders or trustees of the rights secured to them by virtue of their contract of July 1, 1871, and the laws of the State in force when the contract was made. They alleged that the contract rights of all the parties to the mortgage of July 1, 1871, were fixed by the laws in force when the mortgage was executed, and that no law of the State of Maine then existing authorized the organization of the new corporation in the manner attempted herein, and that the laws then existing formed a part of the mortgage contract and provided a mode by which the mortgage could be legally foreclosed and a new company formed for the benefit of all the bondholders, and they alleged that the rights of the bondholders who who took no part in the formation of the new company were fixed by the mortgage contract and could not be affected in any way, except by payment. Various other matters were set up in their answer which it is not now necessary to mention.

The Supreme Judicial Court of Maine upon these issues held: "(1) That the new company was legally organized; that the various acts of the legislature of Maine, passed subsequently to the execution of the mortgage, did not impair the obligations of the contract contained in the mortgage,

but simply afforded a more convenient and quicker remedy for a violation of the agreement and for the foreclosure of the mortgage than existed at the time of its execution"; (2) the court also stated and held as follows: "The new corporation took possession of the mortgaged property on the first day of September, 1883, and has ever since held it and operated the railroad. This action was authorized by the statute, consented to by the Somerset Railroad Company, the mortgagor, actively proposed and aided by one at least of the trustees, and ever since acquiesced in by all the trustees. It is too late for the trustees or dissenting bondholders now to object to technical irregularities, if any exist, especially as the Somerset Railway has since extended the railroad from North Anson to Bingham, a distance of about sixteen miles; built a branch railroad of one mile in length of great importance to the productiveness of the main line, placed a mortgage upon the road for $225,000 to make these extensions and other improvements, and in other ways materially changed the condition and relations of all parties interested in the road. Their long acquiescence, without objection, coupled with the changed conditions and relations resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation."

The court further held that, under the statutes of Maine, the bondholders who had refused to take stock in the new company still retained the same rights under their bonds as the holders of the stock in the new company which had been given in exchange for bonds, and that if any bondholder declined ultimately to exchange his bonds for stock he could not be compelled to do so, and that the net earnings of the company when distributed in the form of dividends or otherwise must be distributed to its stockholders, and to the holders of any unexchanged bonds in equal proportions; that if the holders of unexchanged bonds chose to take stock they could do so at any time or they might retain their present possessions and receive their share of the net earnings *pro rata* with the stockholders.

It is thus seen that there were two questions determined by the state court: One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal question. The other related to the defence of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a writ of error to the state court cannot be sustained. *Eustis* v. *Bolles*, 150 U. S. 361; *Rutland Railroad* v. *Central Vermont Railroad*, 159 U. S. 630; *Seneca Nation* v. *Christy*, 162 U. S. 283.

A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.

In the above case of *Eustis* v. *Bolles*, 150 U. S. 361, 368, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. This court held that whether that view of the case was sound or not it was not a Federal question, and therefore not within the province of this court to inquire about.

Mr. Justice Shiras, in delivering the opinion of the court in that case, said:

"The defendants in the trial court depended on a discharge obtained by them under regular proceedings under the insolvency statutes of Massachusetts. This defence the plaintiffs met by alleging that the statutes under which the defendants had procured their discharge had been enacted after the promissory note sued on had been executed and delivered, and that to give effect to a discharge obtained under such subsequent laws would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts it is plain that a Federal question, decisive of the case, was presented, and that if the judgment of

the Supreme Judicial Court of Massachusetts adjudged that question adversely to the plaintiffs it would be the duty of this court to consider the soundness of such a judgment.

"The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that as accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a Federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

Eustis had a right which was protected by the Constitution of the United States. This right, the state court held, he had waived by his action, and this court said whether the state court was right or not, was not a Federal question.

In *Seneca Nation* v. *Christy*, 162 U. S. 283, it was held by

the state court that even if there were a right of recovery on the part of the plaintiffs in error because the grant of 1826 was in contravention of the Constitution of the United States (which the court held was not the case), yet that such recovery was barred by the New York statute of limitations. This court held that as the judgment of the state court could be maintained upon the latter ground, it was without jurisdiction because the decision of the state court upon that ground involved no Federal question.

In this case there being two distinct grounds upon which the judgment of the state court was based, each of which is sufficient, and one of which involves no Federal question, we must, upon the authority of the cases above cited, hold that this court is without jurisdiction, and the writ of error must be

Dismissed.

Mr. Justice Harlan and Mr. Justice White were of opinion that the decree should be affirmed.

Pierce *v.* Ayer, error to the Supreme Judicial Court of the State of Maine. No. 13. Argued with No. 12.

This writ of error is controlled by the decision in the case just announced. The writ will, therefore, be

Dismissed.

ST. LOUIS MINING AND MILLING COMPANY *v.* MONTANA MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 305. Submitted October 10, 1898. — Decided October 31, 1898.

The court again holds that when there is color for a motion to dismiss on the ground that no Federal question was involved in a judgment of a state court, this court may, under a motion to dismiss or affirm, dispose of the case.

When a location is made of a mining claim, the area becomes segregated from the public domain and the property of the locator, and he may sell

it, mortgage it or part with the whole or any portion of it as he may see fit; and a contract for such sale is legal and will be enforced by the court.

Where an application to enter a mining claim embraces land claimed by another, the latter is under no obligation to file an adverse claim; but he may make a valid settlement with the applicant by contract, which can be enforced against him after he obtains his patent.

This was a suit for specific performance brought by the Montana Mining Company against the St. Louis Mining and Milling Company of Montana and Charles Mayger in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke.

The complaint alleged that on March 7, A.D. 1884, plaintiff's predecessors in interest, Robinson, Huggins, Sterling, De Camp and Eddy, were the owners of, and in possession, and legally entitled to the use, occupation and possession, of a certain portion of the Nine Hour Lode and Mining Claim, which embraced in all an area of 12,844.5 feet, together with the minerals therein contained.

That Mayger applied to the United States land office at Helena for a patent to the St. Louis Lode Mining Claim, owned by him, and that in the survey he caused to be made of his claim he included that part of the Nine Hour Lode Mining Claim described in the complaint, whereupon an action was commenced by Robinson and Huggins against Mayger in the district court of the Third Judicial District of the then Territory of Montana to determine the right to the possession of the particular premises. That on said seventh of March, for the purpose of settling and compromising that action, and settling and agreeing upon the boundary lines between the Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, Mayger made, executed and delivered to Robinson, Huggins and Sterling a certain bond for a deed, whereby, in consideration of the compromise and settlement of the action and the withdrawal of the protest and adverse claim, he covenanted and agreed that when he should obtain a patent as applied for, he would, on demand, make, execute and deliver to Robinson, Huggins and Sterling, or their assigns, a good

and sufficient deed for the premises described in the complaint; and thereupon Robinson, Huggins and Sterling dismissed their said action, withdrew their adverse claim, and performed all of the conditions of the bond on their part.

That Mayger then proceeded with his application and obtained a patent, but that he gave no notice to plaintiff, or any of its predecessors in interest, of the obtaining of the patent until some time in November, 1889.

That when the bond for a deed was executed, plaintiff's predecessors in interest were in possession of the premises, and have ever since been and are yet in possession thereof, holding and using the same as a part of the Nine Hour Lode Claim; that by mesne conveyances the title to this claim, including the portion in dispute in this suit, had come to plaintiff; that it is entitled to a conveyance of the premises from Mayger; that Mayger, on or about June 10, 1893, assumed to convey said piece of ground to the St. Louis Mining and Milling Company, which then had full knowledge and notice of the making, execution and delivery of the bond for a deed by Mayger, and of the rights and equities of the Montana Mining Company thereunder; that the St. Louis Company has instituted a number of suits in the Circuit Court of the United States, in which it claims that it is the owner of the premises described in the complaint, and also the right to recover certain sums of money for ores alleged to have been wrongfully extracted therefrom. The bond referred to was appended to the complaint. The prayer was that the court should decree that defendants should convey to plaintiff a good and sufficient deed to the premises in controversy.

The answer denied all the material allegations of the complaint, and affirmatively alleged that the adverse claim interposed to the application of Mayger for a patent was for the purpose of harassing and hindering Mayger in obtaining a patent to his mining claim, and that the bond was given contrary to equity, good conscience and public policy.

The case was tried by the district court without a jury, and the court made and filed findings of fact and conclusions of law. It was found that plaintiff's predecessors in interest

were at the time mentioned in the complaint the owners of, in possession, and entitled to the possession, of the Nine Hour Lode Mining Claim as described, and that the strip of ground in dispute was at the time and continued to be a part of said claim; that the bond was executed and delivered by Mayger to the parties therein named, binding Mayger to convey to them or their assigns the ground in question when Mayger obtained a patent therefor; that it was given as a compromise and settlement of the controversy as to the land now in dispute, and then in litigation between the parties, and for the purpose of fixing and determining the boundary line between the Nine Hour Lode Mining Claim and the St. Louis Mining Claim, as alleged in the complaint, and that Mayger thereafterwards did obtain a patent covering the premises in dispute; that plaintiffs in the adverse mining suit, on the execution to them of the bond by Mayger, dismissed their action and performed all the conditions of the contract on their part; that at the time of the execution of the bond the predecessors of plaintiff were in actual possession of the ground in dispute, and that they and plaintiff have ever since remained in possession thereof, claiming and holding the same as a part of the Nine Hour Lode Mining Claim; that at the date of the execution and delivery of the bond, it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the strip should be a portion of the Nine Hour Lode Mining Claim; that plaintiff is the successor in interest of Robinson, Huggins and Sterling, the obligees named in the bond, and also of De Camp and Eddy, who were cotenants with said obligees in the premises at the date of the execution of the bond; that the mesne conveyances introduced in evidence on the part of plaintiff embraced and were intended to include the ground in question, and conveyed to the grantees therein named all of the interest, legal and equitable, which the grantor or grantors had in said premises, covering as well their interest in the ground in dispute as in every other part and parcel of the Nine Hour Lode Mining Claim.

That in July, 1893, plaintiff duly demanded a deed to the

ground in dispute from defendants, which defendants refused to execute; that in June, 1893, Mayger assumed to convey the controverted ground to the St. Louis Mining and Milling Company, but that at the date of his conveyance the St. Louis company had full notice and knowledge of plaintiff's equities in and to the disputed strip, and of its possession thereof; that defendants wrongfully asserted title to the ground in controversy, and thereby clouded plaintiff's title thereto, which cloud plaintiff had a right to have removed.

The district court concluded as matter of law that plaintiff was entitled to the conveyance prayed for, and that defendants should be enjoined from asserting any right, title or interest in or to the ground in dispute, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

In accordance with the findings of fact and conclusions of law, a decree was entered for plaintiff, and defendants appealed to the Supreme Court of the State of Montana, by which it was affirmed. 51 Pac. Rep. 824.

This writ of error was then sued out, and defendants in error now move to dismiss the writ, or that the decree be affirmed.

Mr. A. B. Browne on behalf of *Mr. Charles J. Hughes, Jr.*, and *Mr. W. E. Cullen* submitted their brief in support of the motion.

Mr. W. W. Dixon, *Mr. Thomas C. Bach* and *Mr. Edwin W. Toole* opposing.

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

While it is conceded by plaintiffs in error that there is no express prohibition on the transaction involved in the record, it is contended that the contract was contrary to the policy of the law, and that the question thus raised is necessarily a Federal question. Granting that this is so, and that the

motion to dismiss must, therefore, be overruled, we are of opinion that there was color for the motion, and that the case may properly be disposed of on the motion to affirm.

The Supreme Court of Montana ruled that, in the absence of statutory prohibition, there was no reason in law or equity why the contract sought to be enforced should be held illegal, and we concur in this disposition of the Federal question suggested.

The public policy of the Government is to be found in the Constitution and the laws, and the course of administration and decision. *License Tax cases*, 5 Wall. 462; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340.

The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the Government which sustains this proposition.

Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it or part with the whole or any portion of it as he may see fit. *Forbes* v. *Gracey*, 94 U. S. 762, 766; *Manuel* v. *Wulff*, 152 U. S. 505, 510; *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449.

The location of the Nine Hour Lode was in all respects sufficient and valid. When the dispute afterwards arose between Robinson and Mayger as to a portion of it, there was nothing to compel the filing of an adverse claim. The settlement made gave Robinson an equitable title immediately, and ultimately he was to have the complete legal title, to a piece of ground, which it seems rightfully belonged to him. The Government was not defrauded in any way, nor

was there any legal or moral fraud involved in the transaction. The settlement and adjustment of the dispute with reference to the right of possession appears upon its face to to have been satisfactory to the parties when made, and should be upheld unless contravening some statute or some fundamental principle of law recognized as the basis of public policy. There was no such statute, and settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored, and are apparently of frequent occurrence in regard to mining land claims; nor is there anything in the decisions of this court to throw doubt on their validity.

In *Ducie* v. *Ford*, 138 U. S. 587, a contract of the character of that under consideration was passed on in a suit brought to enforce its specific performance, and it was assumed that the contract was not void as in contravention of any statute of the United States, or contrary to public policy. In *Meyers* v. *Croft*, 13 Wall. 291, this court was asked to hold that the prohibition against alienation found in the last clause of the twelfth section of the preëmption act of 1841 extended from the date of entry to the actual issue of patent. This the court declined to do, and decided that the object of the act was attained when the preëmptor went with clean hands to the land office and proved up and paid for his land. And the court said: "Restrictions upon the power of alienation after this would injure the preëmptor, and would serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the general land office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the preëmption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the Government should choose to issue the patent."

In *Davenport* v. *Lamb*, 13 Wall. 418, a covenant made by certain grantors "that if they obtain the fee simple to said property, from the Government of the United States, they would convey the same to the grantee, his heirs or assigns, by deed of general warranty," made with reference to a tract of land taken up under what was known as the Oregon Donation Act, was upheld although the point that the covenant was against public policy was distinctly made.

In *Lamb* v. *Davenport*, 18 Wall. 307, 314, Mr. Justice Miller, speaking of claims under that act, said: "They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of their own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is acknowledged; but, subject to these well known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicted upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress has imposed restrictions on such contracts."

And to the same effect see *Gaines* v. *Molen*, 30 Fed. Rep. 27, where the subject was considered by Mr. Justice Brewer, then Circuit Judge.

Anderson v. *Carkins*, 135 U. S. 483, 487, involved a contract made by a homesteader to convey a portion of a tract when he should acquire title thereto from the United States, and was disposed of on different grounds. It was stated in the opinion that: "The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person.' And section 2291, which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated, except

as provided in section twenty-two hundred and eighty-eight,' which section provides for alienation for 'church, cemetery or school purposes, or for the right of way of railroads.' The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet, under them the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader. . . . There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the Government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right."

In the case at bar there was no statute which, in express terms, or by any fair implication, forbade the making of such a contract as that proceeded on here.

Decree affirmed.

NEW YORK STATE *v.* ROBERTS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 21. Argued April 20, 21, 1898. — Decided October 31, 1898.

The statutes of the State of New York, providing that "Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State, except only saving banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this State, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows:" and that "The amount of capital stock which shall be the basis for tax . . . in the case of every corporation, joint stock company and association liable to taxation thereunder shall be the amount of capital stock

Statement of the Case.

employed within this State," as construed by the highest court of that State, are not repugnant to the Constitution of the United States.

It must be regarded as finally settled by frequent decisions of this court, that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State.

PARKE, Davis & Company is the name of a corporation organized under the laws of the State of Michigan for the manufacture and sale of chemical and pharmaceutical preparations. The factory is situated in the city of Detroit. The corporation has a warehouse and depot in the city of New York, and there keeps on hand varying quantities of its manufactured products, which are there sold at wholesale in original packages. The concern is represented in New York by John Clay as manager, who is paid a salary. The business of selling the manufactured articles is carried on in all respects like the ordinary sales of consigned goods. Clay, in his own name, but for the use of the company, imports crude drugs from foreign countries at the port of New York. Such crude drugs are, in large part, sent to the Detroit factory for use, but some portions are sold in the original packages in the city of New York.

The corporation pays an annual rental for its place of business in New York of $12,500, employs there a force of over fifty persons, and expended for the New York branch annually, for the years 1890 to 1894, inclusive, from $102,000 to $172,000. The property owned in New York, in the way of business fixtures, is valued at $15,000; the average stock of goods sent from Michigan and carried in New York during those years was $50,000. It also employed in New York during that period a continuing capital, used in the purchase and sale of crude drugs, of from $23,000 to $62,000 per year.

Upon this state of facts the comptroller of New York imposed for 1894, and five previous years, an annual tax based upon the sum of $90,000 as "capital employed within the State."

Statement of the Case.

At the time of the imposition of this tax the provisions of the statute here drawn in question were as follows (sec. 3, chap. 542, Laws of 1880, as amended by Laws of 1881, chap. 361; Laws of 1885, chap. 359; Laws of 1889, chaps. 193 and 353):

"Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State, or in any other State or country and doing business in this State, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this State, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows."

Then come provisions grading the tax according to annual dividends. The tax originally fell upon the entire capital of a corporation, but the statute was amended in 1885 so as to read:

"The amount of capital stock which shall be the basis for tax under the provisions of section three (*supra*) in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

Parke, Davis & Company, through their said manager, filed a petition in the New York Supreme Court, praying for a writ of certiorari directed to the comptroller, in order to subject his assessment to correction. In the petition it was alleged that the only capital in any proper sense employed by the company within the State of New York in the sale of its products was its leasehold of the warehouse and the office furniture and fixtures, not exceeding in value $15,000; that said company, being a manufacturing corporation, was exempt from taxation under the laws of the State of New York; that the comptroller erred in deciding that goods manufactured

by said corporation and stored at its depot in New York are capital employed in said State within the meaning of the statute ; that if said statute was correctly interpreted by the comptroller, then said statute was unconstitutional and void as in contravention of the Constitution of the United States and the amendments thereof.

To the certiorari granted upon said petition the comptroller duly made a return, alleging that his acts and proceedings were valid.

The cause was heard at the December term, 1895, of said court, and judgment was entered quashing the writ of certiorari, and confirming the comptroller's assessment. From that judgment an appeal was taken to the Court of Appeals of the State of New York, and on June 9, 1896, the cause was heard, the order and judgment of the Supreme Court were affirmed, and the record remitted to the Supreme Court. 91 Hun, 158; 149 N. Y. 608.

Whereupon the cause was brought to this court by a writ of error duly prayed for and allowed.

Mr. James McKeen for plaintiff in error.

Mr. T. E. Hancock, attorney general of the State of New York for defendant in error. *Mr. William Henry Dennis* was on his brief.

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

The construction put upon the statute of the State of New York by its courts is, of course, binding upon this court, and that portion of the contention which questioned the action of the comptroller on the ground of a misinterpretation of the law is thus disposed of.

It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business

within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State. *Paul* v. *Virginia*, 8 Wall. 168; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305.

Accordingly the counsel for the plaintiff in error disavows in his brief any wish to bring those decisions into further review, but his contention is that this Michigan corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the State, is denied the equal protection of the law when subjected to a tax from which are exempted other corporations, foreign and domestic, which wholly manufacture the same class of goods within the State; that such a tax is an unjust discrimination against this corporation, whose place of manufacture is in the State of Michigan. By this contention it is not meant, of course, that this particular corporation is, in terms, discriminated against in the New York statute, but that all corporations which manufacture their goods wholly in other States and send them for sale in New York are discriminated against in favor of such corporations, whether foreign or domestic, as manufacture their goods within the State of New York.

To sustain this contention the well-known line of cases is cited, wherein this court has had to deal with state legislation imposing discriminating taxes against the products of other States. *Walling* v. *Michigan*, 116 U. S. 446; *Robbins* v. *Shelby County Taxing District* 120 U. S. 489; *Minnesota* v. *Barber*, 136 U. S. 313.

If the object of the law in question was to impose a tax upon products of other States, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that obviously such is not the purpose of this legislation. "Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any

other State or country and doing business in this State, . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows."

It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State.

In construing this statute it was held, in the case of *People ex rel. Blackinton Co.* v. *Roberts*, 4 Appellate Div. 388, that a New York corporation which carried on a manufacturing business in another State was liable to this tax; and this decision was affirmed by the New York Court of Appeals. 151 N. Y. 652.

The tax is graded according to annual dividends, and originally was assessed upon the entire capital of a corporation; but the statute was amended in 1885 so as to read: "The amount of capital stock which shall be the basis for tax under the provisions of section three, in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States to the detriment of the latter, or to subject property out of the State to taxation.

In the present case, indeed, complaint is made of the action of the comptroller in determining the "amount of the capital stock employed within the State" — that the amount fixed by him was too large. The action of the comptroller was subject to revision, and the corporation's complaints in respect thereto were heard and passed upon by the Supreme Court of New York. The estimate of the comptroller, in determining the amount of capital employed in the State, would not be judi-

cially interfered with unless it was clearly shown that the same was erroneous; and, even then, such errors would not present a Federal question for our consideration.

Nor can we consider the further contention that portions of the business which were made the basis of the assessment were improperly treated as business of the corporation, whereas they should have been regarded as pertaining to the personal transactions of Mr. Clay, the company's agent. The true relation of Mr. Clay to the corporation's business was one of fact, in respect to which a hearing was afforded to the corporation, and this court is in no position to enter into such an inquiry.

Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419.

But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Home Insurance Co.* v. *New York*, 134 U. S. 594.

When a corporation of one State, whose business is that of a common carrier, transacts part of that business in other States, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective States infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different States, and the subject has been much

discussed in several recent cases. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Pittsburgh, Cincinnati, &c. Railway* v. *Backus*, 154 U. S. 421; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 165 U. S. 194. It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of *Paul* v. *Virginia*, 8 Wall. 168, and of subsequent cases affirming that one. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, may be specially mentioned, as it involved a similar question and the same statutes which are before us in the present case. The Horn Silver Mining Company was a corporation of the Territory of Utah, where it carried on a mining and manufacturing business. It also carried on business in the State of New York, and was there subjected to an annual tax upon its corporate franchise or business, as prescribed in the statute of the State of New York. The company refusing to pay the tax, proceedings to enforce its payment were resorted to, which resulted in the case being brought to this court, where some of the questions raised in the present case were considered and determined. The conclusions reached were that the law in question did not tax property not within the State; nor regulate interstate commerce; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the State.

It is said that the operation of that portion of this taxing law which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corpora-

tions, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts.

The judgment of the Supreme Court of the State of New York is accordingly

Affirmed.

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

It seems to me that the opinion and judgment in this case are not in harmony with former decisions of this court.

The comptroller of New York has imposed upon the plaintiff in error, a Michigan corporation doing business in New York, an annual tax for the year 1894 and the preceding five years, upon the sum of $90,000 "as capital employed" in the latter State. The authority for this tax was found in a statute of New York providing that "every corporation, joint stock company, or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country, and doing business in this State, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies wholly engaged in carrying on manufactures or mining ores within this State, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax, as a tax upon its franchise or business, into the state treasury annually, to be computed as follows," etc. Laws of N. Y., 1889, June 4, c. 353, p. 467.

The goods sold by the plaintiff in error, by its agents in New York, are manufactured in the State of Michigan. If the plaintiff had been wholly engaged in carrying on manufacture in New York it would have been exempted by the statute from the taxes in question.

So that the question in this case is, whether it is competent for New York to impose a tax upon the franchise or business

of manufacturing corporations or companies, foreign or domestic, not "wholly engaged" in carrying on manufacture within its limits, while at the same time it exempts from such taxation like corporations or companies wholly engaged in carrying on manufactures in that State.

Is not such legislation an injurious discrimination against the manufacturing business and the manufactured goods of other States, in favor of the manufacturing business and the manufactured goods of New York, which is forbidden by the Constitution of the United States? Let us see. The question presented for consideration is of such importance as to justify an extended reference to our former decisions.

In *Woodruff* v. *Parham*, 8 Wall. 123, 140, it was contended that a provision in the charter of the city of Mobile, Alabama, authorizing the collection of a tax on sales at auction, was invalid in its application to auctioneers who sold in that State in the original packages goods and merchandise the product of States other than Alabama. This court said: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or of some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

At the same term of the court *Hinson* v. *Lott*, 8 Wall. 148, 150, 151, 152, was decided. That case involved the validity of a statute of Alabama declaring that "before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquors into the State for sale shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per

gallon upon each and every gallon thereof." This court said: "If this section [the one just quoted] stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State, or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without, while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and *in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.*" Again: "But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the Supreme Court of Alabama delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the States was supposed to present a serious objection to the validity of the Alabama statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of commerce. And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power all conflicting state laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further. That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the State until some regulation on the subject had been made

by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States, and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever." Referring to the doctrine announced in *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, that there is a class of legislation of a general nature affecting the commercial interests of all the States, which, from its essential character, is national, and which must, so far as it affects these interests, belong exclusively to the Federal Government, the court said: "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States, in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the Constitution just mentioned." Upon examining the entire revenue statute of Alabama it was found that it did not injuriously discriminate against the products of other States, and the court said: "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the people of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

In *Ward* v. *Maryland*, 12 Wall. 418, 429, the court held to be unconstitutional a statute of Maryland, making it a penal offence for any person, "not being a permanent resident" of that State, to sell, offer or expose for sale, within the city of Baltimore, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in the State of Maryland, without first obtaining a license so to do

—such license being fixed at $300 per year, while the license fees or taxes required of resident traders were from $15 to $150. The statute was adjudged to be void, because it discriminated against the people and products of other States. After referring to some of the former decisions, this court said: "Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court."

In *Welton* v. *Missouri*, 91 U. S. 275, 279, 281, the question was as to the validity of a statute of Missouri declaring that whoever should deal in the selling of patent and other medicines, goods, wares and merchandise, except books, charts, maps and stationery, which were "not the growth, produce or manufacture of this State," by going from place to place to sell the same, should be deemed a pedler, and prohibiting him, under a penalty, from dealing as such without first obtaining a license, no license being required for selling, "by going from place to place," the produce or manufacture of the State. The constitutionality of that statute was sought to be maintained upon the ground that it was only a tax upon a calling. The state court took that view of the statute, and observed that it was a calling limited to

the sale of merchandise not the growth or product of Missouri. But this court, after referring to *Brown* v. *Maryland*, 12 Wheat. 419, 444, as holding an act of Maryland to be in conflict with the Constitution of the United States because it imposed a license tax upon the importer of foreign goods, said: "So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded *as a tax upon such goods themselves;* and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States." The question thus presented was solved by the judgment of this court declaring the legislation of Missouri to be unconstitutional. It was further said: "If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion. The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States."

The case of *Guy* v. *Baltimore*, 100 U. S. 434, 439, 443, is much in point. That case involved the validity of certain ordinances of the mayor and council of Baltimore based upon an act of the General Assembly of Maryland authorizing the mayor and city council of Baltimore to regulate, establish, charge and collect, to the use of the said mayor and city council, such rate of wharfage as they deemed reasonable, "of and from all

vessels resorting to or lying at, landing, depositing or transporting goods or articles *other than the productions of this State*, on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State."

This court, after referring to the previous cases of *Woodruff* v. *Parham*, *Hinson* v. *Lott* and *Ward* v. *Maryland*, said: "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired."

In the argument of that case it was contended that the city, by virtue of its ownership of the wharves in question, had the right, in its discretion, to permit their free use to all vessels landing at them with the products of Maryland; and that those operating vessels laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property. The court said: "This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal corporation of Baltimore was created by the State of Maryland to promote the public interests and the public convenience. The wharf at which appellant landed his vessel was long ago dedicated to public use. The public for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland. It embraces, necessarily, all engaged in trade and commerce upon the public navigable

waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or state authority; and the national Constitution secures to all so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever, not excluded therefrom by or under the authority of some statute in Maryland enacted in the exertion of its police powers. The State, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other States. The concession of such a power to the States would render wholly nugatory all national control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States. But it is claimed that a State may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting from those transporting to its wharves the products of other States wharfage fees which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the State could discriminate against the citizens and products of other States in the use of the public streets or other public highways. . . . Municipal corporations owning wharves upon the public navigable waters of the United States, and quasi-public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations. In the exercise of its police powers a State may exclude from its territory or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind that may be produced or manufactured in other

States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States."

In *Machine Co.* v. *Gage*, 100 U. S. 676, 679, a statute of Tennessee imposing a license tax upon all pedlers of sewing machines was sustained, as not in violation of the Federal Constitution, because it applied "alike to sewing machines manufactured in the State and out of it." This court said: "In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is such discrimination it is fatal. Other considerations may lead to the same result. In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff* v. *Parham*, *Hinson* v. *Lott*, *Ward* v. *Maryland*, *Welton* v. *Missouri*, *supra*."

Webber v. *Virginia*, 103 U. S. 344, 350, is also very much in point. That case involved the validity of a statute of Virginia providing that "any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States and Territories, and should not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles through the agency of another; but a separate license shall be required from an agent or employé who may sell or offer to sell such articles for another. For any violation of this section, the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offence. The specific license tax upon an agent for the sale of any manufactured article or machine of other States or

Territories shall be twenty-five dollars; and this tax shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons *other than resident manufacturers or their agents, selling articles manufactured in this State*, shall pay the specific license tax imposed by this section." §§ 45, 46.

This court said: "By these sections, read together, we have this result: the agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

In *Walling* v. *Michigan*, 116 U. S. 446, 459, 461, the principal

question was as to the validity of certain legislation in Michigan which, it was contended, discriminated against the manufactured products of other States. This court held the Michigan statute to be invalid, saying: "It is suggested by the learned judge who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act, if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650. . . . Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation, which, it is averred, the State has an undoubted right to impose, and reference is made to *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Nathan* v. *Louisiana*, 8 How. 73, 80; *Pierce* v. *New Hampshire*, 5 How. 593; *Hinson* v. *Lott*, 8 Wall. 148; *Machine Co.* v. *Gage*, 100 U. S. 676. *None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State.*"

In *Brimmer* v. *Rebman*, 138 U. S. 78, 81, 83, the question was as to the validity of a statute relating to the sale of meats in Virginia. This court said: "The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot exclude the question of the conformity of the act to the Constitution. . . . Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia

of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, *is thus made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered.* Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, *make discriminations against the products and industries of some of the States in favor of the products and industries of its own or other States.* The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Welton* v. *Missouri*, 91 U. S. 275, 281; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, above cited. The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and, 'a discriminating tax imposed by a

State, operating to the disadvantage of the product of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States.' *Walling* v. *Michigan*, 116 U. S. 446, 455. Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota* v. *Barber*, above cited; *Robbins* v. *Shelby Taxing District*, 120 U. S. 487, 489. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced."

In *Emert* v. *Missouri*, 156 U. S. 296, 311, a Missouri statute, requiring the payment of a license tax by pedlers, was held to apply to the sale by pedlers in Missouri of sewing machines made in other States, and not to be a regulation of interstate commerce. The decision was placed upon the ground that the statute made no discrimination against the goods of other States as compared with domestic goods.

I am unable to reconcile the opinion and judgment in the present case with the principles announced in the above cases. A tax upon the capital employed by a manufacturing corporation or company is *pro tanto* a tax upon the goods manufactured by it. If this be not so, there are many expressions in the former opinions of this court which should be withdrawn or modified. A corporation or company wholly engaged in manufacture in New York has an advantage, in the sale of its goods in the markets of that State, over a corporation or company manufacturing like goods in other States, if the former is altogether exempted from taxation in respect of its franchise or business, and the latter subjected to taxation of its

franchise or business measured by the amount of its capital employed in New York. That State may undoubtedly tax capital employed within its limits by corporations or companies of other States, but it cannot impose restrictions that will necessarily prevent such corporations or companies from selling their goods in New York upon terms of equality with corporations or companies wholly engaged there in manufacturing goods of like kind. By this statute New York says to the manufacturing corporations and companies of other States: "Remove your plant to New York, and the capital employed by you in this State shall be exempt from taxation. But if you persist in keeping your plant where it is already established, your franchise or business shall be taxed upon the basis of the capital employed by you in New York, while the capital of similar corporations or companies wholly engaged in manufacturing in New York, shall be exempt from taxation." Observe, that the statute of New York does not apply exclusively to corporations. It applies equally to companies.

In my judgment, this statute cannot be sustained in its application to the plaintiff in error without recognizing the power of New York, so far as the Federal Constitution is concerned, to enact such statutes as will, by their necessary operation, amount to a tariff protecting goods manufactured in that State against competition in the markets there with goods manufactured in other States. And if such legislation as is embodied in the statute in question is held to be consistent with the Federal Constitution, why may not New York, while exempting from taxation the franchise or business of corporations or companies wholly engaged in carrying on their manufacturing in that State, put such taxation upon the franchise or business of corporations or companies doing business in that State, but not wholly engaged in manufacture there, as will amount to an absolute prohibition upon the sale in New York of the goods manufactured in other States? If each State in the Union should enact a statute exempting from taxation the franchise and business of corporations or companies wholly engaged in carrying on manufacture within its limits, but taxing the franchise or business of corporations or companies

whose manufacturing is carried on in other States, it is easy to see that commerce among the States would be as much at the mercy of discriminating state legislation as it was under the Articles of Confederation, when, as Mr. Justice Story well said, the Government established to conserve the interests of the people of all the States was competent to declare everything, but was without power to do anything. While the authority of the National Government to lay duties upon goods brought from foreign countries into this country so as to build up and protect American industries has been recognized, I had not supposed it was competent for any State of the Union to exert its power of taxation so as to build up and protect its local industries by means of injurious discriminations against the industries of other States. I had supposed that the Constitution of the United States had established absolute free trade among the States of the Union, and that freedom from injurious discrimination in the markets of any State, against goods manufactured in this country, was a vital principle of constitutional law.

The opinion of the court in this case says: "If the *object* of the law in question was to impose a tax upon products of other States, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that obviously such is not the *purpose* of this legislation. 'Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State, . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows.' It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations

of other States as well, when wholly engaged in manufacture within the State."

I submit that the validity of state legislation, as affected by the Constitution of the United States, is not to be determined altogether by what is supposed to be the "object" or "purpose" of such legislation, if by object or purpose is meant the motive which controlled members of the state legislature when they enacted such legislation. In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted. *Henderson* v. *Mayor of New York*, 92 U. S. 259. This has often been adjudged by this court. "There may be no purpose," this court has said, "upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution;" in which case, "the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." *Minnesota* v. *Barber*, 136 U. S. 313, 319, and authorities there cited. Can it be doubted that, whatever may have been the ostensible object for which the New York statute was passed, the natural and reasonable effect of the statute is to withhold from goods not manufactured in New York — *and because they were not there manufactured* — that equality in the markets of New York which, we have often said, is secured by the National Constitution to the like products of other States? If the plaintiff corporation can be taxed on its capital employed in New York in the business of selling its goods, manufactured in Michigan, while capital employed in New York by a like manufacturing corporation is exempted from taxation *because, and only because, it is wholly engaged in manufacture in that State*, is it possible to deny that such legislation injuriously discriminates against the manufactures of Michigan in favor of the like manufactures of New York?

My brethren refer to the general rule that it is competent for a State to prescribe the conditions upon which corporations of other States may do business within its limits. But I sub-

mit that that rule, however broadly stated, has no application here. The New York statute has not assumed to prescribe any rule applicable alike to all manufacturing corporations or companies of other States. It exempts from taxation all corporations or companies, whether of New York or of other States, that wholly carry on their manufacturing business in New York. Thus a distinction is made between manufacturing corporations and companies by exempting from taxation on their capital employed in New York those, and those only, that wholly carry on their manufacturing in that State. Besides, this court has never, in any case, adjudged that the power of a State to prescribe the conditions upon which the corporations of other States may do business within its limits can be exerted by legislation that directly, or by its necessary operation, discriminates injuriously against the products of other States in favor of the products of such State. On the contrary, in the cases above cited, it has directly adjudged that such legislation was unconstitutional. It is not necessary for me now to question the soundness of the general proposition that a State may prescribe the conditions upon which corporations of other States may come within its limits for purposes of business. A good deal may depend upon the nature of the business in which the foreign corporation is engaged. But I do question the power of any State to exact a tax from corporations or companies not wholly engaged in manufacturing within its limits, if it exempts from such taxation corporations and companies wholly engaged, and only because they are wholly engaged, in manufacturing in such State. If this be not a sound view of the Constitution, it follows that local tax laws may be so framed as to destroy the principle, frequently announced and often recognized by this court, that the products of the respective States may go into the markets of the country without being discriminated against because of the place of their origin.

The only case which seems to give any support whatever to the opposite view is *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. But a careful examination of the report of that case and of the opinion shows that counsel did not present, nor did

the court consider or determine, the precise point here presented, as to the authority of the State to exercise the power of taxation so as to place burdens upon goods, the manufacture of other States, solely because they were not produced in the State imposing the taxation.

Some stress seems to be laid upon the fact that the exemption given by the statute to corporations or companies wholly engaged in carrying on manufactures or in mining ores within the State of New York is not limited to corporations or companies of that State; but that the exemption is allowed to such corporations or companies of other States as may carry on their manufacturing or mining business wholly in New York. This view falls far short of meeting the difficulty presented, namely, that the statute, by its necessary operation, injuriously discriminates against goods manufactured in other States, in that such goods are not permitted to go into the markets of New York and compete there upon equal terms with like goods wholly manufactured in that State. This court has often said that the objection that a local statute was invalid, as restraining or binding commerce among the States, was not met by the suggestion that it operated equally upon citizens of the State which enacted it.

I am of opinion that the statute of New York in its application to the plaintiff in error is inconsistent with the power of Congress to regulate commerce among the States, and with that clause of the Fourteenth Amendment, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws. It is well settled that corporations are persons within the meaning of that clause of the Constitution. *Smyth* v. *Ames*, 169 U. S. 466, 522.

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

Mr. Justice Brown authorizes me to say that he concurs in this dissent.

Mr. Justice White was not present at the argument, and took no part in the decision of the case.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 199. GILA BEND RESERVOIR AND IRRIGATION COMPANY *v.* LINN. Appeal from the Supreme Court of the Territory of Arizona. Argued April 14, 1898. Decided May 31, 1898. Decree affirmed with costs by a divided court. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden* for the appellant. *Mr. Samuel F. Phillips* and *Mr. Frederic D. McKenney* for the appellees.

No. 40. UNITED STATES *v.* CITY OF ALBUQUERQUE. Appeal from the Court of Private Land Claims. Argued October 14, 1898. Decided October 17, 1898. *Per Curiam.* Decrees reversed on the authority of *United States* v. *Santa Fé*, 165 U. S. 675, and cause remanded with directions to proceed therein in the matter of amendments, new parties, and otherwise as justice and equity may require. *Mr. Attorney General*, *Mr. Solicitor General Richards* and *Mr. Matt. G. Reynolds* for the appellant. *Mr. Frank W. Clancy* for the appellee.

No. 217. JESKE *v.* COX. Error to the Superior Court of Milwaukee County, Wisconsin. Motion to dismiss submitted October 17, 1898. Decided October 24, 1898. *Per Curiam.* Dismissed on the authority of *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, 582; *Meyer* v. *Cox*, 169 U. S. 735; *McLish* v. *Roff*, 141 U. S. 661; *Union Mutual Life Insurance Company* v. *Kirchoff*, 160 U. S. 374. *Mr. Howard Morris* for motion to dismiss. No one opposing.

No. 336. CITY OF NEW ORLEANS *v.* WARNER. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss submitted October 10, 1898. Decided

October 24, 1898. *Per Curiam.* Dismissed on the authority of *Tennessee* v. *Union and Planter's Bank*, 152 U. S. 454; *Sawyer* v. *Kochersperger*, 170 U. S. 303. *Mr. Richard DeGray*, *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. Wheeler H. Peckham* for motion to dismiss. *Mr. Samuel L. Gilmore* and *Mr. Brauch K. Miller* opposing. (Mr. Justice White took no part in the consideration and disposition of this motion.)

No. 46. Zeckendorf *v.* Zeckendorf, Guardian. Appeal from the Supreme Court of the Territory of Arizona. Argued October 19, 1898. Decided October 24, 1898. *Per Curiam.* Decree affirmed with costs on the authority of *Gray* v. *Howe*, 108 U. S. 12; *Salina Stock Company* v. *Salina Creek Irrigation Company*, 163 U. S. 109. *Mr. Duane E. Fox* and *Mr. Francis J. Heney* for the appellants. *Mr. E. M. Marble* for the appellee.

No. 50. Jurgens, Sheriff, *v.* Yot Sang. Appeal from the District Court of the United States for the District of Montana. Argued October 25, 1898. Decided October 31, 1898. *Per Curiam.* Final order reversed with costs and cause remanded with a direction to discharge the writ and dismiss the petition on the authority of *Washington* v. *Coovert*, 164 U. S. 702, and cases cited. *Mr. Cornelius B. Nolan* for the appellant. *Mr. A. C. Botkin* for the appellee.

Decisions on Petitions for Writs of Certiorari.

No. 659. Hendrickson *v.* Bradley. Eighth Circuit. Denied May 31, 1898. *Mr. Asa Bird Gardiner* and *Mr. W. A. Day* for petitioner. *Mr. Willis Van Devanter* opposing.

No. 660. Walton *v.* Morgan Envelope Company. Third Circuit. Denied May 31, 1898. *Mr. Walter D. Edmonds* for petitioner. *Mr. Melville Church* and *Mr. J. B. Church* opposing.

Decisions announced without Opinions.

No. 664. GATES IRON WORKS *v.* FRASER & CHALMERS. Seventh Circuit. Denied May 31, 1898. *Mr. L. L. Coburn* and *Mr. Edmund Wetmore* for petitioner. *Mr. L. L. Bond*, *Mr. A. H. Adams*, *Mr. C. E. Pickard* and *Mr. J. L. Jackson* opposing.

No. 665. CARSON CITY GOLD AND SILVER MINING COMPANY *v.* NORTH STAR MINING COMPANY. Ninth Circuit. Denied May 31, 1898. *Mr. A. C. Ellis* and *Mr. J. L. Rawlins* for petitioner. *Mr. Curtis H. Lindley* opposing.

No. 666. LOW *v.* BLACKFORD. Fourth Circuit. Granted May 31, 1898. *Mr. Charles Steele* and *Mr. Wm. D. Guthrie* for petitioner. *Mr. Herbert B. Turner*, *Mr. George Rountree*, *Mr. R. O. Burton*, *Mr. E. J. D. Cross* and *Mr. Hugh L. Bond*, *Jr.*, opposing.

No. 667. MCMASTER, ADMINISTRATOR, *v.* NEW YORK LIFE INSURANCE COMPANY. Eighth Circuit. Denied May 31, 1898. *Mr. Henry J. Taylor* for petitioner. *Mr. G. W. Hubbell* and *Mr. W. E. Odell* opposing.

No. 669. JONES *v.* ALLEN. Eighth Circuit. Denied May 31, 1898. *Mr. John M. Taylor* for petitioner. *Mr. U. M. Rose* and *Mr. G. B. Rose* opposing.

No. 672. EVANS *v.* SUESS ORNAMENTAL GLASS COMPANY. Seventh Circuit. Denied May 31, 1898. *Mr. James H. Raymond* for petitioner.

No. 673. CENTRAL TRUST COMPANY OF NEW YORK *v.* CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK. Eighth Circuit. Denied May 31, 1898. *Mr. A. H. Joline* and *Mr.*

Henry T. Rogers for petitioner. *Mr. Frederic J. Stimson*, *Mr. E. O. Wolcott* and *Mr. J. F. Vaile* opposing.

No. 675. HART *v.* BOWEN. Fifth Circuit. Denied May 31, 1898. *Mr. Charles E. Fenner*, *Mr. Henry J. Leovy* and *Mr. Guy M. Hornor* for petitioner.

No. 311. MCDONNELL *v.* MERCANTILE TRUST COMPANY. Fifth Circuit. Denied October 17, 1898. *Mr. Harry T. Smith* and *Mr. Gregory L. Smith* for petitioner. *Mr. Leopold Wallach*, *Mr. D. P. Bestor* and *Mr. W. A. Blount* opposing.

No. 312. ROBERTS, TREASURER OF THE UNITED STATES, *v.* VALENTINE. Court of Appeals of the District of Columbia. Granted October 17, 1898. *Mr. Attorney General*, *Mr. Henry E. Davis* and *Mr. D. W. Baker* for petitioner. *Mr. B. E. Valentine* opposing.

No. 330. MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* DUBOIS, ADMINISTRATOR. Ninth Circuit. Denied October 17, 1898. *Mr. J. B. Foraker* for petitioner. *Mr. R. E. McFarland* opposing.

No. 337. THIRD NATIONAL BANK OF PHILADELPHIA *v.* NATIONAL BANK OF CHESTER VALLEY. Fifth Circuit. Denied October 17, 1897. *Mr. Henry B. Tompkins* for petitioner. *Mr. W. D. Ellis* opposing.

No. 391. KIESEL & COMPANY *v.* SUN INSURANCE OFFICE OF LONDON. Eighth Circuit. Denied October 17, 1898. *Mr. Abbot R. Heywood* for petitioner. *Mr. T. C. Van Ness* opposing.

Decisions announced without Opinions.

No. 410. RUSSELL *v.* STEARNS & COMPANY. Sixth Circuit. Denied October 17, 1898. *Mr. Henry M. Campbell*, *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for petitioner. *Mr. R. A. Parker* and *Mr. C. F. Burton* opposing.

No. 413. SPRINGER *v.* JAKOBSON. Fifth Circuit. Granted October 17, 1898. *Mr. Richard DeGray* for petitioner.

No. 416. MACDANIEL *v.* UNITED STATES. Fourth Circuit. Denied October 17, 1898. *Mr. Tracy L. Jeffords* for petitioner. *Mr. Attorney General* and *Mr. Assistant Attorney General Boyd* opposing.

No. 426. GARDES *v.* UNITED STATES. Fifth Circuit. Denied October 24, 1898. *Mr. J. R. Beckwith* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

No. 427. GALLOT *v.* UNITED STATES. Fifth Circuit. Denied October 24, 1898. *Mr. J. R. Beckwith* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

No. 430. MAST, FOOS & COMPANY *v.* STOVER MANUFACTURING COMPANY. Seventh Circuit. Granted October 24, 1898. *Mr. Lysander Hill*, *Mr. H. A. Toulmin* and *Mr. Melville Church* for petitioner. *Mr. Charles K. Offield* and *Mr. Charles C. Linthicum* opposing.

No. 346. CITY OF ATTICA, HARPER CO., KANSAS, *v.* SPRINGFIELD SAFE DEPOSIT & TRUST COMPANY. Eighth Circuit. Denied October 24, 1898. *Mr. William T. S. Curtis* and *Mr. C. V. Ferguson* for petitioner. *Mr. Henry A. King* opposing.

Decisions announced without Opinions.

No. 370. CASTNER AND CURRAN *v.* COFFMAN. Fourth Circuit. Granted October 24, 1898. *Mr. Arthur V. Briesen* and *Mr. H. E. Everding* for petitioner. *Mr. A. G. Safford* opposing.

No. . FULLER *v.* FIELD. Seventh Circuit. Denied October 31, 1898. *Ezerean Fuller* for petitioner.

No. 418. P. LORILLARD COMPANY *v.* PEPER. Eighth Circuit. Denied October 31, 1898. *Mr. M. B. Philipp* and *Mr. Frederic D. McKenney* for petitioner. *Mr. Smith P. Galt* opposing.

No. 419. CONTINENTAL NATIONAL BANK OF NEW YORK CITY *v.* HEILMAN. Eighth Circuit. Denied October 31, 1898. *Mr. John L. Cadwalader* and *Mr. Addison C. Harris* for petitioner. *Mr. Charles W. Smith*, *Mr. John S. Duncan*, *Mr. Alexander Gilchrist* and *Mr. C. A. DeBruler* opposing.

No. 431. WINSTON *v.* UNITED STATES. Court of Appeals of the District of Columbia. Granted October 31, 1898. *Mr. George Kearney* for petitioner.

No. 432. STRATHER *v.* UNITED STATES. Court of Appeals of the District of Columbia. Granted October 31, 1898. *Mr. Samuel D. Truitt* and *Mr. Tracy L. Jeffords* for petitioner.

No. 433. SMITH *v.* UNITED STATES. Court of Appeals of the District of Columbia. Granted October 31, 1898. *Mr. Chapin Brown* for petitioner.

No. 443. KNIGHTS TEMPLARS AND MASONS' LIFE INDEMNITY COMPANY *v.* CONVERSE. Seventh Circuit. Denied October 31, 1898. *Mr. Charles H. Aldrich* for petitioner. *Mr. James H. Hopkins* opposing.

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HABEAS CORPUS.

1. When the committing court has jurisdiction of the subject-matter and of the person, and power to make the order for disobedience to which a judgment in contempt is rendered, and to render that judgment, then the appellate court cannot do otherwise than discharge a writ of *habeas corpus* brought to review that judgment, and secure the prisoner's discharge, as that writ cannot be availed of as a writ of error or appeal. *Tinsley* v. *Anderson*, 101.
2. It was competent for the District Court to compel the surrender of the minute book and notes in Tinsley's possession, and he could not be discharged on *habeas corpus* until he had performed, or offered to perform so much of the order as it was within the power of the District Court to impose, even though it may have been in some part invalid. *Ib.*

See JURISDICTION, A, 3.

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INTERSTATE COMMERCE.

1. Thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the Joint Traffic Association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western termini of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest therein over its own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should coöperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges,

lies;" and that that act does not cover, and was not intended to cover, such kind of agreements. *Hopkins* v. *United States*, 578.

3. The Traders' Live Stock Exchange was an unincorporated association in Kansas City, whose members bore much the same relation to it, and through it carried on much the same business as that carried on by the members of the Kansas City Live Stock Exchange, considered and passed upon in *Hopkins* v. *United States*, *ante*, 578. The principal difference was, that the members of the Traders' Exchange, defendants in the present proceedings, were themselves purchasers of cattle on the market, while the defendants in the former case were commission merchants who sold cattle upon commission as a compensation for their service. The articles of association of the Traders' Exchange contained the following preamble: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization." The rules objected to in the bill in this case were the following: "Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange. Rule 11. When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange. Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange. Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party." *Held:* (1) That this court is not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act; (2) That, following the preceding case, in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations; (3) That where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered

into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object; (4) That the rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and that for such purpose they are reasonable and fair, and that they can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress. *Anderson* v. *United States*, 604.

See CONSTITUTIONAL LAW, 1–6.

JUDGMENT.

See JURISDICTION, A, 9.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. *Eustis* v. *Bolles*, 150 U. S. 361, affirmed to the points: (1) That to give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it; (2) That where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question not Federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment. *Harrison* v. *Morton*, 38; *Pierce* v. *Somerset Railway*, 641.
2. The appellate jurisdiction of this court from a state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a State where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. *Tinsley* v. *Anderson*, 101.
3. If the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the State having jurisdiction of the case,

3. To the third question, viz.: "3. Is the easterly side of the New York Lode mining claim an 'end line' of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?" it gives a negative answer. *Ib.*
4. The fourth question, viz.: "4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?" it answers in the affirmative. *Ib.*
5. It holds that the fifth question, viz.: "5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?" in effect seeks from this court a decision of the whole case, and therefore is not one which it is called upon to answer. *Ib.*
6. In discussing the first of these questions the court holds: (1) That it is dealing with statutory rights, and may not go beyond the terms of the statutes; (2) That as Congress has prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his own territory; (3) That the Government does not grant the right to search for minerals in lands which are the private property of individuals, or authorize any disturbance of the title or possession of such lands; (4) That the location of a mining claim means the giving notice of that claim: that it need not follow the lines of Government surveys: that it is made to measure rights beneath the surface: and that although the statute requires it to be distinctly marked on the surface, the doing so does not prevent a subsequent location by another party upon the same, or a part of the same territory, as, in such case, the statute provides a way for determining the respective rights of the parties: (5) That the requisition in the statute that the end lines of the location should be parallel was for the purpose of bounding the under-ground extralateral rights which the owner of the location might exercise. (6) That the answer to the first question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. *Ib.*
7. In discussing the fourth of these propositions the court says: "Our conclusions may be summed up in these propositions: *First*, the location as made on the surface by the locator determines the extent of rights below the surface. *Second*, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. *Third*, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he

enters beneath the surface of some other proprietor. *Fourth*, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location." *Ib.*

8. The answer given to the fourth question in *Del Monte Mining and Milling Co.* v. *Last Chance Mining and Milling Co.*, 171 U. S. 55, compels an affirmance of the judgment below in this case. *Clark* v. *Fitzgerald*, 92.

9. On the 28th of April, 1871, on a previous location made in 1857, the Providence Gold and Silver Mining Company obtained a patent in which it was recited that it was "the intent and meaning of these presents to convey" to the company "the vein or lode in its entire width for the distance of 3100 feet along the course thereof." Under that act a patent could be issued for only one vein; but the act of May 10, 1872, c. 152, gave to all locations theretofore made, as well as to all thereafter made, all veins, lodes and ledges, the top or apex of which lies inside of the surface lines. September 29, 1877, the Champion Mining Company made a location upon the Contact Vein, which overlapped the Providence location, both as to surface ground and lode. In 1884 a dispute took place, which brought about a relocation of the lode line of the Champion Company; but eventually the conflicting claims resulted in this suit. *Held*, (1) That the extent of the rights passing under the act of 1866 was decided by this court in *Mining Co.* v. *Tarbet*, 98 U. S. 463, viz.: that "the right to follow the dip of the vein is bounded by the end lines of the claim;" (2) That that right stops at the end line of the lode location, terminated by vertical lines drawn downward; (3) That the original location and lode determined those end lines. *Walrath* v. *Champion Mining Co.*, 293.

10. The following propositions, announced in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, *ante*, 55, are affirmed with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries: "*First*, the location as made on the surface by the locator determines the extent of rights below the surface. *Second*, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. *Third*, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond

PRACTICE.

See NEW MEXICO, LAWS OF, 1.

PUBLIC LAND.

REMOVAL OF PUBLIC OFFICERS.