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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1898

J. C. BANCROFT DAVIS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
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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, 1898.

WALLA WALLA CITY *v.* WALLA WALLA WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

No. 28. Argued October 12, 13, 1898. — Decided November 14, 1898.

By an act of November 28, 1883, the legislature of Washington Territory incorporated the city of Walla Walla, conferring upon it, among other powers, the power to provide a sufficient supply of water for the city, and the right to permit the use of the city streets for the purpose of laying pipes for furnishing such supply for a term not exceeding twenty-five years. The act contained a further provision fixing the limit of indebtedness of the city at fifty thousand dollars. The city, under this authority, by contract granted to the Walla Walla Water Company the right to lay and maintain water mains, etc., for twenty-five years, reserving to itself the right to maintain fire hydrants and to flush sewers during this term, each without charge. The contract further provided that it was voidable by the city, so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of such supply, or a like failure on the part of the company to perform its agreements, and that, until the contract should have been so avoided, the city should not erect, or maintain, or become interested in other water works. These provisions were accepted by the Water Company, and were complied with by it, and the contract was in force when this bill was filed. In 1893 the city authori-

ties passed an ordinance to provide for the construction of a system of water works to supply the city with water, and to issue bonds for that purpose to the amount of one hundred and sixty thousand dollars, which ordinance was accepted by the necessary majority of legal voters. The Water Company then filed its bill to enjoin the city from creating the proposed water works, or from expending city moneys for that purpose, or from issuing city securities therefor. To this bill the city demurred, resting its demurrer upon a want of jurisdiction, all parties on both sides being citizens of the State of Washington. *Held:*

(1) That the allegations in the bill raise a question of the constitutional power of the city to impair the obligations of its contract with the plaintiffs by adopting the ordinance;

(2) That the grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets of a city, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, (which may be made by municipal authorities when the right to do so is given by their charters,) in consideration of the performance of a public service, and, after performance by the grantee, is a contract, protected by the Constitution of the United States against state legislation to impair it;

(3) That the plaintiff has no adequate and complete remedy at law, and the court has jurisdiction in equity;

(4) That as the contract was limited to twenty-five years, and as no attempt was made to grant an exclusive privilege, the city acted within the strictest limitation of its charter;

(5) That if the contract for the water supply was innocuous in itself, and was carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power could not be invoked to abrogate or impair it;

(6) That the stipulation that the city would not erect water works of its own during the life of the contract did not render it objectionable;

(7) That the objection that the indebtedness created by the contract exceeded the amount authorized by the charter was without merit, under the circumstances;

(8) That the act of 1883, being subsequent to the general statute of 1881, authorizing cities to provide for a supply of water, was not in violation of that act;

(9) That the city was bound to procure the nullity of the contract before the courts, before it could treat it as void.

This was a bill in equity filed by the Water Company to enjoin the city of Walla Walla and its officers from erecting water works in pursuance of an ordinance of the city to that effect, or from acquiring any property for the purpose of carrying out such enterprise, or from expending the moneys

of the city, or selling its bonds or other securities for the purpose of enabling the city to erect such water works.

The facts are substantially as follows: By an act of the Territory of Washington, November 28, 1883 (Laws of 1883, 270), incorporating the city of Walla Walla, it was enacted (section 11) that the city should have "power . . . to provide . . . a sufficient supply of water;" and by section 10 "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years, . . . provided always, that none of the rights or privileges herein granted shall be exclusive, nor prevent the council from granting the same rights to others." Other sections are as follows:

"SEC. 11. The city of Walla Walla shall have power to erect and maintain water works within or without the city limits or to authorize the erection of the same, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, . . . and to enact all ordinances and regulations necessary to carry the power herein conferred into effect; but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city, or pay a property tax therein, on not less than five hundred dollars' worth of property, shall at a general or special election vote for the same.

"SEC. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works, and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof."

* * * * *

"SEC. 22. The city of Walla Walla shall have power to adopt proper ordinances for the government of the city, and to carry into effect the powers given by this act."

* * * * *

"SEC. 23. The city of Walla Walla shall have power to establish and regulate the fees and compensation of all its officers, except when otherwise provided, and have such other power and privileges not here specifically enumerated as are incident to municipal corporations."

* * * * *

"SEC. 24. The power and authority hereby given to the city of Walla Walla by this act shall be vested in a mayor and council, together with such other officers as are in this act mentioned, or may be created under its authority."

* * * * *

"SEC. 43. The city council shall possess all the legislative powers granted by this act."

* * * * *

"SEC. 103. The rights, powers and duties and liabilities of the city of Walla Walla and of its several officers shall be those prescribed in this act, and none others, and this is hereby declared a public act."

* * * * *

"SEC. 105. The limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars."

Pursuant to these sections of the charter, the city council, on March 15, 1887, passed "An ordinance to secure a supply of water for the city of Walla Walla," by which it granted, under certain restrictions, to the Water Company, for the period of twenty-five years from the date of the ordinance, "the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city, for the purpose of furnishing the inhabitants thereof with water."

By section 4 the city reserved the right to erect and maintain as many fire hydrants as it should see fit, and, in case of fire, that the city should have all reasonable and necessary control of the water for the extinguishment thereof.

The ordinance also contained the following further provisions:

"SEC. 5. The city of Walla Walla shall pay to said Walla

Walla Water Company for the matters and things above enumerated, quarter-yearly, on the first days of July, October, January and April of each year, at the rate of fifteen hundred dollars ($1500) per annum, for the period of twenty-five (25) years from and after the date of the passage of this ordinance, the first quarterly payment to be made on the first day of October next (October 1, 1887).

"SEC. 6. The city of Walla Walla shall during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, not oftener than once each week.

"SEC. 7. For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-five (25) years; and this contract shall be voidable by the city of Walla Walla so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part, herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain or become interested in any water works except the ones herein referred to, save as hereinafter specified.

"SEC. 8. Neither the existence of said contract nor the passage of this ordinance shall be construed to be or be a waiver of or relinquishment of any right of the city to take, condemn and pay for the water rights and works of said or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company."

The Water Company accepted this ordinance, entered into a formal contract with the city, and substantially complied with the terms and conditions of such contract — which has never been avoided by the city or by the courts, and was still in force at the time the bill was filed.

After this contract had been in force and the stipulated rentals paid for about six years, on June 20, 1893, an ordinance was passed "to provide for the construction of a system of water works" for the purpose of supplying the city and its inhabitants with water; to authorize the purchase and condemnation of land for that purpose, and the issue of bonds to the amount of $160,000 to provide the necessary funds. Pursuant to the provisions of such ordinance an election was held whereby the proposition submitted by the ordinance was carried by a sufficient majority of the legal voters.

The answer of the defendants insisted that the contract of the city with the plaintiff was not a valid and binding contract, so far as concerned the stipulation binding the city not to erect or maintain or become interested in any system of water works other than that of the plaintiff.

A demurrer to the bill having been overruled, and a preliminary injunction having been granted pursuant to the prayer of the bill, the case subsequently went to a hearing upon the pleadings and proofs, and resulted in a decree perpetuating the injunction. From this decree defendants appealed directly to this court, pursuant to section 5 of the Circuit Court of Appeals act, allowing such appeal in any case that involves the construction or application of the Constitution of the United States.

Mr. A. H. Garland for appellants. *Mr. J. Hamilton Lewis* and *Mr. R. Garland* were on his brief.

Mr. John H. Mitchell for appellee.

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

The demurrer to the plaintiff's bill rested principally upon

a want of jurisdiction of the court in certain particulars hereinafter specified. There was confessedly no diversity of citizenship, and the case was treated by the court below as one arising under the Constitution and laws of the United States.

1. The jurisdiction depends specifically upon the allegation in the bill that defendants insist that the contract of the city with the plaintiff was not a valid and binding contract, either in respect to the stipulation binding the city not to erect, maintain or become interested in any system of water works other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by the plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the plaintiff for the trade and custom of the consumers of water; that the plaintiff is the owner of property in the city of the value of $125,000, and pays taxes to the city on the same; that if the city is permitted to borrow money and apply the same to the erection of water works, the indebtedness will become a cloud and burden upon all taxable property in the city, and that such loan is inequitable, and imposes upon the taxpayers a large and unnecessary burden; that the value of plaintiff's property is largely dependent upon the fact of its having no competition, and that the threatened action of the city has greatly diminished the value of such property and the credit of the company, and that it finds itself without the ability to borrow money to make the necessary additions and repairs to its property; and, in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guaranteed to it under the Constitution of the United States.

These allegations, upon their face, raise a question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance of June 20, 1893. The argument of the defendant in this connection is that the action of the city in contracting with the Water Company, and in passing the ordinance of 1893 providing for the erec-

tion of water works, was not in the exercise of its sovereignty; that in these particulars the city was not acting as the agent of the State, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interests; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizens and nowise as the agent of the State; and, therefore, that neither the State nor the city as its agent can be charged either with the making or the impairing of the original contract; that for these reasons the Constitution of the United States has no application to the case, the Federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the State of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy.

It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step farther, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the State or its authorized agent, but one of an ordinary breach of contract by a private party, and hence the case does not arise under the Constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the

court, or the application of the contract clause, may admit of considerable doubt, if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64; *Crescent City Gas Light Co.* v. *New Orleans Gas Light Co.*, 27 La. Ann. 138, 147.

It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the Supreme Court of Ohio in *State* v. *Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262, 293: "And assuming that such a power" (granting franchises to establish gas works) "may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority." This case is directly in line with those above cited. See also *Wright* v. *Nagle*, 101 U. S. 791; *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258, 266; *Bacon* v. *Texas*, 163 U. S. 207, 216; *New Orleans &c. Co.* v. *New Orleans*, 164 U. S. 471.

The cases relied upon by the appellant are no authority for the position assumed, that the Federal court has no jurisdic-

tion of a case wherein the charter of a water company is alleged to have been impaired by subsequent legislation. In several of these cases the actions were for negligence in the performance of certain duties which the court held to be public or private, as the case might be. *New Orleans* v. *Abbagnato*, 23 U. S. App. 533, 545; *Maxmilian* v. *Mayor*, 62 N. Y. 160; *Western College* v. *Cleveland*, 12 Ohio St. 375. In *Safety Insulated Wire & Cable Co.* v. *Baltimore*, 25 U. S. App. 166, a contract to put electric wires under ground was held to be for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the State at large, and that with reference to such contracts the city must be regarded as a private corporation. The contract was held to be one into which the city could lawfully enter, but no question of jurisdiction was made. In *Illinois Trust &c. Bank* v. *Arkansas*, 40 U. S. App. 257, the power to contract for water works was held to be for the private benefit of the inhabitants of the city, and that in the exercise of these powers a municipality was governed by the same rules as a private corporation, but the jurisdiction of the case was apparently dependent upon citizenship.

We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States. Granting that in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company have been treated as falling within the constitutional

provision, are altogether too numerous to be now questioned or even to justify citation.

2. The argument which attacks the jurisdiction of the court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction, goes rather to the sufficiency of the pleading than to the jurisdiction of the court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a private corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contracts should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain or become interested in any water works except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge, and within the common observation of men. That which is patent to any one of average understanding need not be particularly averred.

3. The objection that a court of equity has no jurisdiction, because the plaintiff has a complete and adequate remedy at law, is equally untenable. Obviously it has no present remedy at law, since the city has done nothing in violation of its

covenant not to erect competing water works and the Water Company has as yet suffered no damage. It is true that after the city shall have gone to the great expense of erecting a plant of its own and of entering into competition with the plaintiff company, the latter would doubtless have a remedy at law for breach of the covenant. In the meantime great, perhaps irreparable, damage would have been done to the plaintiff. What the measure of such damage was would be exceedingly difficult of ascertainment and would depend largely upon the question whether the value of the plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with the business of the plaintiff.

This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215; *Ins. Co.* v. *Bailey*, 13 Wall. 616, 621; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Tyler* v. *Savage*, 143 U. S. 79, 95.

Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction. In such a case as this, the remedy will save to one party or the other a large pecuniary loss — to the city, if it be obliged to pay to the plaintiff damages occasioned by the establishment of its competing works; — to the plaintiff, if it be adjudged that the city has a right to do so.

But it is further insisted in this connection that, under section 8 of the contract, the city had the right at any time to take and condemn the water works of the company, and that, in case of such condemnation, the contract should not be taken into consideration in estimating the value of the water works;

and hence, that if the city elected to establish water works of its own, without condemning those of the plaintiff company, the value of such water works would furnish the proper measure of damages in such action. This argument necessarily assumes, however, that the damages in such action would be the same as in a proceeding for condemnation. Perhaps if the plaintiff company were forced to abandon its works entirely by the competition of the city, the value of such works might furnish the measure of its compensation; but it could not be forced to do this, and if the company elected not to abandon, but to enter into competition with the city, the damages would have to be estimated by the probable injury done to the company by such competition. This, as above indicated, would furnish a most uncertain basis.

4. The case upon the merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract, which purports to have been passed in pursuance of this charter, declared that until such contract should be avoided by a court of competent jurisdiction, the city should not erect, maintain or become interested in any water works except the ones established by the company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of water works by the city for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict — the latter clearly impaired the obligation of the former.

The argument of the city is that the council exceeded its powers in authorizing the contract with the Water Company for a continuous supply of water and the payment of rentals for twenty-five years, and that such contract was specially obnoxious in its stipulation that the city should not construct water works of its own during the life of the contract. The several objections to the contract are specifically stated by counsel for the city in their brief as follows:

a. The contract creates a monopoly which, in the absence of an express grant from the legislature of power so to do or such power necessarily implied, is void as in contravention of public policy;

b. The contract is void as an attempt to contract away a part of the governmental power of the city council;

c. The contract is void as creating an indebtedness in excess of the charter limits;

d. The contract is in violation of the express provision of a general statute of the Territory of Washington.

By section 10 of the city charter, the city is authorized "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years, . . . provided always, that none of the rights or privileges hereinafter granted shall be exclusive or prevent the council from granting the said rights to others;" and by section 11 "the city of Walla Walla shall have power to erect and maintain water works within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water."

As the contract in question was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the Water Company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Water Works* v. *Atlantic City*, 48 N. J. Law, 378.

Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect. It is true that in *City of Brenham* v. *Brenham Water Works*, 67 Texas, 542, a city ordinance granting to the water company the right and privilege for the term of twenty-five years of supplying the city with water, for which the city agreed to pay an annual rental for each hydrant, the Supreme Court of Texas held to be the grant of an exclusive privilege to the water company for the period named. The decision seems to have been rested largely upon the use of the words "privilege" and "supplying" — words which are not found in the contract in this case. Without expressing an opinion upon the point involved in that case, we are content to say

that an ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect water works of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise.

5. The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. Thus in *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, an act of the General Assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might buy or own. Subsequently, the charter of the village of Hyde Park was revised, and

power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the State, citing *Coates* v. *Mayor &c. of New York*, 7 Cowen, 585.

Substantially, the same ruling was made in *Butchers' Union Co.* v. *Crescent City &c. Co.*, 111 U. S. 746, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaughter houses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughter houses.

The same principle has been applied to charters for the maintenance of lotteries which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government; *Boyd* v. *Alabama*, 94 U. S. 645; *Stone* v. *Mississippi*, 101. U S. 814; *Douglas* v. *Kentucky*, 168 U. S. 488; as well as to laws regulating the liquor traffic, *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657; and even laws regulating the inspection of coal oil; *United States* v. *DeWitt*, 9 Wall. 41; *Patterson* v. *Kentucky*, 97 U. S. 501. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York* v. *Squire*, 145

U. S. 175; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

6. Nor do we think the contract objectionable in its stipulation that the city would not erect water works of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish water works of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.

An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not

to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself — a field in which it undoubtedly would have become the master — and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking.

Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party. The more prominent of these cases are *Minturn* v. *Larue*, 23 How. 435; *Wright* v. *Nagle*, 101 U. S. 791; *State* v. *Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262; *Logan* v. *Pyne*, 43 Iowa, 524; *Jackson Co. Horse Railroad* v. *Rapid Transit Railway Co.*, 24 Fed. Rep. 306; *Norwich Gas Co.* v. *Norwich City Gas Co.*, 25 Conn. 19; *Saginaw Gas Light Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Grand Rapids Electric Light and Power Co.* v. *Grand Rapids Edison &c. Gas Co.*, 33 Fed. Rep. 659; *Gale* v. *Kalamazoo*, 23 Michigan, 344. These cases furnish little or no support to the proposition for which they are cited.

If, as alleged in the answer, the Water Company failed to carry out its contract, and the supply furnished was inadequate for domestic, sanitary or fire purposes, and the pressure so far insufficient that in many parts of the city water could not be carried above the first story of the buildings, the seventh section of the contract furnished an adequate and

complete remedy by an application to the courts to declare the contract void.

7. The objection that the indebtedness created by this contract exceeds the amount authorized by the charter raises a serious though by no means a novel question. The objection is founded upon section 105 of the charter, which enacts "that the limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars," and, upon the allegation in the bill that the city, at the date of the contract, was indebted in a sum exceeding $16,000. The city, by section 5 of its ordinance and contract with the Water Company, agreed to pay a rental of $1500 per annum for twenty-five years, or an aggregate amount of $37,500, which, added to the existing indebtedness of $16,000, would create a debt exceeding the limited amount of $50,000.

There is a considerable conflict of authority respecting the proper construction of such limitations in municipal charters. There can be no doubt that if the city proposed to purchase outright, or establish a system of water works of its own, the section would apply, though bonds were issued therefor made payable in the future. *Buchanan* v. *Litchfield*, 102 U. S. 278; *Culbertson* v. *Fulton*, 127 Illinois, 30; *Coulson* v. *Portland*, Deady, 481; *State* v. *Atlantic City*, 49 N. J. Law, 558; *Spilman* v. *Parkersburg*, 35 W. Va. 605; *Beard* v. *Hopkinsville*, 95 Kentucky, 239. There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter. *Niles Water Works* v. *Niles*, 59 Michigan, 311; *Humphreys* v. *Bayonne*, 55 N. J. Law, 241; *Salem Water Co.* v. *Salem*, 5 Oregon, 29.

But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter.

There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by instalments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. *Wood* v. *Partridge*, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own, exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting water works upon the faith of the city paying its annual rentals. *Smith* v. *Dedham*, 144 Mass. 177; *Crowder* v. *Sullivan*, 128 Indiana, 486; *Saleno* v. *Neosho*, 127 Missouri, 627; *Valparaiso* v. *Gardner*, 97 Indiana, 1; *New Orleans Gas Light Co.* v. *New Orleans*, 42 La. Ann. 188; *Merrill Railway & Lighting Co.* v. *Merrill*, 80 Wisconsin, 358; *Weston* v. *Syracuse*, 17 N. Y. 110; *East St. Louis* v. *East St. Louis Lighting Co.*, 98 Illinois, 415; *Grant* v. *Davenport*, 36 Iowa, 396; *Lott* v. *Waycross*, 84 Georgia, 681; *Burlington Water Co.* v. *Woodward*, 49 Iowa, 58.

The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers or other salaried employés to whom

the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen and the supply of water by the payment of annual rentals therefor.

It is true that in the case of *Lake County* v. *Rollins*, 130 U. S. 662, it was held by this court that a similar provision in the constitution of Colorado was an absolute limitation upon the power to contract any and all indebtedness, including warrants used for county expenses such as for witness and jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc.; but the case is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defence being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but, as it appears that the limit of indebtedness was $50,000 and the amount of the city debt but $16,000, it is clear that the payment of an annual rental of but $1500 would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness a different question would be presented.

8. Further objection is made to this contract upon the ground that it is violative of a general statute of the Territory of Washington, enacted December 1, 1881, authorizing cities, etc., to provide for a supply of water. By the first section of this act all cities are authorized to contract for a term not exceeding twenty-five years with corporations for a supply of water, but section 2 states that before any such contract

shall be entered into, the terms of the proposed contract shall be submitted to a vote of the taxpayers at a special election to be called by the council after a notice of three weeks. As no such election was held to ratify the contract in this case, it is insisted that the city council was never authorized to enter into it.

We are of opinion, however, that the general act of 1881 was, so far as it applied to the city of Walla Walla, superseded by the charter of November 28, 1883, which provided that the city might enter into contracts for the purpose of supplying its inhabitants with water without any further requirement that an election should be held to ratify such contract. That no such ratification by the electors was intended is also evident from section 11 of the charter, which enacts that no water works shall be *erected* by the city without a vote of a majority of its freeholders. The fact that such ratification was required where water works were to be erected, and that no mention was made of a vote where the city contracted with a corporation for such purpose, clearly evinces an intent on the part of the legislature to permit the city to make a contract for a limited term without appealing to the people for their assent. While the special act is silent with reference to the ratification of contracts to supply water, we think the maxim *expressio unius est exclusio alterius* is applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular, leaving the general law to stand where it is proposed that the city shall erect and maintain water works of its own.

9. Finally, it is argued, that upon the facts of this case it clearly appears that the plaintiff company has failed to comply with its contract to furnish an ample supply of good and wholesome water; that the pressure in the mains was not sufficient for fire protection, or for domestic purposes and irrigation of lawns; that the pressure was not a sufficient supply for satisfactory use in the second stories of buildings; that several of the city additions are higher than the reservoir, and cannot be supplied from them, etc.

We are of opinion, however, that these facts cannot be set up

in defence to this bill. By the express provision of section 7 of the contract ordinance, it was made voidable by the city of Walla Walla so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of supply, or a failure on the part of the company to keep or perform any agreement on its part specified in the contract, and until "so avoided" the city would not erect water works of its own. Had the city failed to pay its quarterly rentals, we should have no doubt that in an action to recover the same it might set up the failure of the company to perform its contract. Perhaps it might itself institute an action for that purpose, but we do not think it within the power of the city to constitute itself the judge, and to proceed to erect water works of its own upon the theory that the company had failed to carry out its contract, without, in the language of section 7, obtaining the judgment of a court of competent jurisdiction to that effect. As the section provides the manner in which the failure of the company shall be legally established, we think the city was bound to pursue this course before taking steps to erect water works of its own. We have already held that so long as the contract remained in force the city had no right to establish water works, but under section 7 of the ordinance and contract the failure of the company to furnish a sufficient supply did not of itself avoid the contract. It rendered the contract voidable, not void. The city was bound to procure its nullity before the courts before it could treat it as void. Whether if a sudden emergency arose, requiring immediate action on the part of the city to procure a further supply, or to preserve the health of its inhabitants, a preliminary avoidance of the contract would be necessary, is a question not involved in this case, and upon which we express no opinion. There was no pretence that the water was impure, and the evidence was conflicting upon the sufficiency of the supply.

Upon the whole case, we are of opinion that the decree of the Circuit Court must be

Affirmed.

ANDERSEN *v.* TREAT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 415. Argued November 8, 1898. — Decided November 14, 1898.

The principle that a writ of *habeas corpus* cannot be made use of as a writ of error is again announced and affirmed.

Where a petition for a writ of *habeas corpus* is founded upon judicial proceedings which are claimed to be void, and those proceedings and the records thereof are insufficiently set forth in the petition, the originals may be referred to on the hearing.

It appearing on examination of the original record and proceedings that the contention of the petitioner as to the facts is not supported by them, this case comes within the general rule that the judgment of a court having jurisdiction of the offence charged and of the party charged with its commission is not open to collateral attack; and it is held that the District Court could not have done otherwise than deny the writ, and its order in that respect is affirmed, and the mandate ordered to issue at once.

John Andersen was indicted in the Circuit Court of the United States for the Eastern District of Virginia at the November term thereof, A.D. 1897, and, December 23, 1897, convicted of the murder, on August 6, 1897, on the high seas, of William Wallace Saunders, mate of the American vessel Olive Pecker, and sentenced to death. The case was brought to this court on error and the judgment was affirmed May 9, 1898. 170 U. S. 481. The mandate having gone down, execution of the sentence was fixed for August 26, 1898. On that day, (H. G. Miller and P. J. Morris assuming to act as his counsel,) Andersen filed a petition in the District Court of the United States for the Eastern District of Virginia, praying for a writ of *habeas corpus*, on the ground that he was held in custody for execution "in violation of the laws and the Constitution of the United States of America," in that he had been deprived "of the free exercise of his rights to be represented by counsel, in accordance with article 6 of the Amendments of the Constitution of the United States."

Statement of the Case.

The petition stated:

"Your petitioner represents that on the 7th day of November, 1897, he was delivered to the United States marshal for the Eastern District of Virginia, charged with having committed the crime of murder within the maritime jurisdiction of the United States of America; that as a prisoner of the said United States marshal he was confined on the day of his delivery in the city jail in the city of Norfolk to await his examination, as provided by law, before the United States commissioner for the Eastern District of Virginia; that on that day, viz., the 7th day of November, 1897, while thus detained in the city jail of the city of Norfolk, he employed as counsel to represent him one P. J. Morris, an attorney at law, residing in the city of Norfolk, Virginia.

"Your petitioner further represents that after securing the services of the said Morris, on the same day the said Morris called at the city jail (the place of the detention of your petitioner) and asked permission to see your petitioner to consult with him as attorney and client. Your petitioner represents that admission was refused my said attorney, for the reason that the district attorney of the United States for the Eastern District of Virginia had instructed the jailor and others in charge of your petitioner to allow no one, without exception, to see your petitioner; whereupon your petitioner represents that on the 7th day of November, 1897, my said attorney asked permission, by phone, of the district attorney for the Eastern District of Virginia, to permit him to visit the said jail and consult with your petitioner; that said application was refused, and that on account of the order of the district attorney lodged with the jailors and keepers of the prison in which your petitioner was detained, your petitioner was denied the right of the assistance of counsel to represent your petitioner.

"Your petitioner further represents that the district attorney for the Eastern District of Virginia informed your petitioner's counsel on the night of the 7th of November, 1897, that he would let him know on the following day whether or not permission would be granted your petitioner's counsel to consult

with your petitioner. Your petitioner represents that instead of informing my said attorney and giving my said attorney full notice as to the time when your petitioner's preliminary hearing would be held, and before the United States district attorney for the Eastern District of Virginia had given my said attorney permission to consult with me, I was taken in irons, handcuffed, to the office of the United States commissioner and examined, without aid or presence of my attorney. Your petitioner further represents that before the time the said examination was completed and statements made by me were finished, my said attorney discovered that said examination was going on without his presence and before any consultation could be held between your petitioner and his said attorney, and my said attorney thereupon applied to the said district attorney of the United States and to the Honorable Robert W. Hughes, late judge for the Eastern District of Virginia, and was told by them that, as the defence of your petitioner was inconsistent with the defence of others charged at the same time with complicity in the destruction of the vessel, Olive Pecker, that any attorney representing both prisoners was objectionable, and that the court would not permit the same attorney to represent both your petitioner and the other prisoners, and therefore the court would assign him an attorney to represent him. Your petitioner therefore represents that he was deprived of the free exercise of his rights to be represented by counsel, in accordance with article 6 of the Amendments of the Constitution of the United States, and that therefore the action of the court in depriving him of the right to select his own counsel the court exceeded its power and jurisdiction, and that therefore the trial and proceedings therein are null and void, and that the judgment and the sentence of the court are void and in violation of his constitutional rights, as he will show."

The matter came on for hearing on the petition, together with an order and certain papers, which were made part of the proceedings by consent of parties, and were as follows:

1. The order was entered by District Judge Hughes on December 14, 1897, *nunc pro tunc* as of November 8, and

read: "The court having, on the 8th day of November, 1897, upon its own motion, as well as upon the request of the accused, John Andersen, assigned George McIntosh, Esq., as counsel for the said John Andersen, under and by notice of sec. 1034 of the Revised Statutes of the United States, and it appearing to the court that he has since then performed the duties of such counsel and has been recognized as such by this court in all proceedings had herein.

"And it further appearing that no entry of said assignment was made in the minutes of this court for the said 8th day of November, A.D. 1897, it is hereby ordered that the said assignment be now entered by the clerk of this court as of the said 8th day of November, A.D. 1897."

No indictment had been found November 8, but the *nunc pro tunc* order of December 14, referred in its title to five indictments against Andersen, numbered 234, 235, 236, 239 and 240, two of said indictments being for arson on the high seas; two of them for the murder of Saunders; and one for the murder of John W. Whitman.

2. A statement dated at Norfolk, Virginia, November 9, 1897, and signed by P. J. Morris, as counsel for Horsburgh, Lind, Barrial, Barstad and March, which, referring to the United States District Attorney, declared:

"Mr. White, in this case, as in all others, has shown me the utmost consideration. Yesterday morning, when I went up to the office of Mr. White, I found he was about to examine the prisoners, and told him that I expected to be employed by them. Mr. White informed me that he had not himself talked with the men, and that it was imperatively necessary that he should do so in order to judge which would be indicted and which might be needed only as witnesses; that as soon as he had completed that and the men had employed me, they would be at my disposal. I acquiesced in the propriety of this position. The men were in custody of the United States marshal and in the United States marshal's room after this preliminary examination, which I understand was voluntary on the part of the prisoners, and before it was finished I applied to Judge Hughes to give me permission to

see the men, who were then in the United States marshal's custody and in his office. This was done, and five of the men then in writing employed me, and I then gave this writing to Mr. White.

"I desire distinctly to say that in this matter Mr. White has done nothing which justifies any criticism on my part, and I have to thank him in this, as in other matters, for courtesies of a very considerate character."

3. The writing referred to was dated November 8, addressed to the judge of the United States court at Norfolk, and signed by Horsburgh, Barstad, March, Barrial and Lind, who thereby authorized "P. J. Morris to represent us in all the courts of the United States in any and all cases pending against us and to be presented against us connected with the charges against us growing out of the burning of the vessel O. H. Pecker."

4. A letter addressed to P. J. Morris, attorney at law, dated at Norfolk, November 7, 1897, signed by Horsburgh, March, Barstad, Lind and Barrial, stating: "We desire counsel and request an interview with you, in order to arrange for our defence of charge now pending in the court of the United States." This note was endorsed by Judge Hughes, November 8, 1897, as follows: "The prisoners mentioned in this paper are entitled to be seen at any time and at all times by their counsel. Mr. P. J. Morris is hereby authorized to see and confer with these prisoners whenever he or they think fit."

The District Court denied the writ of *habeas corpus* prayed for, and ordered the petition to be dismissed, whereupon an appeal was allowed petitioner to this court, and a transcript of the petition, the final order and all other proceedings in the cause were directed to be forwarded to its clerk. The final order concluded in these words: "And the court further certifies as a part of this order that although indictment No. 241, under which the petitioner, John Andersen, was tried and convicted of murder, was not one of the number embraced in the order of the 14th of December, 1897, assigning said McIntosh as counsel, that still said McIntosh, under said order and pursuant to the assignment of the court, continued

to represent the said Andersen upon his trial in the Circuit Court of the United States and upon his appeal in the Supreme Court of the United States on trial of the said indictment No. 241."

Mr. Hugh G. Miller and *Mr. P. J. Morris* for appellant. *Mr. J. G. Bigelow* was on their brief.

Mr. William H. White for appellees.

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

The rule that the writ of *habeas corpus* cannot be made use of as a writ of error being firmly established, the contention of appellant's counsel is that the judgment of the Circuit Court, the judgment of this court and the action of the Circuit Court in pursuance of our mandate, are wholly void because he was denied "the assistance of counsel for his defence," that is, the assistance of counsel of his own selection.

The petition was insufficient in not setting forth the proceedings, or the essential parts thereof, prior to August 26, 1898, on which day it was presented, and it was very properly conceded on the hearing of this appeal that the record of Andersen's trial and conviction and of the proceedings on error was to be treated as part of the record, and it was referred to by counsel on both sides accordingly. *Craemer* v. *Washington State*, 168 U. S. 124, 128.

The record disclosed that on Monday, the 8th of November, 1897, the day after Andersen had been delivered into the custody of the marshal, George McIntosh, Esq., was assigned to him as counsel upon his own request and in accordance with section 1034 of the Revised Statutes; and that Mr. McIntosh actually represented him from thence onward, contesting every step of the way, until, after having obtained a writ of error from this court, and argued the cause here, his petition for a rehearing was denied.

But the petition averred that on November 7 petitioner had

"employed as council to represent him, one P. J. Morris;" that on the same day Morris called at the place of detention and asked permission to see petitioner for consultation, which was refused; that petitioner's preliminary examination was had without the aid or presence of his attorney; and that the district judge and the district attorney told his said attorney that as petitioner's defence was "inconsistent with the defence of others charged at the same time with complicity in the destruction of the vessel Olive Pecker," the court would not permit the same attorney to represent them all.

The contention seems to be that petitioner was denied, at any rate in the first instance, the assistance of the attorney he had selected, and that he did not have his attorney with him when he told his story November 8; and that, as he was thereby deprived of fundamental constitutional rights, all subsequent proceedings were void for want of jurisdiction.

The papers introduced before the District Court, by consent, tended to show that Morris had not been employed by Andersen prior to November 8; that the five members of the crew other than Andersen authorized Morris on that day to represent them; that the district attorney had had no interview with any of the prisoners up to the morning of November 8, which he informed the attorney it was imperatively necessary in view of future action that he should have, and then if the prisoners employed him they would be at his disposal.

Apart from that evidence, however, the record of the trial showed that examination before the United States commissioner was waived by the accused; that the trial lasted several days, during which no other counsel applied to the court for leave to act for Andersen, nor did Andersen request the court to permit any other counsel to conduct or assist in conducting his defence; that Andersen admitted that the statement he made on November 8 was a voluntary one; that no such statement was put in evidence; nor was any objection raised to questions propounded to Andersen when on the stand as to what he had said on that occasion; nor were witnesses called to contradict his answers.

The record did not show, nor was there any pretence that the court was requested to assign Morris as counsel for Andersen and denied the request, and if it were true that the district judge or district attorney suggested that it would be objectionable to do so in view of his employment by the other five members of the crew, even though coupled with the intimation that the court would decline on that ground to make such assignment, the fact was not material on this application.

In *Commonwealth* v. *Knapp*, 9 Pick. 496, the Supreme Judicial Court of Massachusetts refused to make a desired assignment because the person designated was not a member of the bar of that court, and also because "a person of more legal experience ought to be assigned, who might render aid to the court as well as to the prisoner;" but the question under what circumstances a court may in a given case decline to assign particular counsel on the request of the accused, was not discussed.

In the case of *Shibuya Jugiro*, 140 U. S. 291, 296, the alleged assignment at Jugiro's trial "of one as his counsel who (although he may have been an attorney at law) had not been admitted or qualified to practise as an attorney or counsellor at law in the courts of New York," was held to be matter of error and not affecting the jurisdiction of the trial court.

The general rule is that the judgment of a court having jurisdiction of the offence charged and of the party charged with its commission is not open to collateral attack. The exceptions to this rule when some essential right has been denied need not be considered, for whether this application was tested on the petition alone, treating the record as part thereof, or heard, without objection, as on rule to show cause, the District Court could not have done otherwise than deny the writ. *In re Boardman*, 169 U. S. 39.

Order affirmed. Mandate to issue at once.

PITTSBURGH &c. RAILWAY *v.* BOARD OF PUBLIC WORKS OF WEST VIRGINIA.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 8. Submitted January 25, 1898. — Decided November 28, 1898.

The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction.

A railroad bridge across a navigable river forming the boundary line between two States is not, by reason of being an instrument of interstate commerce, exempt from taxation by either State upon the part within it.

A railroad bridge is taxable under the Code of West Virginia of 1891, c. 29, § 67; and, although the board of public works assesses separately the whole length of the railroad track within the State, and that part of the bridge within the State, yet, if the railroad company does not, as allowed by that section, apply to the auditor to correct any supposed mistake in the assessment, nor appeal, within thirty days after receiving notice of the decision of the board, to the circuit court of the county, and the officers of the State make no attempt to interfere with the company's possession and control of its real estate, nor, until after the expiration of the thirty days, either to impose a penalty for delay in paying the taxes, or to levy on personal property for non-payment of them, the company cannot maintain a bill in equity in a court of the United States to restrain the assessment and collection of any part of the taxes.

The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, a corporation of the State of Ohio, owning and operating a railway running through the States of West Virginia, Ohio, Pennsylvania, Indiana and Illinois, under the laws of those States, and crossing the Ohio River, a navigable stream, forming the boundary between the States of West Vir-

[1] The docket title of this case is — "The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company *v.* The Board of Public Works of the State of West Virginia."

ginia and Ohio, by means of a bridge built, owned and controlled by the plaintiff, filed in the Circuit Court of the United States for the District of West Virginia a bill in equity against the Board of Public Works of the State of West Virginia, a public corporation, against its members individually, (being the governor, the auditor, the treasurer, the superintendent of free schools and the attorney general of the State,) and against one Cowan, sheriff of Brooke County, all of them citizens of that State, to restrain the assessment and collection of taxes upon the bridge under section 67 of chapter 29 of the Code of West Virginia of 1891.

The bill alleged that, under and by virtue of that section of the Code, the plaintiff was required, through its principal officers, to make return in writing, under oath, to the auditor of the State, on or before the 1st of April in each year, and in the manner prescribed by that section, of its property subject to taxation in the State; the auditor was required to bring the return, as soon as practicable, before the board of public works; that board was authorized either to approve the return, or to proceed to assess and fix the fair cash value of all the property of railroad companies which they were so required to return for taxation; and it was further provided that, as soon as possible after the value of any railroad property was fixed for purposes of taxation by one of the several methods designated by that section, the auditor should assess and charge such property with the taxes properly chargeable thereon.

The bill also alleged that the plaintiff's main line of railway ran through the State of West Virginia for a distance of 7.11 miles, of which 6.53 miles were in the county of Brooke and 0.58 miles in the county of Hancock; that its bridge across the Ohio River was part of its railway; that the total length of the bridge, including its abutments, was 2044 feet, of which 1518 feet were in West Virginia and 526 feet in Ohio; and that the plaintiff, before April 1, 1894, as required by section 67 of chapter 29 of the Code, made to the auditor of the State of West Virginia a return of its property subject to taxation in the State for the year 1894, (a copy of which was

annexed to and made part of the bill, and is set out in the margin,[1]) and, in making that return, included, in the 7.11 miles of its main track, so much of the bridge as lay within the State, amounting to 1518 feet.

The bill further alleged that some time in September, 1894, the board of public works, meeting at Charleston in that State, as provided by that section of the Code, to assess and fix the

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[1] Valuation of P., C., C. & St. L. R'y Main Line in the State of West Virginia as returned for Taxation for the Year 1894.

Brooke County. Cross Creek district:				
Main track	6.53 miles at	$13,000 00 =	$84,890 00	
Second track	6.53 " "	4,000 00 =	26,120 00	
Side track	12.62 " "	2.500 00 =	31,550 00	
Rolling stock	6.53 " "	3,567 78 =	23,298 00	
Telegraph line	6.53 " "	100 00 =	653 00	
Supplies and tools			1,306 00	
Station house at Colliers			1,300 00	
Water tank " "			400 00	
Sand house " "			50 00	
Car house " "			100 00	
Trainmen's house "			950 00	
Scale house at "			100 00	
Tower west of "			450 00	
Tower at New Cumberland Junction			800 00	
Station at Hollidays Cove			180 00	
Station at Wheeling Junction			400 00	
Total listed value for Brooke County				$172,547 00
Hancock County. Butler district:				
Main track	0.58 miles at	$13,000 00 =	$7,540 00	
Second track	0.58 " "	4,000 00 =	2,320 00	
Side tracks	0.95 " "	2,500 00 =	2,375 00	
Rolling stock	0.58 " "	3,567 00 =	2,069 00	
Telegraph line	0.58 " "	100 00 =	58 00	
Supplies and tools			116 00	
Total listed value for Hancock County				14,478 00
Total listed value of main line				$187,025 00

Summary of Mileage.

Main track	7.11 miles.
Second track	7.11 "
Side tracks	13.57 "
Rolling stock	7.11 "
Telegraph line	7.11 "

valuation of railroad property for the purposes of taxation, refused to approve the plaintiff's return, and proceeded, among other things, to assess the plaintiff with 6.53 miles of main track and 6.53 miles of second track in the county of Brooke, which assessment and valuation covered the entire length of its railroad in the State of West Virginia, including so much of the bridge as lay within the State; and, in addition thereto, valued and assessed the bridge, as a separate structure, at the sum of $200,000, placing the tax upon the bridge at $3060, and the auditor proceeded to assess the plaintiff with this sum of $3060; thereby assessing it with the entire length of the bridge in West Virginia as a part of its railway in the State, and also assessing it with the bridge as a separate structure, thus taxing the plaintiff a second time for that part of its bridge which lay in West Virginia; whereas the bridge should only have been assessed as so many feet of the railway.

The bill further alleged that neither the board of public works, nor any member thereof, nor the auditor, informed the plaintiff of the valuation which had been placed upon its property by the board for taxation, nor of the taxes which had been assessed thereon by the auditor; that on September 28, 1894, the plaintiff, not having been informed of the action of the board or of the auditor, addressed through its chief engineer a letter to the auditor, inquiring what action had been taken by the board of public works and the auditor with regard to the assessment of taxes on its property for 1894; that the letter was not answered, nor was any information in regard to the taxes given to the plaintiff until January 19, 1895, when it received from the auditor a statement showing that the board of public works had placed a separate and additional valuation of $200,000 upon the bridge for the purposes of taxation, and that the auditor had proceeded to assess and charge the plaintiff with the sum of $3060 as a tax for 1894 upon that valuation; and that on January 19, 1895, the auditor demanded of the plaintiff payment of that sum, and the plaintiff refused to pay it, but paid to the auditor the rest of the taxes assessed, amounting to the sum of $4187, upon a valua-

tion of $310,830, which included the plaintiff's railroad in the county of Hancock.

The bill further alleged that "on the — day of —— 1895" the auditor added ten per cent to the sum of $3060, to pay the expense of collection, and certified that sum, with the ten per cent added, to the sheriff of Brooke County for collection; and that the sheriff "since said date" had demanded payment of the sum of $3060 and the ten per cent additional, and was threatening to collect them by legal process, and would thus inflict irreparable injury upon the plaintiff, unless prevented by the interposition of a court of competent jurisdiction.

The plaintiff further alleged that the bridge constituted a part of its line of railway, and had no separate earning capacity, and no greater earning capacity than any other equal number of feet of its line of railway, and was used exclusively by it in transporting freight and passengers across the Ohio River to and from the States of West Virginia and Ohio; and that it was advised and believed that the bridge was an instrument of interstate commerce, and was not, as a separate structure from its line of railway, a proper subject for taxation by the State of West Virginia in the manner above set forth.

The bill then charged that the tax upon the bridge was illegal and unjust, and constituted a cloud upon the title to the bridge, and that by reason of that clause of the Constitution of the United States, which gives Congress control over interstate commerce, the Circuit Court of the United States for the District of West Virginia was clothed with authority and jurisdiction to restrain and to prevent the assessment and collection of this illegal and unjust tax; and prayed for an injunction against its assessment and collection, and for further relief.

The bill was sworn to March 18, 1895; and was filed March 25, 1895, together with an affidavit to the effect that, since the bill was sworn to, the sheriff had levied upon one of the plaintiff's freight engines for the purpose of enforcing the collection of the tax upon the bridge. Upon the filing of the bill, a temporary injunction was granted as prayed for.

A general demurrer to the bill was afterwards filed and

sustained, the injunction dissolved, and the bill dismissed. The plaintiff appealed to this court, under the act of March 3, 1891, c. 517, § 5. 26 Stat. 828.

Mr. J. Dunbar and *Mr. J. B. Sommerville* for appellant.

Mr. Edgar P. Rucker, attorney general of the State of West Virginia, *Mr. T. S. Riley* and *Mr. Thayer Melvin* for appellee.

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

The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. *Dows* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *State Railroad Tax cases*, 92 U. S. 575; *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516; *Milwaukee* v. *Kœffler*, 116 U. S. 219; *Shelton* v. *Platt*, 139 U. S. 591.

In *Dows* v. *Chicago*, a citizen of the State of New York, owning shares in a national bank organized and doing business in the city of Chicago, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, to restrain the collection of a tax assessed by the city of Chicago upon his shares in the bank, alleging, among other things, that the tax was illegal and void, because the tax was not uniform and equal with taxes on other property as required by the constitution of the State, and because the shares were taxable only at the domicil of the owner and therefore were not property within the jurisdiction of the State of Illinois. This court, speaking by Mr. Justice Field, without considering the validity of the objections to the tax, held that the bill could not be maintained, saying: "Assuming the tax to

be illegal and void, we do not think any ground is presented by the bill, justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law." 11 Wall. 109, 110. "The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." 11 Wall. 112.

In the *State Railroad Tax cases*, this court, in a careful and thorough opinion delivered by Mr. Justice Miller, stated that "it has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a

court of equity;" referred to section 3224 of the Revised Statutes, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court;" and said that "though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." The court then quoted from *Dows* v. *Chicago*, and *Hannewinkle* v. *Georgetown*, above cited, and proceeded as follows: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction; and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner, it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner." 92 U. S. 613–615.

In *Union Pacific Railway Co.* v. *Cheyenne*, in which the Union Pacific Railway Company obtained an injunction against the levy of a tax by the city of Cheyenne, the facts were peculiar. The plaintiff, owning many lots of land in that city, had paid a tax assessed on all its property by a board of equalization under a general statute of the Territory of Wyoming, and had also been taxed by the city of Cheyenne under provisions of its charter which had been repealed by that statute; and the bill showed, as stated in the opinion, that the levy complained of "would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold; would prevent their sale; and would cloud the title to all its real estate." 113 U. S. 526, 527.

In *Shelton* v. *Platt*, 139 U. S. 591, the president in behalf of himself and other members of an express company, a joint stock company of the State of New York, filed a bill in equity in a Circuit Court of the United States in Tennessee to restrain the collection of a license tax upon the company under a statute of the State of Tennessee, alleged to be contrary to the Constitution of the United States. The bill averred that the comptroller had issued a warrant of distress to a sheriff to collect such taxes for two years, the sheriff had levied or was about to levy the warrant on the property of the company, and the comptroller was about to issue a like warrant to collect the tax for a third year; that the property of the company in Tennessee was employed in interstate commerce in the express business, and was necessary to the conduct of it; and that the seizure by the sheriff would greatly embarrass the company in the conduct of that business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience. This court held that, even if the statute was unconstitutional and the tax void, the bill could not be maintained, and, speaking by the Chief Justice, said: "The trespass involved in the levy of the distress warrant was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of dam-

ages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averment showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage and inconvenience which would be in their nature irremediable." The court went on to say that another statute of the State (which had been adjudged by this court in *Tennessee* v. *Sneed*, 96 U. S. 69, to afford a simple and effective remedy) provided that where an officer charged by law with the collection of a tax took any steps to collect it, a party conceiving it to be unjust or illegal might pay it under protest and sue the officer to recover it back, and should have no other remedy by injunction or otherwise. The court observed that "legislation of this character has been called for by the embarrassments resulting from the improvident employment of the writ of injunction in arresting the collection of the public revenue; and, even in its absence, the strong arm of the court of chancery ought not to be interposed in that direction, except where resort to that court is grounded upon the settled principles which govern its jurisdiction;" and that the jurisdiction exercised by the courts of the United States to restrain by injunction the collection of a tax wholly illegal and void had always been rested on other grounds than merely the unconstitutionality of the tax. 139 U. S. 596–598.

In the light of these decisions, we proceed to an examination of the provisions of the Code of West Virginia of 1891, c. 29, § 67, under which the tax upon the plaintiff's bridge was assessed.

That section requires every corporation, owning or operating a railroad wholly or partly within the State, to make, through its principal officers, to the auditor of the State, on or before the 1st of April in each year, a return in writing, under oath, showing, among other things, the following: 1st. The whole number of its miles of railroad within the State. 2d. If the railroad is partly within and partly without the State, the whole number of miles within, and of those without the State, including all its branches. 3d. "Its railroad track in each county in this State through which it runs, giving the whole number of miles of road in the county, including the

track and its branches, and side and second tracks, switches and turnouts therein; and the fair cash value per mile of such railroad in each county, including in such valuation such main track, branches, side and second tracks, switches and turnouts." 4th. All its rolling stock, and the fair cash value thereof, distinguishing between what is used wholly within the State, and what is used partly within and partly without the State, and the proportionate value of the latter, according to the time used and the number of miles run thereby in and out of the State; "and the proportional cash value thereof to each county in this State through which such railroad runs." 5th. "Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate, other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it; and the fair cash value of all buildings and structures, and all machinery and appendages, and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this State in which it is located."

The return made by the railroad company to the auditor is to be laid by him, as soon as practicable, before the board of public works. If the return is satisfactory to the board, the board shall approve it, and, by an order entered upon its records, direct the auditor to assess the property of the company with taxes, and he shall assess it as afterwards provided. But if the return is not satisfactory, the board is authorized to proceed, in such manner as it may deem best, to obtain the information required to be furnished by the return; and may compel the attendance of witnesses and the production of papers; and is directed, as soon as possible after having procured the necessary information, to assess and fix the fair cash value of all the property required to be returned, in each county through which the railroad runs; and, in ascertaining such value, to consider the return, and all the evidence and information that it has been able to procure, and all such as may be offered by the railroad company.

The legislature evidently intended that the annual return should include all the real estate owned or used by the railroad company in connection with its railroad within the State. The plaintiff's bridge across the Ohio River between the States of West Virginia and Ohio was real estate. It was a "building or structure," within the proper meaning of the words. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 147; *Whitall* v. *Gloucester Freeholders*, 11 Vroom (40 N. J. Law), 302, 305. And it had been declared by Congress to be "a lawful structure." Act of July 14, 1862, c. 167; 12 Stat. 569. The fact that the bridge was an instrument of interstate commerce did not exempt so much of it as was within West Virginia from taxation by the State. *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679.

According to the facts alleged in the bill, and admitted by the demurrer, the plaintiff has been assessed by the board of public works one sum upon the whole length of its railroad track within the State, and another sum upon that part of the bridge within the State, as a separate structure.

The plaintiff alleged in the bill that its return included, in the number of miles of its main track, so much of the bridge as lay within the State; and contended that the bridge was included in "its railroad track," within the meaning of the third subdivision of the section of the code, above quoted, and therefore should have been assessed only as so many feet of the railroad. But the return does not mention the bridge; and, if it was included in the term "railroad track" in that subdivision, the increased value of the track by reason of the bridge might properly be taken into consideration in estimating the value of the railroad track, and the assessment of the track and the bridge separately would seem to be a difference of form rather than of substance. *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421, 429; *Robertson* v. *Anderson*, 57 Iowa, 165.

If the bridge was not covered by the third subdivision, it was certainly included in the fifth. This subdivision begins by designating "depots, station houses, freight houses, machine and repair shops and machinery therein, and all other build-

ings, structures and appendages connected thereto or used therewith." It was argued that the words "thereto" and "therewith," in this sentence, referred to the same antecedent as the previous word "therein;" and that "therein" referred to depots, station houses, freight houses, machine and repair shops, and therefore "thereto" and "therewith" must be equally restricted. But if a strictly grammatical construction should be adopted, it may well be doubted whether "machinery therein" related to anything but machine and repair shops; and it can hardly have been the intention of the legislature to limit the words "buildings, structures and appendages connected thereto or used therewith" to those connected or used with such shops only. If the bridge is not a "building or structure," within the meaning of those words, as here used, it certainly (if not part of the "railroad track," under the third subdivision,) comes within the words next following, "together with all other real estate, other than its railroad track, owned or used by it in connection with its railroad." By a clause near the end of the same section, it is provided that "all buildings and real estate owned by such company, and used or occupied for any purpose not immediately connected with its railroad," are to be taxed like similar property of individuals.

The same section further provides that the decision made by the board of public works shall be final, unless the railroad company, within thirty days after such decision comes to its knowledge, appeals (which it is expressly authorized by the statute to do) from the decision, as to the assessment and valuation made in each county through which the railroad runs, to the circuit court of that county. The appeal is to have precedence over all other cases, and is to be tried as soon as possible after it is entered. That court, on such appeal, is to hear all legal evidence offered by the appellant, or by the State, county, district or municipal corporation, and, if satisfied that the valuation as fixed by the board of public works is correct, to confirm the same; but, if satisfied that such valuation is too high or too low, to correct it, and to ascertain and fix the true value of the property

according to the facts proved, and certify such value to the auditor.

This provision for a review and correction, by the circuit court of the county, of the assessment made by the board of public works affords a convenient and adequate remedy for any error in the taxation, and has been held by the highest court of the State to be in accordance with its constitution. *Wheeling Bridge Railway* v. *Paull*, 39 West Virginia, 142.

That court has often had occasion to inquire how far the action of the circuit court of the county, in this respect, is administrative only, and how far it may be considered as judicial in its nature. *Pittsburgh &c. Railway* v. *Board of Public Works*, 28 West Virginia, 264; *Charleston & Southside Bridge Co.* v. *Kanawha County Court*, 41 West Virginia, 658; *State* v. *South Penn Co.*, 42 West Virginia, 80. See also *Upshur County* v. *Rich*, 135 U. S. 467.

But it is not important, in this case, to pursue that course of inquiry; since, in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assessment, at some stage of the proceedings. *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421.

Even if, therefore, no previous notice of the hearing before the board of public works was required by the statute, or was in fact given to this plaintiff, (which is by no means clear,) yet the notice of its decision, with the right to appeal therefrom to the circuit court of the county, and there to be heard and to offer evidence, before the valuation of its property for taxation was finally fixed, afforded the plaintiff all the notice to which it was entitled.

The railroad bridge in question being liable to assessment under section 67, it is unnecessary, for the purposes of this case, to determine whether it should be treated as "railroad track," or as a "building or structure," or as "other real estate, owned or used in connection with the railroad." In any view, its assessment and valuation by the board of public works, of which the plaintiff complains, was subject to review by the

circuit court of the county upon an appeal seasonably taken by the railroad company.

The section, indeed, also provides that, when the return made to the auditor is satisfactory to the board of public works, or when an assessment is made by that board, the auditor shall immediately certify, to the county court of each county through which the railroad runs, the value of the property of the railroad company therein, as valued and assessed as aforesaid; that that court shall apportion that value among the districts, school districts and municipal corporations through which the railroad runs; and that the clerk of that court, within thirty days after it has laid the county and district levies, shall certify to the auditor the apportionment so made; that the recording officer of each district or municipal corporation through which the road runs shall, within thirty days after a levy is laid therein, certify to the auditor the amount levied; and that, if any such officer fails to do so, the auditor may obtain the rate of taxation from the land books in his office or from any other source.

But the provision directing the auditor to immediately certify the assessment made by the board of public works to the county court of each county must be construed as subordinate to and controlled by the next preceding provision giving the right of appeal from the board of public works to the circuit court of the county — as clearly appears from the next succeeding provision, by which it is after the value of the property of the railroad company has been "fixed by the board of public works, or by the circuit court on appeal as aforesaid," that the auditor is directed to assess and charge the property of the company "with the taxes properly chargeable thereon," in a book to be kept by him for that purpose.

The statute also contains a provision that "no injunction shall be awarded by any court or judge to restrain the collection of the taxes, or any part of them, so assessed, except upon the ground that the assessment thereof was in violation of the Constitution of the United States, or of this State, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly charge-

able on the property of said corporation or company; and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill." While this provision cannot, of course, bind the courts of the United States, it is nearly in accord with the rule governing the exercise of the jurisdiction in equity of those courts, as established by the decisions cited at the beginning of this opinion.

The statute further makes it the duty of the auditor, "as soon as possible after he completes the said assessments," to make out and transmit to the railroad company "a statement of all taxes and levies so charged;" and the duty of the railroad company "so assessed and charged" to pay "the whole amount of such taxes and levies upon its property" by the 20th of January "next after the assessment thereof;" and if the company does not pay "such taxes and levies" by that day, the auditor is directed to add ten per cent to the amount thereof to pay the expenses of collecting them, and to certify to the sheriff of each county "the amount of such taxes and levies assessed within his county."

In the present case, the bill does not allege that there was any fraud in the assessment; or that the defendants made any attempt to interfere with the plaintiff's ownership or control of its real estate; or that the plaintiff either made any application to the auditor to correct any supposed mistake in the assessment, or took any appeal from the decision of the board of public works to the circuit court of the county; or that, within the thirty days allowed for such an appeal, any attempt was made by the defendants, either to charge the plaintiff with the penalty of ten per cent for delay in payment of the taxes, or to levy upon its property for non-payment of them.

On the contrary, the bill would appear to have been studiously framed to avoid making any such allegation. The bill, which was sworn to on March 18, 1895, alleged that on January 19, 1895, (sixty days before,) the plaintiff received notice from the auditor of the decision of the board of public works; that "on the —— day of 1895" (which might be any day

before the bill was sworn to) the auditor added the ten per cent and certified to the sheriff the amount of the tax assessed with that addition; and that the sheriff "since said date" had demanded payment of both sums from the plaintiff; and the affidavit filed with the bill on March 25, 1895, shows that the sheriff's levy on one of the plaintiff's engines was made after the bill was sworn to.

The only reasonable inference from these vague allegations of the bill is that the auditor waited for more than thirty days, after giving the plaintiff notice of the decision of the board of public works, in order to afford full opportunity for an appeal from that decision; and that no penalty was imposed for delay in payment of the taxes, nor any active measure taken to enforce them, until it had become clear that the plaintiff did not intend to take such an appeal.

The plaintiff, upon its own showing, having made no attempt to avail itself of the adequate remedies provided by the statute of the State for the review of the assessment complained of, is not entitled to maintain this bill.

Decree affirmed.

UNITED STATES *v.* WARDWELL.

APPEAL FROM THE COURT OF CLAIMS.

No. 53. Argued October 20, 1898. — Decided November 28, 1898.

Three cheques were drawn in June, 1869, by authorized army officers upon the Assistant Treasurer of the United States in New York, in favor of Wardwell and in payment of his lawful claims against the United States. These cheques, while in his possession, were lost or destroyed, presumably in a depredation made on his house by hostile Indians in 1872. Not having been presented for payment, the amount of these cheques was covered into the Treasury in pursuance of the statutes of the United States, and was carried to the account of "outstanding liabilities." Wardwell having died, his administratrix applied to the Treasury for payment of the cheques by the issue of Treasury warrants, under the authority conferred by Rev. Stat. §§ 306, 307, 308. This payment being refused, this suit was brought in the Court of Claims in April, 1896, and the statute of limitations was set up as a defence. *Held*, that the promise by the Government contained in the statute to hold money so paid into the Treasury was a continuing promise available to plaintiff at any

Statement of the Case.

time she saw fit, to which full force should be given; that there was no cause for a suit until after refusal of an application for a warrant, and that then for the first time a claim for the breach of the contract accrued, and the limitation, prescribed by Rev. Stat. § 1069, began to run.

THIS is an appeal from the Court of Claims. The facts as found by that court are that in June, 1869, three cheques were drawn in favor of William V. B. Wardwell, one by Major W. B. Rochester, paymaster, United States Army, and two by Major M. I. Ludington, quartermaster, United States Army, all drawn on the Assistant Treasurer of the United States in New York, and in payment of lawful claims of Wardwell against the United States. Subsequently to the issue of the cheques and while still in the possession and ownership of Wardwell they were lost or destroyed, probably in a depredation committed on his house by Indians in the year 1872. None of the cheques having been presented for payment the amounts thereof were covered into the Treasury of the United States and carried to the account of "outstanding liabilities" in pursuance of the act of May 2, 1866, now sections 306 and following, Revised Statutes, the entry on the books of the Treasury (as shown by a report made by the Secretary of the Treasury to the House of Representatives) being as follows:

Name.	Period.	Balance due United States.	Balance due from United States.
W. V. B. Wardell.....	1872	.....	$461 87
William V. B. Wardwell..	1872	.....	500 00
Do.	1872	.....	1,017 30

No part of the same has ever been paid. Wardwell is dead and the claimant is his duly appointed and acting administratrix. As such she in 1890 applied to the Treasury Department for payment of the cheques by the issue of Treasury warrants and at the same time filed a bond of indemnity, with sufficient sureties, for double the amounts thereof, to secure the United States against a possible second demand for payment. The First Comptroller of the Treasury declined to per-

mit the settlement of a new account or the issue of warrants in favor of the claimant. Thereafter, and on April 10, 1896, she commenced this suit. As a conclusion of law the court found that the statute of limitations did not begin to run until the 14th day of April, 1890, the time when the accounting officers of the Treasury refused to recognize the claimant's demand, and that she was entitled to recover the amount of the three cheques, and on the 11th day of January, 1897, entered judgment for that amount. From such judgment the United States appealed to this court.

Section 1069, Revised Statutes, provides:

"Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

The act of May 2, 1866, c. 70, is entitled "An Act to facilitate the Settlement of the Accounts of the Treasurer of the United States, and to secure certain Moneys to the People of the United States, or to Persons to whom they are due, and who are entitled to receive the same." 14 Stat. 41.

This was carried into the Revised Statutes as sections 306 and following. Sections 306, 307 and 308 read:

"Sec. 306. At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts or cheques, issued by the Treasurer, or by any disbursing officer of any department of the government, upon the Treasurer or any Assistant Treasurer or designated depositary of the United

Counsel for Appellants.

States, or upon any national bank designated as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant and to be carried to the credit of the parties in whose favor such certificates, drafts or cheques were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'

"SEC. 307. The certificate of the Register of the Treasury, stating that the amount of any draft issued by the Treasurer to facilitate the payment of a warrant directed to him for payment has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly endorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts and cheques.

"SEC. 308. The payee or the *bona fide* holder of any draft or cheque the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States."

Mr. George Hines Gorman for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. George A. King for appellee. *Mr. Edward E. Holman* was on his brief.

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

Section 1069, Revised Statutes, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance. *Finn* v. *United States*, 123 U. S. 227.

Counsel for the government contend that the claim against the United States first accrued in 1869, when the cheques were issued, or, if not then, at least in 1872, when they were lost or destroyed, and, therefore, this being twenty-four years before the commencement of this suit, that the claim was barred. If there were nothing to be considered but the single section referred to it would be difficult to escape this conclusion of counsel.

It is further contended that sections 306, 307 and 308 relate to what is simply a matter of bookkeeping, and do not in any manner change the scope of the liability of the Government. But we are of the opinion that they mean something more. While it may be that they do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a promise by the Government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given. If bookkeeping was the only matter sought to be provided for, there were no need of section 308. That prescribes payment, and payment in a particular way. The payee does not simply surrender his cheque and receive money; but "on presenting the same to the proper officer" he is "entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor." This may be mere machinery for payment, but it is machinery not used or required until after the money has been "covered into the

Treasury by warrant" and "carried to the credit" of the payee. The right given is the right to surrender the cheque and receive a warrant on the Treasury. It will also be noticed that the purpose of the act of 1866 was, as expressed in its title, not merely to "facilitate the settlement of the accounts of the Treasurer of the United States," not merely to perfect a system of bookkeeping, but also "to secure certain moneys . . . to persons to whom they are due, and who are entitled to receive the same." And the deposit by the Treasurer is not of a gross amount to be applied to any claims that may arise, but of the amount due for certain specified cheques and drafts. In other words, the purpose of the government by this statute is to secure to each party who holds government paper the amount thereof, to place it in the Treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the Government. The ordinary rules for the maturity of negotiable paper do not control. Congress has directed that the money already once appropriated and chequed against shall be placed in the Treasury and held subject to the call of the party for whose benefit it has been so appropriated and chequed. There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise made in section 308 is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by section 1069 begins to run. There is thus no conflict with that section. Its full force is not impaired.

In this connection it may be not amiss to notice those authorities in which it is held that upon the ordinary deposit of money with a bank no action will lie until a demand has been made, by cheque or otherwise, and that hence the statute of limitations will not begin to run until after a refusal to pay on such demand. In *Downes* v. *The Phœnix Bank of Charlestown*, 6 Hill, 297, 300, Bronson, J., delivered the opinion of the court, and, after referring to the ordinary rule that where there is a promise to pay on demand the bringing of an action is a sufficient demand, and criticising it as illogical, added:

"The rule ought not to be extended to cases which do not fall precisely within it. Here, the contract to be implied from the usual course of the business is, that the banker shall keep the money until it is called for. Although it is not strictly a bailment, it partakes in some degree of that character."

See also *Johnson* v. *Farmers' Bank*, 1 Harrington (Del.), 117; *Watson* v. *Phœnix Bank*, 8 Met. (Mass.), 217–221.

In *Dickinson* v. *Savings Bank*, 152 Mass. 49, 55, it was held that the statute of limitations would not begin to run in favor of the bank and against a depositor until there had been something equivalent to a refusal on the part of the bank to pay, or a denial of liability.

In *Girard Bank* v. *Penn Township Bank*, 39 Penn. St. 92, 98, 99, the holder of a certified cheque was the plaintiff, and, the cheque having been outstanding more than six years, the statute of limitations was pleaded; but the plea was not sustained, the court, by Strong, J., saying, in respect to the case of an ordinary deposit:

"Were this a suit against the Bank of Penn Township by the original depositor the statute of limitations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows that no right of action exists, and the statute of limitations does not begin to run until the demand stipulated for in the contract has been duly made."

And the rule thus announced in respect to ordinary deposits was held to apply in case of a certified cheque:

"When a cheque payable to bearer, or order, is presented with a view of its being marked 'good,' and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the cheque, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been actually demanded and refused."

In Morse on Banks and Banking, page 40, 2d ed., the author says:

"We have already seen that it is a contract specially modified by the clear legal understanding that the money shall be forthcoming to meet the order of the creditor whenever that order shall be properly presented for payment. It follows, therefore, that this demand for payment is an integral and essential part of the undertaking, it may be said, even of the debt itself. In short, the agreement of the bank with the depositor, as distinct and valid as if written and executed under the seal of each of the parties, is only to pay upon demand; accordingly, until there has been such demand, and a refusal thereto, or until some act of the depositor, or some act of the bank made known to the depositor, has dispensed with such demand and refusal, the statute ought not to begin to run, nor should any presumption of payment be allowed to arise."

It is not meant to be asserted that the authorities are unanimous on this question; on the contrary, there is a diversity of opinion. It is sufficient for the purposes of this case to notice that the rule finds support in the decisions of many courts of the highest standing. It is not inconsistent with the proposition laid down by this court in *Marine Bank* v. *Fulton Bank*, 2 Wall. 252, and often reaffirmed, *Phœnix Bank* v. *Risley*, 111 U. S. 125, and cases cited in opinion, to the effect that the relation between a bank and its depositor is that of debtor and creditor and nothing more, for that proposition throws

no light upon the question when the debt of the debtor becomes due, and when the statute of limitations begins to run. Neither is it pretended that the relation of the United States to this petitioner was that of bank and depositor, but the reasoning of the authorities cited strengthens the conclusion that when Congress declared that this money should be covered into the Treasury to the credit of the plaintiff, and that she should, on presentation of the cheques to the proper officer of the Treasury, be entitled to a settlement of an account and the issue of a warrant, it was the intention to recognize a continuing obligation — one which was available to the plaintiff at any time she saw fit, that it was a promise which was not broken until after demand and refusal.

But authority more in point is not wanting to sustain these views. The direct tax act of August 5, 1861, c. 45, 12 Stat. 292, provided, in the thirty-sixth section, that, in case of a sale of real estate, and a surplus remaining after satisfying the tax, costs, etc., such surplus should be paid to the owner, or if he be not found, "then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who upon such application shall, by warrant on the Treasury, cause the same to be paid to the applicant." In *United States* v. *Taylor*, 104 U. S. 216, the owner did not apply for the surplus until more than six years had elapsed from the closing up of the sale and the deposit of the money in the Treasury, and it was held that section 1069 did not bar his action, the court observing (p. 221):

"This section limits no time within which application must be made for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his legal representatives should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an in-

definite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.

"A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the Government to say to the owner that the surplus proceeds should be held in the Treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

"The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the statute of limitations will begin to run against him from the time such knowledge is brought home to him, and not before.

* * * * *

"In analogy to this rule the right of the owner of the land to recover the money which the Government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued."

This was reaffirmed in *United States* v. *Cooper*, 120 U. S. 124. Counsel distinguish those cases from this in that there the money came into the Treasury subject to an express trust created by the act of Congress, which directed that it be there held for the benefit of the owner, while here in the first instance there was a written promise by the Government, a promise for which an appropriation had been made and upon which a cause of action existed. But while there is a difference, we do not think it sufficient to create a different rule or measure of liability. There is no new deposit when a cheque is certified, but as shown by the opinion in *Girard Bank* v. *Bank of Penn Township*, *supra*, this fact works no change in

the rule. Whether the money to satisfy this liability was paid in by some third party or already held by the Treasurer; whether there was or was not any prior liability on the part of the Government, in each case there was a declaration by Congress that the money thus received or covered into the Treasury should there be held for the benefit of and subject to the call of the owner, and no time was specified within which such call must be made. This was a distinct and separate promise, creating a new liability, and the claim accrued when this new liability matured. It matured when the claimant presented her cheques and, calling for warrants, was refused them.

The judgment is

Affirmed.

GREEN BAY & MISSISSIPPI CANAL COMPANY *v.* PATTEN PAPER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 14. Argued January 13, 14, 1898. — Decided November 28, 1898.

No particular form of words or phrases in which a claim of Federal rights must be asserted in a state court has ever been declared necessary by this court; but it is sufficient, if it appears from the record that such rights were specially set up or claimed there in such way as to bring the subject to the attention of the state court.

Under the legislation and contracts set forth in the opinion of the court in this case, the water power incidentally created by the erection and maintenance of the dam and canal for the purpose of navigation in Fox River is subject to control and appropriation by the United States, and the plaintiff in error is possessed of whatever rights to the use of this incidental water power could be granted by the United States.

At what points in the dams and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation.

This was a suit brought, in 1886, in the circuit court of Outagamie County, Wisconsin, by the Patten Paper Company and others, against the Kaukauna Water Company, the Green Bay and Mississippi Canal Company and others. The object

of the proceeding, as set forth in the complaint, was to have determined what share or proportion of the flow of Fox River where the same passes Islands Nos. 3 and 4 in township No. 21, north of range No. 18 east, is appurtenant and of right should be permitted to flow in the south, middle and north channels of said river respectively, and to have the defendants restrained from drawing from said Fox River above the head of Island No. 4, and so that there shall not come into the middle channel of said river and into the mill pond of the plaintiffs more water flow of said river than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in the south channel of said river.

The scope of the investigation was widened by reason of the answer of the Green Bay and Mississippi Canal Company, which it was agreed and stipulated should have the effect of a cross-bill in the action, and which asserted that any decree to be entered in the suit determining or adjudicating what share or proportion of the flow of the river should be permitted to flow in its several channels, should be made subject to the right of the Canal Company, by reason of the facts stated, to use all of the water power created by the government dam and improvements on the river.

The principal facts disclosed in the case were the following:

The Fox River is a navigable stream, and flows through township 21, north of range 18 east, in the county of Outagamie, Wisconsin, and in said river, below Lake Winnebago, there are and always have been rapids and abrupt falls. To permit navigation through or by said rapids and falls necessarily requires the building of dams, locks and canals at great expense. By an act approved August 8, 1846, 9 Stat. 83, c. 170, Congress granted to the State of Wisconsin, on its admission into the Union, a large amount of public lands for the express purpose of, and in trust for, improving the navigation of the Fox and Wisconsin Rivers. The State accepted said grant of land for said purposes, and by an act of its legislature, approved August 8, 1848, undertook the improvement of said rivers, and enacted, among other things, that "*whenever a water power shall be created by reason of any dam erected*

or other improvements made on any of said rivers, such water power shall belong to the State, subject to the future action of the legislature."

One of the rapids in Fox River, around which it was necessary to secure slack water navigation by means of dams, locks and canals, was commonly known as the Kaukauna Rapids. The State adopted a plan and system for the construction of a dam and canal at said Kaukauna Rapids, whereby there was to be built a low dam beginning on the south side near the head of the rapids, extending down stream, on or near the south bank of the river, across lots 8, 7, 6, and on to lot 5 of section 22, and thence extending at about a right angle with the south bank across the river, leaving an opening at the north end through which the water of the river could pass, and be conducted by a conduit or canal to a certain point at which should be placed a lock.

The sales of lands granted by Congress not proving sufficient to carry on the work, the board of public works was authorized by the legislature to issue certificates of indebtedness, which were declared to be a charge upon the proceeds of the lands granted by Congress and upon the revenues to be derived from the works of improvement.

In July, 1853, the state legislature created a corporation under the name of "The Fox and Wisconsin Improvement Company," to which, by the second section thereof, were granted and transferred the uncompleted works of improvement, together with all and singular the rights of way, dams, locks, canals, water power and other appurtenances of said works. The company agreed to pay the outstanding certificates, and forthwith undertook the work. Additional lands were granted by Congress in 1854 and 1855, to aid the State in the improvement of the Fox and Wisconsin Rivers. The company subsequently executed a deed of conveyance of the works of improvement, the incidental water powers and all of the lands, in trust to apply all revenues derived from the improvement and the proceeds of sales of the lands to the payment of the unpaid certificates and of bonds issued by the company, and to the completion of the works.

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In 1864 the company failed, the deed of trust was foreclosed, and, in 1866, the property of the company, consisting of the works of improvement, the water powers and the lands, were sold pursuant to a decree of court entered February 4, 1864. The purchasers became incorporated under the name of the Green Bay and Mississippi Canal Company, and that company was authorized, by the third section of an act of the legislature approved April 12, 1866, to "enlarge and increase the capacity of said works and of the said rivers so as to make a uniform steamship navigation from the Mississippi River to Green Bay, or to surrender the same to the United States for such enlargement, on such terms as may be approved by the Governor for the time being of the State."

July 7, 1870, Congress passed an act entitled "An act for the improvement of water communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers." 16 Stat. 189, c. 210. By this act Congress authorized the Secretary of War to ascertain the sum "which in justice ought to be paid to the Green Bay and Mississippi Canal Company as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin River and the mouth of Fox River, including its locks, dams, canals and franchises, or so much of the same as shall, in the judgment of said Secretary, be needed," and to that end he was authorized to "join with said company in appointing a board of disinterested and impartial arbitrators" — one to be selected by the Secretary, one by the company, and the third by the two arbitrators so selected. The act provided that in making their award the arbitrators should take into consideration the amount of money realized from the sale of lands granted by Congress to aid in the construction of said water communication, which amount should be deducted from the actual value thereof as found by the arbitrators. It was further enacted that no money should be expended on the improvement of the Fox and Wisconsin Rivers until the Green Bay and Mississippi Canal Company should make and file with the Secretary of War an agreement, in writing, whereby it shall agree to grant

and convey to the United States its property and franchises upon the terms awarded by the arbitrators.

By an act, approved March 23, 1871, by the legislature of Wisconsin, the directors of the Green Bay and Mississippi Canal Company were authorized to sell and dispose of the rights and property of said company to the United States, and to cause to be made and executed all papers and writings necessary thereto as contemplated in the act of Congress.

Subsequently, in November, 1871, the arbitrators fixed the then value of all the property of the company at $1,048,070, and the amount realized from land sales, to be deducted therefrom, at $723,070, leaving a balance of $321,000 to be paid to the company. And, in anticipation that the Secretary might decide that the personal property and "the water powers created by the dams and by the use of the surplus waters not required for purposes of navigation," were not needed, these water powers and the water lots necessary to the enjoyment of the same, subject to all uses for navigation, were valued at the sum of $140,000, personal property $40,000, and the improvements $145,000.

The Secretary of War recommended to Congress that it should take the works of improvement and not the water powers and personal property. Congress accordingly, by act approved June 10, 1872, made the necessary appropriation, and the company, by its deed of September, 1872, conveyed and granted to the United States "all and singular its property and rights of property in and to the line of water communication between the Wisconsin River and the mouth of Fox River, including its locks, dams, canals and franchises, saving and excepting therefrom, and reserving to the said company, the following described property, rights and portion of franchises which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to wit: First. All of the personal property of the said company, and particularly of all such property described in the list or schedule attached to the report of said arbitrators, and now on file in the office of the Secretary of War, to which reference is hereto made, whether or not such property be appurtenant to

said line of water communication. Second. Also all that part of the franchise of said company, viz., the water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company, a blank form of which attached to the said report of said arbitrators is now on file in the office of the Secretary of War, and to which reference is here made, and subject also to all leases, grants and assignments made by said company, the said leases, et cet., being also reserved therefrom."

The leases referred to, and reserved from the grant, were those granted by the company to third parties, in consideration of the payment of annual rents. The use of the surplus water began as early as 1861, and has extended until now from one quarter to one half of the flow of the river is utilized at points near the first lock. The company has caused to be erected, at this point, large and costly mills, and it was found by the trial court that the Green Bay and Mississippi Canal Company has leased all of the water power created by the dam and canal, or arm of the dam, to be used over the water lots abutting on the canal.

The cause having been submitted to the Superior Court of Milwaukee County, upon the pleadings and proofs, that court sustained the allegations contained in the cross-complaint of the Green Bay and Mississippi Canal Company, and adjudged, among other things, that "The Green Bay and Mississippi Canal Company is the owner of and entitled as against all the parties to this action, and their successors, heirs and assigns, to the full flow of the river, not necessary to navigation, and that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay and Mississippi Canal Company in so withdrawing and using such water; and it is further considered and adjudged and decreed as in favor of the Patten Paper Company against all other

defendants, that all of the water of the river which is permitted by the Green Bay and Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river, should be, and it is hereby, divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company, and its successors and assigns, and the Green Bay and Mississippi Canal Company, and its successors and assigns, between and to the south, middle and north channels of the river in the following proportions, et cet."

The Supreme Court of Wisconsin reversed the judgment so rendered by the Superior Court, and remanded the case to the Superior Court with directions to enter judgment in accordance with its opinion. That court, in obedience to the mandate of the Supreme Court, entered a final judgment in the case, as follows, omitting recitals:

"Upon motion of Hooper and Hooper, plaintiffs' attorneys, it is considered, adjudged and decreed, as in favor of the Patten Paper Company, Union Pulp Company and Fox River Pulp and Paper Company against all defendants, that all the water of the river except that required for purposes of navigation shall be and is hereby divided and apportioned between and to the south, middle and north channels of the river, in the following proportions, that is to say: 43–200 thereof of right should flow down the south channel; 157–200 thereof should of right flow down the main channel of the river, north of Island No. 4, and that of the water so of right flowing down the main channel of the river, north of Island No. 4, and above the middle channel, 62–157 thereof should of right flow down the middle channel and south of Island No. 3, and that of the water flowing down the north channel north of Island No. 4, and above Island No. 3, 95–157 part should of right flow down the north channel and north of Island No. 3; and each of the parties to this action, their heirs, successors and assigns, are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid.

"And it is further adjudged by the court that said Green

Statement of the Case.

Bay and Mississippi Canal Company, its successors and assigns, shall so use the water, if at all, created by said dam, as that all the water used for water power or hydraulic purposes shall be returned to the stream in such a manner and at such a place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past the lands of the said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants shall have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature without material alteration or diminution."

From this judgment the Green Bay and Mississippi Canal Company, plaintiff in the cross-bill, appealed to the Supreme Court of the State; and on January 10, 1896, the respondents, the present defendants in error, moved to dismiss said appeal for the reason that the judgment was in exact accord with the mandate and was in effect the judgment of the Supreme Court. Upon this motion the Supreme Court dismissed the appeal, expressing itself as follows:

"After careful consideration we are constrained to hold that the judgment entered is a substantial compliance with the mandate of this court. Certainly it would have been improper to allow any amendment to pleadings or new litigation. The mandate was not for a new trial, nor for further proceedings according to law, but with direction to enter judgment in accordance with the opinion, and the opinion left nothing undetermined. This left nothing for the trial court to do in the case except to enter judgment therein as directed."

By that appeal and its decision the jurisdiction of the state courts in the case was exhausted, and the judgment entered in the Superior Court became the final judgment of the highest court in the State in which a decision in the suit could be had. And on May 18, 1896, a writ of error to said judgment by the Green Bay and Mississippi Canal Company was taken to this court and allowed by the Chief Justice of the Supreme Court of Wisconsin.

Mr. B. J. Stevens and *Mr. William F. Vilas* for plaintiff in error. *Mr. E. Mariner* was on their brief.

Mr. Alfred L. Cary, *Mr. George G. Greene* and *Mr. Moses Hooper* for defendants in error. *Mr. John T. Fish* and *Mr. David S. Ordway* were on their brief.

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

First for our consideration is the motion made by the defendants in error to dismiss the writ of error because the record does not disclose that any Federal question was involved in the controversy, and because no title, right, privilege or immunity claimed under the Constitution of the United States, or any treaty or statute of, or commission held or authority exercised under the United States, was specifically set up or claimed in the trial court or in the Supreme Court of the State of Wisconsin by the plaintiff in error, nor was there any decision in either of said state courts against any such title, right, privilege or immunity specially set up or claimed by the plaintiff in error.

The contention that no Federal question is disclosed in the record is sufficiently disposed of, we think, by an inspection of the cross-complaint filed by the Green Bay and Mississippi Canal Company. It was therein claimed that the water power in question was created by a dam, canal and other improvements owned and operated by the United States, and that the right and title of the said Canal Company to the use of the water power so created arose under and by virtue of certain alleged and recited acts of Congress and acts of the legislature of the State of Wisconsin, relating to the improvement of Fox River as a public highway, and especially by virtue of an alleged contract between the United States and the Canal Company, whereby the use of the surplus water created by said dam and canal was granted and reserved to the Canal Company.

Assuming the truth of such allegations, it is plain that the

plaintiff in error asserted a right and title and authority exercised under the United States.

It is, however, urged that, whatever may have been the right, title, privilege or authority possessed by the Canal Company and derived from the United States, such right, title, privilege or authority was not specially set up and claimed in the state courts at a time and in a manner to give this court jurisdiction.

This contention is based on the words in section 709 of the Revised Statutes, carried forward from the twenty-fifth section of the Judiciary Act of 1789, "specially set up or claimed;" and the effect to be given to those words has been frequently considered by this court.

There is a class of cases wherein it has been held and laid down as settled doctrine that "the revisory power of this court does not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States; that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court; that this statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

The last elaborate discussion of this phase of the subject is found in the opinion of the court in *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, delivered by Mr. Justice Harlan, in which many of the cases are reviewed and from which the preceding quotation is taken.

But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state

court in such manner as to bring it to the attention of that court.

"The true and rational rule," this court said in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143, "is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Roby* v. *Colehour*, 146 U. S. 153, 159, it was said that "our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment." "If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient." *Powell* v. *Brunswick County*, 150 U. S. 433, 440; *Sayward* v. *Denny*, 158 U. S. 180; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226.

As then in its cross-complaint, the Canal Company explicitly set up and claimed, as the foundation of its alleged rights, the acts of Congress and the transactions between the United States and the Canal Company, under which the United States became the owner of the dam, canal and other improvements on the Fox River, and the Canal Company became vested with its rights in the surplus water power incidental to said works, and as, in the final judgment, the Supreme Court of Wisconsin necessarily held adversely to these claims of Federal right, we hold that the motion to dismiss for want of jurisdiction must be overruled, and that it is our duty to inspect the record in order to see whether there was error in the rulings of the court below.

Whether the water power, incidentally created by the erection and maintenance of the dam and canal for the purpose of navigation in Fox River, is subject to control and appro-

priation by the United States, owning and operating those public works, or by the State of Wisconsin, within whose limits Fox River lies, is the decisive question in this case.

Upon the undisputed facts contained in the record we think it clear that the Canal Company is possessed of whatever rights to the use of this incidental water power that could be validly granted by the United States.

That Fox River is one of the navigable waters of the United States has been already decided by this court in the case of *The Montello*, 20 Wall. 430, upon the same facts, historical and legislative, that are now before us. That was the case of a libel filed by the Government in the Circuit Court of the United States for the District of Wisconsin against the steamer Montello, in admiralty, for non-compliance with acts of Congress making enrolment and license and certain provisions as to steam valves necessary for vessels like the Montello navigating the navigable waters of the United States. The court below dismissed the libel, resting its decision on the ground that before the navigation of the river was artificially improved there had been numerous obstructions to a continuous navigation, by reason of falls and rapids, and that, therefore, Fox River was not a navigable water of the United States. But this court reversed the judgment and held that Fox River is a stream of a national character, and that steamboats navigating its waters are subject to governmental regulations.

To aid in the improvement of the Fox and Wisconsin Rivers, and to connect the same by a canal, the United States, by the act of August 8, 1846, c. 170, 9 Stat. 83, granted a quantity of land on each side of Fox River, and the lakes through which it passes, from its mouth to the point where the portage canal should enter the same, and provided that, as soon as the Territory of Wisconsin should be admitted as a State, all the lands granted by the act should become the property of said State "for the purpose contemplated by the act, and no other." It further enacted that the legislature should agree to accept said grant upon the terms specified in the act, and should have power to fix the price at which said lands should be sold, not less than one dollar and twenty-five cents

the acre; and to adopt such kind and plan of improvement on said route as the said legislature shall from time to time determine for the best interest of said State; and provided, also, that the lands granted should not be conveyed or disposed of by said State, except as said improvements should progress — that is, the said State might sell so much of said lands as should produce the sum of twenty thousand dollars, and then the sales should cease until the Governor of the State should certify the fact to the President of the United States that one half of said sum had been expended upon said improvement, when the said State might sell and dispose of a quantity of said lands sufficient to reimburse the amount expended; and that thus the sales should progress as the proceeds thereof should be expended, and the fact of such expenditure certified in the manner in the act mentioned. It further enacted that the said improvements should be commenced within three years after the said State should be admitted into the Union, and completed within twenty years, or the United States should be entitled to receive the amount for which any of said lands might have been sold by the State.

In February, 1848, the State of Wisconsin was created by the adoption of a constitution, and the legislature of the new State, by an act passed August 8, 1848, accepted the grant from Congress made by the act of August 8, 1846, and organized a board of public works, and authorized the board, in the construction of such improvements, to "enter on, to take possession of and use all lands, waters and materials the appropriation of which for the use of such works of improvement should in their judgment be necessary." The act of August, 1848, contained the following section:

"SEC. 16. When any lands, waters or materials appropriated by the board to the use of said improvements shall belong to the State, such lands, waters or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the State, and whenever a water power shall be created by reason of any dam erected or other improvements made on any of

said rivers, such water power shall belong to the State subject to future action of the legislature."

Sections 17, 18, 19, 20, 21 and 22 provided for condemnation by the board of such lands, waters and materials belonging to individuals, with whom the board could not agree, and for payment of damages out of the fund.

By an act approved February 9, 1850, c. 283, p. 226, the legislature of Wisconsin enacted as follows:

"The board of public works are hereby authorized and empowered in any future lettings of contracts for the improvement of the Fox and Wisconsin Rivers to consider bids made by any person or persons for improvements which will create a water power, and when such person or persons offer to perform, or perform and maintain, the work in consideration of the granting by the State to him or them, his or their assigns, forever, the whole or a part of such water power: *Provided*, That before such bid is accepted and the contracts entered into it shall receive the approval of the governor.

"When lettings have been made for the improvement of said rivers, whereby a water power is created, the board of public works may relinquish to the person or persons who have performed the same all or a part of such power as a consideration in full or in part for such performance or maintenance of such improvement, or for both."

The eighth article of the constitution of Wisconsin contained the following:

"Sec. 10. The State shall never contract any debt for works of internal improvement or be a party carrying on such works; but whenever grants of land or other property shall have been made to the State, especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

By the act approved July 6, 1853, the legislature of Wisconsin created a corporation to supersede the board of public works in the construction and maintenance of the improvements on the Fox and Wisconsin Rivers under the name of

the "Fox and Wisconsin Improvement Company," and granted and surrendered to the said company "the works of improvement contemplated by the act entitled 'An act to provide for the improvement of the Fox and Wisconsin Rivers and connecting the same by a canal,' approved August 8, 1848, and by several acts supplemental thereto and amendatory thereof, and known as the 'Fox and Wisconsin Rivers improvement,' together with all and singular the rights of way, dams, locks, canals, water power and other appurtenances of said works; also all the right possessed by the State of demanding and receiving tolls and rents for the same, so far as the State possesses or is authorized to grant the same, and all privileges of constructing said works and repairing the same, and all other rights and privileges belonging to the improvement to the same extent and in the same manner that the State now holds or may exercise such rights by virtue of the acts above referred to in this section."

The Fox and Wisconsin Improvement Company, thus created and empowered, agreed to fully execute the trust, and forthwith undertook the work.

By an act, approved October 3, 1856, c. 112, p. 123, entitled "An act to secure the enlargement and immediate completion of the improvement of the navigation of the Fox and Wisconsin Rivers," etc., it was enacted, by its second section, as follows:

"SEC. 2. To enable said company to make all the dams, locks, canals, feeders and other structures, and to do all the dredging and other work, and furnish all materials necessary to complete the improvement of the navigation of the Fox and Wisconsin Rivers and the canal connecting the same, all the lands now unsold, granted by Congress in aid of said improvement, as explained by the same body, (which grants are hereby accepted,) are hereby granted to the Fox and Wisconsin Improvement Company, subject, however, to the terms and conditions of said grants by Congress, and to the further terms and conditions following, that is to say: That within ninety days after the passage of this act, the said company shall make a deed of trust to three trustees, to be ap-

pointed as hereinafter provided, including and conveying to said trustees and their successors all the unsold lands granted to the State of Wisconsin by the several acts and resolutions of Congress to aid in the improvement of the Fox and Wisconsin Rivers, and all the works of improvements constructed or to be constructed on said rivers, and all and singular the rights of way, dams, locks, canals, water powers and other appurtenances of said works, and all rights, privileges and franchises belonging to said improvement, and all property of said company, of whatever name and description."

By the third section it was enacted that, for raising funds, from time to time, for the construction, enlargement and completion of said works of improvement, and for the purchase of materials to be used therein, etc., said company might issue its bonds, to be countersigned by said trustees, in sums of not less than five hundred nor more than one thousand dollars each, at rates of interest not exceeding ten per centum per annum, payable semiannually, the principal of said bonds payable at a period to be therein named, not exceeding twenty years from their date, etc., and that the payment of said bonds should be secured by the deed of trust aforesaid of said lands, works, water powers, property and franchises. It was further provided that, in case the company should fail to comply with any of the requirements of the act, or to pay the principal or interest of its bonds, to be issued as therein provided, the said trustees should sell the said lands in tracts not exceeding six hundred and forty acres, and should apply the proceeds thereof to the purposes expressed in the act, and that, if the proceeds of said sales should be insufficient to pay all the evidences of state indebtedness and interest thereon and redeem all the bonds and other obligations of said company, then the said trustees should sell the water powers created by said improvements, and thereafter all the corporate rights, privileges, franchises and property of said company in said improvement, and all appurtenances thereto, to pay the same; and that the purchasers thereof should take, hold and use the same as fully as they were held, used and enjoyed by said company, etc.

By the fourth section it was enacted that the trustees might on the requisition of said company, proceed to sell the lands granted by Congress in aid of said improvement, and might sell or lease the water powers created by said improvement, in such manner and upon such terms, as to price and time and place of payment, as the company might direct; but that no sales of said lands, or sales or leases of said water powers, should be made until after the execution and delivery of said deed of trust, etc.

In 1864 the company failed, the deed of trust was foreclosed, and the property of the company, consisting of the works of improvement, lands and water powers, were sold, in February, 1866, to purchasers, who became incorporated, under authority of law, as the Green Bay and Mississippi Canal Company. In the act of April 12, 1866, authorizing the purchasers at said sale to form "a corporation for the purpose of holding, selling, operating or managing the lands, water powers, works of improvement, franchises and other property purchased at said sale, or any part thereof," it was enacted that said corporation should have power to enlarge and increase the capacity of said works and of the said rivers so as to make a uniform steamship navigation from the Mississippi River to Green Bay, or to surrender the same to the United States for such enlargement on such terms as should be approved by the Governor of the State.

The amount realized at the sale was just sufficient to pay the state indebtedness, outstanding on account of certificates issued to aid in the work of improvement, and the sum estimated, by a commission duly appointed, to be necessary to complete the improvement.

The Green Bay and Mississippi Canal Company, thus organized, continued to hold the works of improvements and manage the same until, in 1870, Congress passed an act providing for the purchase from the company of "all and singular its property and rights of property in and to the line of water communication between the Wisconsin River and the mouth of the Fox River, including its locks, dams, canals and franchises, or so much of the same as should, in the judgment of the Secre-

tary of War, be needed," and authorizing the appointment of a board of arbitrators, to be mutually chosen, who should appraise the properties to be taken. This act provided that in making their award the arbitrators should take into consideration the amount of money realized from the sale of the lands granted to the State of Wisconsin to aid in the construction of said water communication, which amount was to be deducted from the actual value thereof as found by the arbitrators.

In pursuance of this legislation, the arbitrators were appointed and acted. They fixed the value of the company's property at $1,048,070; the amount of the land sales at $723,070; leaving a balance of $325,000 to be paid the company. They valued the water power and the water lots necessary to the enjoyment of the same at the sum of $140,000; the personal property at $40,000, and the improvement at $145,000.

Subsequently Congress, by act of June 10, 1872, c. 416, 17 Stat. 370, appropriated the amount of $145,000, and on September 18, 1872, the Canal Company, by its deed of that date, transferred and conveyed the works of improvement to the United States, reserving to itself the personal property and the water powers in the language following:

"All that part of the franchises of said company, viz.: The water powers created by the dams and by the use of the surplus waters not required for purposes of navigation, with the rights of protection and reservation appurtenant thereto, and the lots, pieces or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company; . . . and subject, also, to all leases, grants and assignments made by said company, the said leases, etc., being also reserved herefrom."

Since that time the United States have assumed possession and exclusive control of the rivers, and have expended several millions of dollars in their improvement, in pursuance of yearly appropriations; and the Canal Company has con-

tinued, until the decree complained of in the present case, in the possession and enjoyment of the water powers and water lots mentioned in the report of the arbitrators and reserved in the deed to the United States.

It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition. Nor was it created by the erection of a dam by private persons for that sole purpose.

We, of course, must accept the doctrine of the Supreme Court of Wisconsin, that it would not be competent even for the legislature to legalize such structures for private purposes. Such a question is for the state tribunals.

But we have here the case of a water power incidental to the construction and maintenance of a public work and, from the nature of the case, subject to the control of the public authorities, in this instance the United States.

It also appears that, through the entire history of this improvement, these incidental water powers were recognized by the legislature of the State as a source of revenue for the promotion and success of the public enterprise, and in aid of its completion. By the act of July 6, 1853, the water powers were granted with the rest of the public works to the Fox and Wisconsin Improvement Company, upon a public trust to continue and complete the partially constructed highway, and the company was thereby authorized to mortgage such water powers, as part of the plant, to secure bonds issued to raise money for that purpose; and, subsequently, upon a foreclosure the entire property became vested in the Green Bay and Mississippi Canal Company.

The case of *Kaukauna Co.* v. *Green Bay and Mississippi Canal Co.*, 142 U. S. 254, involved some of the questions presented in the present case. There a private riparian owner sought to withdraw water from this very dam to furnish power to its works. The Canal Company filed a bill against such owner, the Kaukauna Water Company, to enjoin it from interfering with the Canal Company in building and maintaining the dam, and from cutting said dam in order to permit a flow of water out of the pool into the works of the defendant.

The decree asked for was granted by the Circuit Court of Outagamie County, and that judgment was affirmed by the Supreme Court of Wisconsin. 70 Wisconsin, 645. The case was brought to this court where it was contended, on behalf of the Kaukauna Water Power Company, that said company, by reason of ownership of the bank and of the bed of the stream, was the owner of the use, while passing, of all the water which might flow over the bed of the stream; in other words, was the owner of all the water power which could be utilized upon its land; and that, therefore, the act of the State of Wisconsin of August 8, 1848, was void as an impairment of such property rights. The judgment of the court below was affirmed in an opinion by Mr. Justice Brown, some of the observations of which are so pertinent to our present purpose that we quote them at some length:

"The case of the plaintiff canal company depends primarily upon the legality of the legislative act of 1848, whereby the State assumed to reserve to itself any water power which should be created by the erection of the dam across the river at this point. No question is made of the power of the State to construct or authorize the construction of this improvement, and to devote to it the proceeds of the land grant of the United States. The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose is doubtless a proper exercise of the authority of the State under its power of eminent domain. Upon the other hand it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to

make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to withdraw — controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.

"The value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors, who had not the means to make it available. Those proprietors lost nothing that was useful to them, except the technical right to have the water flow as it had been accustomed and the possibility of their being able some time to improve it. If the State could condemn this use of the water, with the other property of the riparian owner, it might raise a revenue from it sufficient to complete the work, which might otherwise fail. There was every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed, it seems to have been the practice, not only in New York, but in Ohio, in Wisconsin and perhaps in other States, in authorizing the erection of dams for the purpose of navigation, or rather public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the State; and where the surplus thus created was a mere incident to securing an adequate amount of water for the public improvement, such legislation, it is believed, has been uniformly sustained."

The learned judge then proceeds to cite decisions to that effect rendered in several of the state Supreme Courts.

As respected the right of the riparian owners in that case to recover compensation for their property thus taken, this court held that the act of Congress of March 3, 1875, c. 166, 18 Stat. 506, to aid in the improvement of the Fox and Wisconsin Rivers, made a proper provision for such compensation, and that although the act of 1875 may have been repealed by the act of February 1, 1888, c. 4, 25 Stat. 4, 21, yet that the lapse of thirteen years had afforded a reasonable opportunity for the Kaukauna Water Power Company to have obtained compensation for the damages sustained by the construction of the improvements.

As previously stated, the State of Wisconsin, by its act of October 3, 1856, granted and conveyed to the Fox and Wisconsin Improvement Company all the rights and interest of the State in the improvement, including the water powers created thereby, and, in case the sales of the granted lands should fail to realize a sum sufficient to complete the intended works of improvement and to pay the outstanding indebtedness of the State, and redeem the bonds issued by the company, the State authorized the sale of the water powers created by the said improvements. And, subsequently, by act of March 23, 1871, the State authorized the Green Bay and Mississippi Canal Company, which had become the owner of the entire improvement works, lands and water powers by purchase at the foreclosure sale, to sell and dispose of the same to the United States.

The legal effect and import of the sale and conveyance by the Canal Company were to vest absolute ownership in the improvement and appurtenances in the United States, which proprietary rights thereby became added to the jurisdiction and control that the United States possessed over the Fox River as a navigable water. By the findings of the arbitrators the sum of three hundred and twenty-five thousand dollars was payable to the Canal Company, but, by agreement and under the act of Congress of June 10, 1872, the United States consented to the retention by the Canal Company of certain personal property and of the water powers, with the lots appurtenant thereto, in part payment of the sum at which

the entire plant had been appraised; and accordingly, in its deed of conveyance, the company reserved to itself such personal property and the water powers and appurtenances, and the United States paid the remaining sum of one hundred and forty-five thousand dollars.

The substantial meaning of the transaction was, that the United States granted to the Canal Company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works, and that the United States were credited with the appraised value of the water powers and appurtenances and the articles of personal property. The method by which this arrangement was effected, namely, by a reservation in the deed, was an apt one, and quite as efficacious as if the entire property had been conveyed to the United States by one deed, and the reserved properties had been reconveyed to the Canal Company by another.

So far, therefore, as the water powers and appurtenant lots are regarded as property, it is plain that the title of the Canal Company thereto cannot be controverted; and we think it is equally plain that the mode and extent of the use and enjoyment of such property by the Canal Company fall within the sole control of the United States. At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire.

This aspect of the subject was before us in *Wisconsin* v. *Duluth*, 96 U. S. 379, 387, where the State of Wisconsin sought, by an original bill in this court, to restrain the city of Duluth from changing the current of the St. Louis River and making other improvements in the city harbor to the detriment, as was claimed, of the harbor of Superior City within the jurisdiction of Wisconsin. It, however, was disclosed that Congress had made large appropriations for the work complained of, and that the executive department had taken

exclusive charge and control of it. The court dismissed the bill, and in its opinion, by Mr. Justice Miller, said:

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the States. And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority."

To the same effect is *South Carolina* v. *Georgia*, 93 U. S. 4.

Several cases are cited in the briefs for the defendants in error, wherein it has been decided by state Supreme Courts of high authority that whatever remains of the stream, beyond what is wanted for the public improvement, and which continues to flow over the dam and down the original channel of the river, belongs to riparian owners upon the stream, in the same manner as if the state dam had not been erected.

Our examination of the cases so cited has not enabled us to perceive that they are applicable to the present subject. In none of them have we found that, by the state legislation, was there a fund created out of the use of the surplus water, to be expended in the completion and maintenance of the public improvement. As we have seen, the entire legislation, state and Federal, in the present instance, has had in view the dedication of the water powers incidentally created by the dams and canal to raising a fund to aid in the erection, completion and maintenance of the public works; and, as we have further seen, provision was made in the Federal act of 1875 for the ascertainment and payment of damages, in respect to which this court said, in *Kaukauna Co.* v. *Green Bay and Mississippi Canal Co.*, 142 U. S. 254, 279, that "the terms of

this act are broad enough to cover not only lands taken for flowage purposes, but all injury done to lands or other property by means of any part of the works of said improvement, which would include damages caused by the diversion of the waters."

Moreover, in the state cases cited by the defendants in error, the question of Federal jurisdiction and control did not arise and was not considered.

Other propositions, based on the alleged departure by the Supreme Court of the State from the case made by the pleadings, were discussed by the counsel for the plaintiff in error; but, as the views heretofore stated dispose of the case, it is not necessary for us to consider them.

Our conclusion, then, is, that, as by the judgment of the Supreme Court of Wisconsin there was drawn into question the validity of an authority exercised under the United States, to wit, the granting of the said water powers and easement, and the decision was against the validity of such authority, thereby depriving the plaintiff in error of property without due process of law, the judgment of that court must be and is hereby

Reversed and the case remanded to the Supreme Court of Wisconsin for further proceedings not inconsistent with this opinion.

MEYER *v.* RICHMOND.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 48. Submitted October 14, 1898. — Decided November 28, 1898.

The plaintiff's declaration, in a case pending in a *nisi prius* court in Virginia, set forth that he was the owner in fee of a lot of land fronting on Eighth street between Cary and Canal streets, in Richmond, on which were located two brick buildings, the first floor of which was used for store purposes and the second story as dwellings; that said property, previous to the obstruction of Eighth street, as hereinafter described, was very profitable as an investment, being continuously rented to good tenants, who promptly paid remunerative rents for the same; that on the 25th

Statement of the Case.

day of June, 1886, the city council of Richmond, by ordinance, authorized the Richmond and Alleghany Railway Company to obstruct for the distance of sixty feet (commencing at Canal street in the direction of Cary street) Eighth street, and by virtue of which said railway company wholly obstructed and occupied said street for said distance with its tracks, sheds, fences, etc., except to pedestrians, for whom said company was required to provide by overhead bridge and stairway approaches thereto. It further was averred that by means of this obstruction, so made by said company by authority of said city, travel along said street was arrested and the property rights of the petitioner, as an abutter upon said street, were not only substantially injured, but practically destroyed; that the city had no right under the Constitution and laws of the land to authorize the said railroad company to close said street or place obstructions therein without proper legal proceedings for that purpose and the making of just compensation to such abutting owners as might be injured by said action; that this unconstitutional and illegal action rendered said defendants liable to the petitioner, as trespassers on his property, for all damages that he had sustained not common to the public; that the obstructions were in themselves nuisances which the city was charged with the duty of abating and moving, and that every day's continuation of the same was a new offence. A general demurrer being entered, judgment was given for defendants. The plaintiff moved to set aside said judgment, solely on the ground that the act of the general assembly of Virginia, approved May 24, 1870, providing a charter for the city of Richmond, so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the Fourteenth Amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and therefore there was no warrant of law for the closing of said street; but the court overruled said motion and refused to grant said motion and to set aside said judgment; to which action of the court the plaintiff excepted. The Supreme Court of Appeals of the State sustained that judgment, whereupon a writ of error was sued out to this court.

Held,

(1) That the constitutional question so raised was set up in time, and this court has jurisdiction.

(2) That the judgment of the state court was right, and should be affirmed.

This is a common law action of trespass on the case, and was brought by plaintiff in error against the defendants in error in one of the *nisi prius* courts of the State of Virginia. The substance of the plaintiff's declaration is as follows:

That he was the owner in fee of a lot of land fronting on Eighth street between Cary and Canal streets, on which were

located two brick buildings, the first floor of which was used for store purposes and the second story as dwellings; that said property, previous to the obstruction of Eighth street, as hereinafter described, was very profitable as an investment, being continuously rented to good tenants, who promptly paid remunerative rents for the same; that on the 25th day of June, 1886, the city council of Richmond, by ordinance, authorized the Richmond and Alleghany Railway Company to obstruct for the distance of sixty feet (commencing at Canal street in the direction of Cary street) Eighth street, and by virtue of which said railway company wholly obstructed and occupied said street for said distance with its tracks, sheds, fences, etc., except to pedestrians, for whom said company was required to provide by overhead bridge and stairway approaches thereto. It was averred in said declaration that by means of this obstruction, so made by said company by authority of said city, travel along said street was arrested and the property rights of your petitioner, as an abutter upon said street, were not only substantially injured, but practically destroyed; that the city had no right under the Constitution and laws of the land to authorize the said railroad company to close said street or place obstructions therein without proper legal proceedings for that purpose and the making of just compensation to such abutting owners as might be injured by said action; that this unconstitutional and illegal action rendered said defendants liable to your petitioner, as trespassers on his property, for all damages that he had sustained not common to the public; that the obstructions were in themselves nuisances which the city was charged with the duty of abating and removing, and that each day's continuation of the same was a new offence; that the rights, privileges and obligations of said Richmond and Alleghany Railway Company had been legally transferred to and assumed by said Chesapeake and Ohio Railway Company, and that it, the said last-named company, now maintained the said obstructions and was therefore liable, jointly with said city of Richmond, for the said trespasses. A plat of the *locus in quo* and a copy of said ordinance were made parts of said declaration.

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Damages were claimed in the sum of five thousand dollars.

On the 9th of September, 1895, the defendants entered a general demurrer to the whole declaration and each count thereof, in which the plaintiff joined, and on the 27th of December, 1895, the court sustained the demurrer and gave judgment for the defendants, dismissing the action.

And thereupon the plaintiff, by counsel, moved the court to set "aside the said judgment and enter judgment for him on said demurrer, and it being represented to the court that it is the intention of the plaintiff in the case of H. Wythe Davis against The City of Richmond and The Chesapeake and Ohio Railway Company to apply for a writ of error to the judgment of this court entered this day in that cause, and the questions involved in that case being the same as in this case, the court takes time to consider of said motions, and by consent of parties this case is retained on the docket of this court, and the determination of said motions to await the result of the application for a writ of error in the case of H. Wythe Davis against The City of Richmond and The Chesapeake and Ohio Railway Company."

On the 31st day of January, 1896, the following proceedings were had:

"This day came the parties again, by their attorneys, and the court, being now advised of its judgment to be rendered herein, on the motion of the plaintiff to set aside the judgment rendered on the demurrer to the plaintiff's declaration and to each count thereof, doth refuse to set aside said judgment.

"And thereupon the plaintiff again moved the court to set aside said judgment entered on the 27th day of December, 1895, sustaining defendants' demurrer to the declaration and to each count thereof, solely on the ground that the act of the general assembly of Virginia, approved May 24, 1870, providing a charter for the city of Richmond, (Acts 1869–'70, p. 120,) so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the Fourteenth Amendment of the Constitution of the United States, which prohibits any

State from depriving any person of property without due process of law, and therefore there was no warrant of law for the closing of said street as claimed by said defendants; but the court overruled said motion and refused to grant said motion and to set aside said judgment; to which action of the court the plaintiff excepted and filed his bill of exception, which was signed, sealed and enrolled, and made a part of the record."

The plaintiff then presented a petition to the Supreme Court of Appeals of Virginia, the court of last resort of that State, asking for a writ of error to said judgment, but said court rejected the petition by the following order:

"VIRGINIA:

"In the Supreme Court of Appeals held in the state Library Building, in the city of Richmond, on Thursday, February 20, 1896.

"The petition of Engelbert Meyer for a writ of error from a judgment rendered by the law and equity court of the city of Richmond on the 31st day of January, 1896, in a suit in which the petitioner was plaintiff and the city of Richmond and the Chesapeake and Ohio Railway Company were defendants, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that said judgment is plainly right, doth reject said petition."

The case is here on error to this order.

In his petition to the Court of Appeals the plaintiff set up and urged a right under the Constitution of the United States as follows:

"Your petitioner now insists that the said law and equity court erred in sustaining said demurrer to his declaration, and also in refusing to set aside its judgment so holding as set forth in his bill of exception.

"Your petitioner therefore humbly submits—

"That under the constitution and laws of this State the free and uninterrupted use of public highways once dedicated to and accepted by the public or acquired by right of eminent domain are for continuous public use, and that the right of

access to and use of such streets by an abutting property holder is property of which the owner cannot under the Federal Constitution be deprived without due process of law.

* * * * *

"The said law and equity court in sustaining the said demurrer denied to your petitioner his constitutional rights, and specially so did it in refusing to set aside its judgment when its attention was called to the unconstitutionality of the act of the general assembly of Virginia approved May 24, 1870, (Acts 1869–'70, p. 120,) so far as it authorized the passage of the ordinance in the declaration mentioned, because in conflict with the Fourteenth Amendment, which prohibits any State from depriving any person of property without due process of law, there being no mode prescribed in said act of the general assembly or in said ordinance for the divesting him of his said property rights by any judicial proceedings whatsoever."

On page 88 is a copy of the diagram showing plaintiff's property and the obstructions complained of.

The ordinance under which the defendants justified is inserted in the margin; also the sections of the Virginia Act of May 24, 1870, c. 101, Acts of Assembly, 1869–'70, under which the ordinance was passed are inserted in the margin.[1]

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[1] Ordinance permitting the Richmond and Alleghany Railroad Company to close a certain portion of Eighth street and requiring them to erect a foot bridge. (Approved June 28, 1886.)

Be it ordained by the city council of Richmond, First. So much of Eighth street as lies between the present southern boundary line of the property of the Richmond and Alleghany Railroad Company, being also the southern boundary line of the right of way of the James River and Kanawha Company, and a line drawn across Eighth street at right angles, sixty feet north of the face of the north wall of the canal as said wall is now built, shall be, and the same is hereby, closed from the 31st day of August, 1886, until it is required to be reopened in accordance with the provisions of this ordinance: Provided, that the said Richmond and Alleghany Railroad Company shall, on or before the said 31st day of August, begin to erect an overhead foot bridge across the tracks and canal of said railroad on that portion of Eighth street above described, and shall complete the same by the 30th day of September, 1886.

Second. The said bridge and the stairways thereto shall be twelve feet

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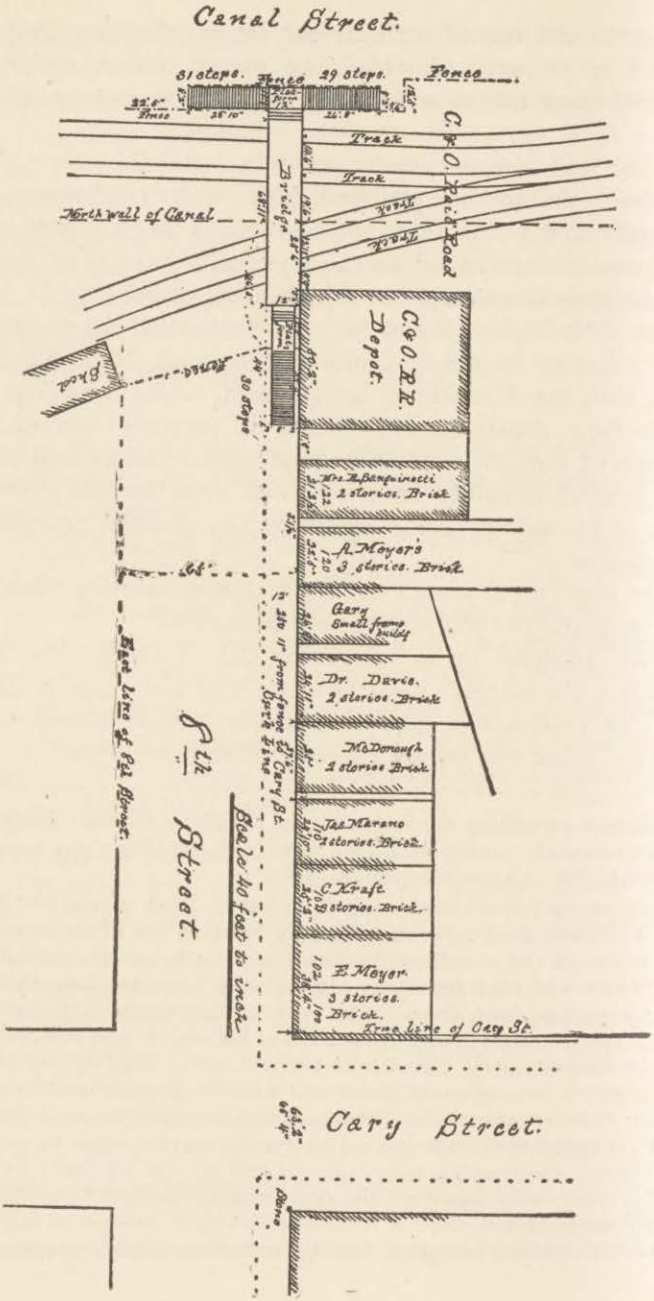

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The constitution of Virginia, so far as involved in this controversy, provides in article 5, section 14, that the general assembly shall not pass "any laws whereby private property shall be taken for public use without just compensation."

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wide, and shall be so located, and shall be of such material or materials, design, security and capacity, as may be required by the city engineer; the same shall always be kept and maintained in such condition and repair as may be from time to time required by the committee on streets of the said city council, and always be open to the free use of the public.

Third. Should the said company fail for the space of ten days to put the said bridge or stairways in such condition or repairs, after having been required so to do by said committee, then the said company shall be liable to a fine of fifty dollars, to be imposed by the police justice of Richmond, and each day's failure to be a separate offence; and the city may in all such cases repair said bridge or stairways when not done by said company as herein required, and the expense thereof shall be a debt against the said company recoverable as debts are now recoverable by the city of Richmond.

Fourth. The said company, by exercising the privileges herein granted, doth hereby agree and bind themselves to indemnify and save harmless at all times the said city from any loss or damage suffered by reason of any one being injured in any manner in using said bridge or stairways, or by reason of the building or existence of the same, and shall pay to the city any amount or amounts recovered against said city by any judgment or judgments given on account of any such injuries.

Fifth. The above-described portion of Eighth street shall remain closed until the said Richmond and Alleghany Railroad Company shall have been ordered by the ordinances of two successively elected councils to remove the said overhead bridge and restore the street to its present condition, and to the same authority and control of the city as existed prior to the passage of this ordinance. Whenever it is so ordered to be reopened, the said company shall be allowed three months from the date of the passage of the last of the said two ordinances in which to remove said bridge and stairways, and to restore said Eighth street to the same condition in which it was before the passage of this ordinance. And should the said company fail to remove said bridge and stairways and to restore said Eighth street to its former condition, before the expiration of the said three months, then the said company shall be liable to a fine of one hundred dollars, and each day's default shall be a separate offence; and the said city may remove said bridge and stairways and restore said Eighth street as above mentioned, when not done by said company as above required, and the expense thereof shall be a debt against the said company recoverable as debts are now recoverable by the city of Richmond.

Sixth. The said company doth, by exercising the privileges herein granted, agree and bind itself and its assigns to make no claim to the land now occupied by that portion of Eighth street to be closed, on account of

Counsel for Parties.

Mr. Henry R. Pollard for plaintiff in error.

Mr. H. T. Wickham and *Mr. Henry Taylor, Jr.*, for defendants in error.

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said closing or the privileges herein granted, and doth fully recognize and admit the right of the said city to reopen the said Eighth street at any time, according to the provisions of this ordinance.

Seventh. Nothing in this ordinance shall conflict in any way with the ordinance approved May 12, 1886, granting permission to the Richmond and Chesapeake Railroad Company to construct a tunnel under Eighth street; and should the bridge constructed under this ordinance obstruct in any manner the said tunnel or tracks leading thereto, it shall be changed by the said Richmond and Alleghany Railroad Company within sixty days after receipt of notice from the committee on streets of the said city council requiring such change to be made.

A copy. Teste: BEN. T. AUGUST, *City Clerk.*

Virginia Acts of Assembly, 1869-'70, pp. 120-146.

SEC. 19. The city council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city and of all property, real and personal, belonging to the said city; and may make such ordinances, orders and by-laws, relating to the same, as it shall deem proper and necessary. They shall likewise have the power to make such ordinances, by-laws, orders and regulations as they may deem desirable to carry out the following powers which are hereby vested in them:

* * * * * * *

VII. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in and culverts under said streets, and may prevent or remove any structure, obstruction or encroachment over or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its work the streets of the city without the consent of the council. In the meantime no order shall be made and no injunction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents or servants, are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

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SEC. 22. The council shall not take or use any private property for streets or other public purpose without making to the owner or owners

Opinion of the Court.

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

The jurisdiction of this court is challenged. The defendants in error claim that "the declaration shows no point is therein raised which demanded the consideration by the court of any constitutional question," and they insist further that "if it were intended to raise the question that the charter and ordinance were unconstitutional, and in consequence thereof plaintiff was deprived of his property without due process of law, the same should have been specially set up as claimed by apt language in the declaration so as to bring the question to the attention of the court when it had to pass on the demurrer." This certainly was not done, and if it was an indispensable condition to the jurisdiction of this court it has none.

But it was done subsequently, as we have stated, and, whatever the ground of the court's ruling on the demurrer and on the first motion to reverse that ruling, the second motion was unequivocally based on the invalidity of the city ordinance because of its asserted conflict with the Fourteenth Amendment of the Constitution of the United States, and the court's ruling necessarily responded to and opposed the grounds of the motion — necessarily denied the right specially set up by him under the Constitution.

Plaintiff's motion and the special grounds of it and exceptions to the ruling of the court were embraced in a bill of exceptions, and allowed and became part of the record on his petition to the Supreme Court of Appeals of Virginia for a review and reversal of the judgment, and the petition besides explicitly set up and urged a right under the Constitution of the United States.

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thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the circuit or county court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law.

The Court of Appeals rejected the petition. Its order recited ". . . that, having maturely considered, and the transcript of the record of the judgment aforesaid seen and inspected, the court, being of opinion that such judgment is plainly right, doth reject said petition."

Necessarily, therefore, the Supreme Court of Appeals did as the court of the city of Richmond did — considered the right which plaintiffs claimed under the Constitution of the United States, and denied the right. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 228.

So far the conditions of the power of review by this court existed. A right under the Constitution of the United States was specially set up and the right was denied. Was it set up in time? It has been repeatedly decided by this court that to suggest or set up a Federal question for the first time in a petition for a rehearing in the highest court of a State is not in time. *Texas & Pacific Railway* v. *Southern Pacific Railroad*, 137 U. S. 48, 54; *Butler* v. *Gage*, 138 U. S. 52; *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371; *Leeper* v. *Texas*, 139 U. S. 462; *Loeber* v. *Schroeder*, 149 U. S. 580.

In all of these cases the Federal question was not presented in any way to the lower court nor to the higher court until after judgment. It is not, therefore, decided that a presentation to the lower court at some stage of the proceedings and in accordance with its procedure, and a presentation to the higher court before judgment, would not be sufficient.

In *Loeber* v. *Schroeder* the Court of Appeals of Maryland, having before it for review a judgment of one of the lower state courts, reversed such judgment, and, having denied a rehearing on April 28, 1892, issued its order for a *fieri facias* against Loeber for the amount of the judgment decreed returnable to the lower court. On April 29, 1892, Loeber entered a motion before that court to quash the writ because the decree on which the writ was issued and the writ were void, because said writ would deprive him of his property without due process of law, and because it was issued in violation of the Constitution of the United States and amendments thereto. The motion was denied and Loeber prosecuted an

appeal which affirmed the order of the lower court, holding that the state law upon which it had made its decision was not in conflict with the Constitution of the United States. From this judgment of the Court of Appeals, Loeber prosecuted a writ of error to this court assigning the unconstitutionality of the state law sustained by the Court of Appeals.

Mr. Justice Jackson, who delivered the opinion of the court, said: "The motion to quash the *fi. fa.* in this case on the grounds that the order of the Court of Appeals, which directed it to be issued, was void for the reasons assigned, stood on no better footing than a petition for rehearing would have done, and suggested Federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the Court of Appeals was rendered on January 28, 1892." In other words, should have been urged when the case was pending and before its decision. It is an inference from the opinion that, if this had been done, the Federal question would have been claimed in time.

In *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, the right under the Constitution of the United States was claimed by plaintiff in error after verdict and in a motion to set aside the verdict and to grant a new trial. It is true that in that case, being a proceeding to condemn land under the eminent domain act of the State of Illinois, no provision was made for an answer, but this accounts for some but not all of the language of the decision. Mr. Justice Harlan, speaking for the court, said: "It is not, therefore, important that the defendant neither filed or offered to file an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that said right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court." But he said further: "But this is not all. In the assignment of errors filed by the defendant in the Supreme Court of Illinois these claims of rights under the Constitution of the United States were distinctly reasserted."

The similarity of that case to the case at bar is apparent. In both, the constitutional right was claimed in such manner

as to bring it to the attention of the lower court, and its decision was necessarily adverse to such right. In both it was reasserted in the assignment of errors to the higher court, and there again in both the effect of the judgment was to declare the right not infringed by the proceedings in the case. This court, therefore, has jurisdiction, and we proceed to the consideration of the merits.

The plaintiff's constitutional claim is under that provision of the Fourteenth Amendment, which prohibits a State from depriving any person of property without due process of law, and he avails himself of it by the contention (which we give in his own language):

"That under the constitution and laws of the State of Virginia, the free and uninterrupted use of highways, once dedicated to and accepted by the public, or acquired by the right of eminent domain, are for continuous public use, and that, when relying upon that fact, important public and private property rights have been acquired, the highway cannot be permanently diverted to a private use without proper compensation being made to those injured, and as a consequence, any person or persons so diverting such highway are trespassers and liable in damages to the parties injured."

The proposition is very general. To make it available to plaintiff in error it must be held to cover and protect an owner whose property abuts on one part of a street from damage from obstruction placed in another part of the street and not opposite his property — not only a physical taking of his property, but damages to it — not only direct damages, but consequential damages. All of these aspects of the proposition seem to be rejected by the decision of the Supreme Court of Appeals of Virginia on the plaintiff's petition for writ of error. The petition submitted for decision the power of the city of Richmond to make or authorize the obstruction complained of under its charter, and the constitution and laws of Virginia as well as the prohibition of the Constitution of the United States. If the decision necessarily passed on and denied the latter as we hold it did, and hence entertain jurisdiction to review its judgment, it necessarily passed on and denied the

former. If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria*, he cannot be said to have been deprived of any property. *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380.

The plaintiff quotes *Western Union Telegraph Co.* v. *Williams*, 86 Virginia, 696; *Hodges* v. *Railroad Co.*, 88 Virginia, 636; *Norfolk City* v. *Chamberlain*, 29 Gratt. 653; *Buntin* v. *Danville*, 93 Virginia, 200. The case at bar is not within the principle of these cases. These were concerned with erections immediately in front of the abutting owner's property, and it was held that he owned to the middle of the highway, subject only to the easement of the latter; that it was for the easement only for which he was compensated, and that any other use was an additional servitude and its authorization illegal unless paid for.

In *Home Building &c. Co.* v. *Roanoke*, 91 Virginia, 52, the city of Roanoke authorized the erection of a bridge across a street in the city and itself constructed the approaches to it. These approaches were sixteen feet high and thirty-five wide, but did not extend to either side of the street, but left on each side about seven and one half feet unoccupied on Randolph street, on which the complainant's lot was situated, available for its use and that of the public. It was held that the city was not liable.

The substantial thing is not that one may be damaged by an obstruction in a street — not that one may be specially damaged beyond others, but is such damage a deprivation of property within the meaning of the constitutional provision? According to the Virginia cases an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which makes consequential damages to property a taking within the meaning of the constitution of that State. Decisions in other States we need not resort to or review. Those of this court furnish a sufficient guide. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Chicago* v. *Taylor*, 125 U. S. 161; *Marchant* v. *Penn-*

sylvania Railroad, 153 U. S. 380; *Gibson* v. *United States*, 166 U. S. 269.

In *Transportation Company* v. *Chicago*, it was decided "that acts done in the proper exercise of governmental power and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." Removing any apparent antagonism of this proposition to *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, and *Eaton* v. *Boston, Concord & Montreal Railroad Co.*, 51 N. H. 504, it was further said that in those cases "the extremest qualification of the doctrine is to be found, perhaps," and they were discriminated by the fact that in them there was a permanent flooding of private property, hence a "taking" — "a physical invasion of the real estate of the owners and a practical ouster of his possession."

In *Chicago* v. *Taylor*, Taylor sued to recover damages sustained by reason of the construction by the city of a viaduct in the immediate vicinity of his lot. The construction of the viaduct was directed by special ordinances of the city council. The facts were:

"For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coal yard, having upon it sheds, machinery, engines, boilers, tracks and other contrivances required in the business of buying, storing and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber street, as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was, also, evidence tending to show that one of the

results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago River, was that the coal yard was often flooded with water running on to it from said approaches, whereby the use of the premises as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

"On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all other persons in the vicinity, and could not be the basis of an individual claim for damages against the city."

There was a verdict and judgment against the city, and this was sustained. The tenor of the decision is, that the damages were consequential, and the difference of the ruling from that in *Transportation Co.* v. *Chicago* was explained and based upon a change in the constitution of the State of Illinois, which enlarged the prohibition to the damaging as well as to the taking of private property for public use, and its interpretation by the Supreme Court of the State "that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the improvement is the cause of the damage, though consequential, the party may recover."

In *Marchant* v. *Pennsylvania Railroad Co.*, the plaintiff owned a lot on the north side of Filbert street, Philadelphia; the railroad erected an elevated railroad on the south side of the street and opposite plaintiff's property. It was held by the Supreme Court of Pennsylvania, reversing the trial court, that for the damages hence resulting the plaintiff could not recover. The case was brought to this court by writ of error, the plaintiff urging that her property had been taken without due process of law. The judgment was affirmed. The court, by Justice Shiras, said:

"In reaching the conclusion that the plaintiff, under the admitted facts in the case, had no legal cause of action, the Supreme Court of Pennsylvania was called upon to construe the laws and constitution of that State. The plaintiff pointed

to the tenth section of article 1 of the constitution, which provided that 'private property shall not be taken or applied to public use, without authority of law, and without just compensation being first made or secured;' and to the eighth section of article 16, which contains the following terms: 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.'

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of the State, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason."

In *Gibson* v. *United States*, a dike was constructed in the Ohio River under the authority of certain acts of Congress for the improvement of rivers and harbors. The construction of said dike by the United States substantially destroyed the

landing of Mrs. Gibson by preventing ingress and egress to and from the landing on and in front of her farm to the main or navigable channel of the river, — Held, *damnum absque injuria.* The court by the Chief Justice said: "The Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without just compensation. Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

Judgment affirmed.

Mr. Chief Justice Fuller, with whom Mr. Justice Gray concurred, dissenting on the question of jurisdiction.

I am of opinion that this writ of error should be dismissed. The contention of plaintiff in error is that the validity of the act of the general assembly of Virginia of May 24, 1870, was drawn in question in the state courts on the ground of repugnancy to the Constitution of the United States, and that the decision of the Court of Appeals was in favor of its validity.

The validity of a statute is drawn in question when the power to enact it is denied, and a definite issue in that regard must be distinctly deducible from the record in order for this court to hold that the state courts have adjudicated as to the validity of the enactment under the Constitution.

This case had gone to judgment, and a motion to set aside the judgment had been made and denied, before it was suggested that the act was inconsistent with the Federal Constitution. And that question was then attempted to be raised by a second motion to vacate. But the disposal of motions of this class is within the discretion of the trial court, and only revisable by the appellate tribunal, if at all, when there is a palpable abuse of discretion.

Whether the trial court, in this instance, overruled the second motion because a second motion of that sort, without special cause shown, could not be entertained, or because of

unreasonable delay, it is impossible to say, and to impute to that court the decision of a Federal question when it obviously may have considered that the point was presented too late, seems to me wholly inadmissible. And although in his petition to the Court of Appeals, plaintiff in error recited the action he had taken, and urged that the trial court had erred in sustaining the demurrer to his declaration, and in refusing to set aside the judgment so that the constitutional question suggested might be passed on, that court, in the exercise of appellate jurisdiction only, may well have concluded that the discretion of the court below could not be interfered with.

It does not follow from the bare fact that this second motion presented in terms a single point that that point was disposed of in denying the motion, when other grounds for such denial plainly existed.

It is thoroughly settled that if the record of the state courts discloses that a Federal question has been raised and decided, and another question, not Federal, broad enough to sustain the judgment, has also been raised and decided, this court will not review the judgment; that this is so, even when it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one; and also where the record shows the existence of non-Federal grounds of decision though silent as to what particular ground was pressed and proceeded on. In other words, the rule is that the record must so present a Federal question that, even if the reasons for decision are not given, this court can properly conclude that it was disposed of by the state courts. If the conflict of a state law with the Constitution and the decision by the state court in favor of its validity are relied on, such decision must appear on the face of the record before the judgment can be re-examined in this court.

In *Klinger* v. *Missouri*, 13 Wall. 257, 263, a juror had declined to take the test oath prescribed by the sixth section of the second article of the constitution of Missouri of 1865, and was discharged from the panel. It was insisted here that he was thus excluded for no other reason than that he refused

to take the oath, and, if this had been so, the question of the repugnancy of the section to the Constitution of the United States would have arisen. But as this court was of opinion that, inasmuch as the grounds the juror assigned for his refusal manifested a settled hostility to the Government, he might "well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws;" it was held that "it certainly would have been in the discretion of the court, if not its duty, to discharge him." And Mr. Justice Bradley, delivering the opinion of the court, said: "In this case it appears that the court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear *but that* he was discharged for that ground. It cannot, therefore, with certainty, be said that the Supreme Court of Missouri did decide in favor of the validity of the said clause of the state constitution, which requires a juror to take the test oath." There was nothing in the record to show on what ground the trial court excluded the juror, or that the point urged in this court was taken in the Supreme Court of the State, and yet because the trial court might have discharged the juror as matter of discretion, or because of unfitness in the particular suggested, this court decided that its jurisdiction could not be maintained, and the writ of error was dismissed. And see *Johnson* v. *Risk*, 137 U. S. 300; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63.

We have held that the question whether a party has by laches and acquiescence waived the right to insist that a state statute impaired the obligation of a contract is not a Federal question. *Pierce* v. *Somerset Railway Company*, 171 U. S. 641.

And, certainly, in view of the careful language of § 709 of the Revised Statutes, we ought not to take jurisdiction to revise a judgment of a state court, where a party seeks to import a Federal question into the record, after judgment, by an application so palpably open to decision on non-Federal grounds. I am authorized to state that Mr. Justice Gray concurs in this dissent.

Syllabus.

McCULLOUGH *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 3. Argued February 21, 23, 1898. — Decided December 5, 1898.

On the 29th of May, 1892, the plaintiff below (plaintiff in error here) filed a bill in the Circuit Court of the city of Norfolk, Virginia, to establish the genuineness of certain coupons tendered by him in payment of taxes, and obtained a judgment there in his favor. When the suit was commenced, the highest court of Virginia had often decided against the right to require the State to accept such coupons in payment of taxes. This court, on the other hand, in a series of decisions reaching from 1880 to 1889, had been uniform and positive in favor of the validity of the act authorizing the issue of such bonds, and of the liability of the State to accept the coupons in payment of taxes. In the present case the Supreme Court of Appeals of Virginia dismissed the plaintiff's petition, on appeal, and awarded costs to the Commonwealth, on the ground that the coupon provision of the act of 1871 was void. In the previous cases there had been no direct decision by the state court that such provision was entirely void, although the intimation was clear that such was the opinion of the judges then composing the court. It was contended by the State that this court has no jurisdiction of this case, for the reason that the state Court of Appeals does not consider, in its opinion, the subsequent legislation of the State, passed with a view to impair the act of 1871, but limits itself to the consideration of that act, which it adjudges to be void, and also that the repeal of the act of 1882, after the judgment in the trial court below, amounts to a withdrawal of the consent of the State to be sued, and is fatal to the maintenance of this action.

Held:

(1) That the lawful owner of such coupons has the right to tender the same after maturity in payment of taxes, debts and demands due the State;

(2) That this court has the right to inquire and judge for itself with regard to the making of the alleged contract with the holder of the coupons without regard to the views or decisions of the state court in relation thereto;

(3) That the owner's right to pay taxes in coupons is not affected by the consideration that some taxes, other than the ones now in question, were, when the act of 1871 was passed, required to be paid in money;

(4) That while it is true that the state court placed its decision on the ground that the act of 1871 was void, in so far as it related to

Statement of the Case.

the coupon contract, the judgment also gave effect to subsequent statutes; and this court has jurisdiction of the case;

(5) That the rights acquired by the plaintiff under the judgment were not lost or disturbed by the repeal, after judgment, of the act of 1882.

On March 30, 1871, the general assembly of the State of Virginia passed an act for the refunding of the public debt. Virginia Acts Assembly, 1870–71, p. 378. See also act of March 28, 1879; Virginia Acts Assembly, 1878–79, p. 264. This act, which authorized the issue of new coupon bonds for two thirds of the old bonds, leaving the other third as the basis of an equitable claim upon the State of West Virginia, contained this provision: "The coupons shall be payable semiannually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face." Under this act a large amount of the outstanding debt of the State was refunded. This provision gave value to the bonds as affording an easy method of securing payment of the interest. This refunding scheme, however, did not prove satisfactory to the people of the State, and since then there has been repeated legislation tending to destroy or impair the right granted by this provision. Among other statutes may be noticed the following: The act of March 7, 1872, c. 148, Acts of Assembly, 1871–72, p. 141, providing that it should not be "lawful for the officers charged with the collection of taxes or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." That of March 25, 1873, c. 231, Acts of Assembly, 1872–73, p. 207, imposing a tax of fifty cents on the hundred dollars market value of bonds, and directing that such amount be deducted from coupons tendered in payment of taxes or dues.

At the time the act of 1871 was passed and the new bonds and coupons were issued, the Court of Appeals of the State had jurisdiction to grant a mandamus in any action where the writ would lie according to the principles of the common law, and in

Antoni v. *Wright*, 22 Gratt. 833, it was held by that court that mandamus was the proper remedy to compel the collector to accept coupons offered in payment of taxes. On January 14, 1882, the assembly passed an act, Acts 1881–82, c. 7, p. 10, which, in effect, provided that a taxpayer seeking to use coupons in payment of his taxes should pay the taxes in money at the time of tendering the coupons, and thereafter bring a suit to establish the genuineness of the coupons, which, if decided in his favor, enabled him to obtain from the treasurer a return of the money paid. The various features of this act are specifically pointed out in *Antoni* v. *Greenhow*, 107 U. S. 769. At the same session, and on January 26, 1882, Acts 1881–82, c. 41, p. 37, the assembly passed a further act declaring that the tax collectors should receive in payment of taxes and other dues "gold, silver, United States Treasury notes, national bank currency and nothing else," with a provision for suit by one claiming that such exaction was illegal. The act contained this proviso: "There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the taxpayer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition or any other writ or process whatever; but in all cases, if for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner."

At the same session, on February 14, 1882, a new funding bill was passed containing a proposition to the bondholders, act of April 7, 1882, c. 84, Acts 1881–82, p. 88; and again at the same session, on April 7, 1882, an act was passed amending the Code of Virginia in respect to mandamus, which provided: "That no writ of mandamus, prohibition or any other summary process whatever, shall issue in any case of the collec-

tion, or attempt to collect revenue, or to compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, Acts of Assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim and demand, if just." Acts 1881–82, p. 342.

On March 15, 1884, the general assembly passed a general act in reference to the assessment of taxes on persons, property and incomes, Acts 1883–84, c. 450, p. 561, the one hundred and thirteenth section (p. 603) of which required that all school taxes should be paid "only in lawful money of the United States."

On January 21, 1886, Acts 1885–86, c. 46, p. 37, an act was passed providing that in a suit in respect to coupons tendered in payment of taxes, no expert testimony should be receivable, and that the bonds from which the coupons were cut should be produced, if demanded, as a condition precedent to the right of recovery.

Section 399 of "The Code of Virginia," which was a revision and reënactment of the general statutes of the State, adopted May 16, 1887, reads: "It shall not be lawful for any officer charged with the collection of taxes, debts or other demands of the State to receive in payment thereof anything else than gold or silver coin, United States Treasury notes or national bank notes."

On May 29, 1892, the plaintiff in error filed his petition in the Circuit Court of the city of Norfolk to establish the genuineness of certain coupons tendered in payment of taxes. The proceeding was had under the act of 1882, and no question is made of a full compliance with the terms of that statute. Judgment was rendered in his favor by the Circuit Court of the city of Norfolk, which judgment was, on March 23, 1894, reversed by the Supreme Court of Appeals of the State, 90 Virginia, 597, and a judgment entered in favor of the Commonwealth, dismissing the petition of the plaintiff and award-

ing to the Commonwealth costs. On June 13, 1894, a writ of error was allowed, and the case brought to this court.

Mr. Richard L. Maury and *Mr. William A. Maury* for plaintiff in error. *Mr. Matthew F. Maury* was on their brief.

Mr. A. J. Montague and *Mr. Henry R. Pollard* for defendant in error. *Mr. R. Taylor Scott*, attorney general of the State of Virginia, filed a brief for same.

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

Perhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the coupon legislation of Virginia. That legislation has been prolific of many cases, both in the state and Federal courts, not a few of which finally came to this court. *Hartman* v. *Greenhow*, 102 U. S. 672; *Antoni* v. *Greenhow*, 107 U. S. 769; *Virginia Coupon cases*, 114 U. S. 269; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Carter* v. *Greenhow*, 114 U. S. 317, 322; *Moore* v. *Greenhow*, 114 U. S. 338, 340; *Marye* v. *Parsons*, 114 U. S. 325; *Barry* v. *Edmunds*, 116 U. S. 550; *Chaffin* v. *Taylor*, 116 U. S. 567, 571; *Royall* v. *Virginia*, 116 U. S. 572; *Royall* v. *Virginia*, 121 U. S. 102; *Sands* v. *Edmunds*, 116 U. S. 585; *Stewart* v. *Virginia*, 117 U. S. 612; *In re Ayers*, 123 U. S. 443; *McGahey* v. *Virginia*, 135 U. S. 662.

For the first time in the history of this litigation has any appellate court, either state or Federal, distinctly ruled that the coupon provision of the act of 1871 was void. After the passage of the act of March 7, 1872, which in terms required all taxes to be paid in cash, the case of *Antoni* v. *Wright* came before the Court of Appeals of Virginia, 22 Gratt. 833, and on December 13, 1872, was decided. Elaborate opinions were filed, and the court held the act of 1871 valid, and the act of 1872 void as violating the contract embraced in the coupon provision of the act of 1871. This decision was reaffirmed in

Wise Bros. v. *Rogers*, 24 Gratt. 169, decided December 17, 1873; *Clark* v. *Tyler*, 30 Gratt. 134, decided April 4, 1878, and again in *Williamson* v. *Massey*, 33 Gratt. 237, decided April 29, 1880. In *Greenhow* v. *Vashon*, 81 Virginia, 336, decided January 14, 1886, the act requiring school taxes to be paid in cash was sustained, and such taxes excepted from the coupon contract on the ground of a specific command in the state constitution in force at the time of the passage of the funding act. There was no direct decision that the coupon provision was entirely void, although the intimation was clear that such was the opinion of the judges then composing the court.

In this court the decisions have been uniform and positive in favor of the validity of the act of 1871. There has been no dissonance in the declarations, from the first case, *Hartman* v. *Greenhow*, 102 U. S. 672, 679, decided at the October term, 1880, in which, referring to this act, the court said, by Mr. Justice Field, "a contract was thus consummated between the State and the holder of the new bonds, and the holders of the coupons, from the obligations of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two thirds of their amount," to *McGahey* v. *Virginia*, 135 U. S. 662, 668, decided at the October term, 1889, in which Mr. Justice Bradley, delivering the unanimous opinion of the court, observed: "We have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the State, to use them in payment of state taxes and public dues.

This was determined in *Hartman* v. *Greenhow*, 102 U. S. 672, decided in January, 1881; in *Antoni* v. *Greenhow*, 107 U. S. 769, decided in March, 1883; in the *Virginia Coupon cases*, 114 U. S. 269, decided in April, 1885, and in all the cases on the subject that have come before this court for adjudication. This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the State."

Since the decision of the Court of Appeals of Virginia, in *Antoni* v. *Wright*, 22 Gratt. 833, that the act of 1872, providing for the payment of taxes in cash only was unconstitutional, the general assembly of Virginia has from time to time passed acts tending to embarrass the coupon holder in the exercise of the right granted by the funding act. Some of these acts appear in the statement preceding this opinion, but for a more full review of the legislation and the course of decision reference may be had to the opinion of Mr. Justice Bradley in the several cases reported under the title of *McGahey* v. *Virginia*, *supra*.

We are advised by the opinion of the Court of Appeals of Virginia, in 22 Gratt. 833, that the debt — two thirds of which was proposed to be refunded and most of which was, in fact, refunded — amounted to $40,000,000 of principal. These refunding bonds, amounting to many millions of dollars, have passed into the markets of the world, and have so passed accredited, not merely by the action of the General Assembly of the State of Virginia, but by the repeated decisions of her highest court, as well as of this court, for substantially a quarter of a century, to the effect that such coupon provision was constitutional and binding. Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guarantee of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force and that all the transactions which have been had based thereon rested upon nothing. Such a result

is so startling that it at least compels more than ordinary consideration.

We pass, therefore, to a consideration of the specific question presented in this record. First. It is insisted that the decision of the Court of Appeals was right, and that the coupon provision was void. It were a waste of time to repeat all the arguments which have been heretofore presented, and we content ourselves with reiterating that which was said by Mr. Justice Bradley, speaking for the entire court, in *McGahey v. Virginia*, 135 U. S. 662, 668: "This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the State."

Secondly. It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a State upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the

phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion." The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 145; *Wright* v. *Nagle*, 101 U. S. 791, 793; *McGahey* v. *Virginia*, 135 U. S. 664, 667, in which, in reference to this very contract, it was said: "In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto." See also *Douglas* v. *Kentucky*, 168 U. S. 488, 501, and cases cited therein.

Thirdly. It is urged that our last decision, that in *McGahey* v. *Virginia*, *supra*, logically leads to the conclusion that the whole coupon contract was void, and that the Court of Appeals of Virginia rightly interpreted the scope of that decision when it so held. The argument of that court is that because the constitution of Virginia compels the payment of certain taxes in cash, and that therefore the coupon contract cannot be enforced as against those taxes, the whole contract must fail, the partial failure being a vice which enters into and destroys the entire contract. But the court overlooks that which was in fact decided in the eight cases reported under the title of *McGahey* v. *Virginia*, for while in two of those cases it was held that the coupon contract could not be enforced against

certain specific taxes and dues, it was in others as distinctly held that it could be enforced in respect to general taxes.

It may be well to here quote the language with which Mr. Justice Bradley concludes his general review of the prior litigation, and which in its last paragraph shows that this very matter was considered and determined (pp. 684, 685):

"Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established:

"First, that the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

"Second, that the various acts of the assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

"Third, that no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State;

"Fourth, that any lawful holder of the tax-receivable coupons of the State issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to

prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him. No conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed, without wholly overruling that rendered in the coupon cases and disregarding many of the rulings in other cases, which we should be very reluctant to do. To the extent here announced we feel bound to yield to the authority of the prior decisions of this court, whatever may have been the former views of any member of the court.

"There may be exceptional cases of taxes, debts, dues and demands due to the State which cannot be brought within the operation of the rights secured to the holders of the bonds and coupons issued under the acts of 1871 and 1879. When such cases occur they will have to be disposed of according to their own circumstances and conditions."

Neither is the argument a sound one. It ignores the difference between the statute and the contract and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the state constitution could not be affected by legislative

action, the statute is to be read as though it in terms excluded them from its operation.

Indeed, the Court of Appeals does not follow what it calls the logic of the decision in *McGahey* v. *Virginia* to its necessary result. The scope of its argument is that if a part of the consideration be illegal, the whole contract fails. But the promise on the part of the State, written into these coupons and authorized by the act of 1871, was a promise to pay so much money and to receive such promise in satisfaction of taxes. In reference to this, the Court of Appeals, in its opinion in this case, uses this language:

"We do not assail that act as unconstitutional as an entirety. We simply hold that the coupon feature of the act, the coupon contract, which is readily separable from the rest of the act, is repugnant to sections 7 and 8 article 8 of the constitution of Virginia, and is, therefore, an illegal contract. The validity of the bonds issued under and by authority of said acts of March 30, 1871, and March 28, 1879, is not denied; nor is it denied that the bondholders are entitled to the interest on the bonds, to be collected in the ordinary way; but we do deny that it can be collected through the medium of the illegal coupon, which have been most aptly designated the 'cut worm of the treasury.'" 90 Virginia, 597–606.

Further, the authorities to which it refers make against the conclusion which it reaches. Thus, at the end of its argument, it quotes as a principal authority the following:

"The concurrent doctrine of the text books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts part of which are unlaw-

ful, because the whole consideration is the basis of the whole promise. The parts are inseparable. *Widoe* v. *Webb*, 20 Ohio St. 431, citing Metcalf on Contracts, 246; Addison on Contracts, 905; Chitty on Contracts, 730; 1 Parsons on Contracts, 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, section 190; Byles on Bills, 111; Chitty on Bills, 94.

"And in the same case it is said: 'Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, illegality in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force, that where parties have woven a web of fraud or wrong it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound;' citing Story on Prom. Notes and Byles on Bill, *supra*, and then adds: 'And, in general, it makes no difference as to the effect whether the illegality be at common law or by statute.'"

This decision declares that when the consideration is illegal, the promise fails; and to like effect are the other authorities cited. But in the case at bar there is no illegality in the consideration. That was furnished by the bondholder in the old bond, and that bond was the sole consideration. It is nowhere suggested that there was any vice or illegality in it; that it was not a valid obligation of the State. When the bondholder surrendered that he furnished the entire consideration for the contract, and for that he received from the State a promise. And as the Supreme Court of Ohio said in the case above cited: "When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue." The Court of Appeals concedes that the promise made by the State to pay the interest is valid, because made upon a good and lawful consideration. Does it not logically follow that the promise of the State is also good as to all other matters contained within it in respect

to which it might lawfully make a promise? It promised to receive the coupons "for all taxes, debts, dues and demands due the State." That promise was necessarily for each tax and debt, as well as for all taxes and debts. If it should so happen that any single tax or debt cannot, under the constitution of the State, be lawfully discharged by the receipt of the coupon, there is no difficulty in separating that part of the contract from the balance. And as said by the Supreme Court of Ohio: "Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established."

To like effect are the decisions of this court. In *United States* v. *Bradley*, 10 Pet. 343, suit was brought on a paymaster's bond, and it was claimed that as some of the stipulations were in excess of those required by the statute and illegally inserted, the whole bond was void. But the court overruled the contention, saying (p. 360):

"That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus in *Pigot's case*, 11 Co. Lit. 27*b*, it was said that it was unanimously agreed in 14 Hen. VIII, 25, 26, that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio* and the others stand good."

So in *Gelpcke* v. *Dubuque*, 1 Wall. 175, this court said, in reference to a similar contention in a suit on a contract made by the officials of the city of Dubuque (p. 222):

"We have not, therefore, considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se*, is that the bad parts do not affect the good. The valid may be enforced."

We see no reason to change the views heretofore and often expressed by this court, and reiterate, as said in 135 U. S. 668, "this question, therefore, must be considered as foreclosed, and no longer open for consideration."

Fourthly. It is urged that this court has no jurisdiction of this case for the reason that the Court of Appeals in its opinion does not consider the subsequent legislation passed by the State with the view of impairing the contract created by the act of 1871, but limits itself to a consideration of that act, and adjudges it void. In support of this proposition the rule laid down in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 38, reaffirmed in *Huntington* v. *Attrill*, 146 U. S. 657, 684, and *Bacon* v. *Texas*, 163 U. S. 207, 216, is cited.

In this last case the doctrine is summed up in the following statement:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109. . . . If the judgment of the state court gives no effect to the subsequent law of the State, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle."

It is true the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly

held by this court that in reviewing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a state legislature should pass an act exempting the property of a particular corporation from all taxation, and that a subsequent legislature should pass an act subjecting that corporation to the taxes imposed by the city in which its property was located, and that, on the first presentation to the highest court of the State of the question of the validity of taxes levied under and by virtue of this last act, that court should in terms hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last act of the legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the state court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to set at naught the purpose of the

Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made. In *Hickie* v. *Starke*, 1 Pet. 94, 98, Chief Justice Marshall, delivering the opinion of the court, said:

"In the construction of that section (the twenty-fifth) the court has never required that the treaty or act of Congress under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of that treaty or act."

And in *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 245, 250, the same Chief Justice also said:

"But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. . . . This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Miller* v. *Nichols*, 4 Wheat. 311; and *Williams* v. *Norris*, 12 Wheat. 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the twenty-fifth section of the judicial act, if the record shows that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law."

In *Satterlee* v. *Matthewson*, 2 Pet. 380, 410, Mr. Justice Washington observed:

. . . "If it sufficiently appear from the record itself, that the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, or that

that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the State to any part of that Constitution was drawn into question."

In *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 143, an act passed by the State in 1860 was claimed to be in violation of a contract created by an act of 1790, and it was said:

"Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. . . . It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

There are also some cases involving alleged contract exemptions from taxation which are worthy of notice. In *Given* v. *Wright*, 117 U. S. 648, 655, the plaintiff in error claimed to hold real estate exempt from taxation by virtue of a contract alleged to have been contained in a law of the New Jersey colonial legislature passed August 12, 1758. The validity of this exemption had been sustained in *New Jersey* v. *Wilson*, 7 Cranch, 164, notwithstanding which for about sixty years before the assessment in question was laid taxes had been regularly assessed upon the land and paid without objection.

The highest court of New Jersey upheld the tax, on the ground that the long acquiescence of the landowners raised a presumption that the exemption which had once existed had been surrendered. The jurisdiction of this court to review such judgment was sustained, the court saying:

"Where it is charged that the obligation of a contract has been impaired by a state law, as in this case by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

In *Yazoo &c. Railroad* v. *Thomas*, 132 U. S. 174, 184, the plaintiff in error was given by its charter, which became a law on February 17, 1882, a certain exemption from taxation. In 1888 the legislature passed an act for the collection of taxes for past years, which by its terms was not applicable to railroad companies exempt by law or charter from taxation. The Supreme Court of the State held that the plaintiff was not entitled to the benefit of the exemption named in the act of 1888. The jurisdiction of this court to review that judgment was challenged. But the court, by the Chief Justice, said:

"Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

Opinion of the Court.

In *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293, the state court, conceding the validity of a contract of exemption from taxation, held that certain property was not within its terms, and on this ground a motion to dismiss the writ of error was made by the defendant. In respect to that the Chief Justice said:

"The jurisdiction of this court is questioned, upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.

"In arriving at its conclusions, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

In *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492, 493, Mr. Justice Jackson, reviewing prior decisions, said:

"It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In the case before us, after the act of 1871, and in 1872, the general assembly passed an act requiring that all taxes should be paid in "gold or silver coin, United States Treasury notes, or notes of the national banks of the United States;" and

again, in 1882, a further statute commanding tax collectors to receive in payment of taxes "gold, silver, United States Treasury notes, national bank currency, and nothing else." This command was reënacted in the Code of 1887. Under these statutes the State demanded payment of its taxes in money and repudiated its promise to receive coupons in lieu thereof. True, in its opinion, the Court of Appeals did not specifically refer to these statutes, but by declaring that the contract provided for in the act of 1871 was void it did give full force and effect to them, as well as to the general revenue law of the State. Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision.

It must also be borne in mind that this is not a case in which, after a statute asserted to be the foundation of a contract, acts are passed designed and tending to destroy or impair the alleged contract rights, and the first time the question is presented to the highest court of the State it takes no notice of the subsequent acts, but inquires simply as to the validity of the alleged contract. Here it appears that the state courts had repeatedly held the act claimed to create a contract valid, and had passed upon the validity of subsequent acts designed and calculated to destroy and impair the rights given by such contract, sustaining some and annulling others. Some of those judgments had been brought to this court, and by it the validity of the original act had been uniformly and repeatedly sustained, and the invalidity of subsequent and conflicting acts adjudged, and now at the end of many years of litigation, with these subsequent statutes still standing on the statute books unrepealed by any legislative action, the state court, with only a casual reference to those later statutes, goes back to the original act, and, reversing its prior rulings, adjudges it void, thus in effect putting at naught the repeated

decisions of this court as well as its own. Under such circumstances it seems to us that it would be a clear evasion of the duty cast upon us by the Constitution of the United States to treat all this past litigation and prior decisions as mere nullities and to consider the question as a matter *de novo*. It would be shutting our eyes to palpable facts to say that the Court of Appeals of Virginia has not by this decision given effect to these subsequent statutes.

Finally, it is urged that since the judgment in the trial court and prior to the decision in the Court of Appeals the general assembly of the State of Virginia passed the act of February 21, 1894, c. 381, Acts General Assembly, 1893–94, p. 381, in terms repealing the statute authorizing this particular form of suit; that no State can be sued without its own consent; that such consent has thus been withdrawn, and therefore the whole proceeding abates and this suit must be dismissed. It is true that such an act was passed, and that in *Maury* v. *Commonwealth*, 92 Virginia, 310, its validity was sustained by the Court of Appeals, but the judgment in this case did not go upon the effect of that repealing statute. It was not noticed in the opinion, and the decision was not that the suit abate by reason of the repeal of the statute authorizing it, but that the judgment of the trial court be reversed, and a new judgment be entered against the petitioner for costs. If the action had abated it was error to render judgment against him for costs.

But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the Circuit Court of the city of Norfolk the act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the Court of Appeals of the State brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on

subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. So, properly, the Court of Appeals, in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing act of 1894 had upon proceedings initiated thereafter, or pending at the time, but whether such a repeal divested a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute.

Even if the repeal had preceded the judgment in the trial court, or if in a proceeding like this, equitable in its nature, the mere taking of the case to the Court of Appeals operated to vacate the decree, there would still remain a serious question. When the act of 1871 was passed the coupon holder had a remedy by writ of mandamus to compel the acceptance of his coupons in payment of taxes. The form and mode of proceeding were prescribed by statute. Code Virginia, c. 151, 1873, p. 1023. On January 14, 1882, the general assembly passed the act providing a new remedy for the coupon holder. This act came before this court in *Antoni* v. *Greenhow*, 107 U. S. 769, 774, and was sustained, the court holding that while it is true that, "as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge and enforcement,' *Walker* v. *Whitehead*, 16 Wall. 314, 317," "it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left." Upon this ground it was held that the new remedy being adequate and efficacious, the taking away of the old right of proceeding by mandamus was valid, and the coupon holder must be content with the new remedy. Now the statute

creating this new remedy was, as we have seen, repealed by the act of 1894. That act does not in terms revive the former remedy. Indeed, the right to use the writ of mandamus in tax cases was specifically taken away, after the act of January 14, 1882, by the act of January 26, 1882. It was said, however, in the argument of counsel that the former remedy was one arising under the common law, and that the settled law of Virginia is that when an act is passed repealing an act creating a statutory remedy it operates to revive the former common law remedy. *Ins. Co.* v. *Barley's Administrator*, 16 Gratt. 363; *Booth* v. *Commonwealth*, 16 Gratt. 519, and *Mosely, Trustee*, v. *Brown*, 76 Virginia, 419. If this be still the law of Virginia and applicable to the case at bar, so that the repeal of the act of 1882 revives the former remedy by mandamus, then it is undoubtedly true that new suits can no longer be maintained under the act of 1882, and a party must proceed by mandamus. But that is a question yet to be settled by the Court of Appeals of Virginia. It is not decided in the case of *Maury* v. *Commonwealth*, *supra*, and, so far as we have been advised, has not yet been determined by that court. If it shall finally be held by that court that the remedy by mandamus does not exist, then it will become a question for further consideration whether the act repealing the act of 1882 can be sustained. But it is not necessary now to determine that question, inasmuch as the judgment in the trial court was rendered, as we have seen, prior to the repealing act, and the right acquired by the judgment creditor was not and could not constitutionally be taken away.

The judgment of the Court of Appeals will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Peckham dissenting.

I dissent from the opinion and judgment of the court in this case because I think that the ground upon which the state court has based its decision deprives this court of any jurisdiction. The case having originated in a state court, we

have no jurisdiction to reëxamine its judgment unless there is some Federal question involved therein, the decision of which by the court below was unfavorable to the claim set up, and its decision was necessary to the determination of the case, or the judgment as rendered could not have been given without deciding it. *Eustis* v. *Bolles*, 150 U. S. 361.

Jurisdiction is said to exist herein because of the alleged violation of the constitutional provision denying to any State the right to pass any law impairing the obligation of a contract.

In all the litigation arising in the state courts, by reason of the subsequent legislation by Virginia upon the subject, the claim was made, on a review of the judgments in this court, that the judgments of the state courts had given effect to statutes which were passed subsequently to the original coupon statutes, and that the original contract made by those statutes had been impaired by reason of those subsequent statutes to which effect was given by the judgments of the state courts. It was the giving effect by the judgment of the court to the subsequent statutes, which it was alleged impaired the contract, that gave jurisdiction to this court to decide for itself whether there was a contract, and, if so, what the contract was, as a preliminary to the decision of the question whether the subsequent statutes impaired the contract as construed by this court. The cases in which this court decides for itself, without reference to the decision of the state court, what the contract was, are cases where there has been not only subsequent legislation which is alleged to impair the contract, but also legislation which has been given some effect to by the judgment of the state court. Such is the case of *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, and such are all the other cases decided in this court upon that subject.

If by the judgment of the state court in this case no effect has been given to any statute passed subsequently to either of the coupon acts, this court is without jurisdiction to review that judgment. *Lehigh Water Company* v. *Easton*, 121 U. S. 388; *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *St. Paul &c. Railway*

v. *Todd County*, 142 U. S. 282; *Central Land Company* v. *Laidley*, 159 U. S. 103; *Bacon* v. *Texas*, 163 U. S. 207.

If there had never been any subsequent legislation regarding these coupon acts, and the highest court of the State had adjudged that they were void as being in violation of the constitution of the State existing at the time of their passage, of course there would be no jurisdiction in this court to review that judgment. And the state court might have decided the case in different ways, at one time holding the acts valid and subsequently holding them void, and still this court would have no jurisdiction to reëxamine the judgments of that court. This would be true even if millions of dollars had been invested in the bonds upon the strength of the judgment of the state court first given holding the acts valid.

The cases above cited show that even if there has been subsequent legislation, if the judgment of the state court does not give that legislation any effect, and decides the case without reference thereto, this court is also without jurisdiction to review that judgment.

I do not say that in order to give this court jurisdiction, the state court must in words allude to the subsequent legislation and in terms give effect to it. It may be assumed that if the real substance and necessary effect of the judgment of the state court was the determination of a Federal question or the giving effect to subsequent legislation, this court would have jurisdiction to review that judgment, notwithstanding the particular language used in the opinion. But when the case before the state court could have been decided upon two distinct grounds, one only of which embraced a Federal question, the sole way of determining upon which of those grounds the judgment was rested would be to examine the language used in the opinion of the state court. If that language showed the judgment was founded wholly upon a non-Federal question, this court would be without power to review it. Whether the state court has decided this case wholly without reference to subsequent legislation can only be learned from its opinion. To this extent it has always been within the power of the state court to determine the jurisdic-

tion of this court. If the former court chooses to decide a case upon a non-Federal question, when it might have decided it upon one which was Federal in its nature, the effect of such choice is to deprive this court of jurisdiction, no matter how erroneous we may regard the decision of the state tribunal. The power is with the state court in such cases to deprive us of jurisdiction to review its determination, and we are wholly without any power to control its action in that respect. This is what has been done, and all that has been done, in this case. The opinion of the state court shows that the judgment went upon the original and inherent invalidity of the coupon statutes and its judgment in that respect, as I shall hereafter attempt to show, gave no effect to any subsequent legislation. That is the material question in this case upon which the jurisdiction of this court hangs. Prior decisions of this court in other cases holding the contract valid, where we had jurisdiction to determine such cases, can have no effect upon the question of our jurisdiction to review the judgment in the case at bar. Prior decisions in such event constitute no ground of jurisdiction.

I concede, plainly and fully, the power of this court to review a judgment of the state court when effect has been given by that judgment to subsequent legislation claimed to impair the validity of a contract. But that vital fact must appear in order to support the jurisdiction, and without it the jurisdiction does not exist, no matter how important the question may be or how many times it may have been heretofore decided.

To say that the duty is cast upon this court to inquire whether a State has passed a law impairing the obligations of a prior contract is but to half state the case. The inquiry must be further prosecuted to the extent of learning whether the state court has, by its judgment, given effect to such subsequent legislation, and, if it has not, then no duty or right rests upon this court to review the judgment.

However true it may be that in many prior cases this court has held there was a valid contract created by the coupon statutes, so called, which could not be impaired by any sub-

sequent legislation, the fact remains that unless such subsequent legislation has been given effect to by the judgment in this case, there is not the slightest shadow of a claim for jurisdiction in this court to review that judgment. Millions or hundreds of millions of dollars may have been invested in reliance upon a judgment of this court declaring the law to be that there was a valid contract, and yet a state court might in a subsequent action adjudge that there never was a valid contract, because the statute which it was claimed created it was in violation of the state constitution. If that judgment did not, in effect, put in operation any subsequent legislation, the solemn adjudications of this court in some former cases that the contract was valid, could not affect the judgment in question nor furnish ground for the jurisdiction of this court to review that judgment. This court is not entrusted with the duty of supervising all decisions of state courts to the end that we may see to it that such decisions are never inconsistent, contradictory or conflicting. We supervise those decisions only when a Federal question arises. It is said this court is not bound to follow the last decision of a state court reversing its prior rulings upon a question of the validity of a contract, when bonds have been issued and taken in reliance upon the decision of the state court adjudging the validity of the law under which the bonds were issued. I do not dispute the proposition, but it has nothing to do with this case. Where an action has been brought under such circumstances in a Federal court, it has been frequently held that such court was not bound to follow the latest decision of the state court which invalidated the law under which bonds had been issued, at a time when the state court had held the law valid. In such case the Federal court would follow the prior decision of the state court and apply it to all the securities which had been issued prior to the time when the state court changed its decision. But such a case raises no question of jurisdiction in this court to review the judgment of a state court. When that question of jurisdiction does arise, the right of review cannot rest upon the fact that the state court has refused to follow its former decision, and, on the contrary, has directly

overruled it. The jurisdiction of this court to review the state court in this class of cases is confined in the first instance to an inquiry as to the existence of subsequent legislation upon the subject, and if none has been enacted to which any effect has been given by the state court, this court cannot review the decision of the state tribunal, even though that decision makes worthless a contract which it had prior thereto held valid.

The cases of *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, and *Railroad Company* v. *McClure*, 10 Wall. 511, illustrate this difference between the powers of this court when reviewing a judgment of a lower Federal court and its powers when reviewing a judgment of a state court.

In this class of cases the absolutely unbending and essential fact which must exist, in order to give jurisdiction to review a judgment of a state court, is subsequent legislation to which effect has been given by the judgment of the state court. This court is not the Mecca to which all dissatisfied suitors in the state courts may turn for the correction of all the errors said to have been committed by the state tribunals. Nor is it confided to this court to supervise the judgments of a state court in all cases where we may think that court has by its later decision invalidated a contract which it had once held to be lawful, and the judgment in which this court had upheld. The right of the state court in another case to reverse its former ruling is wholly unaffected by the fact that its former judgment had been affirmed here. Unless the Federal question exists in this case there is no ground of jurisdiction founded upon any prior decisions.

Now, has this judgment of the state court given effect to any subsequent legislation? At the time of the passage of the coupon acts there was no prior statute in Virginia permitting taxes to be paid in coupons of any kind whatever. The sole authority for such attempted payment of taxes rested in the coupon statutes under consideration. If they gave no such authority, then none existed, and no payment of taxes by means of coupons was valid. This is wholly irrespective of the subsequent acts. The state court has held the coupon

acts to be entirely void, because in violation of the state constitution in existence when they were passed. Under that decision those acts are to all intents and purposes as if they never had been passed. They therefore furnished not the slightest form of legality to a payment of taxes in coupons. It was not a statute to forbid paying taxes in coupons that was necessary in order to deprive such payments of legality. A statute, a valid statute authorizing such payment, was necessary in the first instance, and if there were no such statute there was no authority existing to receive coupons in payment of taxes. The Supreme Court of Appeals of Virginia, in a case in which it had jurisdiction, decided there was no such statute, and consequently no such authority, because the statute purporting to confer that authority was void, as in violation of the constitution of the State. This judgment did not give the slightest effect to the legislation subsequent to the coupon statutes. It simply held there were no coupon statutes, because those which purported to be such were totally void. No subsequent statute was necessary, and none such was given effect to. Striking down the coupon statutes effectually destroyed any assumed right to pay taxes in coupons, and the subsequent legislation was needless and ineffectual. Thus the whole groundwork upon which to base our jurisdiction in this case falls to the ground, and we are left to maintain it upon the insufficient claim of prior decisions of this court.

In truth, the particular question decided in this case has never been before this court. In some of the former cases this court decided the general proposition that the coupon legislation was valid and created a contract. After it had thus decided, a case came before it where a subsequent statute provided that, in the case of the school tax, coupons should not be received in payment thereof. The state court had decided that the coupon statute was invalid so far as it related to the school tax, because the constitution in existence when the coupon acts were passed required in substance that such tax must be paid in lawful money, and consequently the coupon act was unconstitutional as to such tax. This court

affirmed that judgment. *Vashon* v. *Greenhow*, 135 U. S. 662, 713. Part of the coupon statute was thus held invalid by the state court and also by this court.

The State had also passed a subsequent statute providing that the tax for a license to retail liquor should be paid in lawful money. This court (affirming in that respect the court below) held that act valid, because it was in effect a regulation of the liquor traffic, and the State could at all times legislate upon that subject, notwithstanding the coupon acts and the alleged contract therein created. *Hucless* v. *Childrey*, 135 U. S. 662, 709. Both of these decisions were made subsequently to the time when this court had held the coupon statute valid, and that a valid contract was therein created.

The state court has now decided in this case that as the coupon acts were invalid as to the payment of the school tax in coupons, (a proposition concurred in by this court,) the result was that the whole acts were invalid, that they could not stand partly valid and partly void, and that the whole coupon scheme was unconstitutional. This phase of the controversy has never before reached this court, and the court has therefore never before decided this particular point. It has said, generally, that the legislation was valid, but it said so only in cases where the general power of the legislature to enact the coupon statutes was in question, and it has never decided squarely the point that if the coupon acts be unconstitutional in some particulars they are nevertheless valid in all others. The fact is alluded to simply as a matter of history.

But even if it had, that fact confers no jurisdiction upon this court to review this judgment, if it otherwise is without it. In other words, because this court has heretofore decided the question of the validity of the contract, in cases where it had jurisdiction, that fact furnishes no foundation for its jurisdiction in this case, where the state court has given no effect to any subsequent legislation. Prior decision is not the foundation of jurisdiction. What I say is, that whether there have been two or more decisions, is wholly immaterial; jurisdiction cannot be taken because it is said that in a second or subsequent decision the state court did not follow its first decision

in regard to the contract, although that decision had been affirmed, as to that point, by this court. In this decision now before us it has given no effect to subsequent legislation, and not having done so, but simply decided a question of local law regarding its own constitution, the state court has given no decision which raises a Federal question, and therefore none that this court can review.

Under all the circumstances I can only see a determination to take jurisdiction in this case simply because this court, as it is said, has in cases in which it had jurisdiction decided the question differently from the decision in this case by the state court. That ground does not give jurisdiction, and that is the only ground that does exist.

The writ of error should be dismissed for want of jurisdiction.

UNITED STATES *v.* RANLETT AND STONE.

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

No. 20. Submitted October 11, 1898. — Decided December 5, 1898.

Section 7 of the act of February 8, 1875, c. 36, 18 Stat. 307, 308, was repealed by the tariff acts of 1883 and of 1890.

When a later statute is a complete revision of the subject to which the earlier statute related, and the new legislation was manifestly intended as a substitute for the former legislation, the prior act must be held to have been repealed.

When bags are imported, part of which are returned bags of American manufacture and part foreign, if the appraiser, after examination, decides that the goods are not as described, his judgment must stand unless reversed.

Section 2901, Rev. Stat., was intended for the benefit of the Government, and is not mandatory.

Where merchandise, liable in large part to duty, is entered as exempt therefrom, the collector has the right to assume that the mingling was intentional and with design to evade the revenue laws; and it devolves upon the importer to show what part of the whole he contends should not be taxed.

In the light of the rulings of the Treasury Department, and the special cir-

cumstances of the case, the court is not disposed to hold that if the proportion of dutiable bags sufficiently appeared or might reasonably have been ascertained, the Circuit Court could not have adjudged a recovery of that proportion, or directed a reliquidation.

In view of the testimony, and considering that the statute was not strictly pursued in the examination (though the court perceives no reason to doubt the faithfulness of the officials in the discharge of their duties), and the difficulties in the way of determining the make of the bags disclosed by the evidence, and bearing in mind that the taxation of so many of the bags as were of American manufacture operated as a penalty in spite of the concession that no fraud on the revenue was intended, the court thinks it unnecessary to remand the cause for another hearing, and that the ends of justice will be best subserved by directing a decree for the refunding of one fourth of the duties paid.

Ranlett and Stone imported at the port of New Orleans, from Liverpool, England, 2925 bales of grain bags, known as cental bags, each bale containing one thousand bags, or 2,925,000 in all, by several vessels, the entries running from August 14, 1893, to January 15, 1894.

The bags were entered free of duty under paragraph 493 of the act of October 1, 1890, c. 1244, 26 Stat. 603, as bags of American manufacture returned to the United States.

That paragraph is as follows:

"Articles the growth, produce and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; . . . but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury; and if any such articles are subject to internal tax at the time of exportation such tax shall be proved to have been paid before exportation and not refunded: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed. . . ."

Statement of the Case.

The general regulations prescribed by the Secretary of the Treasury under this paragraph contained the following provisions:

"ART. 331. Articles of the growth, produce and manufacture of the United States, exported to a foreign country and returned without having been advanced in value or improved in condition, by any process of manufacture or other means, and upon which no drawback or bounty has been allowed, are entitled to entry free of duty, but this privilege does not extend to articles exported in bond from a manufacturing warehouse and afterward returned to this country. The exportation must be *bona fide* and not for the purpose of evading any revenue law.

* * * * *

"If returned to the port of original exportation, the fact of regular clearance for a foreign destination must be shown by the records of the customs, . . . and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation, there shall be required, in addition to the declaration, a certificate from the collector and the naval officer if any, of the port, where the exportation was made showing the fact of exportation from that port.

* * * * *

"ART. 332. To guard against fraud, and to insure identity, the collector shall require, in addition to proof of clearance, the production of a statement, certified by the proper officer of the customs at the foreign port from which the reimportation was made, and authenticated by the consul of the United States, that such merchandise was imported from the United States in the condition in which it is returned, and that it has not been advanced in value or improved in condition by any process of manufacture or other means."

* * * * *

"ART. 335. Casks, barrels, carboys, bags and vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes,

are free of duties, but in case drawback has been allowed upon the exportation of any such articles, they shall on importation be subject to a duty equal to the drawback. Proof of the identity of such articles must be made, and if any of them were subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded, or duty will accrue.

* * * * *

"ART. 336. Before entry, the following proof shall be required by the collector:

"*First.* A certificate as follows from the shipper in triplicate, attested by a consul or other proper officer authorized to take affidavits, as follows:

"I hereby certify, under oath, that, to the best of my knowledge and belief, the [1] ——— hereinafter specified, are truly of the manufacture of the United States,[2] ——— or were exported from the United States, filled with [1] ———, and that it is intended to reship the same to the port of ———, in the United States,[3] ——— on board the ——— now lying in the port of ———. I further certify that, to the best of my knowledge and belief, the actual market value of the articles herein named, at this time and in the form in which the same are to be exported to the United States, is as follows [4] ———.

———.

"Sworn to before me, this — day of ———, 18—.

———.

* * * * *

"*Second.* A declaration in the entry by the importer of the name of the exporting vessel, the date of the ship's manifest, and the marks and numbers on the articles for which free

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[1] "Name the articles.

[2] "If the packages are empty, insert statement of the facts, as 'and were exported from the United States filled with the produce of that country.'

[3] "If the packages contain foreign merchandise, insert 'filled with' and a description of the merchandise they contain.

[4] "This blank is to be filled only when the merchandise contained in the packages is subject to a duty ad valorem."

entry is sought. If the exportation was made by railroad, the way bill may be substituted as evidence for the manifest. The marks and numbers should be such as to prove beyond any reasonable doubt the identity of the articles with those entered on the outward manifest. . . .

"*Third.* An affidavit by the importer, attached to the entry, that the articles mentioned therein are to the best of his knowledge and belief truly and *bona fide* manufactures of the United States, or were bags exported therefrom filled with grain."

* * * * *

"*Fifth.* Verification, after examination, by the appraiser, with an indorsement stating whether the articles are of domestic or of foreign manufacture.

"Such bags and other coverings exported to be returned should, when practicable, be marked or numbered, in order that they may be identified on their return; and the marks or numbers should appear on the shipper's manifest upon which they are exported."

When the respective shipments arrived in this country free entry was made by the importer and evidence furnished regarding the right to free entry and the character of the goods. Samples of the respective invoices were then sent to the appraiser's office and examined as follows:

From one entry of 600 bales, 70 were ordered to the appraiser's store and 18 of that number were opened by him;

Of another entry of 650 bales, 43 were ordered to the store and 19 were opened;

Of a third entry of 325 bales, 38 were ordered to the store and 13 were opened;

Of a fourth entry of 850 bales, 85 were ordered to the store and 16 were opened;

Of a fifth entry of 300 bales, 21 were ordered to the store and 14 were opened;

Of a sixth entry of 100 bales, 100 were ordered to the store and 10 were opened;

And of a seventh entry of 100 bales, 100 were ordered to the store and 10 were opened.

The examination of the bales was made by the appraiser, assisted by an examiner. The appraiser reported as to each importation that the bales contained bags of foreign manufacture, subject to duty, and thereupon the collector, by direction of the Treasury Department, at the request of the importers in order to obtain possession of the goods, made impost entries, assessing duties at the rate of two cents per pound on the entire consignment, under paragraph 365 of the act of 1890, 26 Stat. 593, as "bags for grain made of burlaps." The importers protested against the "decision, liquidation and rate and amount of duties assessed," on the grounds: That the bags were entitled to free entry under paragraph 493 of the free list as bags of American manufacture, exported filled with American products; that, if not free under that paragraph, they were entitled to free entry under the provisions of section 7 of the act of February 8, 1875, and the regulations for the free entry of bags other than of American manufacture, prescribed by the Secretary of the Treasury thereunder; and that the goods were not fairly and faithfully examined by the appraisers; that the assessment of two cents per pound because the bales contained a mixture of foreign and American bags was incorrect, and that the goods being all of one value, whether of foreign or American make, did not come under the provisions of section 2910 of the Revised Statutes.

The Board of General Appraisers sustained the action of the collector. General Appraisers' Decisions, No. 2623.

The importers applied for a review of this decision to the Circuit Court of the United States for the Fifth Circuit, which, without taking any additional testimony, reversed the decision of the board, and entered a decree that the duties paid by Ranlett and Stone, namely, two cents per pound on the several consignments of bags, enumerating them, be refunded; "that the examination heretofore made of said bales of bags is void and not in conformity to law or the regulations of the Treasury Department, and any liquidation of duties based on said examination is illegal and void, and the liquidation of duties heretofore made be set aside, and the money

received from Ranlett and Stone as duties be refunded as aforesaid; and the court doth further order and decree that the collector direct a reëxamination of said bales of bags to be made according to law, and on such reëxamination to reliquidate the duties which may be lawfully due thereon."

The United States appealed from the decree to the Circuit Court of Appeals, which certified certain questions to this court, whereupon a writ of certiorari was issued and the entire record brought up.

Mr. Assistant Attorney General Hoyt and *Mr. W. J. Hughes* for appellants.

Mr. Thomas J. Semmes and *Mr. William A. Maury* for appellees.

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

In respect of these importations, it must be assumed that the bags were not in fact all of American manufacture or substantially so.

The opinion of the General Appraisers stated that "it was admitted that there were bags of foreign manufacture and of American manufacture, all indiscriminately mingled together, no attempt being made on entry or afterwards to separate from these enormous totals of goods of the same class those claimed to be relieved from duty accompanied by the proof establishing such indulgence." The examiner testified that he "in some cases examined every bale of the whole entire invoice;" that he used his judgment "to try to open sufficient to get at the classification of the goods;" and that where he opened the bales and examined them he found of foreign make in general "from seventy-five to eighty per cent." Indeed we do not understand the importers to deny that these importations contained foreign made bags.

Under Title 33 of the Revised Statutes a duty was imposed on grain bags, except those manufactured in the United

States and exported containing American products, declaration having been made of intent to return the same empty. Rev. Stat. §§ 2504, 2505.

By section 7 of the act of February 8, 1875, c. 36, 18 Stat. 307, 308, it was provided: "That bags, other than of American manufacture, in which grain shall have been actually exported from the United States, may be returned empty to the United States free of duty, under regulations to be prescribed by the Secretary of the Treasury."

Section 6 of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 489, provided that on and after July 1, 1883, "the following sections shall constitute and be a substitute for Title 33 of the Revised Statutes." The provision in regard to empty returned bags of American manufacture was reënacted in substance in the free list, but that of section 7 of the act of 1875 was omitted, and bags, excepting bagging for cotton, were made dutiable.

Paragraph 493 of the tariff act of 1890 retained the same exemption from duty upon returned empty bags of American manufacture, and was silent in regard to returned empty foreign made bags which were filled when exported.

In view of this legislation, Acting Attorney General Maxwell advised the Secretary of the Treasury, July 20, 1893, that the provision of section 7 of the act of 1875 exempting foreign made grain bags was repealed. 20 Op. Atty. Gen. 630. This ruling was followed and approved by the Treasury Department, August 22, 1893, Syn. T. D. 14,281; and the same ruling was made by the Board of General Appraisers, February 3, 1894, in *Kent* v. *United States*, G. A. 2448, as it had been in prior decisions; by Judge Lacombe, in effect, April 21, 1891, in *In re Straus*, 46 Fed. Rep. 522; and specifically by Judge Townsend in *Kent* v. *United States*, 68 Fed. Rep. 536, June 2, 1895. The latter case was carried to the Circuit Court of Appeals for the Second Circuit and the decree affirmed, April 7, 1896, 38 U. S. App. 554. The rule applied was that "when a later statute is a complete revision of the subject to which the earlier statute related, and the new legislation was manifestly intended as a substi-

tute for the former legislation, the prior act must be held to have been repealed;" and the opinion of Judge Shipman leaves nothing to be added in support of the conclusion reached.

Foreign made bags, then, being dutiable at two cents per pound under paragraph 365 of the act of October 1, 1890, and these bales being permeated with bags of foreign manufacture, the appraiser reported all the bags as dutiable and the collector so assessed them.

But the importers insist that this assessment was illegal because of the insufficiency or invalidity of the examination; or of the absence of a statute specifically applicable; or because it was not confined to foreign made bags.

Paragraph 493 required proof of the identity of articles entered as exempt thereunder, and this was not only repeated in the regulations, but Article 336 required "verification, after examination, by the appraiser, with an indorsement stating whether the articles are of domestic or foreign manufacture." By section 2 of the Customs Administrative Act of June 10, 1890, c. 407, all invoices must contain a correct description of the merchandise, signed by the manufacturer or by the person owning or shipping the same, or by his duly authorized agent, which under section 5 might be adopted by the domestic consignee or owner, who by section 9 was made liable for the employment or use of any fraudulent or false invoice or statement by means whereof the United States may be deprived of lawful duties. Under section 10 it was the duty of the appraiser to ascertain, estimate and appraise the actual market value and wholesale price of merchandise imported, and the number of yards, parcels and quantities. And evidently this ascertainment involves character and quality as well as value, since the statement, invoice or entry must be true in respect of the character of the goods as well as of their value. 26 Stat. 131, 136.

On the question of identity, then (which under the law includes the question of country of manufacture), the production of the papers required by the regulations are not conclusive proof, and if the appraiser, after actual examination had,

decides that the goods are not as described, but are such, in fact, as to fall within a different classification, and so reports to the collector, his judgment must stand unless reversed on reappraisement, or by the Board of General Appraisers on protest filed.

As to these bags, the examiner reported to the appraiser his finding of a very large percentage of foreign made bags in the shipments, and the appraiser reported that he found the shipments to contain bags of foreign manufacture and that the importations were dutiable at two cents per pound under paragraph 365.

If the importers were not satisfied with the examination made, and objected to the competency of the examiner and appraiser, they should have applied for a reëxamination; but they did not do this, nor did they offer evidence before the Board of General Appraisers tending to establish an objection on that ground.

But it is said that the appraisement was invalid because the examination was not in accordance with § 2901 of the Revised Statutes. That section, however, was intended for the benefit of the Government, and we have held that it is not mandatory, and that official acts are not invalidated for want of strict compliance therewith. *Erhardt* v. *Schroeder*, 155 U. S. 124, 125; *Origet* v. *Hedden*, 155 U. S. 228.

The section reads thus:

"The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner or agent, the contents of the entire package in which the article may be, shall be liable to seizure and forfeiture on conviction thereof before any

court of competent jurisdiction ; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended."

Assuming that fraudulent intent was lacking, these bags were not held for forfeiture, but the collector, in effect, added them all to the entries, leaving it to the importers to prefer such claim to exemption as they might consider they were entitled to.

Section 2901 was brought forward from section 32 of the act of March 2, 1861, c. 68, 12 Stat. 197, and on December 28, 1868, Mr. Secretary McCulloch made the following ruling.

At that time the law imposed a duty of twelve cents per pound on all woollen rags, and admitted free rags composed of cotton and linen and intended for the manufacture of paper, and twenty-one bales of rags brought into the country from Canada and containing at least forty per cent of woollen rags, though imported as containing rags for the manufacture of paper, had been seized. The matter being referred to the Secretary, he ruled, in a letter addressed to the Collector of Customs at Rochester, as follows: "If you are satisfied that there was no intention on the part of the importers to conceal the dutiable rags by mingling them with others free of duty, you will not hold them for condemnation, but will allow the parties to separate such as are dutiable from such as are not so, and make entry accordingly, paying the proper duty on the former class. These instructions are to be considered as applicable only to such bales as contain so large a proportion of woollen rags as to render it worth while to collect a duty. Forty per cent of woollen rags is, however, much too large a percentage to be allowed entry as free goods."

Again, in July, 1890, it was held by the Treasury Department that where cargoes of anthracite and bituminous coal were imported, so mixed as to render it impracticable to

separate the free from the dutiable coal for the purpose of the accurate weighing of each kind, the whole cargo should be treated as dutiable. T. D. 10,098, Syn. 1890.

The general policy of the law is indicated in the statutory requirements that where goods of different qualities or different values are mingled, or are composed of material of different values, the highest rate of duty shall be imposed, as in the familiar instances of the classification of articles composed of two or more materials, at the rate of duty charged on the component material of chief value; in section 2911 of the Revised Statutes, that whenever articles composed wholly, or in part, of wool or cotton, of similar kind, but different quality, are found in the same package, charged at an average price, the appraisers shall adopt the value of the best article as the average value; in section 2912, that when bales of wool of different qualities are embraced in the same invoice at the same prices whereby the average price is reduced more than ten per centum below the value of the bale of the best quality, the value of the whole shall be appraised according to the value of the bale of the best quality, and that no bale, bag or package shall be liable to a less rate of duty in consequence of being invoiced with wool of lower value; and in section 2910, that: "When merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject."

Numerous provisions exist in the statutes and regulations designed to protect the Public Treasury from the bringing in of goods at a less rate of duty than they ought to pay under cover of association with goods properly subject to the lower amount; and the protection intended to be secured ought, on principle, equally to be accorded in respect of dutiable goods invoiced indiscriminately with free goods.

Of these seven importations, according to the importers, all the bales in two of them, and ten per cent of those in three of them, were ordered to the appraiser's store, while as to two of them, the number taken for examination fell a little

short of ten per cent; and of all these bales, one hundred were opened. It appeared also that all the merchandise covered by all the invoices was of the same character and description. Since the bales that were opened were found to contain foreign made bags in large numbers in importations claimed to consist solely of American made bags, it is not easily seen how the examination of a larger number of bales would have affected the result arrived at by the appraiser. And, as before observed, if the importers believed that they had sustained injury because more bales were not opened, they should have applied for a reëxamination, and they might have produced evidence before the Board of General Appraisers to maintain their claim that the bags were American made notwithstanding the return of the examiner and the report of the appraiser, or they might have protested on the ground that the duty should have been levied only on part thereof, and tendered evidence to support that contention.

If they had furnished evidence of the number of bags of domestic manufacture and the number of bags of foreign manufacture, or had sought a reëxamination with the view to an adjustment by proportion, and that had been had, then the collector might have assessed the foreign bags so ascertained and admitted the American bags free from duty. But it was for the importers and not for the Government to make the separation on which such a claim for relief would have rested, or, at least, to have invoked the rule of proportion based on a reëxamination.

The importers contended that they had complied with the law and the Treasury regulations by furnishing certain statements of the shippers as to the origin of the goods, and certain certificates as to their exportation filled with wheat, and that this *prima facie* evidence of the bags being of the manufacture of this country had not been disproved. But if it were admitted that these papers made a *prima facie* showing, that showing was overturned when it appeared that foreign made bags in large numbers made up the importations.

The remedies provided by the act of June 10, 1890, furnish the equivalent for the action against the collector which was

originally the remedy for an illegal exaction of duties, *United States* v. *Passavant*, 169 U. S. 16; *Schoenfeld* v. *Hendricks*, 152 U. S. 691; and as in that action, so in this proceeding, the importer must establish the illegality in order to recover back duties paid under protest; and this, in a case like the present, involves, in substantiating that contention, the making proof of the identity of the merchandise. *Earnshaw* v. *Cadwalader*, 145 U. S. 247, 262; *Erhardt* v. *Schroeder*, 155 U. S. 124.

Moreover, where merchandise liable in large part to duty is entered as exempt therefrom, the collector has the right to assume that the mingling was intentional and with design to evade the revenue laws; and hence even where the confusion of goods is accidental or not fraudulent in fact, and forfeiture is not incurred, it yet devolves on the importer to show what part of the whole he contends should not be taxed.

These importers, however, planted themselves on the ground that all these bags were exempt under the act of 1875; or, if not, that the assessment was wholly void for insufficient examination; or illegal except as to foreign made bags, which it devolved upon the Government to segregate from the common mass.

In the case of *Kent*, already referred to, it was decided by the Board of General Appraisers, February 3, 1894 (G. A. 2448), that the act of February 8, 1875, was not in force, and a reliquidation was ordered for a classification according to the proportion of foreign and American bags found in two bales which by agreement had been examined as representative bales, bag by bag. On the second of May, 1894 (G. A. 2610), the Board of General Appraisers held, in the matter of Balfour, Guthrie & Company, that inasmuch as bags made of burlaps were dutiable, except such as are described in paragraph 493, it was the duty of all persons, bringing in goods claimed to be free out of a class otherwise dutiable, to prove affirmatively the facts constituting the exemption, and that they should separate and designate such merchandise accompanied by the evidence required by law. This decision was reaffirmed May 5, 1894 (G. A. 2613), and again in the case before us.

On the 27th of April, 1894, which was after this case had been carried before the Board of General Appraisers and the evidence had been taken, the Treasury Department (T. D. 14,912) held that in the absence of any provision of law to prevent the importation of both free and dutiable second hand bags baled together, collectors might pursue the course of examining the designated number of packages, making such investigation of their contents as would reveal the character of the bags contained therein, and then adopt the finding of the appraisers as the basis of the assessment of duty on bales not examined. And since then it has been determined that importers of bags must have bags of foreign and bags of domestic origin packed separately. T. D. 18,425.

Notwithstanding the positions taken by the importers are, as we have seen, untenable, we are not disposed to hold, in the light of these rulings of the Department and the special circumstances of the case, that, if the proportion of dutiable bags sufficiently appeared or might reasonably have been ascertained, the Circuit Court could not have adjudged a recovery in that proportion, or directed a reliquidation.

A reëxamination *de novo* is now impracticable, but it appears to us that the evidence taken by the Board affords an adequate basis for a conclusion. The examiner testified that he found "along about 80 to 86 per cent foreign make;" "in general from seventy-five to eighty per cent;" and that, in his judgment, there was no invoice "that would show over twenty-five per cent of American bags;" yet he also said that he could not give specific details of each invoice, and that he "supposed if seventy-five per cent of the bags in the bale were of foreign manufacture, it carried the whole of them."

In view of this testimony, and considering that the statute was not strictly pursued in the examination (though we perceive no reason to doubt the faithfulness of the officials in the discharge of their duties), and the difficulties in the way of determining the make of the bags disclosed by the evidence, and bearing in mind that the taxation of so many of the bags as were of American manufacture operated as a penalty in

spite of the concession that no fraud on the revenue was intended, we think it unnecessary to remand the cause for another hearing, and that the ends of justice will be best subserved by directing a decree for the refunding of one fourth of the duties paid.

Decree reversed, and cause remanded with a direction to enter such a decree.

HARKRADER *v.* WADLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 41. Argued October 17, 1898. — Decided December 5, 1898.

The facts in the record show that there is no merit in the several objections to the jurisdiction of this court taken by the appellee in this case.

Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: (1) When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of *habeas corpus*. (2) When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.

A court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused.

A Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a State to enforce the criminal laws of such State.

In the Circuit Court of the United States for the Western District of Virginia, one H. G. Wadley filed a petition, signed

and sworn to August 10, 1896, praying for the allowance of a writ of *habeas corpus*. The petition was as follows:

"To the honorable Circuit Court of the United States in and for the Western District of Virginia, at Abingdon, Virginia, Fourth Circuit.

"Your petitioner, H. G. Wadley, respectfully represents and shows to this honorable court that he is a citizen of the United States of America and a citizen of the State of North Carolina, and a resident of the city of Wilmington in that State; that he is unjustly and unlawfully detained and imprisoned in the county jail of Wythe County, Virginia, at Wytheville, Virginia, in the custody of I. R. Harkrader, sheriff of said county, and as such the warden and keeper of said jail, by virtue of a warrant or order of commitment made by the county court of Wythe County, Virginia, at Wytheville, Virginia, on Monday, the 10th day of August, 1896, a copy of which order or warrant of commitment is hereto annexed, marked Exhibit A.

"Your petitioner would now show that on a petition filed by him before the Honorable Charles H. Simonton, United States Circuit Court Judge for said Fourth Circuit, embracing said Western District of Virginia, on the 5th of August, 1896, the said honorable judge, Simonton, entered an order on said petition, allowing it to be filed in the equity cause of *H. G. Wadley* v. *Blount & Boynton et als.*, pending in said court, and on said petition, duly verified and sustained by affidavits, the said honorable judge, Simonton, on said 5th day of August, 1896, in accordance to the prayer of said petition, granted an injunction against Robert Sayers, the Commonwealth's attorney of Wythe County, Virginia; J. A. Walker and C. B. Thomas, special prosecutors, and the creditors embraced in said petition, together with their counsel, from all further proceedings in said county court of Wythe upon an indictment obtained against the said H. G. Wadley in said county court on the 16th day of May, 1894, and especially from exacting or requiring any bail or any commitment to imprisonment of said H. G. Wadley on said indictment in said county court.

"A certified copy of the said petition which was presented

to Judge Simonton on the 5th of August, 1896, is herewith filed, marked Exhibit B, and a certified copy of the said order of Judge Simonton of the 5th of August, 1896, on said petition is likewise herewith filed, marked Exhibit C.

"Your petitioner, H. G. Wadley, would further show that heretofore, to wit, on the 31st of January, 1895, on an injunction theretofore awarded by him to your petitioner in his case of *H. G. Wadley* v. *Blount & Boynton et als.*, in this court, by the Honorable Nathan Goff, he, by a decree of that date, fully sustained the contention of your petitioner by refusing to dissolve said injunction and continuing it in full force, and by said decree enjoined and prohibited all further prosecution of said indictment in the county court of Wythe County, Virginia, as shown by copy of the said decree and the opinion of the Honorable Nathan Goff, herewith filed, marked Exhibit D.

"Your petitioner had hoped that after this final decree in the United States Circuit Court by the Honorable Nathan Goff on said injunction, prohibiting all further prosecution of said indictment, that the order of that honorable court would have been obeyed; but that was a vain conjecture, as the said Robert Sayers, Commonwealth's attorney of Wythe County, Virginia, and said special prosecutors, J. A. Walker and C. B. Thomas, persisted and continued, from term to term or from time to time, in calling up said indictment in said county court, and asking for a continuance of the said indictment and for the commitment of the said H. G. Wadley to the county jail of Wythe County, and he was bailed with sureties for his appearance before the said county court to appear on Monday, the 10th of August, 1896, being the first day of the August term of the said county court. Your petitioner would now show that notwithstanding the fact that the honorable judge, Simonton, as aforesaid, did on the 5th of August, 1896, enter said order especially forbidding any further order in said case in said court except a mere order of continuance, and although copies of the said order were duly executed on said Commonwealth attorney, Robert Sayers, and on said special prosecutors, J. A. Walker and C. B. Thomas, and all of the creditors named in said petition and upon their counsel

of record by the marshal for the Western District of Virginia; which order was duly executed on Saturday, the 8th of August, 1896 —

"Your petitioner, H. G. Wadley, would now show that in flagrant and contemptuous violation of both of the orders named, that of the Honorable Nathan Goff, of the 31st of January, 1895, prohibiting all further prosecution of said indictment, and in violation likewise of the said order of the Honorable Charles H. Simonton of the 5th of August, 1896, upon the calling of the said indictment this day in said county court of Wythe County, Virginia, the said Commonwealth's attorney and one of the special prosecutors asked for a continuance and stated that they had nothing to do with the question of bail or with the question of the commitment of petitioner, but that that was the duty of the court, and thus indirectly accomplished what the order of Judge Simonton in express words prohibited, for the said Commonwealth's attorney and special prosecutors, instead of asking a compliance by the said county court with the order of Judge Simonton, indirectly asked the court to commit him by saying it was the duty of the court to do so, and thereupon W. E. Fulton, the judge of the county court of Wythe County, Virginia, in violation of said orders of the United States court, did order the said petitioner, H. G. Wadley, to be committed to the sheriff of Wythe County, to keep and hold him over to answer said indictment, which is now enjoined by the said United States court, and your petitioner is now in the custody of the sheriff of Wythe County, at Wytheville, who is *ex officio* the warden and jailer of said county, and your petitioner is thus deprived of his personal liberty by the said court on its own motion committing petitioner to the custody of the jailer of Wythe County, Virginia, procured as aforesaid.

"Petitioner avers that the said indictment upon which petitioner was committed was illegally and improperly obtained, in violation of petitioner's rights as a citizen of the United States, by the counsel for the said creditors having themselves summoned before the grand jury of the county court of Wythe County, Virginia, on the 16th of May, 1894, and car-

rying before the grand jury and reading to them a copy of the deposition of your petitioner, which had been taken of petitioner in an equity suit of *Blount & Boynton et als.* v. *H. G. Wadley et als.*, and thus indirectly by said record or deposition from the United States court taken in a cause in that court indirectly required petitioner to testify against himself in a criminal case, and upon the mere copy of said deposition of petitioner, illegally taken from the files of the said cause in the United States court and read to said grand jury of Wythe County, petitioner was indicted. A copy of said indictment is fully set forth, with said exhibit, along with the petition filed on the 5th of August, 1896, and is here referred to as a part of this petition.

"Petitioner avers that his term of imprisonment, now complained of, began on the 10th day of August, 1896, at 12 o'clock M., and that such imprisonment still continues, and that he is now in the custody of the said sheriff, as such jailer, at Wytheville, Virginia.

"Your petitioner will now show that his detention and imprisonment as aforesaid is illegal in this, to wit:

"First. That this court, by two decrees, that of Judge Goff of 31st of January, 1895, as also by the second order of Judge Simonton of 5th of August, 1896, declares and adjudicates the prior jurisdiction of the said United States court, both of the person of your petitioner, and also of the subject-matter of the controversy and of the issues involved in said indictment, and that said prior jurisdiction of the said United States court renders such detention and imprisonment of prisoner by said county court illegal.

"Second. That, as stated by the Honorable Nathan Goff in his petition filed with his order of the 31st of January, 1895, in the injunction case, the indictment against petitioner in said county court of Wythe County, Virginia, was obtained against him illegally and in violation of his constitutional rights as a citizen of the United States, by the misuse and abuse of the records of the United States court, in the withdrawal therefrom of a copy of the deposition of petitioner taken in said court in said equity cause and read and used

before the said grand jury of said county court of Wythe as the foundation of said indictment.

"Wherefore, to be relieved from said unlawful detention and imprisonment, your petitioner, H. G. Wadley, prays that a writ of *habeas corpus*, to be directed to I. R. Harkrader, sheriff of Wythe County, Virginia, at Wytheville, Virginia, and keeper of the said jail of said county, and in whose custody petitioner now is, may issue in his behalf, so that your petitioner, H. G. Wadley, may be forthwith brought before this court, to do, submit to and receive what the law may direct, and upon the hearing thereof that your honor will discharge petitioner from all further custody or imprisonment, and that he go hence without bail."

There was attached to said petition the following exhibit:

"This day came The Commonwealth, by her attorney, and James A. Walker and C. B. Thomas, assistant prosecutors, as well as the accused, in his own proper person, in discharge of his recognizance; whereupon the attorney for the Commonwealth moved the court to continue this cause on the ground that there are documents, books and papers in the possession of I. C. Fowler, clerk of the Circuit Court of the United States for the Western District of Virginia, at Abingdon, and that there are other documents, papers and books in the possession of H. B. Maupin, receiver of the said Circuit Court of the United States, in the chancery cause of Paul Hutchinson, administrator, against the Wytheville Insurance and Banking Company, pending therein, which said papers, books and documents are material evidence of the Commonwealth in the prosecution of the said indictment against the said H. G. Wadley, and that the Commonwealth cannot safely go to trial without the said papers, books and documents; that the said J. L. Gleaves, then attorney for the Commonwealth of Virginia for Wythe County aforesaid, at a former term of the Circuit Court of the United States, applied to the said Circuit Court for an order directing the said clerk and the receiver to obey any *subpœna duces tecum* issued from the clerk's office of this court, requiring said clerk and said receiver to produce

said papers, books and documents before this court on the trial of this prosecution, and that since said order was entered in the said Circuit Court of the United States, the said J. L. Gleaves, attorney for the Commonwealth aforesaid, procured *subpœna duces tecum* to be regularly issued from the clerk's office of this court for said I. C. Fowler, clerk as aforesaid, residing at Abingdon, Virginia, and H. B. Maupin, receiver as aforesaid, residing in Wythe County, Virginia, requiring them to produce said papers, books and documents in their possession as aforesaid; which said *subpœnas duces tecum* were duly executed on the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, but that they refused and declined to obey the same or to produce said papers, books and documents, because since said order was entered by the United States court, and since said *subpœnas duces tecum* were issued and served, the accused, H. G. Wadley, had prepared and sworn to a bill asking for an injunction restraining the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, from obeying any such *subpœna duces tecum;* which bill was presented by counsel for the said H. G. Wadley to the Hon. Nathan Goff, one of the Circuit Judges of the United States for the Fourth Circuit, and on the *ex parte* motion of the said Wadley the said judge awarded an injunction restraining the said J. L. Gleaves, attorney for the Commonwealth of Wythe County, Virginia, either by himself or the agreement of others; I. C. Fowler, clerk of the said United States Circuit Court; H. B. Maupin, receiver as aforesaid, by themselves or by their agents or defendants, from all further proceedings or participation by them or either of them in a prosecution now pending in the county court of Wythe County, in the name of *The Commonwealth* v. *H. G. Wadley*, for the embezzlement of the assets of the Wytheville Insurance and Banking Company, restraining and enjoining them and all other defendants named in said bill, including their attorneys, clerks, agents, either directly or indirectly, through their own agency or the agency of others, from in any manner using against said H. G. Wadley in any other court, state or Federal, in any other case, civil or criminal, the deposition of the said Wad-

ley taken in another case of *Paul Hutchinson, Adm'r*, v. *The Wytheville Insurance and Banking Company*, pending in the Circuit Court of the United States for the Western District of Virginia, or any copy thereof or extract therefrom.

"And the prayer of said bill is in the following words:

"Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed for, and that they may answer to the matters hereinbefore stated and charged, the prayer of your orator is —

"That this bill of injunction and for relief be treated as incidental to said suit now pending in your honor's said court at Abingdon; that your honor may grant a writ of injunction, issuing out of and under the seal of this honorable court, restraining and enjoining, under the penalty for a violation hereof, all of the defendants to this bill, including their attorneys, clerks and agents, either directly or indirectly, through their own agency or through the agency of others, from in any manner using against orator in any other court, state or Federal, in any other case, civil or criminal, the said deposition of your orator aforesaid taken in said suit in equity, or any copy thereof, or the report of Master Commissioner Gray, taken and filed therein, or any copy thereof, or any of the books, papers, records or correspondence, or any copies thereof or extracts therefrom, of the Wytheville Insurance and Banking Company, in the possession or that came under the control of said Gray, commissioner, or of H. J. Heuser, late receiver, or of H. B. Maupin, present receiver, or of I. C. Fowler, clerk, in said equity suit that was brought in this court by said creditors; that your honor will likewise enjoin each and all of said defendants, creditors, who are now parties by the decrees of this court in said suit in equity now pending in this court, whether they are parties to the original bill or intervenors by petition or are plaintiffs in the amended, supplemental and cross bill, or whose claims have been allowed by or presented to the master commissioner, Gray, for allowance, together with all their attorneys, clerks or agents, either through their

own agency or acts or through the agency or acts of others, and also the said J. L. Gleaves, the Commonwealth's attorney of Wythe County, Virginia, either by himself or by the agency of others, and said commissioner, Gray, receivers Heuser and Maupin, and said clerk, Fowler, by themselves or their agents or deputies, from all further prosecution of or participation by them or by either of them in the criminal procedure now pending in the county court of Wythe County, Virginia, in the name of *The Commonwealth of Virginia* v. *H. G. Wadley*, upon an indictment for embezzlement of the assets of the Wytheville Insurance and Banking Company, the said creditors having already submitted themselves and their claims affected by or involved in said criminal procedure, by their bill in equity, to the prior jurisdiction of this court; that your honor, upon a final hearing of this cause, will punish the parties involved for their unjust and unlawful misuse of the records of this court in said equity suit, for the promotion and prosecution by said creditors of said criminal procedure against your orator, now pending in the said county court of Wythe County, Virginia, put on foot by said creditors and their attorneys.

"Copy. Attest: I. C. Fowler, *Clerk.*

"The restraining order is in the following words:

"This day came H. G. Wadley, one of the defendants in the above proceedings in equity now pending in the above-named court, and he presented his bill for an injunction in his name against said Blount and Boynton *et als.*, and this said bill being duly sworn to by H. G. Wadley and fully supported by the affidavits of J. H. Gibboney, H. J. Heuser and J. B. Barrett, Jr., the cause came on this day to be heard upon said bill for injunction, and upon all the exhibits filed thereto, and upon a transcript of the record of said original bill and said amended, supplemental and cross bill above named, and, upon reading said bill and affidavits and the said exhibits and transcripts, the court is of opinion that the equity jurisdiction of the United States court above named first attached to both the persons and the subject-matter involved in said suits

in equity, and that it is improper that the records of the pleadings, proofs, books and papers filed in and parts of said equity suits now in litigation and pending unadjudicated in this court between said parties, or copies thereof, should be withdrawn therefrom and used by any one in any criminal or other proceedings, in any other court, against the said party to any of said suits, in regard to any matters in issue in said suits in equity, until the same have been fully adjudicated by this court; and it appearing to this court from said bill for injunction that such has been done and is now threatened by parties to said suits in equity for the use in a criminal proceeding just begun by them in the county court of Wythe County, Virginia, against said H. G. Wadley, for matters involved in and growing out of said suits in equity which were first instituted and are still pending in litigation and undetermined in this court, it is ordered that an injunction be awarded to said H. G. Wadley according to the prayer of his bill; and it appearing to the court that the defendants in said bill are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

"But before this injunction shall take effect the said H. G. Wadley will execute a bond before the clerk of the court in the penalty of $10,000, conditioned according to law, with N. L. Wadley, as his surety, who is approved as such surety, proof of her solvency being now made.

"June 8, 1894.

"To I. C. Fowler, clerk United States Circuit Court, Abingdon, Virginia.

"N. Goff, *Circuit Judge.*

"And thereupon, on motion of the attorney for the Commonwealth, the case is continued until the next term.

"And the court, of its own motion, required the prisoner to enter into a bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county.

"Enter.

Wm. E. Fulton, *Judge.*"

In pursuance of this petition a writ of *habeas corpus* was issued, on August 11, 1896, directed to I. R. Harkrader, sheriff of Wythe County, Virginia, and, as such, jailer of said county, commanding him to bring said H. G. Wadley, together with the day and cause of his caption and detention, before Charles H. Simonton, judge of the Circuit Court of the United States within and for said district aforesaid, on August 14, 1896.

On August 14, 1896, I. R. Harkrader, sheriff, produced the body of said Wadley and made the following return:

"To the honorable Judge of the United States Circuit Court for the Fourth Circuit of the United States:

"In the matter of the petition of H. G. Wadley and the writ of *habeas corpus ad subjiciendum* which issued from the clerk's office of the Circuit Court of the United States for the Western District of Virginia on the 11th day of August, 1896, and returnable on the 14th day of August, 1896, in the town of Wytheville, Wythe County, Virginia, this respondent, for answer to the said writ, says that he here produces the body of the said H. G. Wadley, the person named in the said petition for the said writ, in obedience to the command and direction thereof, and for further return and answer to said writ here avers that he detained in his custody the body of said H. G. Wadley, under and by virtue of an order of the county court of Wythe County, State of Virginia, entered in the case of *The Commonwealth of Virginia* v. *said H. G. Wadley* on the 10th day of August, 1896, upon an indictment for a felony pending in said court against said Wadley. So much of said order as relates to the custody of said Wadley is here inserted in the words and figures following, to wit:

"'And the court, of its own motion, required the prisoner to enter into bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county.'

"And now respondent, having fully answered, prays that said writ may be discharged, and that he may be awarded his

costs about his return to the writ aforesaid in this behalf expended; and, in duty bound, he will ever pray, etc.

"I. R. HARKRADER,

"*Sheriff of Wythe County, Virginia, and as such Jailer Thereof.*"

To this return Wadley filed a reply in the following words:

"The petitioner, H. G. Wadley, comes and says that for ought contained in the said return of I. R. Harkrader, sheriff of Wythe County, Virginia, to his petition for *habeas corpus*, that petitioner is entitled to his discharge because he denies, as contained in said return, said county court of Wythe County, Virginia, had any jurisdiction of said petitioner or the subject-matter of said indictment at the time it was found or now has such jurisdiction. Petitioner denies the validity of the order of commitment of said court of petitioner to said sheriff of 10th August, 1896, relied on in said return, and says that commitment is void, because said court has no jurisdiction to enter it, and also because the indictment upon which the petitioner was so committed was obtained in violation of the Constitution of the United States by the illegal and unconstitutional use of petitioner's deposition withdrawn from the files of this court and carried before and read to the said grand jury which found the said indictment, and hence said custody is unlawful, and petitioner is deprived illegally of his personal liberty."

He also filed the following demurrer:

"And now comes H. G. Wadley in his own proper person and by his counsel, Blair and Blair, and having heard the return of said sheriff read in answer to the writ of *habeas corpus* awarded in this cause, he says that the said return and the matters therein contained and set forth are not sufficient in law, and that the said return shows no legal ground for petitioner's detention by said sheriff, and that it is not sufficient answer to the matters of law and fact contained in said petition and exhibits; and this he is ready to verify; wherefore, for want of any sufficient return in this behalf, said H. G. Wadley, the petitioner, prays judgment that the said

return be held insufficient; that an order be entered discharging petitioner from the custody of the said sheriff."

The record, as certified, discloses the following proceedings:

"On this the 14th day of August, 1896, came H. G. Wadley, the petitioner, by his counsel, Blair & Blair, and this cause coming on to be heard upon the petition for a writ of *habeas corpus* and for order of discharge, with the exhibits filed with the said petition, and said petition being duly verified by the affidavit of the petitioner, and upon the writ of *habeas corpus* issued on said petition on the 11th of August, 1896, and duly executed upon I. R. Harkrader, sheriff of Wythe County, and as such the jailer and warden of said county, in whose custody the petitioner is detained, and upon the return of said sheriff to said writ of *habeas corpus*, with the commitment filed therewith as the authority under which he acts, upon the demurrer of petitioner to said return and joinder in said demurrer, and upon the answer and denial of the said petitioner to said return, and upon the record in said case of *H. G. Wadley* v. *Blount & Boynton et al.*, and upon the production of the body of said H. G. Wadley before this court by the said sheriff, the said sheriff appearing in person, and also by counsel, attorney general of Virginia, and after argument of counsel, and the court being fully advised in the premises, the court finds that the said petitioner, H. G. Wadley, is unlawfully restrained of his liberty by the county court of Wythe County, Virginia, by virtue of an order of the judge thereof, committing him to custody in default of bail, entered on the 10th of August, 1896, on an indictment of *The Commonwealth of Virginia* v. *H. G. Wadley* on a complaint of felony set up in the petition, notwithstanding the injunction and writ of this court, it is therefore considered and ordered by this court that the said H. G. Wadley be discharged from the custody of the said I. R. Harkrader, sheriff of Wythe County, Virginia, and from the custody of said court, as said court cannot prosecute said indictment pending said injunction, and that the said H. G. Wadley hold himself subject to the further order of this court.

"And it is further ordered that the United States marshal for the Western District of Virginia serve a copy of this order upon I. R. Harkrader, sheriff of Wythe County, Virginia, and as such the warden and jailer of said county, and also a copy thereof upon W. E. Fulton, judge of said court, and Robert Sayers, Jr., the Commonwealth's attorney for Wythe County, Virginia.

"15th August, 1896.

"To I. C. Fowler, clerk of this court at Abingdon, Virginia.

"CHARLES H. SIMONTON, *Circuit Judge.*

"The attorney general of Virginia, in his proper person, states that from this order the Commonwealth of Virginia desires to appeal.

"CHARLES H. SIMONTON."

Thereafter, I. R. Harkrader, sheriff of Wythe County, Virginia, by R. Taylor Scott, attorney general of Virginia and counsel for petitioner, filed a petition for an appeal to the Supreme Court of the United States, which was, on October 12, 1896, allowed by the Circuit Judge of the Circuit Court for the Western District of Virginia.

Mr. A. J. Montague, attorney general of the State of Virginia, for appellant.

Mr. F. S. Blair for appellee.

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

The appellee has moved the dismissal of the appeal because, as is alleged, the order discharging the prisoner on the writ of *habeas corpus* was made by a judge, and not by a court; because the order, whether made by a judge or a court, was not final, as the prisoner was discharged only "pending said injunction," and was held subject to the further order of the United States Circuit Court, and because there was no certificate from the court below as to the distinct question of jurisdiction involved.

It is, indeed, true, as was decided in *Carper* v. *Fitzgerald*, 121 U. S. 87, that no appeal lies to this court from an order of a Circuit Judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of *habeas corpus*. But this record discloses that, while the original order was made at chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the Circuit Court at a stated term, and therefore the case falls within *In re Palliser*, 136 U. S. 257, 262.

We see no merit in the suggestion that the order discharging the prisoner was not a final judgment. It certainly, if valid, took away the custody of the prisoner from the state court, and put an end to his imprisonment under the process of that court.

That the jurisdiction of the Circuit Court was put in issue by the petition for the writ of *habeas corpus* and the return thereto, is quite evident. The contention made, that such question has not been presented to us by a sufficiently explicit certificate, we need not consider, for the case plainly involves the application of the Constitution of the United States. The division and apportionment of judicial power made by that instrument left to the States the right to make and enforce their own criminal laws. And while it is the duty of this court, in the exercise of its judicial power, to maintain the supremacy of the Constitution and laws of the United States, it is also its duty to guard the States from any encroachment upon their reserved rights by the General Government or the courts thereof. As we shall presently see, this is the nature of the question raised by this record.

It is doubtless true, as urged by the appellee's counsel, that an assignment of error cannot import into a cause questions of jurisdiction which the record does not show distinctly raised and passed on in the court below; but we think that this record does disclose that the assignments of error, which were embodied in the prayer for an appeal, set up distinctly the very questions of jurisdiction which were contained in the record and passed on by the trial court.

Opinion of the Court.

The further contention on behalf of the appellee, that the record does not show that the appeal as allowed was ever "filed" in the United States Circuit Court, and that therefore this court is without jurisdiction to entertain the case, we cannot accept, because we think the record, as certified to us, distinctly shows that the petition for appeal was filed on October 8, 1896; that the appeal was allowed on October 12, 1896; that the bond, containing a recital that the said Harkrader, sheriff, had "obtained an appeal and filed a copy thereof in the clerk's office of said court," was filed and approved on October 12, 1896; and that the citation was served and duly filed. This is a plain showing that the appeal as allowed was duly "filed." It is sufficient to cite *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258, 261, where it was said: "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance), the appeal bond and the citation. In *Brandies* v. *Cochrane*, 105 U. S. 262, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office."

We now come to the question, thus solely presented for our consideration, Had the Circuit Court of the United States authority to issue a writ of *habeas corpus* to take and discharge a prisoner from the custody of the state court when proceeding under a state statute not repugnant to the Constitution or laws of the United States, under which the prisoner had been indicted for an offence against the laws of the State?

Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: First. When a state court has entered upon the trial of a

criminal case, under a statute not repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of *habeas corpus*. *Andrews* v. *Swartz*, 156 U. S. 272; *Bergmann* v. *Backer*, 157 U. S. 655. Second. When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Taylor* v. *Taintor*, 16 Wall. 366; *Ex parte Crouch*, 112 U. S. 178.

In the present case it is not contended that the state statute, under which the county court of Wythe County was proceeding, was repugnant to the Constitution or any law of the United States, or that the State did not have jurisdiction of the offence charged and of the person of the accused.

But it is claimed, under the second of the above propositions, that as the Circuit Court of the United States had obtained prior and therefore exclusive jurisdiction of the affairs and assets of the Wytheville Banking and Insurance Company, a corporation of the State of Virginia, by virtue of two suits in equity brought in said court in October, 1893, by creditors of the said banking company, in which suits a receiver to take charge of the property of the bank, and a master to take all necessary accounts, had been appointed, it followed that the state court had no jurisdiction, pending those suits, to proceed by way of indictment and trial against an officer for the offence of embezzlement, as created and defined by a valid statute of the State of Virginia. For the state court to so proceed, it is claimed, constituted an interference with the Federal court in the exercise of its jurisdiction; and that hence it was competent for the United States court to grant an injunction against the prosecution of the

criminal case and to release the prisoner by a writ of *habeas corpus* directed to the sheriff.

It is not denied, on behalf of the appellee, that by section 720 of the Revised Statutes it is enacted that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy. Nor do we understand that it is denied that, apart from the effect of section 720, the general rule, both in England and in this country, is that courts of equity have no jurisdiction, unless expressly granted by statute, over the prosecution, the punishment or pardon of crimes and misdemeanors, or over the appointment and removal of public officers, and that to assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the Government. *In re Sawyer*, 124 U. S. 200.

But, as respects section 720, it is argued that it must be read in connection with section 716, which provides that "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law;" and the cases of *French* v. *Hay*, 22 Wall. 231, 253, and *Dietzsch* v. *Huidekoper*, 103 U. S. 494, are cited to the alleged effect that the prohibition in section 720 does not apply where the jurisdiction of a Federal court has first attached.

The cited cases were of ancillary bills, and were in substance proceedings in the Federal courts to enforce their own judgments by preventing the defeated parties from wresting replevied property from the plaintiffs in replevin, who by the final judgments were entitled to it.

As was said in *Dietzsch* v. *Huidekoper*: "A court of the United States is not prevented from enforcing its own judg-

ments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court. Dietzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending, and was finally determined in the United States Circuit Court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented. The bill in this case was filed for that purpose and that only."

Nor was there any attempt made in those cases to enjoin the state courts or any state officers engaged in the enforcement of any judgment or order of a state court.

It is further contended that when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court, by a bill in equity, as to the matter or right involved, a bill for an injunction will lie to prevent interference by criminal procedure in another court; and the decision of this court in *In re Sawyer*, 124 U. S. 200, is cited, where Mr. Justice Gray said: "Modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*" So, also, the case of *The Mayor &c. of York* v. *Pilkington*, 2 Atkins, 302, is cited, and in that case, where plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defendant to be indicted at the York Criminal Court for a breach of the peace for such fishing, Lord Hardwicke awarded an injunction to restrain the plaintiff from all further criminal proceedings in other courts, and said that if a plaintiff filed a bill in equity against a defendant for a right to land and a right to quiet the possession thereof, and after that he had preferred an indictment against such defendant for a forcible entry into said land, the court of equity would certainly stop the indictment by an injunction.

But the observations quoted had reference to cases where

the same rights were involved in the civil and criminal cases, and where the legal question involved was the same. Thus the case of the fishery, both in the civil and the criminal proceeding, involved the right of the defendant to fish in certain waters where the plaintiff claimed an exclusive right, and, as no actual breach of the peace was alleged, the public was not concerned. And when, in the later case of *Lord Montague* v. *Dudman*, 2 Vesey, 396, where an injunction was prayed for to stay proceedings in a mandamus, his ruling in *Mayor of York* v. *Pilkington* was cited, Lord Hardwicke said: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information. As to *Mayor of York* v. *Pilkington*, the court granted an order to stay the proceedings because the question of right was depending in the court in order to determine the right, and therefore it was reasonable they should not proceed by action or indictment until it was determined."

If *any* case could be supposed in which a court of equity might look behind the formal proceeding, in the name of the State, to see that its promoters are parties to the case pending in the court of equity, using the process of the criminal court, not to enforce the rights of the public, but to coerce the defendant to surrender in the civil case, it is sufficient to say that, in the present case, the indictment, whose prosecution the Circuit Court sought to stay, appears to have been regularly found, and to assert an offence against a law of the State, the validity of which is not assailed.

The fallacy in the argument of the appellee in the present case is in the assumption that the *same right* was involved in the criminal case in the state court and in the equity case pending in the Federal court. But it is obvious that the civil liability of Wadley to indemnify the plaintiffs in the equity suits, by reason of losses occasioned by his misconduct as an officer of the bank, is another and very different question from his criminal liability to the Commonwealth of Virginia for embezzlement of funds of the bank. There might well be different conclusions reached in the two courts. A jury in the criminal case might, properly enough, conclude that, how-

ever foolish and unjustifiable the defendant's conduct may have been, he was not guilty of intentional wrong. The court, in the equity case, might rule that the defendant's disregard of the ordinary rules of good sense and management was so flagrant as to create a civil liability to those thereby injured, without viewing him as a criminal worthy of imprisonment. The verdict and judgment in the criminal case, whether for or against the accused, could not be pleaded as *res judicata* in the equity suits. Nor could the conclusion of the court in equity, as to the civil liability of Wadley, be pleadable either for or against him in the trial of the criminal case. Surely if, by reason of a compromise or of failure of proof, the court in equity made no decree against Wadley, the Commonwealth of Virginia would not be thereby estopped from asserting his delinquencies under the criminal laws of the State. Nor would the court in equity be prevented, by a favorable verdict and judgment rendered in the state court, from adjudging a liability to persons injured by the defendant's official misbehavior.

And this reasoning is still more cogent where the respective courts belong one to the state and the other to the Federal system.

Embezzlement by an officer of a bank organized under a state statute is not an offence which can be inquired into or punished by a Federal court. Such an offence is against the authority and laws of the State. The judicial power granted to their courts by the Constitution of the United States does not cover such a case. The Circuit Court of the United States for the Western District of Virginia could not, in the first instance, have taken jurisdiction of the offence charged in the indictment, nor can it, by a bill in equity, withdraw the case from the state court, or suspend or stay its proceedings.

In both of the injunctions pleaded in answer to the return of the sheriff the attorney of the Commonwealth of Virginia for Wythe County was named as such, and was thereby prohibited from all further prosecution of the indictment pending in the county court of Wythe County in the name of the *Commonwealth of Virginia* v. *H. G. Wadley*, charged with

embezzlement of the funds of the Wytheville Insurance and Banking Company.

No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the Commonwealth's attorney, in the prosecution of an indictment found under a law admittedly valid, represented the State of Virginia, and the injunctions were therefore in substance injunctions against the State. In proceeding by indictment to enforce a criminal statute the State can only act by officers or attorneys, and to enjoin the latter is to enjoin the State. As was said in *In re Ayers*, 123 U. S. 443, 497: "How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

It is further contended, on behalf of the appellee, that even if the injunctions in the equity causes, restraining the proceedings in the county court were erroneous, they could not be attacked collaterally by this appeal in the *habeas corpus* case. The obvious answer to this is that this court is dealing only with the question of the jurisdiction of the court below. To the return of the sheriff, justifying his detention of the prisoner by setting up the order of the county court, the petitioner, Wadley, by way of reply pleaded the injunctions. This, of course, raised the question of the validity of those injunctions. If they were void, they conferred no jurisdiction upon the Circuit Court to enforce them as against the officers and process of the state court.

Again, it is urged that the indictment had been improperly found by reason of the admission before the grand jury of Wadley's deposition in the civil case. But, even if what passed in the grand jury room can be inquired into on a writ of *habeas corpus*, and this we do not concede, the remedy for

such misconduct must be sought in the court having control and jurisdiction over the proceedings.

So, too, any offence to the dignity or authority of the Circuit Court, by the misuse of its records or papers, by its suitors or their counsel, can be corrected by that court without extending its action so as to include the state court or its officers.

We are of opinion, then, that a court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused. Much more are we of opinion that a Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a State to enforce the criminal laws of such State.

Therefore the judgment of the Circuit Court of the United States for the Western District of Virginia, discharging said H. G. Wadley from the custody of the said I. R. Harkrader, sheriff of Wythe County, Virginia, and from the custody of said county court of Wythe County, is hereby reversed, and the cause is remanded to that court with directions to restore the custody of said H. G. Wadley to the sheriff of Wythe County, Virginia.

NEW MEXICO *v.* UNITED STATES TRUST COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 106. Argued October 25, 26, 1898. — Decided December 5, 1898.

The provision in Sec. 2 of the act of July 27, 1866, c. 278, 14 Stat. 292, 294, which exempts from taxation within the Territories of the United States, the right of way granted by the act to the Atlantic & Pacific Railroad Company, operates to exempt from such taxation the land itself to the extent to which it is made by the act subject to such right of way and all structures erected thereon.

In so deciding the court does not question the rule of construction declared in *Vicksburg, Shreveport & Pacific Railroad* v. *Thomas*, 116 U. S. 665, and followed in *Yazoo &c. Railroad* v. *Thomas*, 132 U. S. 174; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279; *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301; *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667; and *Covington &c. Turnpike Co.* v. *Sandford*, 169 U. S. 578, but rests the present decision simply on the terms of the statute.

This case was begun by the filing in the district court for Bernalillo County, in the Territory of New Mexico, by the District Attorney for the Territory, of an intervening petition on behalf of the Territory praying for an order against the receiver of the Atlantic and Pacific Railroad Company, requiring him to pay the amount of taxes claimed to be due upon the improvements on the right of way of said railroad company in the county of Bernalillo, and upon station houses and other improvements at seven different stations in said county. The taxes claimed were for the years 1893, 1894 and 1895.

The case was submitted upon the following agreed statement of facts:

"For the purposes of the hearing to be had upon the intervening petition of the Territory of New Mexico, in the above-entitled cause, and answers thereto of C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by

and between said above-named parties, that the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

"That on and prior to January 1, 1892, the Atlantic and Pacific Railroad Company, under the provisions of its charter, definitely located its line of road and right of way through Bernalillo County, which said right of way so located involved all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations. That upon said right of way so located through the city of Albuquerque, in said county, was definitely located necessary ground for station buildings, work shops, depots, machine shops, side tracks, turn tables and water stations; and there was also located upon said right of way at the Atlantic and Pacific Junction, at Chaves or Mitchell, at Coolidge, at Wingate, at Gallup and at Manuelito, necessary ground for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations.

"That thereafterwards and prior to 1893 there was built and constructed upon said right of way by the Atlantic and Pacific Railroad Company from a point of junction with the Atchison, Topeka and Santa Fé Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way, from said junction point to the Colorado River, in the Territory of Arizona; that the Atlantic and Pacific Railroad Company has, under an agreement with the Atchison, Topeka and Santa Fé Railroad Company, occupied and used the tracks of the last named company between the junction of the two railroads at Isleta and the city of Albuquerque as and for the railroad of the Atlantic and Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself; or, in other words, under contract between the two companies the railroad of the Atchison, Topeka and Santa Fé Railroad Company through the city of Albuquerque to the junction at Isleta, a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., aforesaid, of the Atlantic and Pacific Railroad Company at

Albuquerque; that the right of way so located by the Atlantic and Pacific Railroad Company and upon which it built its railroad, as aforesaid, runs through Bernalillo County, and is situated in Bernalillo County as follows:

"Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction 4 miles 3780 feet to the division line between Bernalillo County and Valencia County, and then after crossing a portion of Valencia County at a point known as Station 5247 it again runs through Bernalillo County 68 miles and 44 feet to the west line of the county of Bernalillo, being the west line of the Territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is of the width of 200 feet, being 100 feet on each side of the centre of the railroad track located thereon.

"That in due time the former receivers of the property of the Atlantic and Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo County as property belonging to said railroad company, taxable in said county, certain property, which was and is described in said returns as follows, to wit:

"List of personal property belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western Division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico.

"The line of its road running through the counties of Bernalillo and Valencia in said Territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line, and its terminus at Mojave, in said county of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said Territory of New Mexico being 166.6, of which 73.142 are in Bernalillo County, and 93.458 miles are in Valencia County.

"And the receivers of the property of said company,

make a full report of all of its personal property as follows, to wit:

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipments owned, possessed or used by said receivers or said company upon the entire line aforesaid	$452,960
Track tools, and all other personal property not having its situs or domicil in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and material, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito	78,000
Personal property within the city limits of Albuquerque	200,000
Personal property within the city limits of Gallup	5,000

"That the above and foregoing was all the property returned for taxation in Bernalillo County by said receivers or by the railroad company itself; and that the same was made as the assignment of the property of said company subject to taxation in said county for the year A.D. 1895; that the county assessor of Bernalillo County in the year 1895, under the direction of the board of county commissioners of said county, placed on the assessment roll an assessment of property against the Atlantic and Pacific Railroad Company for the year 1893. A true and correct copy of the assessment roll showing such assessment so placed thereon is filed with this as a part hereof, and as 'Exhibit 1,' which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said assessor, under the instructions of said board, placed upon said assessment roll certain property claimed to be taxable property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by 'Exhibit 2,' herewith filed and made a part hereof.

"That the said assessor at the same time placed upon said

assessment roll property claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which said assessment roll, with said last-named assessment placed upon it, is shown by 'Exhibit 3,' hereto attached and made a part hereof and filed herewith.

"That these exhibits show precisely the descriptions of property entered by the assessor, the penalties added, and the values and also the taxes levied thereon. 'Exhibit 3' also shows the description of the property as returned by the receivers.

"That all the property so placed upon the assessment roll by the assessor, outside of that returned by the receivers, was placed upon said assessment roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment roll by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon situated on the right of way of the Atlantic and Pacific Railroad Company in Bernalillo County, in the Territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic and Pacific Railroad Company under its charter and in accordance with the provisions thereof; and the machine shops, station buildings, water tanks, section houses and other buildings of like character connected with and a part of the machinery used in the operation of said railroad; that each and every item of property described in the assessments so placed upon the said assessment roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic and Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops, turn tables, side tracks, switches, water tanks, station buildings and other buildings of the same class and character actually used and needed in the operation of said railroad, and that no part of the same was, at the time of the placing of said assessment upon said assessment rolls by the

assessors, detached from the actual right of way and station grounds of said railroad company; but, on the contrary, was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27, 1866, known as the charter of the Atlantic and Pacific Railroad Company, the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

"That during the year 1893 there were no receivers in possession of said property, and that said railroad was being operated by the railroad company itself, and, if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo County, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

"That at Albuquerque, upon the reservations and station grounds, there were situated the largest machine shops of the said railroad company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the Western Division of the Atlantic and Pacific Railroad Company, and, since the appointment of receivers, of the receivers operating the same.

"That the assessor, in placing each of these three assessments upon the assessment rolls as stated, added to the actual value of the property one fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

"That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds, under the honest belief that the same constituted a part of the right of way and was exempt from taxation."

Subsequently, the case came on to be heard, upon the intervening petition of the Territory and the answer thereto

of the United States Trust Company and of the receiver, C. W. Smith, and the agreed statement of facts. Upon the hearing the judge of the district court ordered the receiver to pay to the treasurer of the county of Bernalillo the sum of forty-three thousand two hundred and fifty-four dollars and seventy cents ($43,254.70), the amount ascertained by a special master to be the aggregate of the taxes levied upon the additional assessments and penalties. An appeal was taken from this order by the United States Trust Company, and also by the receiver, C. W. Smith, who had obtained from the court permission to take such an appeal. The order appealed from was reversed upon hearing before the Supreme Court of the Territory, the court determining that the additional assessments placed upon the rolls were illegal and void. An application was made for a rehearing, which the court denied, and an appeal was taken to this court.

The sections of the act of July 27, 1866, c. 278, 14 Stat. 292, with which we are concerned, are inserted in the margin;[1] also sections 2807, 2822, 2834 and 2835 of the

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[1] SEC. 1. . . . And said corporation is hereby authorized and empowered to lay out, locate and construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River; thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. * * *

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction

of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations, and the right of way shall be exempt from taxation within the Territories of the United States. * * *

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers. * * *

SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. * * *

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-

outs, standing places for cars, depots, station houses or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its roadbed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners in their assessment of damages shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. * * *

SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

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SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other

Counsel for Appellant.

Compiled Laws of 1884 of New Mexico relating to taxation.[1]

Mr. F. W. Clancy for appellant. *Mr. Felix H. Lester* and *Mr. Thomas N. Wilkerson* were on his brief.

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purposes, Congress may at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act.

[1] TITLE 41. CHAPTER 1.

2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

First. The term "real estate" includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto and improvements.

Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired to said land or not.

Third. The term "personal property" includes everything which is subject of ownership, not included within the term "real estate."

Fourth. The term "credit" includes every claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected, for services to be rendered are not included in the above term.

2822. The assessor is required, between the first day in March and the first day in May of each year, to ascertain the names of all taxable inhabitants and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately:

First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

Second. The county in which such property is situated, or in which it is liable to taxation.

Third. A description by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewellery, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

Mr. Victor Morawetz and *Mr. C. N. Sterry* for appellees. *Mr. E. D. Kenna* and *Mr. Robert Dunlap* were on their brief.

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

The right of way is granted to the extent of two hundred feet on each side of the railroad, including necessary grounds for station buildings, workshops, etc. What, then, is meant by the phrase "the right of way"? A mere right of passage, says appellant. *Per contra*, appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted, that all that was attached to it became part of it and partook of its exemption from taxation.

To support its contention, appellant urges the technical meaning of the phrase "right of way," and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context, and the intention of the legislature otherwise indicated. Examining the statute, we find that whatever is granted is exactly measured as a physical thing — not as an abstract right. It is to be two hundred feet wide, and to be carefully broadened so as to include grounds for the superstructures indispensable to the railroad.

The phrase "right of way," besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes

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2834. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headings, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to "unknown owners" shall be entered.

2835. Each tract of land shall be valued and assessed separately except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together.

and another thing in a grant to a railroad for public purposes — as different as the purposes and uses and necessities respectively are.

In *Keener* v. *Union Pacific Railway*, 31 Fed. Rep. 126, 128, Mr. Justice Brewer defined the words "right of way" as follows: "The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed."

Mr. Justice Blatchford said in *Joy* v. *St. Louis*, 138 U. S. 1, 44: "Now the term 'right of way' has a twofold signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; *and it is also used to describe that strip* of land which railroad companies take upon which to construct their roadbed." That is, the land itself — not a right of passage over it. So this court in *Missouri, Kansas & Texas Railway* v. *Roberts*, 152 U. S. 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee. The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that State title could be tried in ejectment. Title was asserted by Roberts, who was plaintiff in the state court, and this court evidently considered it involved in the case. The language of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.

Washburn in his work on Easements, on p. 10, says: "Whether the thing granted be an easement in land or the land itself may depend upon the nature and use of the thing granted." To sustain this view the learned author cites *Jamaica Pond Aqueduct Corporation* v. *Chandler*, 9 Allen, 159. In that case the court said: "Whenever a grant is made of a

right or easement in lands which fall within the class sometimes described as 'non-continuous' — that is, where the use of the premises by the grantee for the purpose designated in the deed will be only intermittent and occasional, and does not embrace the entire beneficial occupation and improvement of the land — the reasonable interpretation is, that an easement in the soil, and not the fee, is intended to be conveyed. Among the most prominent of this class of easements is a way." An ordinary way, of course, the court meant, one the use of which would be non-continuous — only intermittent and occasional; but a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land, might require the fee for its enjoyment — certainly would require more than a mere right of passage. "Unlike the use of a private way — that is, discontinuous — the use of land condemned by a railroad company is perpetual and continuous." *New York, Susquehanna & Western Railroad* v. *Trimmer*, 53 N. J. L. 1, 3.

But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.

In *Smith* v. *Hall*, 72 N. W. Rep. 427, the Supreme Court of Iowa says, speaking of the right of way of a railroad: "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired and damages are assessed on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or mine."

"The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574, 580.

In *Southern Pacific* v. *Burr*, 86 California, 279, the Supreme Court of California sustained an action of ejectment for land constituting a part of the right of way granted to the Central Pacific Railroad by the act of July 1, 1862, by language similar to the grant in the case at bar.

Distinguishing the case from *Wood* v. *Truckee Turnpike Co.*, 24 California, 474, in which it was held that "a road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments," the court said: "We think that case plainly distinguishable from this. Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to the public use and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so." The court quoted and approved the views expressed in *Winona* v. *Huff*, 11 Minnesota, 119, that for a mere easement perhaps an action of ejectment would not lie; but wherever a right of entry exists and the interest is tangible so that possession can be delivered, an action of ejectment will lie. The same distinction was made in *New York, Susquehanna & Western Railroad* v. *Trimmer*, *supra*, and the court said that if the interest of the railroad company was a naked right of way it would constitute no such right of possession of the land itself as would sustain the action; for such a right would be an incorporeal one upon which there could be no entry, nor could possession of it be given under an *habere facias possessionem*. In this case it was held that the interest taken by the railroad was not an easement.

The interest granted by the statute to the Atlantic and

Pacific Railroad Company, therefore, is real estate of corporeal quality, and the principles of such apply. One of these, and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts. As to rails put down against him from whom purchased, *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *United States* v. *New Orleans Railroad*, 12 Wall. 362; *Thompson* v. *White Water Valley Railroad*, 132 U. S. 68; even though the contract of purchase provided that the property should remain that of the vendor and he have a right to remove the same, *Porter* v. *Pittsburg Bessemer Steel Co.*, 122 U. S. 267, and cases cited; in determining the relation of the rails to the right of way, *Joy* v. *St. Louis*, 138 U. S. 1. In this case Mr. Justice Blatchford said: "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way." See also *Palmer* v. *Forbes*, 23 Illinois, 301; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *New Haven* v. *Fair Haven & Westville Railroad*, 38 Conn. 422.

The principle has also illustrations in cases of taxation. *People* v. *Cassity*, 46 N. Y. 46; *Appeal Tax Court of Baltimore City* v. *The Baltimore Cemetery Co.*, 50 Maryland, 432; *Osborne* v. *Humphrey*, 7 Conn. 335; *Parker* v. *Redfield*, 10 Conn. 490; *Lehigh Coal & Navigation Co.* v. *Northampton County*, 8 W. & S. 334; *Chicago, Milwaukee & St. Paul Railway* v. *Crawford*, 48 Wisconsin, 666; *Richmond* v. *Richmond & Danville Railroad*, 21 Gratt. 604; *Mayor &c. of Baltimore* v. *Baltimore & Ohio Railroad*, 6 Gill. 288; *Osborn* v. *N. Y. & N. H. Railroad*, 40 Conn. 491; *Richmond & Danville Railroad* v. *Alabama*, 84 N. C. 504; *Worcester* v. *Western Railroad Corporation*, 4 Met. 564.

It is urged, however, that the rule of construction declared in *Vicksburg, Shreveport & Pacific Railroad* v. *Dennis*, 116

U. S. 665, and the cases there cited and approved, and repeated in *Gazoo &c. Railroad* v. *Thomas*, 132 U. S. 174; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 294; *Keokuk & Western Railroad* v. *Missouri*, 151 U. S. 301, 306; *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667, and *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, determines in favor of appellant's contention. That we do not think so is probably sufficiently indicated, but we cite the cases to preclude the thought that they have been overlooked, or that the rule announced by them is questioned. Indeed, we regard it as salutary, and not impaired by our decision which simply rests on the terms of the statute.

The decree is

Affirmed.

THE TERRITORY OF NEW MEXICO *v.* THE UNITED STATES TRUST COMPANY OF NEW YORK *et al.* No. 169. SAME *v.* SAME. No. 170. Appeals from the Supreme Court of the Territory of New Mexico.

MR. JUSTICE MCKENNA: On the authority of the foregoing opinion the decrees in these cases are

Affirmed.

THE ELFRIDA.[1]

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

No. 60. Argued November 10, 11, 1898. — Decided December 12, 1898.

Where the stipulated compensation in a salvage contract is dependent upon success it may be made for a larger compensation than a *quantum meruit* and much more so when such success is to be achieved within a limited time; and such contract, after execution, will not be set aside simply because the compensation is excessive, unless shown to have been corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of important facts, in immediate danger to the

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[1] The docket title of this case is "Charles Clarke and Robert P. Clarke, Petitioners, *v.* The Steamship Elfrida, Pyman, Bell & Co., Claimants."

Statement of the Case.

ship, or under other circumstances amounting to compulsion, or when its enforcement would be contrary to equity and good conscience.

Many leading cases in this country and some in England, where salvage contracts have been set aside, and compensation awarded in proportion to the merits of the services, examined, and shown to establish (1) That the courts of both countries are in entire accord in holding that a contract of salvage, which the master has been corruptly or recklessly induced to sign, will be wholly disregarded; (2) that some of the American courts have also laid down the rule that all salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable, to which this court is unable to give its assent; (3) that while in England there has been some slight fluctuation of opinion, by the great weight of authority, and particularly of the more recent cases, it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside.

Where no circumstances exist which amount to a moral compulsion, such a contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth.

On the continent of Europe the courts appear to exercise a wider discretion, and to treat such contracts as of no effect if made when the vessel is in danger, but this court cannot accept this as expressing the true rule on the subject.

The facts relating to the making of the contract which is in dispute in this case, as detailed in the opinion of the court, show that few cases are presented showing a contract entered into with more care and prudence than this, and the court is clear in its opinion that it should be sustained.

This was a libel *in rem* by the firm of Charles Clarke & Co., of Galveston, Texas, against the British steamship Elfrida, to recover the sum of $22,000, with interest and costs, claimed to be due them for services rendered in the performance of a salvage contract with the master, to release the Elfrida, then stranded near the mouth of the Brazos River.

The principal averments of the answer were, in substance, that the agreement was signed by the master under a mutual mistake of fact, or by mistake on his part, which libellants took advantage of, as to the danger in which the vessel was, and that it was improvidently made for an excessive com-

pensation without a proper understanding by him of the vessel's alleged freedom from danger; that the master had been prevented from carrying out his instructions to accept a tender made, if lower impossible, by information of the cable being conveyed to the salvors before the master saw it; that the parties were not upon an equal footing; that libellants made an unreasonable bargain with the master because of the stress of the situation and that of his vessel, and acted collusively with other salvors in obtaining from him the agreement.

On Friday, October 5, 1894, the Elfrida, a steel steamship of 1454 tons register, 290 feet long, 38 feet in width, and drawing 11 feet 10 inches, bound for the port of Velasco, Texas, in ballast, grounded on the bar between the jetties which extend from either bank of the river, about a mile into the Gulf, the outer end of these jetties for a distance of a thousand feet or more being submerged. The heel of the ship touched, there being but five inches between the bottom and the bar, and an easterly wind swung her bow against the west jetty. The captain ran out a kedge from the starboard bow, hove taut with the windlass, put the engine full speed astern, but could not move the ship. The wind and sea increased during the afternoon and evening, while the ship was straining and bumping heavily. The weather moderated somewhat on the following day, and the same efforts were continued unsuccessfully until the evening, when the sea rose, carrying her over the submerged outer end of the jetty, and some distance farther shoreward on the beach. She brought up that night about a cable's length to the west of the west jetty. That part of the jetty which was above high water projected seaward beyond her stern and sheltered her from easterly winds. She lay parallel with the jetty about four or five hundred feet from the beach, head on, and about one thousand feet from water of sufficient depth to float her. The shore at this point is very flat, the bottom consisting of a layer of quicksand about ten feet deep. The steamer settled in the quicksand to her normal draft, rocking and moving in it whenever there was a high

sea. She lay in nine feet of water at high tide. The weather continued generally favorable from the 7th to the 17th, with occasional gales and high seas. The ship drifted somewhat further on the beach, but efforts to relieve her by her own resources seem to have been practically abandoned.

On Tuesday, October 9, the master sent the following letter to the libellants:

"Velasco, *Oct.* 9, 1894.

"Capt. Chas. Clarke, re S.S. Elfrida.

"Dear Sir: Please tender for to float and place in a place of safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus. Also to furnish all material and labor in floating said steamship Elfrida, also time required. Reply at your earliest convenience under seal to Jas. Sorely, Lloyds agent, or myself.

"No cure, no pay.

"Yours truly, By B. Burgess, *Master.*

"P.S. — A convenient time to be laid to get the ship off, and if at the expiration of the time the vessel is still aground, all claim on this contract to cease and to be null and void.

"B. Burgess, *Master.*"

In reply to this, libellants submitted a tender, offering to perform the service for the sum of $22,000, which was accepted by the advice of Lloyds' agent, who was on board the vessel at the time, and with the consent of Pyman, Bell & Co., of Newcastle-on-Tyne, owners of the Elfrida.

The following contract, which forms the basis of the present suit, was thereupon entered into:

"The State of Texas, }
County of Brazoria. }

"This agreement, made and entered into this 15th day of October, 1894, between the steamship Elfrida, and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part,

"Witnesseth, that for and in consideration of the covenants

and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S.S. Elfrida, which is now stranded west of and near to the west jetty at the mouth of the Brazos River, in said county and State; to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

"The said party of the first part agrees to pay to the said party of the second part for such service, *i.e.* when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said second party in lieu of the amount of $22,000 agreed to be paid as aforesaid.

"It is further understood and agreed by and between the parties hereto that a failure to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified, to wit, twenty-one days from date hereof, that said party of the second part shall receive no compensation whatever from said first party for work performed, labor, tools or appliances furnished.

"Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

"Witness the hand of B. Burgess, master of the steamship Elfrida, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this 15th day of October, 1894.

"Benj. Burgess.

"Witnesses: "Chas. Clarke & Co.

"M. P. Morrissey.

"J. H. Durkie,

"*Master S.S. Lizzie, of Whitby.*"

Statement of the Case.

The day before the contract was signed, the libellants, having learned that their tender for the work had been accepted, hired the schooner Louis Dolsen of fifteen tons, for which they paid $100, to take their plant to Galveston in tow of their tug Josephine. They also hired a large force of men, procured nearly a month's supplies, cables, chains, anchors, two tugboats, two lighters and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their equipments were hired. For one of the lighters they agreed to pay $6500 if she should be lost. Their entire outfit was worth from $30,000 to $50,000. On arriving at Velasco on the same or following day, they engaged a derrick lighter for use in laying the anchors, and on the two following days, the 16th and 17th, the salvors were at work planting the anchors and connecting cables from them to the winches of the ship. This work was completed during the afternoon of the 17th, the water ballast pumped out, when the Elfrida's engines, winches and windlass were started by her own steam, and in less than half an hour she began to move herself off. She went slowly for the distance of about a thousand feet when she floated clear, but was carried by the current against the west jetty. The libellants' tug then for the first time took hold of her and towed her away from the jetty, and at 7.40 P.M., four hours after the work of hauling her off was begun, she was free and clear of everything, and put to sea under control of the pilot. Subsequent examination of her bottom, in the dry dock at Newport News, showed that she was wholly uninjured except for a slight indentation about a foot long in the bilge, which was probably caused by contact with the jetty. At the time she was stranded she was insured for the sum of £18,000, subsequently reduced to £16,000.

Upon a full hearing upon pleadings and proofs, the District Court entered a final decree in favor of the libellants for the stipulated sum of $22,000, with interest and costs. Claimants appealed to the Circuit Court of Appeals, which reversed the decree of the District Court, one judge dissent-

ing, and remanded the case with instructions to enter a decree in favor of libellants for the sum of $10,000, with interest at six per cent. 41 U. S. App. 585. A petition for rehearing having been denied, libellant applied to this court for a writ of certiorari, which was granted.

Mr. James B. Stubbs for Clarke et al. *Mr. Charles J. Stubbs*, *Mr. Joseph H. Wilson* and *Mr. Henry M. Earle* were on his brief.

Mr. J. Parker Kirlin for the Elfrida.

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

But a single question is presented by the record in this case: Was the contract with the libellants of such a character, or made under such circumstances, as required the court to relieve the Elfrida against the payment of the stipulated compensation?

We are all of opinion that this question must be answered in the negative. Salvage services are either (1) voluntary, wherein the compensation is dependent upon success; (2) rendered under a contract for a *per diem* or *per horam* wage, payable at all events; or (3) under a contract for a compensation payable only in case of success.

The first and most ancient class comprises cases of pure salvage. The second is the most common upon the Great Lakes. The third includes the one under consideration. Obviously where the stipulated compensation is dependent upon success, and particularly of success within a limited time, it may be very much larger than a mere *quantum meruit*. Indeed, such contracts will not be set aside unless corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of important facts, in immediate danger to the ship, or under other circumstances amounting to compulsion, or when their enforcement would be contrary to equity and good conscience. Before advert-

ing to the facts of this particular case, it may be well to examine some of the leading authorities where salvage contracts have been set aside and compensation awarded in proportion to the merit of the services.

In the case of *The North Carolina*, 15 Pet. 40, the master of a vessel which had struck upon one of the Florida reefs was improperly, if not corruptly, induced to refer the amount of salvage to the arbitrament of two men, who awarded thirty-five per cent of the vessel and cargo. The court found that under the circumstances the master had no authority to bind his owners by the settlement; that the settlement was fraudulently made, and that the salvors, by their contract, had forfeited all claims to compensation even for services actually rendered.

In *The Tornado*, 109 U. S. 110, the owners of three steam tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for a compensation of $50 per hour for each boat, "to be continued until the boats were discharged." When the boats were about to begin pumping, the United States marshal seized the ship and cargo upon a warrant on a libel for salvage. After the seizure the marshal took possession of the ship and displaced the authority of the master, but permitted the tugs to pump out the ship. After they had pumped for about eighteen hours, the ship was raised and placed in a position of safety. The tugs remained by the ship, ready to assist her in case of need, for twelve days, but their attendance was unnecessary, and not required by any peril of ship or cargo. In libels of intervention, in the suit for salvage, the owners of the tugs claimed each $50 per hour for the whole time, including the twelve days, as salvage. The court held that as the contract was to pump out the ship for an hourly compensation, the right of the steam tugs to compensation must be regarded as having terminated when the ship and cargo were raised, and that, as the marshal seized the ship as the tugs began to pump her out, the authority of the master was displaced, and the boats must be regarded as having been discharged under any fair

interpretation of the contract. Standing by for a period of twelve days was found to have been unnecessary, and not required by any peril to the Tornado or her cargo. The case was not one where the contract was set aside as inequitable, though found to be so, but where it had been completed by pumping out the ship and the supersession of the master. See, also, *Bondies* v. *Sherwood*, 22 How. 214, where the court overruled an attempt on the part of the salvors to repudiate their contract as unprofitable and recover on a *quantum meruit.*

These are the only cases in our reports in which the question of nullifying a salvage contract was squarely presented, although there is in the case of *Post* v. *Jones*, 19 How. 150, 160, an expression of the court to the effect that "courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." Indeed, it may be said in this connection that the American and English courts are in entire accord in holding that a contract which the master has been corruptly or recklessly induced to sign will be wholly disregarded. *The Theodore*, Swabey, 351; *The Crus*, V. Lush. 583; *The Generous*, L. R. 2 Ad. 57, 60.

The intimations of this court have been followed except in very rare instances by the subordinate courts. Thus, in the case of *The Agnes I. Grace*, 49 Fed. Rep. 662; *S.C.* 2 U. S. App. 317, a schooner bound for Port Royal, South Carolina, put into Tybee Roads under stress of weather. She came up on the sands in an exceedingly perilous condition. The ground was treacherous and dangerous, and while lying there she was exposed to the full force of the sea and winds. A tow boat company offered its services, and a contract was entered into to pay the sum of $5000 as salvage. A portion of the cargo, amounting to $7000, was saved, as well as the

schooner, which was sold for $5030, probably about one half her value. The contract was sustained. The court put its decision upon the ground that the case could not be considered as belonging to that class "where the master being upon the high seas or an uninhabited coast, at a distance from all other aid, is absolutely helpless and without power to procure assistance other than that offered, and is compelled in consequence to make a hard and inequitable contract. He was within easy reach of Savannah, where, had he desired to assume the risk for his owners, he could have procured lighters and other tugs to render the service."

The cases in these courts are too numerous for citation, but it is believed that in nearly all of them the distinction is preserved between such contracts as are entered into corruptly, fraudulently, compulsorily or under a clear mistake of facts, and such as merely involve a bad bargain, or are accompanied with a greater or less amount of labor, difficulty or danger than was originally expected.

In the earliest of these, (1799,) *Cowell* v. *The Brothers*, Bee's Ad. 136, the libellant very properly relinquished his written agreement and applied to the court for such compensation as his services appeared to deserve, although the court expressed the opinion that the contract would have been held void as having been made under circumstances of great distress. To the same effect is *Schutz* v. *The Nancy*, Bee's Ad. 139.

In the case most frequently cited, *The Emulous*, 1 Sumn. 207, the parties treated the contract at an end on account of unexpected difficulties, but Mr. Justice Story expressed the opinion that salvage contracts were within control of the court, and that the salvor could not avail himself of the calamities of others to force upon them a contract unjust, oppressive or exorbitant. In the subsequent case of *Bearse* v. *Pigs of Copper*, 1 Story, 314, Mr. Justice Story found that no fixed or definite contract for the services existed, although he had previously remarked that it was "one of the few and excepted cases in which there may be a private contract fixing the rate of salvage, which will be, and ought to be, obligatory between

the parties." We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception. *The A. D. Patchin*, 1 Blatch. 414; *Harley* v. *467 Bars Iron*, 1 Sawyer, 1; *The R. D. Bibber*, 33 Fed. Rep. 55; *The Wellington*, 48 Fed. Rep. 475; *The Sir Wm. Armstrong*, 53 Fed. Rep. 145; *The Alert*, 56 Fed. Rep. 721; *The Silver Spray's Boilers*, Brown's Ad. 349.

In *The H. D. Bacon*, Newberry's Ad. 274, certain salvors, by the use of their machinery and diving bell worth $20,000, raised a badly sunken steamboat in the Mississippi, valued $20,000, in twelve hours. It was held that the contracted price of $4000 was just and reasonable.

In *The J. G. Paint*, 1 Ben. 545, an agreement to pay a steamboat $5000 for towing a vessel worth $8000, with a cargo of sugar, for twenty-seven hours, was sustained by Judge, subsequently Mr. Justice, Blatchford.

In most of the cases where the contract was held void the facts showed that advantage was taken of an apparently helpless condition to impose upon the master an unconscionable bargain. *Brooks* v. *Steamer Adirondack*, 2 Fed. Rep. 387; *The Young America*, 20 Fed. Rep. 926; *The Don Carlos*, 47 Fed. Rep. 746.

It must be admitted that some of these courts have exercised a wide discretion in setting aside these contracts, and have laid down the rule that they are to be closely scrutinized, and will not be upheld when it appears that the price agreed upon by the master is unreasonable or exorbitant. We do not undertake to say that these cases were improperly decided upon their peculiar facts, but we are unable to assent to the general proposition laid down in some of them that salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable. If such were the law, contracts for salvage services would be of no practical value, and salvors would be forced to rely upon the liberality of the courts.

Nor is such a contract objectionable, when prudently en-

tered into, upon the ground that it may result more or less favorably to the parties interested than was anticipated when the contract was made. A person may lawfully contract against contingencies; in fact, the whole law of insurance is based upon the principle that, by the payment of a small sum of money, the insured may indemnify himself against the possibility of a greater loss; or, by the expenditure of a trifling amount to-day in the way of premium, his family may receive a much larger sum in case of his subsequent death. If there were ever any doubt with respect to the validity of such contracts it was long since removed by the universal concurrence of the courts, and an enormous business has grown up all over the world upon the faith of their validity. Indeed, nearly every contract for a special undertaking or *job* is subject to the contingencies of a rise or fall in the price of labor or materials, to the possibility of strikes, fires, storms, floods, etc., which may render it unexpectedly profitable to one party or the other.

We do not say that to impugn a salvage contract such duress must be shown as would require a court of law to set aside an ordinary contract; but where no such circumstances exist as amount to a moral compulsion, the contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth. The presumptions are in favor of the validity of the contract, *The Helen & George*, Swabey, 368; *The Medina*, 2 P. D. 5, although in passing upon the question of compulsion the fact that the contract was made at sea, or under circumstances demanding immediate action, is an important consideration. If when the contract is made the price agreed to be paid appears to be just and reasonable in view of the value of the property at stake, the danger from which it is to be rescued, the risk to the salvors and the salving property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, this sum ought not to be reduced by an unexpected success in accomplishing the work, unless the compensation for the work actually done be grossly exorbitant.

While in England there has been some slight fluctuation of opinion, by the great weight of authority, and particularly of the more recent cases, it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside. *The Mulgrave*, 2 Hagg. Ad. 77; *The True Blue*, 2 W. Rob. 176; *The Henry*, 15 Jur. 183; *S.C.* 2 Eng. Law and Eq. 564; *The Prinz Heinrich*, 13 P. D. 31; *The Strathgarry*, (1895) P. D. 264.

In *The Kingalock*, 1 Spinks, 263, an agreement was set aside upon the ground that when the vessel was taken in tow the master concealed the fact that she had been compelled to slip an anchor and cable, and that her foresail was split. Dr. Lushington thought that whether the omission to state those facts would vitiate the agreement depended upon whether they could, with any reasonable probability, affect the services about to be performed. He found that the weather was very tempestuous and the task was made much more difficult for the want of ground tackle, and hence that the agreement was null and void. *Per contra*, in the case of *The Canova*, L. R. 1 Ad. 54, he held that as no danger to property was proved, the agreement would not be set aside by reason of the fact that a great part of the crew of the vessel was disabled by illness.

In *The Phantom*, L. R. 1 Ad. 58, an agreement for eight shillings six pence, as an award for salvage services, was set aside as futile, where it appeared that there was real danger to the salvors in rendering the services. The value of the Phantom was about seven hundred pounds. The case was certainly a very hard one upon the salvors, who appeared to have been ignorant beachmen. But it is somewhat difficult to reconcile that with the prior case of *The Firefly*, Swabey, 240, where the court distinctly held that it would not set aside a salvage agreement because it seemed to be a hard bargain; or that of *The Helen and George*, Swabey, 368, unless proved to be grossly exorbitant, or to have been ob-

tained by compulsion or fraud. It was also held in *The Waverley*, L. R. 3 Ad. 369, that a steamer which contracts to render salvage services for a fixed sum will be held strictly to her agreement, and that it is no ground for extra salvage remuneration that the service was prolonged or became more difficult. See also *The Jonge Andries*, Swabey, 303.

In the *Cargo ex Woosung*, 1 P. D. 260, it appeared that the ship was wrecked on a reef in the Red Sea, and was in a position of imminent peril, and subsequently went to pieces. A government vessel was sent to her relief from Aden, and the master of the Woosung, "under circumstances of enormous pressure," agreed to pay half of the proceeds of the cargo saved. The agreement was upheld by the admiralty court (Sir Robert Phillimore), but was set aside by the Court of Appeal upon the ground that the officers of government ships, while entitled to salvage, could not impose terms upon the persons whose property they saved, and refuse to render assistance unless these terms were accepted. The circumstances showed a clear case of compulsion. So, too, in *The Medina*, 1 P. D. 272; *S.C.* 2 P. D. 5, where the master of a vessel found passengers of another steamer, (550 pilgrims,) wrecked on a rock in the Red Sea in fine weather, and refused to carry them to Jeddah for a less sum than four thousand pounds, and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that sum, and the service was performed without difficulty and danger, the agreement was held inequitable and set aside. The compulsion in this case was even clearer than in the last.

In *The Silesia*, 5 P. D. 177, a vessel which with her cargo and freight was valued at £108,000 on a voyage from New York to Hamburg, became disabled about 340 miles from Queenstown. The weather was fine and the sea smooth, but after tossing about for four or five days, she hoisted signals of distress. Another steamer bore down upon her bound from Antwerp to Philadelphia, and demanded £20,000 to take her to Queenstown. The master of the Silesia offered £5000, and finally agreed to pay £15,000, under threat of the other steamer to leave him. The service occupied three days.

The court set aside the agreement as exorbitant, and awarded £7000. Evidently advantage was taken of the helpless condition of the Silesia, and the agreement was signed under compulsion.

In *The Prinz Heinrich*, 13 P. D. 31, the master of the Prinz Heinrich, which was in a position of serious danger, and ashore upon a barbarous and thinly inhabited coast, entered into a written agreement with the master of the salving steamer, whereby he agreed to pay £200 a day for every day the latter stood by and assisted by towing to get the Prinz Heinrich off, and in the event of her being got off, or coming off the rocks during the continuance of the agreement, to pay £2000 in addition. The Prinz Heinrich came off the same day, either owing to the jettison of her cargo or to the towing of the salving steamer. The court held the agreement to be reasonable, and that the salvors were entitled to recover the full £2200, although the Heinrich was so much damaged that she was subsequently sold for £3500. The cargo was valued at £14,000. This is a strong case in favor of sustaining the agreement.

In *The Mark Lane*, 15 P. D. 135, a steamer becoming disabled in the Atlantic Ocean in fine weather, about 350 miles from Halifax, agreed to pay another steamer £5000 to tow her to Halifax, and in case of failing in the attempt to reach there, to pay her for the services rendered. The value of the property saved was somewhat less than £30,000. The contract was set aside, apparently because of the stipulation in the agreement to pay for the services rendered, even if they were unsuccessful. The court found the contract to have been signed under compulsion and threat of the salvage steamer to leave her if the master refused.

In *The Rialto*, (1891) P. D. 175, a steamer in the Atlantic fell in with another which had broken her main shaft. Her master thereupon entered into an agreement that the owner should pay £6000 for being towed to the nearest port, believing that unless he consented to such terms the salvors would not assist. The distance towed was about 450 miles, and the value of the saved property £38,000. The weather was fine

when the contract was made. There was no serious risk to the salvors or their vessel. The court found the contract to be inequitable, that the parties stood on unequal terms, and reduced the amount to £3000.

The most recent case in the English courts is that of *The Strathgarry*, (1895) P. D. 264. In this case a master of a vessel, whose cylinders were disabled, entered into an agreement with a passing steamship to pay £500 for half an hour's towage, in order to get his engines to work. The hawser broke immediately after the completion of the agreed time, and the steamship refused to continue the towage. It was held that although no benefit had resulted from the service, the agreement had been duly carried out, and that it was not, under the circumstances, manifestly unfair and unjust, and therefore the stipulated sum must be paid. The case was certainly a hard one, but the court held that, notwithstanding the services lasted but thirty minutes, the whole £500 should be paid.

In none of these cases, except perhaps that of *The Phantom*, was the agreement set aside except upon proof of corruption, suppression of facts, or circumstances amounting to a compulsion. In the case of *The Phantom* the circumstances were peculiar. The salvors were seven ignorant longshoremen, who agreed for a consideration which amounted to but little more than a shilling apiece to undertake the salving of a vessel worth £700. The salvors labored for two hours at great risk of their lives, and the court naturally held the consideration to be merely nominal.

Under the continental system the courts appear to exercise a wider discretion, and to treat contracts as of no effect when made while the vessel is in danger. Some intimations go so far as to say that they will be disregarded whenever made before the services are rendered. The doctrine of these courts seems to have arisen from the following extract from the fourth article of the Rules of Oleron:

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in,

the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgement."

By the German Commercial Code, art. 743, it is enacted that "when during the danger an agreement has been made as to the amount of salvage or payment for assistance, such agreement may nevertheless be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance to the circumstances of the case may be demanded."

Under the Scandinavian Code, art. 27, the master may, within two months, bring the question of contract before the court, which can refuse the amount if considerably in excess of a reasonable payment for the services performed. Even if it be agreed that the amount be settled by arbitration, the person liable to pay may repudiate the agreement if he does so within fourteen days.

By the Commercial Code of Holland, art. 568, every agreement or transaction regarding the price of assistance or of salvage may be modified or annulled by the judge, if it has been made in the open sea or at the time of stranding. Nevertheless, when the danger is passed, it shall be lawful for both to make regulations or agreements as to the price of assistance or salvage.

By the Commercial Code of Portugal, art. 1608, and by that of the Argentine Republic, sec. 1469, every agreement for salvage made upon the high seas, or at the time of stranding, with the captain or other officer, shall be null, both with respect to the vessel and to the cargo; but after the risk has terminated the price may be agreed upon, although it will not be binding upon the owners, consignees or underwriters who have not consented to it.

The French, Belgian, Italian, Spanish and Brazilian Codes have no special provisions upon the subject, and the question of sustaining or annulling them is rather a question of fact than of law.

Opinion of the Court.

We have examined the cases cited by counsel in the Revue Internationale de Droit Maritime, and find that they are more favorable to the respondent than the English and American authorities. In short, they appear to pay much less regard to the sanctity of contracts than obtains under our system, and we are loath to accept them as expressing the true rule upon the subject. Indeed, we have had frequent occasion to hold that the maritime usages of foreign countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. *The John G. Stevens*, 170 U. S. 113, 126, and cases cited.

The facts in this case are somewhat peculiar, and, in entering into the contract, unusual precautions were taken. On October 5, the Elfrida in entering the river grounded by the stern about mid-channel, her bow drifting over toward the west jetty. Her crew were unable to get her off, either upon that or the following day, when, owing to the sea rising, she was carried over the jetty and a very considerable distance further on to the beach (about 600 feet), where she remained in seven or eight feet of water, gradually working inward and making a bed for herself in the sand, which had a tendency to bank up about her bows. She appears to have been at no time in imminent peril, but her situation could have been hardly without serious danger, unless she were released before a heavy storm came on, which might have broken her up or driven her so far ashore that her rescue would have been impossible. It was shown that in previous years a number of vessels had gone ashore in this neighborhood, several of which were lost by bad weather coming on. In other cases the difficulty of getting them off had been very largely increased by similar causes. The testimony shows that while the Elfrida lay there the wind was at times blowing a gale with a rough sea, in which the ship strained and bumped heavily. On Saturday the 6th, the day of her final stranding, the master having given up his idea of getting her off with her own anchors, telegraphed his owners and also Lloyds' agent at Galveston, who appear to have sent Mr. Clarke, one of the libellants,

down on Sunday evening. He offered to undertake the relief of the ship for what the court would allow him. This offer the master declined. About the same time Mr. Sorley, Lloyds' agent, came down to the vessel, saw her situation, remained there two days, and advised the master to invite bids for her relief. He obtained two bids, one for $24,000 and one made by the libellants for $22,000, and on the advice of Sorley and of his owners, Pynam, Bell & Co., of Newcastle-on-Tyne, with whom he kept in constant communication by cable, he accepted libellants' bid, and a contract was entered into, whereby they agreed to float the Elfrida and place her in a safe anchorage, and to complete the job within twenty-one days from date. The master agreed to pay therefor the sum of $22,000, but reserved the right to abandon the ship in lieu of this amount. At the request of the owners he also inserted a further stipulation that if the libellants should fail to float the ship and place her in a position of safety within twenty-one days, they should receive no compensation whatever for the work performed, or the labor, tools or appliances furnished. This contract was made at Velasco on October 15. Clarke proceeded at once to get ready a wrecking outfit, consisting of a tugboat and schooner, with fifteen or sixteen men, went to the wreck, and spent about two days planting anchors and connecting cables from them to the winches of the ship. The tugboat took no part in the actual relief of the vessel, which was effected by the aid of the anchors and the steamer's engines, although after the Elfrida was afloat she drifted against the west jetty and the tug hauled her off.

For the work actually done the stipulated compensation was undoubtedly very large, and if the validity of the contract depended alone upon this consideration, we should have no hesitation in affirming the decree of the Circuit Court of Appeals; but the circumstances under which the contract was made put the case in a very different light. In the first place, the libellants offered to get the vessel off for such salvage as the court should award, but the master declined the proposition, and, acting under the advice of Lloyds' agent and of Moller & Co., the owners' agents at Galveston, invited bids

for the service. This certainly was a very proper step upon his part, and there is no evidence showing any collusion between the bidders to charge an exorbitant sum. The conditions imposed upon the libellants were unusual and somewhat severe. Their ability to get her off must have depended largely upon the continuance of good weather. Their ability to get her off within the time limited was even more doubtful, and yet under their contract they were to receive nothing — not even a *quantum meruit* — unless they released her and put her in a place of safety within twenty-one days. Further than this, if in getting her off, or after she had been gotten off, she proved to be so much damaged that she was not worth the stipulated compensation, the master reserved the right to abandon her.

We give no weight to the advice of Pynam, Bell & Co., her owners, to enter into the contract, since in the nature of things they could have no personal knowledge of her situation, or of the possibility of relieving her; but it shows that her master, though a young man and making his first voyage as master, acted with commendable prudence. He took no step without the advice of his owners and that of the underwriters' agent at Galveston, Mr. Sorley, who was a man over seventy years of age, perfectly honest, and of large experience in these matters. Sorley visited the vessel, saw her situation, and advised an acceptance of the bid. The value of the ship is variously estimated at from $70,000 to $110,000, but the sum for which she was insured, £18,000 or $90,000, may be taken as her approximate value. Under the stringent circumstances of this contract, we do not think it could be said that an agreement to pay one quarter of her value if released could be considered unconscionable, or even exorbitant, and unless the fact that it proved to be exceedingly profitable for the libellants is decisive that it was unreasonable, it ought to be sustained. For the reasons above stated we think that the disproportion of the compensation to the work done is not the sole criterion. Very few cases are presented showing a contract entered into with more care and prudence than this, and we are clear in our opinion that it should be sustained.

Had the agreement been made with less deliberation or pending a peril more imminent our conclusion might have been different.

The decree of the Circuit Court of Appeals must therefore be reversed and the case remanded to the District Court for the Eastern District of Texas with directions to execute its original decree.

UNITED STATES *v.* LOUGHREY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 22. Argued and submitted April 21, 1898. — Decided December 12, 1898.

Under the act of June 3, 1856, c. 44, 11 Stat. 21, the State of Michigan took the fee of the lands thereby granted, to be thereafter identified, subject to a condition subsequent that, if the railroad, to aid in whose construction they were granted, should not be completed within ten years, the lands unsold should revert to the United States; but, until proceedings were taken by Congress to effect such reversion, the legal title to the lands and the ownership of the timber growing upon them remained in the State, and the United States could not maintain an action of trespass against a person unlawfully entering thereon, and cutting and removing timber from the land so granted: and timber so cut and separated from the soil was not the property of the United States, and did not become such after acquisition of the lands by reversion; and the United States could not avail themselves of the rule that in an action of trover, a mere trespasser cannot defeat the plaintiff's right to possession by showing a superior title in a third person, without showing himself in priority with, or connecting himself with such third person.

This was an action originally begun by the United States in the Circuit Court for the Eastern District of Wisconsin, to recover the value of timber cut from the north half of the northwest quarter of the northeast quarter of section thirteen, township forty-four north, of range thirty-five west, in the State of Michigan. The complaint charged the cutting of the timber by one Joseph E. Sauve, and that he removed from the lands 80,000 feet of timber so cut and left the balance

skidded upon the lands. The defendants were charged as purchasers from Sauve. The amount of timber cut by Sauve was alleged to have been 600,000 feet, and the time of the cutting in the winter of 1887–8 and prior to the first day of March, 1888.

The case was tried by the court without a jury upon facts stipulated as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half ($\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$), and the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), and the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a wilful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at $2.50 per thousand, board measure; that the value of the same when cut and upon the land, $3.00 per thousand, board measure; that the value of the same when placed in the river was $5.00 per thousand, board measure; that the value of the same when manufactured was $7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the State of Michigan by an act of the Congress of the United States, approved June 3, 1856, being chapter 44 of volume 11 of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature, approved February 14, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad men-

tioned in said act No. 126 of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin state line, therein denominated "The Ontonagon and State Line Railroad Company."

The finding of facts by the court was in accordance with the foregoing stipulation, with the additional finding that said railroad was never built and said grant of lands was never earned by the construction of any railroad.

And as conclusions of law, the court found:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

No exceptions were taken to the findings of fact, and no further requests to find were made. Exceptions were only taken to the conclusions of law found by the court, and for its failure to find other and contrary conclusions.

Upon writ of error sued out from the Circuit Court of Appeals, the judgment of the Circuit Court dismissing this complaint was affirmed. 34 U. S. App. 575.

Whereupon the United States sued out a writ of error from this court.

Mr. George Hines Gorman for plaintiffs in error. *Mr. Solicitor General* was on his brief.

Mr. W. H. Webster for defendants in error submitted on his brief.

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

To entitle the plaintiff to recover in this action, which is substantially in trover, it is necessary to show a general or special property in the timber cut, and a right to the possession of the same at the commencement of the suit.

There is no question that the lands belonged to the United

States prior to June 3, 1856. By an act of Congress, passed upon that date, 11 Stat. 21, c. 44, it was enacted that "there be, and hereby is, granted to the State of Michigan, to aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin state line," with others not necessary to be mentioned, "every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads; . . . which lands . . . shall be held by the State of Michigan for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of each of said roads: *Provided*, *further*, That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which said lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." By the third section it was enacted that the "said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other." Provision was made in the fourth section for a sale of the lands for the benefit of the railroads as they were constructed. The last clause provided that "if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

1. Under this act the State of Michigan took the fee of the lands to be thereafter identified, subject to a condition subsequent that if the roads were not completed within ten years the lands unsold should revert to the United States. With respect to this class of estates Professor Washburn says that "so long as the estate in fee remains, the owner in possession has all the rights in respect to it, which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another — something more than a possibility of reverter belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the prem-

ises." 1 Wash. Real Prop. 5th ed. 95. As was said in *De Peyster* v. *Michael*, 6 N. Y. 467, 506, a right of reëntry "is not a reversion, nor is it the possibility of reversion, *nor is it any estate in the land.* It is a mere right or chose in action, and, if enforced, the grantor would be in by a forfeiture of a condition, and not by a reverter. . . . It is only by statute that the assignee of the lessor can reënter for condition broken. But the statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other *estate.* . . . When property is held on condition, *all the attributes and incidents of absolute property belong to it until the condition be broken.*" Had the State through its agents cut timber upon these lands, an action would have lain by the United States upon the covenant of the State that the lands should be held for railway purposes only, and devoted to no other use or purpose; but the State was not responsible for the unauthorized acts of a mere trespasser, and it was no violation of its covenant that another person had stripped the lands of its timber.

In the case of *Schulenberg* v. *Harriman*, 21 Wall. 44, an act immediately preceding this, granting public lands to the State of Wisconsin to aid in the construction of railroads in that State, and precisely similar to this act in its terms, was construed by this court as a grant *in præsenti* of title to the odd sections designated, to be afterwards located; that when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the lands. As it is stipulated in this case that the lands from which the timber was cut were a part of the grant of June 3, 1856, to the State of Michigan, and were a part of the lands within the six-mile limit, certified and approved to the State by the Secretary of the Interior, no question arises with respect to the identity of the lands.

The case of *Schulenberg* v. *Harriman* was also an action for timber cut upon lands granted to the State, against an agent of the State who had seized the logs, which had been cut after the ten years had expired for the construction of the railroad, but before any action had been taken by Congress

to forfeit the grant. The complaint in the case alleged property and right of possession in the plaintiffs. It was stipulated by the parties that the plaintiffs were in the quiet and peaceable possession of the logs at the time of their seizure by the defendants, and that such possession should be conclusive evidence of title in the plaintiffs against evidence of title in a stranger, unless the defendant should connect himself with such title by agency, or authority in himself. The title of the plaintiffs was not otherwise stated. It was held that the title to the lands did not revert to the United States after the expiration of the ten years, in the absence of judicial proceedings in the nature of an inquest of office, or a legislative forfeiture, and that until a forfeiture had taken place the lands themselves and the timber cut from them were the property of the State. Said Mr. Justice Field, in delivering the opinion of the court, p. 64: "The title to the land remaining in the State, the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property." The same rule regarding the construction of this identical land grant was applied by this court in *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354. Indeed, the principle is too well settled to require the citation of authorities. The case of *Schulenberg* v. *Harriman*, 21 Wall. 44, differs from the one under consideration in the fact that no act forfeiting the grant was ever passed; but it is pertinent as showing that under a statute precisely like the present the title to the timber cut before such forfeiture is in the State and not in the General Government.

It follows that the United States, having no title to the lands at the time of the trespass and no right to the possession of the timber, are in no position to maintain this suit. Neither a deed of land nor an assignment of a patent for an

invention carries with it a right of action for prior trespasses or infringements. Such rights of action are, it is true, now assignable by the statutes of most of the States, but they only pass with a conveyance of the property itself where the language is clear and explicit to that effect. 1 Chitty on Pleading, 68; *Gardner* v. *Adams*, 12 Wend. 297, 299; *Clark* v. *Wilson*, 103 Mass. 219, 223; *Moore* v. *Marsh*, 7 Wall. 515; *Dibble* v. *Augur*, 7 Blatchf. 86; *Merriam* v. *Smith*, 11 Fed. Rep. 588; *May* v. *Juneau County*, 30 Fed. Rep. 241; *Kaolatype Engraving Company* v. *Hoke*, 30 Fed. Rep. 444.

So where a landowner entrusts another with the possession of his lands, either by lease, by contract to sell, or otherwise, the right of action for trespasses committed during such tenancy belongs to the latter, and except under special circumstances an action for a trespass, such as the cutting of timber, will not lie in favor of the landlord. *Greber* v. *Kleckner*, 2 Penn. St. 289; *Campbell* v. *Arnold*, 1 Johns. 511; *Tobey* v. *Webster*, 3 Johns. 468; *Cutts* v. *Spring*, 15 Mass. 135; *Lienow* v. *Ritchie*, 8 Pick. 235; *Ward* v. *Macauley*, 4 T. R. 489; *Revett* v. *Brown*, 5 Bing. 7; *Harper* v. *Charlesworth*, 4 B. & C. 574; *Graham* v. *Peat*, 1 East, 244; *Lunt* v. *Brown*, 13 Maine, 236; 2 Greenlf. on Ev. § 616.

Although, as was said by Lord Kenyon in *Ward* v. *Macauley*, 4 T. R. 489, "the distinction between the actions of trespass and trover is well settled: The former are founded on possession; the latter on property;" yet, they are concurrent remedies to the extent that, wherever trespass will lie for the unlawful taking and conversion of personal property, trover may also be maintained. The plaintiff is bound to prove a right of possession in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract, he cannot maintain trover for them. *Smith* v. *Plomer*, 15 East, 607; *Wheeler* v. *Train*, 3 Pick. 255; *Gordon* v. *Harper*, 7 T. R. 9; *Ayer* v. *Bartlett*, 9 Pick. 156; *Fairbank* v. *Phelps*, 22 Pick. 535.

It does not aid the plaintiffs' case to take the position (the soundness of which we by no means concede) that the State held the lands as trustee, to deliver them over to the railroads

upon certain contingencies, and to return them to the United States in case the condition subsequent were not performed, since nothing is better settled than that a trustee has the legal title to the lands, and that actions at law for trespasses must be brought by him, and by him alone. 1 Perry on Trusts, sec. 328, and cases cited; *Fenn* v. *Holmes*, 21 How. 481.

Certain cases having a contrary bearing will now be considered. Several of these are to the effect that if a man leases an estate for a term of years and the tenant unlawfully cuts timber the lessor may sue in trespass, and perhaps in trover, upon the ground that the title to the land remains in the lessor during the pendency of the lease.

In *Richard Liford's case*, 11 Coke Rep. 46, which was an action of trespass by a tenant against the agent of the owner of the inheritance for certain trees cut, it was said "that when a man demises his land for life or years the lessee has but a particular interest in the trees, but the general interest of the trees remains in the lessor; for the lessee shall have the mast and fruit of the trees, and shadow for his cattle, etc., but the interest of the body of the trees is in the lessor as parcel of his inheritance; and this appears in 29 H. 8 Dyer, 36, where it is held in express words that it cannot be denied that the property of great trees, *scil.* the timber, is reserved by the law to the lessor, but he cannot grant it without the termor's license, for the termor has an interest in it, *scil.* to have the mast and fruit growing upon it, and the loppings thereof for fuel, but the very property of the tree is in the lessor as annexed to his inheritance." Again, speaking of disseisin and the respective rights of the disseisee and disseisor when the former regains possession, it is said: "That after the regress of the disseisee the law adjudges as to the disseisor himself, that the freehold has continued in the disseisee, which rule and reason doth extend as well to corn as to trees or grass, etc. The same law, if the feoffee, or lessee, or the second disseisor, sows the land, or cuts down trees or grass, and severs, and carries away, or sells them to another, yet after the regress of the disseisee, he may take as well the corn as the trees and grass to what place soever they are carried; for the regress

of the disseisee has relation as to the property, to continue the freehold against them all in the disseisee *ab initio*, and the carrying them out of the land cannot alter the property."

In *Gordon* v. *Harper*, 7 T. R. 9, it was held that where goods had been leased as furniture with a house, and had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff, pending the lease, because he did not have the right of possession as well as the right of property at the time. The case was distinguished from one where the thing was attached to the freehold, and the doctrine of *Liford's case* was reiterated, that where timber is cut down by a tenant for years the owner of the inheritance may maintain trover for the timber notwithstanding the lease, because the interest of the lessee in it remained no longer than while it was growing on the premises and determined instantly when it was cut down. See also *Mears* v. *London & Southern Railway*, 11 C. B. [N. S.] 850; *Randall* v. *Cleaveland*, 6 Conn. 328; *Elliot* v. *Smith*, 2 N. H. 430; *Starr* v. *Jackson*, 11 Mass. 519.

These cases obviously have no application to one where there has been a conveyance of the fee of the land prior to the cutting of the timber, and no reëntry or analogous proceeding on the part of the vendor for a breach of a condition subsequent.

The same distinction was taken in *Farrant* v. *Thompson*, 5 B. & Ald. 826, in which certain mill machinery, together with the mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under execution by the sheriff and sold by him. It was held that no property passed to the vendee, and the landlord was entitled to bring trover for the machinery, even during the continuance of the term, upon the ground that the machinery attached to the mill was a part of the inheritance which the tenant had a right to use, but not to sever or remove.

So in *United States* v. *Cook*, 19 Wall. 591, it was held that timber standing upon lands, occupied by Indians, cannot be cut by them for the purposes of sale, although it may be for

the purpose of improving the land, as the Indians had only the right of occupancy, and the presumption was against their authority to cut and sell the timber. In such case the property in the timber does not pass from the United States by severance, and they may maintain an action for unlawful cutting and carrying it away. To the same effect is *Wooden Ware Co.* v. *United States*, 106 U. S. 432.

In *Wilson* v. *Hoffman*, 93 Michigan, 72, the same principle was extended to a plaintiff in ejectment who was held entitled to maintain an action for trover for logs cut by the defendant during the pendency of the suit which had been determined in the plaintiff's favor, although the defendant was in possession of the land under a *bona fide* claim of title adverse to the plaintiff. This is but another application of the doctrine which allows the plaintiff in ejectment to recover mesne profits upon the theory that the land has always been his, and that the defendant illegally obtained possession of it. See also *Morgan* v. *Varick*, 8 Wend. 587; *Busch* v. *Nester*, 62 Michigan, 381; 70 Michigan, 525.

In *Mooers* v. *Wait*, 3 Wend. 104, a person entered into possession of wild lands under a contract of sale giving him the right of entry and occupancy, reserving to the landlord the land as security until the payment of the consideration by withholding the deed. It was held that he had a right to enter and enjoy the land for agricultural purposes, but that he had no right to cut timber for any other purpose than for the cultivation, improvement and enjoyment of the land as a farm; and that the owner of the inheritance, who had never parted with his title, might maintain an action of trover for it against any one in possession, although a *bona fide* purchaser under the occupant. This was also upon the principle that the vendor had never parted with title to his land. But see *Scott* v. *Wharton*, 2 Hen. & M. 25; *Moses* v. *Johnson*, 88 Alabama, 517.

In *Burnett* v. *Thompson*, 6 Jones, N. C. (Law), 210, the plaintiff had a life estate *pur autre vie* in a lease of Indian lands for ninety-nine years, and also a reversion after the expiration of the term. A stranger entered and cut down

cypress trees and carried them off. The plaintiff was permitted to recover. It was held that "if there be a tenant for years or for life, and a stranger cuts down a tree, the particular tenant may bring trespass, and recover damages for breaking his close, treading down his grass, and the like. But the remainderman, or reversioner in fee, is entitled to the tree, and if it be converted may bring trover and recover its value. The reason is, the tree constituted a part of the land, its severance was waste, which is an injury to the inheritance, consequently the party in whom is vested the first estate of inheritance, whether in fee simple or fee tail (for it may last always), is entitled to the tree, as well after it is severed, as before; his right of property not being lost by the wrongful acts of severance by which it is converted into a personal chattel." See also *Halleck* v. *Mixer*, 16 California, 574.

While these cases run counter to some of those previously cited, they are all distinguishable from the one under consideration in the fact that the plaintiff was the owner of the inheritance, and had the legal title to the land at the time the trespass was committed. We see nothing in them to disturb the doctrine announced by this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, that timber cut upon the lands prior to the forfeiture belongs to the State. The fact is that nothing remained of the original title of the United States but the possibility of a reversion, a contingent remainder, which would be an insufficient basis for an action of trover. *Gordon* v. *Lowther*, 75 N. C. 193; *Matthews* v. *Hudson*, 81 Georgia, 120; *Farabow* v. *Green*, 108 N. C. 339; *Sager* v. *Galloway*, 113 Penn. St. 500. To sustain this action there must be an immediate right of possession when the timber is cut. This might arise if the severance of the timber involved a breach of obligation on the part of the tenant, but if the timber were cut by a third person, the question would be as to the right to the timber so cut as against the trespasser, and unless the case of *Schulenberg* v. *Harriman* is to be overruled, it must be held to be that of the State.

2. As the United States can take title to the timber in-

volved in this case only through its ownership of the lands, it remains to consider whether the act of March 2, 1889, c. 414, 25 Stat. 1008, forfeiting the lands granted by this act to aid in the construction of a railroad from Marquette to Ontonagon, operated by relation to revest in the United States title to the timber which had been cut during the winter of 1887 and 1888, and prior to the act of forfeiture. This act provided that "there is hereby forfeited to the United States, and the United States hereby resumes title thereto, all lands heretofore granted to the State of Michigan . . . which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain."

The position of the plaintiffs must necessarily be that this act of forfeiture not only revested in the United States the title to the lands as of a date prior to the cutting of the timber in question, but also revested them with the property in the timber which had been cut while the lands belonged to the State of Michigan. Had this act of forfeiture not been passed, there could be no question that, under the case of *Schulenberg* v. *Harriman*, 21 Wall. 44, this timber would have belonged to the State of Michigan, and no action therefor could have been brought by the United States.

But conceding all that is contended for by the plaintiffs with respect to the revestiture of the title to the lands by this act, it does not follow that the title to the timber which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg* v. *Harriman*, the title to the timber remained in the State after it had been severed. But it remained in the State as a separate and independent piece of property, and if the State had elected to sell it, a good title would have thereby passed to the purchaser, notwithstanding the subsequent act of forfeiture. It did not remain the property of the State as a part of the lands, but as a distinct piece of property, although the State took its title thereto through and in consequence of its title to the lands. From the moment it was cut, the State was at liberty to deal with

it as with any other piece of personal property. *Robert* v. *Hurdle*, 48 N. C. 490.

We know of no principle of law under which it can be said that timber, which was the property of the State when cut, becomes the property of the United States by an act of Congress resuming title to the land from which it was cut, although the timber may in the meantime have been removed hundreds of miles from the lands, and passed into the hands of one who knew nothing of the source from which it was derived. It may be, in such a case, that if the State sues for and recovers the value of such timber, it might be accountable to the United States for the proceeds, in case the Government resumed title to the lands.

Two cases cited by the Solicitor General in the brief lend support to the doctrine that the resumption of title by the United States operates upon the timber already cut as well as upon the lands. In the first of these, *Heath* v. *Ross*, 12 Johns. 140, the action was in trover for a quantity of timber cut upon lands for which the plaintiff had applied for a patent before the timber was cut. The patent was not granted until after the timber was cut. The patent was held, upon well-settled principles, to relate back to the date of application. The defendant knew he had no title to the lot or right to cut the timber. The plaintiffs were held entitled to recover.

The other case is that of *Musser* v. *McRae*, 44 Minnesota, 343. In that case an act of Congress, granting lands to the State of Wisconsin in aid of the construction of railroads, provided that it should be lawful for the agents appointed by the railway company, entitled to the grant, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States, "deficiency" lands within certain indemnity limits. It was *held* that the issuance of a patent to the railway company for the lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States at the date of the selection. And it was further held that where, after the lands had been so selected, but prior to the issue of the patent,

timber had been wrongfully cut and removed by trespassers, the title acquired by the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land, or its value.

These cases are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the lands — a title which no one could disturb, and which the State was bound to perfect by the issue of a patent, provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended.

3. Nor are the plaintiffs entitled to avail themselves of the rule that in an action of trover a mere trespasser cannot defeat the plaintiff's right to possession by showing a superior title in a third person without showing himself in privity or connecting himself with such third person. The cases in which this principle is applied are confined to those where the plaintiffs were either in possession of the property or entitled to its immediate possession, and thus showed a *prima facie* right thereto. It has no application to cases wherein the plaintiff has shown no such right to bring the action. *Jeffries* v. *Great Western Railway Co.*, 5 El. & Bl. 802; *Weymouth* v. *Chicago & Northwestern Railway*, 17 Wisconsin, 567; *Wheeler* v. *Lawson*, 103 N. Y. 40; *Halleck* v. *Mixer*, 16 California, 574; *Terry* v. *Metevier*, 104 Michigan, 50; *Stevens* v. *Gordon*, 87 Maine, 564; *Fiske* v. *Small*, 25 Maine, 453. Counsel are mistaken in supposing that the plaintiffs had an immediate right to the possession of this timber. They had no right to the possession of the land until Congress passed the act of March 2, 1889, forfeiting the grant. Up to that time the title was in the State, and until then the United States had no more right to enter and take possession than they would have had to take possession of the property of a private individual.

As the plaintiffs failed to show title to or right of possession to the timber in question, there was no error in the action of the Court of Appeals, and its judgment is therefore

Affirmed.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER and MR. JUSTICE HARLAN, dissenting.

The United States donated the land from which the timber was cut to the State of Michigan in aid of a contemplated railroad. The donating act dedicated the property thus conveyed to the State, for the sole purpose of aiding in the construction of the railroad, and it contained a provision that if the road was not built within a designated period the land conveyed was to revert to the United States. The road was never built, and the granted land was forfeited by act of Congress, because of non-compliance with the conditions contained in the grant.

The issue presented for decision is the right of the United States to recover in an action of trover the proceeds of timber cut from the land by a trespasser whilst the legal title was in the State, but after the period had elapsed when the right in the United States to assert a forfeiture had arisen. The decision of the court is that a recovery cannot be had, because at the time of the severance of the timber by the trespasser the legal title was in the State. It is thus in effect decided that it was in the power of a trespasser, while the legal title to the land and its incidents was in the State, to destroy the value of the land by severing and appropriating the timber, and that there exists no remedy by which the right of property of the United States can be protected. Such a consequence strikes me as so abnormal that I cannot bring my mind to assent to its correctness; and thinking as I do that it involves a grave denial of a right of property, not only harmful in the case decided, but harmful as a precedent for cases which may arise in the future, I state the reasons for my dissent.

At the outset it becomes necessary to determine the nature of the rights of the State and those of the United States created by and flowing from the act of donation. That the land from which the timber was cut belonged to the United States at the time of the grant goes without saying. It was conveyed by the act of Congress to the State, not for the use and bene-

fit of the State, but for the sole purpose of aiding in the construction of a railroad. The State had no right to dispose of the land except for the declared object; and whilst it is true that a power to sell the land was vested by the act in the State, it was a power which the State could only call into being as the work progressed, and, to quote from the act, "for the purposes aforesaid and no other" — that is, the specific object stated, namely, the construction of the railroad referred to. The granting act clearly imported that in the event of a forfeiture before the land had been earned and conveyed by the State, the land should be restored to the United States in its integrity.

I submit that the effect of the act of Congress was to create a trust in the land and to vest the legal title thereto, with the incidents such as timber, in the State of Michigan for the purposes of the trust, to hold, primarily, for the benefit of the owners of a line of railroad if constructed, and, secondarily, for the benefit of the United States, in the contingency that a forfeiture was declared for a breach of the condition subsequent as to the time of completion of the road. The State, in all reason, was bound to restore the land and timber which passed to its possession to the United States, upon the declaration of the forfeiture, retaining no benefit whatever from the land for itself by reason of such custody and control. Being clothed with the legal estate in the land, the State, while it so held the land, "possessed all the power and dominion over it that belonged to an owner." *Stanley* v. *Colt*, 5 Wall. 119, 167. As the timber when severed belonged to the true owner of the land, the State, as the trustee of an express trust and representing such owner, was the proper party, during the continuance of the trust, to recover any portion of the inheritance wrongfully converted by a trespasser, and this would have been the case even if the United States had stipulated to retain possession until a conveyance of the land by the State. *Wooderman* v. *Baldock*, 8 Taunt. 676; *White* v. *Morris*, 11 C. B. 1015; *Barker* v. *Furlong*, (1891) L. R. 2 Ch. 172; *Myers* v. *Hale*, 22 Mo. App. 204. Clearly this was so, because, to maintain replevin or trover, it is essential that the plaintiff

have *at the time of suit brought* the legal title to the property, and, until the enactment of the forfeiting act, the legal title to this timber was in the State of Michigan.

It was manifestly because the legal title was in the State that this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, declared that a State was the owner of timber which had been wrongfully cut by trespassers from land granted in aid of a railroad by a statute similar to the one above referred to. The Schulenberg action was instituted, however, at a time when no forfeiture had been declared, and the controversy was simply between a trespasser and the State as to their respective rights in timber which had been unlawfully severed from the granted land. That land so conveyed, with all that formed part thereof, was deemed to be held upon trust is manifest from the opinion; for, speaking through Mr. Justice Field, the court said (p. 59):

"The acts of Congress made it a condition precedent to the conveyance by the State of any other lands that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could pass any title to the company."

And this view was reiterated by this court, speaking through Mr. Justice Brewer, in *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354, when, in interpreting the very statute now under consideration, it was said (p. 373):

"Further the grant to the State of Michigan was to aid in the construction of a railroad. Affirmatively, it was declared in the acts of Congress that the lands should be applied by the State to no other purpose. Even if there had been no such declaration such a limitation would be implied from the declaration of Congress that it was granted for the given purpose. As the State of Michigan had no power to appropriate these lands to any other purpose, certainly no act of any executive officer of the State could accomplish that which the State itself had no power to do."

To reason, however, to establish that in so far as the granting act restricted the State to the use of the land and that

which adhered in it for a particular purpose it engendered an express trust, is wholly unnecessary, since it is admitted that had the State through its agents cut timber upon the land before the passage of the forfeiture act, a right of action would have arisen on behalf of the United States against the State as upon a covenant by the State that it would keep the land and its incidents for railway purposes only. This conclusion necessarily carries with it as a legal resultant the proposition that the granting act contained an express trust. How then, I submit, can it in reason be held that there was a right which could only exist upon the hypothesis of an express trust arising from the granting act, and yet it at the same time be decided that there was no trust whatever implied in the act, or that the rights which would obtain if there were a trust have no being? It cannot be doubted that the act restricted the use to a particular purpose, nor can it be gainsaid that the right of reëntry was stipulated only as respects the non-completion of the railroad. But the failure to preserve a right of reëntry in case of the misuse of the property did not destroy the terms of the act restricting the use, and as therefore the restriction as to use was unaccompanied with a clause of reëntry, the effect was to give rise to a trust upon the grantee with reference to such use. This last principle, I submit, is sustained by authority. *Stanley* v. *Colt*, 5 Wall. 119, 165; *Packard* v. *Ames*, 16 Gray, 327, and cases cited; *Sohier* v. *Trinity Church*, 109 Mass. 119.

As the State held the land with power simply to sell on the happening of a particular event, until the occurrence of that event the State had no greater rights in the land than would have existed in favor of one who was entitled to the mere use and occupancy of the land. It could not therefore sell the timber for purposes of mere profit, for, as said in *United States* v. *Cook*, 19 Wall. 591:

"The timber while standing is a part of the realty and can only be sold as the land could be. The land cannot be sold, . . . consequently the timber, until rightfully severed, cannot be."

If, therefore, the State could not rightfully acquire the

absolute ownership, in its own right, of timber, the cutting of which it had authorized, it is clear that it would not become such owner by reason of the unlawful act of an unauthorized person. As the State of Michigan was without power to have authorized a sale of the timber contrary to the purpose of the trust, it is obvious that the act of a mere trespasser, without authority from the State, in denuding the land of its timber, could not operate to vest the State or the trespasser with the absolute ownership, in its or his own right, of said timber; and it is the settled doctrine of this court that the sale of timber by a trespasser does not divest the title of the real owner, and that a purchaser, even though acting in good faith, is liable to respond to the true owner for the timber or its value. *United States* v. *Cook*, 19 Wall. 591; *Wooden Ware Co.* v. *United States*, 106 U. S. 432; *Stone* v. *United States*, 167 U. S. 178, 192, 195.

The simple question presented then is this and this alone: Where the legal title to land, with its incidents, is in one person burdened with an express trust in favor of another, can the *cestui que trust*, upon the cessation of the trust, when the title to the land and its incidents has revested in him, recover from a wrongdoer the value of timber cut, without color of right and unlawfully removed from the land while the legal title and possession thereto was in the trustee?

This question is, I think, fully answered by the rulings of this court in *Schulenberg* v. *Harriman* and *Lake Superior &c. Co.* v. *Cunningham*, *supra*, because, as already stated, in the first case it was said that "no conveyance in violation of the terms of these acts, the road not having been constructed, could pass any title to a grantee of the State;" and in the second, that, "As the State of Michigan had no power to appropriate these lands to any other purpose, certainly no act of any executive officer of the State could accomplish that which the State itself had no power to do." Now, no one will gainsay that this court in those cases declared that if the land was conveyed in violation of the terms of the act of Congress, an occupant under such an unlawful grant might be ousted by the United States, either forcibly

or by suit in ejectment. With this doctrine thus settled by this court in opinions which are now approvingly cited, is it yet to be held that if the occupant under a void grant from the State before forfeiture denuded the land of all its timber, that is, of one of its material incidents, the land might be recovered by the United States from the trespasser, but not the timber or its value? I submit that, upon general considerations, as between the wrongdoer and the *cestui que trust*, the better right is in the latter, that such right can be enforced, and that though ordinarily in an action of trover it is essential that the plaintiff should have had at the time of the unlawful conversion the legal title and right of possession to the property claimed by him, yet, under such circumstances as I have indicated, a title by relation is a sufficient basis for the action.

Relation is a fiction of law, adopted solely for the purposes of justice, *Gibson* v. *Chouteau,* 13 Wall. 92, 100, and by it one who equitably should be so entitled is enabled to assert a remedy for an injury suffered, which otherwise would go unredressed. The doctrine is considered at much length in *Butler* v. *Baker*, 3 Coke, 25, in resolutions of the Justices of England and the Barons of the Exchequer, and "many notable rules and cases of relations" (p. 35*b*) are there stated. The action was trespass, and the refusal of a wife, after the death of the husband, to accept a jointure by which an estate tail had vested in her prior to the death of the husband, was held to relate back as to certain lands and not as to others. It was laid down (p. 28*b*) "that relation is a fiction of law to make a nullity of a thing *ab initio* (to a certain intent), which *in rei veritate* had essence, and the rather for necessity, *ut res magis valeat quam pereat.*" And, in Lord Coke's comments on the case, he observes (p. 30*a*): "The law will never make any fiction, but for necessity, and in avoidance of a mischief."

Early in England the doctrine of relation was applied in favor of the king in cases where until office found the title or right of possession to property, real or personal, was not in the crown. Thus Viner in the eighteenth volume of his Abridgment, at p. 292, title Relations, states the following case:

"2. In *quare impedit*, where the king is entitled to the

advowson by office by death of his tenant, the heir being within age and in ward of the king by tenure in capite, this office shall have relation to the death of the tenant of the king; so that if there be a mesne presentment the king shall avoid it by relation. (Br. Relations, pl. II, cites 14 H. 7, 22.)"

Several instances of the application of the doctrine in favor of the king are referred to at length in the report of the case of *Nichols* v. *Nichols*, Plowden, 477, 488 *et seq.*, one of which, I submit, is precisely parallel to the case at bar, and is thus stated in the report:

"In an action of trespass brought in 19 Edw. IV, for entering into a close and taking the grass, the defendant pleaded that it was found by office that the tenement escheated to the king before the day of the trespass, and there it seems that, as to such things as arise from the land, as the grass, and the like, the action which was well given to the plaintiff was taken away by the office found afterwards, which by its relation entitled the king thereto; but, as to the entry into the land, or breaking of fences, which don't arise from the land, nor any part of the annual *en*crease of it, the action was not taken away by the office."

This last case is reviewed, approvingly, in the opinion of Bayley, J., in *Harper* v. *Charlesworth*, 4 B. & C. 574, where, in an action of trespass, brought by one in the possession of lands under a parol license from agents of the crown, which possession was not good as against the crown because not granted in conformity to statute, it was adjudged that, as the king had not proceeded against the occupant, the action might be maintained, though the right of such occupant to recover for the trees was denied in the opinion of Holroyd, J., presumably because they form part of the inheritance.

The doctrine was early enforced in England to vest a right of action, in trover, in an administrator. In 18 Viner's Abr., title Relation, p. 285, it is said:

"(1. If a man dies possessed of certain goods, and after a stranger takes them and converts them to his own use, and then administration is granted to J. S., this administration shall relate back to the death of the testator, so that J. S.

may maintain an action of trover and conversion for this conversion before the administration granted to him. Trin. 10 Car. B. R. between Locksmith and Creswell adjudged, this being moved in arrest of judgment, after verdict for the plaintiff. Intratur. Hill, 9 Car. Rot. 729.)"

In the marginal note it is stated: "For this is to punish an unlawful act; but relations shall never divest any right legally vested in another between the death of the intestate and the commission of administration."

An administrator has likewise been held, by relation, to have such constructive right of possession in the goods of the intestate before grant of letters as to be entitled to maintain an action of trespass. *Tharpe* v. *Stallwood*, 5 M. & G. 760, and cases there cited. And, in *Foster* v. *Bates*, 12 M. & W. 226, Parke, B., said (p. 233):

"It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrongdoer who has seised or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of *Tharpe* v. *Stallwood*, 12 Law J. N. S. 241, (a) where an action of trespass was held to be maintainable. The reason for this relation given by Rolle, C. J., in *Long* v. *Hebb*, Styles, 341, is, that otherwise there would be no remedy for the wrong done."

The title of an assignee in bankruptcy was also early held to relate back, for the purpose of maintaining trover, to the time of the commission of the act of bankruptcy. See the subject reviewed in *Balme* v. *Hutton*, 9 Bing. 471, particularly pp. 524, 525, where Tindal, C. J., observed that in *Brassey* v. *Dawson*, 2 Str. 978, Lord Hardwicke, then Chief Justice of the King's Bench, stated this relation to be a fiction of law, but that, subsequently, when Chancellor, in *Billon* v. *Hyde*, 2 Ves. 310, he seemed to be of opinion that the terms of the bankrupt act, by necessary construction, imported that such relation was intended.

Another illustration of the application of the doctrine is

where a grantee or mortgagee ratifies an unauthorized delivery of a conveyance or mortgage to a third person, in which case it is held that the title may relate back to the unauthorized delivery, except as to vested rights of third persons. See a review of numerous authorities in *Rogers* v. *Heads Iron Foundry*, 51 Nebraska, 39. See, also, *Wilson* v. *Hoffman*, 93 Michigan, 72, where it was held that a successful plaintiff in ejectment might maintain an action of trover for logs cut by the defendant from standing timber, and removed from the land during the pendency of the suit, and while in possession of the land under a *bona fide* claim of title adverse to the plaintiff. In that case the court said (p. 75):

"In the present case the true owner brings trover against the party who cut the logs, under a *bona fide* claim of title adverse to the owner, after the title to the land has been determined in favor of the plaintiff. . . . If in the present case the logs had been upon the land when the ejectment suit was determined, that determination would have established the title in the plaintiff. Suppose, however, that before the determination of the ejectment suit the logs had been skidded upon adjoining land — would the ownership or right of possession depend upon which party first reached the skids? As is said in the *Busch case*, as between the wrongdoer and the true owner of the land, the title to what is severed from the freehold is not changed by the severance, whatever may be the case as to strangers. If the true owner may keep his own property when he gets it, why may not he get it if another has it?"

Many decisions of this and other courts illustrate the application of the doctrine to various conditions of fact. Thus, where one has claimed land under a donation act, or has entered upon land under homestead or preëmption statutes, the legal title subsequently acquired by patent has been held to relate back to a prior period, to quote the language of this court in *Gibson* v. *Chouteau*, 13 Wall. 100: "So far as it is necessary to protect the rights of the claimant to the land, and the rights of parties deriving their interests from him."

Among the cases recognizing and applying the doctrine

that the legal title when acquired may be held, for certain purposes, to relate back to the inception of an inchoate right in the land, which, however, was in no sense an estate in the land, may be cited the following: *Ross* v. *Barland*, 1 Pet. 655; *Landes* v. *Brant*, 10 How. 348; *Lessee of French* v. *Spencer*, 21 How. 228, 240; *Grisar* v. *McDowell*, 6 Wall. 363; *Beard* v. *Federy*, 3 Wall. 478; *Lynch* v. *Bernal*, 9 Wall. 315; *Stark* v. *Starrs*, 6 Wall. 402; *Gibson* v. *Chouteau*, 13 Wall. 92, 100; *Shepley* v. *Cowan*, 91 U. S. 330; *Heath* v. *Ross*, 12 Johns. 140; and *Musser* v. *McRae*, 44 Minnesota, 343. As was said in *Gibson* v. *Chouteau*, *supra*, p. 101, the doctrine of relation is "usually" applied in this class of cases, but is so applied "for the purposes of justice." I submit it is clear that the inchoate rights in land held in the cases above cited to be sufficient to warrant the application of the doctrine of relation were of no greater legal or equitable merit or efficacy than the interest or expectant right in land with its incidents, reserved to the United States by virtue of the granting act of 1856 here considered, and this it strikes me is patent when it is borne in mind that it is conceded that the interest of the United States in the land was such that, if the timber had been cut by the State, the United States had the better right to the avails, and might, by an action for breach of covenant, recover the same from the State. But, if the State, which held the legal title subject to an express trust, can be held to account by way of damages in an action of covenant for timber cut under its authority, why "for the purposes of justice" should not the doctrine of relation be applied in favor of the United States, at this time when, otherwise, a naked trespasser, who had no title of any kind and whom the State whilst it was trustee choose not to sue and cannot now sue, will escape liability and the United States be defrauded of the value of its property? To deny relief under such a state of facts is, I submit, to hold that if A conveys land in fee to B in trust, to be held for C until the happening of a certain event, and, after the contingency has happened, and the land has been conveyed to C and the trust thus terminated, the former *cestui que trust* discovers that the land had been stripped of all its timber

by a trespasser and rendered practically valueless, he is without remedy, and must endure the pecuniary injury without complaint.

If, as it seems to me is clearly the fact, the State of Michigan held title to the timber merely as an incident to the land, and could only exercise such powers with respect to the timber as it was entitled to exercise as respects the land itself, it results that the State did not stand in the attitude of a grantee of land upon condition subsequent, to whom an *absolute* conveyance had been made, *for its sole use and benefit.* Authorities, therefore, to the point that in the case of *such* a conveyance, the only right of the grantor is to receive back, upon reëntry, the granted land in the condition in which it might then exist, have no pertinency in a case like the present, where the grant was to the State, not as absolute owner, but as a mere trustee. So, also, I submit that decisions which hold that upon the commission of a trespass on land where the legal title and possession is in the real owner, or upon an infringement of a patent the legal title to which is in the real owner, a right of action to recover damages for the trespass or infringement immediately vests in such owner and becomes personal to him, so as not to pass upon a subsequent conveyance of the land or assignment of the patent, have no relevancy in cases like that at bar, where at the time of the trespass or infringement complained of the legal title and the possession was held by one who was but a trustee for another, and had no real, beneficial interest in the land.

Nor can I see the appositeness of the citation of authorities holding that, during the existence of a trust, the trustee and not the *cestui que trust* is the proper person to sue. This is readily conceded, and such was the decision of this court in *Schulenberg* v. *Harriman* and in *Lake Superior &c. Co.* v. *Cunningham.* The question here is, not who may sue during the existence of the trust, but, what are the rights of the *cestui que trust* when the power of the trustee has ended, and the property has reverted under the terms of the trust.

The decisions are uniform, that even where land is in the possession of a lessee, upon an unauthorized severance of

growing timber, the title and right of possession to the severed timber is at once vested in the owner of the land, or, as it is sometimes expressed, the owner of the inheritance; and the latter may resort to the appropriate remedies against one who unlawfully removes the severed timber from the land, *Liford's case*, 11 Coke Rep. 46*b*, 48*a*; *Ward* v. *Andrews*, 2 Chitty, 636; *S.C.* 4 Kent Com. 120; *United States* v. *Cook*, 19 Wall. 591, 594; *Burnett* v. *Thompson*, 6 Jones, Law, (N. C.) 210, 213; *Mather* v. *Ministers of Trinity Church*, 3 Serg. & Raw. 509, and cases cited; *Mooers* v. *Wait*, 3 Wend. 104, 108; *Gordon* v. *Harper*, 7 T. R. 13; 1 Chitty Plead. 16th ed. 217; star paging 168; 1 Wash. Real Prop. 5th ed., 498, note *T*, star paging 314; and the same principle applies to whatever is part of the inheritance and is wrongfully severed and removed from the land. *Farrant* v. *Thompson*, 5 B. & Ald. 826, 828.

To summarize, therefore: The State of Michigan was not the beneficial owner of the land from which the timber in question was severed, but held the legal title merely as a trustee, though, by virtue of being vested with the legal estate, the State was entitled to enforce, for the benefit of the real owner, such remedies as the latter might have resorted to had he held the legal title. But if the owner, the United States, is not permitted to maintain the present action, it loses property which it had a clear right to receive, and the wrongdoer goes unpunished. These circumstances present all the elements which justify resort to the fiction of law by which a person who, in equity and good conscience, was the real owner at the time of an unlawful conversion is to be regarded, as against the wrongdoer, to have had the legal title and possession, by relation, in him at the time of such conversion, and therefore as having had such a title and possession as, when his disability to assert his rights no longer exists, will entitle him to maintain an action of trover.

Indeed, it seems to me that in reason it is impossible to deny the right of the true owner to recover the timber, without involving the mind in irreconcilable propositions and in addition making use of a complete *non sequitur*, that is to say, first, that there was no trust, and yet that rights existed

which could only arise by reason of a trust; and second, that the trustee alone could sue during the existence of the trust, therefore, on the termination of the trust, the same doctrine applies. Reduced to its last analysis, the doctrine now announced is, I submit, really this: That the United States could not recover whilst the trust existed because the trustee must assert the right, and that it likewise could not recover after the termination of the trust, and, hence, could not recover at all. The result in effect concedes the existence of a right of property, but holds that it cannot be protected because the law affords no remedy. The maxim *ubi jus, ibi remedium* lies at the very foundation of all systems of law, and, because, as has been stated at the outset, I cannot believe that the common law departs from it, I refrain from giving my assent to the conclusions of the court, and express my reasons for dissenting therefrom.

GRANT *v.* BUCKNER.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 89. Submitted November 29, 1898. — Decided December 19, 1898.

Certain real estate in Louisiana, consisting of five plantations standing in the name of J. Morgan, was community property. His wife died in 1844, leaving two children as her heirs; and in 1858 Morgan conveyed all the real estate to his children and grandchildren. He died in 1860, and in 1872 his creditors took proceedings to set aside the conveyance and to subject his interest in the property to the payment of his debts. Their contention was sustained by this court in *Johnson* v. *Waters*, 111 U. S. 640. Then a receiver was appointed to take charge of both interests in all the property. The portion to which this suit relates was in the possession of Buckner, claiming under the conveyance made by Morgan in 1858. The receiver threatening to eject him, Buckner, in order to remain in possession, took a lease of the whole plantation from the receiver. In 1891 it was decided in *Mellen* v. *Buckner*, 139 U. S. 388, that one undivided half of the plantation belonged to Buckner, and that only the remaining half was subject to the debts of Morgan, and that if the heirs should not desire a severance of their portions, the whole should be sold and the proceeds divided in accordance with the decree. The sale was made two

years later. Buckner paid the receiver rent for the whole plantation from 1884 to 1891, but paid nothing thereafter. This action was commenced by the receiver in a state court of Louisiana to recover from Buckner rent for one half of the estate for 1891 and 1892, and one half of the taxes thereon for those years. Buckner in reply claimed the right to offset against the receiver's demand one half of the rent which he had paid to him between 1884 and 1891, and asked for judgment against the receiver for the surplus. The Supreme Court of Louisiana sustained the offset and reserved to Buckner the right to recover the surplus. *Held:*

(1) That Buckner was entitled to set off against the rent unquestionably due for the undivided half of the plantation for 1891 and 1892 one half the amount paid by him for rent between 1884 and 1891;

(2) That he was not precluded from obtaining the benefit of this right in the state courts by the fact that the receiver was an officer of the Federal court, or by any proceedings had in that court, as the receiver voluntarily went into the state court;

(3) That the jurisdiction of the state court was clear, and its judgment is affirmed.

THE case is stated in the opinion.

Mr. J. D. Rouse for plaintiff in error.

Mr. Thomas Marshall Miller for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

This case comes on error to the Supreme Court of the State of Louisiana. It is perhaps the last step in a litigation which has been going on for a quarter of a century, and which has twice appeared in this court. *Johnson* v. *Waters*, 111 U. S. 640; *Mellen* v. *Buckner*, 139 U. S. 388. In those cases the full story of the litigation is told. For the present inquiry it is sufficient to note these facts: Prior to the late civil war Oliver J. Morgan was the owner of five plantations in the State of Louisiana. His wife died intestate in 1844, leaving two children as her sole heirs. The property standing in his name was community property. In 1858 he conveyed the plantations to his children and grandchildren. The purpose of this conveyance was, first, to secure to the grantees their shares in the property as the heirs of his wife; and, secondly, to make a donation from himself. He died in 1860. In 1872

certain creditors of Morgan, creditors of him individually and not of the community, brought suit in the Circuit Court of the United States to set aside the conveyance, and subject his interest in the property to the payment of their debts. Their contention was sustained by the Circuit Court, and its decree was substantially affirmed by this court. *Johnson* v. *Waters*, *supra*. Thereafter, and in May, 1884, the Circuit Court appointed a receiver to take charge of all the property conveyed by Morgan. Melbourne plantation was at the time in the possession of the present defendant in error, claiming under the conveyance made by Morgan in 1858. After the appointment of the receiver the defendant in error, rather than be dispossessed, leased from him the plantation. The litigation continued, and, new parties being named, came before this court again in 1889. *Mellen* v. *Buckner*, *supra*. It was decided in 1891 that one undivided half of the Melbourne plantation belonged to the defendant in error, and that only the remaining half was subject to the debts of Morgan. The language of the decree was: "The said heirs are entitled to have and retain a certain portion of said Oliver J. Morgan's estate free from the claims of his creditors, as follows, to wit: two fifths of the four plantations, Albion, Wilton, Westland and Morgana, are directed and decreed to be reserved for the benefit to the heirs of Julia Morgan, deceased; and one half of Melbourne plantation is directed and decreed to be reserved for the benefit of the heirs of Oliver H. Kellam, Jr., deceased; and that the remaining interest in the said plantations is decreed and adjudged to be subject to the payment and satisfaction of the debts due to the administrator of said William Gay," etc.; and further, after providing for other matters, "but if the heirs shall not desire a severance of their portions, then the whole property to be sold, and they to receive their respective portions of the proceeds, but no allowance for buildings. Any moneys in the hands of the receiver, after paying his expenses and compensation, are to be divided between the creditors and heirs in the proportions above stated, applying the amount due to the heirs, so far as may be requisite, to the costs payable by them." Two years thereafter the interest of

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Morgan in the plantation was sold in accordance with the terms of the decree. The defendant had paid to the receiver the rent of the entire plantation from 1884 up to the decree in 1891, but paid nothing thereafter. This action was commenced by the receiver in the district court of the seventh judicial district for East Carroll Parish, Louisiana, to recover one half the stipulated rent of the Melbourne plantation for the years 1891 and 1892, as well as one half of the taxes thereon for those years. The defendant answered, not questioning his liability for the matters set forth in the petition, but alleging that between 1884 and 1891 he had paid the receiver rent for the entire plantation, one half of which had been finally adjudged to be his property, and not subject to the claims of creditors of Morgan, and prayed to set off the one half of the rent wrongfully collected between 1884 and 1891 against the one half due for the years 1891 and 1892, and for a judgment over against the receiver for any surplus. The trial court sustained his defence so far as to decree a full set-off to the claims of the receiver. The Supreme Court of the State affirmed the trial court in this respect, but amended the judgment so "as to reserve the defendant's right to demand of and recover from the plaintiff the residue of the amount of the rents he has collected in excess of the sum actually due by the defendant, after a sufficiency thereof has been used to extinguish by compensation the demands of said receiver in this suit." 49 La. Ann. 668. Whereupon the receiver sued out this writ of error.

Two questions are presented: First, was the defendant entitled to set off against the rent unquestionably due for the undivided half of the plantation for 1891 and 1892, one half the amount paid by him for rent between 1884 and 1891, on the ground that it had been finally adjudged that he was the owner of one undivided half of the plantation, and therefore that the receiver had improperly collected the rent therefor; and, second, if he was entitled to such set-off, was he precluded from obtaining the benefit of it in the state courts by the fact that the receiver was an officer of the Federal court, or by any proceedings had in that court?

The contention of the receiver is that the defendant's right to one half of the plantation dates from the decree in 1891, while the defendant insists that it dates from the conveyance in 1858, and that the decree only determined a preëxisting right. We concur in the latter view. As a rule courts do not create but simply determine rights. The adjudication that the defendant was entitled to an undivided one half of the plantation was neither a donation nor an equitable transfer of property in lieu of other claims. It was a determination of a preëxisting right, and that right dates and could only date from the conveyance in 1858.

The conclusions of the Circuit Court of the United States, as expressed in an opinion and passed into a decree — a decree not appealed from, and, therefore, final between the parties — are to the same effect. Such opinion and decree appear in the record. In the opinion, which was announced after the decision of this court in 139 U. S., *supra*, it was said: "From this last opinion and decree of the Supreme Court in the matter, we are forced to conclude that the portions of lands set off and adjudged to the heirs of Julia Morgan and heirs of O. H. Kellam, Jr., were so set off and adjudged to them as the owners thereof in their own right as the heirs of Julia Morgan and O. H. Kellam, Jr., who were the heirs of Narcisse Deeson, the wife of Oliver J. Morgan, and not to them in any way as the heirs of Oliver J. Morgan or as creditors or claimants of his estate. . . . The heirs of Julia Morgan and Oliver H. Kellam, Jr., participated in the fund recovered in the original case of *Gay, Administrator*, v. *Morgan, Executor, et al.*, but the careful reading and consideration which we have given the opinions and decrees of the Supreme Court, and particularly the supplemental decree in all the cases consolidated, give us the firm impression that the court intended to hold and declare that the portions recovered by said heirs were theirs of right, and that they were to have them, not only free of the claims of creditors of the estate of Oliver J. Morgan, but free from all costs and claims except as in the several decrees adjudged, and as thereafter might be necessary in effecting partition." And in the decree it was among

other things adjudged that "so much of said decree of June 2, 1893, as the same is of record herein, as charges or attempts to charge the said John A. Buckner and Etheline Buckner as the owners of one half of Melbourne plantation, or that attempts to charge their said one half of said Melbourne plantation with lien privilege to contribute to or recuse the contribution of the sum of seven thousand three hundred and forty-seven $\frac{30}{100}$ dollars to the payment of costs, disbursements and solicitors' fees allowed by the court in and for the prosecution of the bill and action in case No. 6612 of the cases herein consolidated, be, and the same are, cancelled, abrogated, annulled and taken from said decree, and that the said John A. Buckner and Etheline Buckner be, and are, now decreed to take and hold said one half of the said Melbourne plantation allotted to them free from said charge and liability for said costs, disbursements and solicitors' fees charged against them in said decree of June 2, 1893, as contribution to the expenses of the prosecution of said cause No. 6612 and of the causes herein consolidated." Obviously, the effect of this last decree was to materially modify the terms of prior orders and decrees, and to change the relations of the defendant as the owner of one half of the Melbourne plantation to the receivership.

The provision in the decree of this court in reference to the division between the creditors and the heirs of the moneys in the hands of the receiver after paying his expenses and compensation is one evidently applicable in case of the sale of the entire property, and cannot be construed as charging against the defendants, the heirs of Mrs. Morgan, any share of the costs incurred by the creditors of Mr. Morgan in their efforts to subject his property to the payment of their debts.

Rents follow title, and the owner of the reality is the owner of the rent. So that from 1884 to 1891, and while the question of title was in dispute, the defendant was paying to the receiver rent for an undivided half of the plantation, property which was absolutely his own, and which the receiver ought not to have had possession of. The rent thus collected belonged to the defendant, and could not be taken

by creditors of Morgan or appropriated to pay the cost of their lawsuits. So it is that the receiver, having in his possession money belonging to the defendant, to wit, the rent of one half the property from 1884 to 1891, now asks a judgment which shall compel defendant to pay him a further sum. This cannot be. This is not a case in which a defendant indebted to an estate, which is insolvent and can therefore pay its creditors only a *pro rata* amount, seeks to set off a claim against the estate in absolute payment of a debt due from him to the estate, thus obtaining a full payment which no other creditor can obtain. For here one undivided half of the plantation was never the property of the estate vested in the receiver. It was wrongfully taken possession of by him. The rent therefor all the while belonged to the defendant, and the receiver holds it not as money belonging to the estate but to the defendant. To allow him to keep that money and still recover an additional sum from the defendant would be manifestly unjust.

It is said in the brief that the court first acquiring jurisdiction has a right to continue its jurisdiction to the end. We fail to see the application of this. The receiver voluntarily went into the state court, and having voluntarily gone there cannot question the right of that court to determine the controversy between himself and the defendant. A similar proposition was often affirmed in cases of bankruptcy, although by section 711, Revised Statutes, the courts of the United States are given exclusive jurisdiction "of all matters and proceedings in bankruptcy." *Mays* v. *Fritton*, 20 Wall. 414; *Winchester* v. *Heiskell*, 119 U. S. 450, and cases cited in the opinion. The same rule applies here. The question presented is not how the estate belonging to the receiver shall be administered, but what is the estate belonging to him. The two questions are entirely distinct. Further, the right to sue a receiver appointed by a Federal court without leave of the court appointing him is granted, by the act of August 13, 1888, c. 866, § 3, 25 Stat. 436. A counterclaim or set-off comes within the spirit of that act. And certainly no objection can be made to the allowance of a set-off, when as here it is

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simply in harmony with the decrees of the Federal court, and in no manner questions their force or efficacy.

The jurisdiction of the state court is therefore clear, and the judgment of the Supreme Court of Louisiana is

Affirmed.

BLAKE *v.* McCLUNG.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 6. Submitted November 8, 1897. — Decided December 12, 1898.

Chapter 31 of the acts of Tennessee of 1877, entitled "An act to declare the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State," provided that corporations organized under the laws of other States and countries, for purposes named in the act, might carry on within that State the business authorized by their respective charters, but that "creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments." *Held*, that, as the litigation proceeded on the theory that plaintiffs in error were citizens of Ohio, where they resided, did business, and had offices, that question could not now be considered; and as the manifest purpose of the act was to give to all Tennessee creditors priority over all creditors residing out of that State, without reference to the question whether they were citizens or only residents in some other State or country, the act must be held to infringe rights secured to the plaintiffs in error, citizens of Ohio, by the provision of Sec. 2 of Art. IV of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business.

It is not in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges, connected with that business, which it denies to citizens of other States.

When the general property and assets of a private corporation, lawfully doing business in a State, are in course of administration by the courts

of said State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union.

While the members of a corporation are, for purpose of suit by or against it in the courts of the United States, to be conclusively presumed to be citizens of the State creating it, the corporation itself is not a citizen within the meaning of the provision of the Constitution that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The said statute of Tennessee, so far as it subordinates the claims of private business corporations not within the jurisdiction of that State (although such private corporations may be creditors of a corporation doing business within the State under the authority of that statute) to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the equal protection of the laws secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed.

The case is stated in the opinion.

Mr. Heber J. May and *Mr. Tully R. Cornick* for plaintiffs in error.

Mr. John W. Green for defendants in error.

Mr. Henry H. Ingersoll for Clarke & Reid.

Mr. Charles Seymour for the London Trust Company.

Mr. Justice Harlan delivered the opinion of the court.

This writ of error brings up for review a final judgment of the Supreme Court of Tennessee sustaining the validity of certain provisions of a statute of that State passed March 19, 1877, c. 31.

The chief object of the statute was declared to be to secure the development of the mineral resources of the State and to facilitate the introduction of foreign capital. § 7.

It provides, among other things, that "corporations chartered or organized under the laws of other States or countries, for the purpose of mining ores or coals, or of quarrying stones

or minerals, of transporting the same, or erecting, purchasing or carrying on works for the manufacture of metals, or of any articles made of or from metal, timber, cotton or wool, or of building dwelling houses for their workmen and others, or gas works, or water works, or other appliances designed for the promotion of health, good order or general utility, in connection with such mines, manufactories and dwelling houses, may become incorporated in this State, and may carry on in this State the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights and do the things therein specified, upon the terms and conditions, and in the manner and under the limitation herein declared." § 1.

The second section provides for the filing in the office of the Secretary of State by "each and every corporation created or organized under or by virtue of any government other than that of this State, of the character named in the first section of this act, desiring to carry on its business" in the State, of a copy of its charter or articles of association, and the recording of an abstract of the same in the office of the register of each county in which the corporation proposes to carry on its business or to acquire any lands. § 2.

The third section declares that "such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdictions of the courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this State." § 3.

The fifth section provides:

"§ 5. That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be *residents of this State* shall have a *priority in the distribution of assets*, or subjection of the same, or any part thereof, to the payment of debts over all simple

contract creditors, being residents of *any other country or countries*, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition. The said corporations shall be liable to taxation in all respects the same as natural persons resident in this State, and the property of its citizens is or may be liable to taxation, but to no higher taxation, nor to any other mode of valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may be hereafter granted to citizens or corporations for the purpose of encouraging manufacturers in this State, or otherwise." Acts of Tennessee 1877, p. 44.

The case made by the record is substantially as follows:

The Embreeville Freehold Land, Iron and Railway Company, Limited — to be hereafter called the Embreeville Company — was a corporation organized under the laws of Great Britain and Ireland for mining and manufacturing purposes. In 1890 it registered its charter under the provisions of the above statute, and established a manager's office in Tennessee. It purchased property and did a mining and manufacturing business there, transacting its affairs in this country at and from its Tennessee office.

On the 20th day of June, 1893, C. M. McClung & Co. and others filed an original general creditors' bill in the Chancery Court of Washington County, Tennessee, against this company and others, alleging its insolvency and default in meeting and discharging its current obligations; charging that it had made a conveyance in trust of certain personal property in fraud of the rights of its other creditors, and asking the appointment of a receiver and the administration of its affairs as an insolvent corporation. The court took jurisdiction of the corporation, sustained the bill as a general creditors' bill, appointed

a receiver of its property in Tennessee, administered its affairs in that State, and passed a decree adjudicating the rights and priorities of certain creditors.

No question is made in respect to the amount due to any one of the creditors whose claims were presented.

The company maintained its home office in London, its managing director resided there, and after this suit was instituted liquidation under the Companies' Acts of Great Britain was there ordered and begun.

There were holders of debentures executed by the British company whose claims were not specifically adjudicated in the decree below. The original debenture issue amounted to $500,000, and another issue, subsequent in time, and in respect of which priority in right was claimed, amounted to $125,000. All the holders of those issues are non-residents of Tennessee and of the United States. There was also a general trade indebtedness aggregating about $90,000 due by the company to residents of Great Britain. Those claims were specifically adjudicated by the decree.

Among the creditors of the company at the time this suit was instituted were the plaintiffs in error, namely: C. G. Blake, whose residence and place of business was in Ohio; Rogers, Brown & Company, the members of which also resided in Ohio and carried on business in that State; and the Hull Coal & Coke Company, a corporation of Virginia. In the intervening petitions filed by those creditors it was averred that the plaintiffs in the general creditor's bill, residents of Tennessee, claimed priority of right in the distribution of the assets of the insolvent corporation over other creditors of the corporation "citizens of the United States, but not of the State of Tennessee;" and that the said statute was unconstitutional so far as it gave preferences and benefits to the plaintiffs or other citizens of Tennessee over the petitioners or other citizens of the United States.

By the final decree of the Chancery Court of Washington County, it was, among other things, adjudged that the act of 1877 was constitutional; that all of the creditors of the Embreeville Company residing in Tennessee were entitled to *priority*

of satisfaction out of its assets (after the payment out of the proceeds of the real estate of the claim of the Pittsburgh Iron & Steel Engineering Company) as against its other creditors who were "residents and *citizens of other States* of the United States or other countries;" that the creditors who were "*citizens of other States* of the United States, and who contracted with the company as located and doing business in Tennessee, are entitled to share ratably in its assets, being administered in this cause next after the payment of the Pittsburgh Iron & Steel Engineering Company *and the Tennessee creditors*."

Upon appeal to the Chancery Court of Appeals the decree of the Chancery Court was reversed in certain particulars. In the findings of the Chancery Court of Appeals it was stated that the Chancery Court of Washington County adjudged, among other things, that "under the act of 1877 (which was adjudged constitutional) all the creditors of said Embreeville Company residing in Tennessee are entitled to priority of satisfaction out of the assets of the Embreeville Company (after the payment out of the proceeds of the real estate of the claim of the Pittsburgh Iron & Steel Engineering Co.) as against the other creditors of said company who are non-residents and citizens of other States of the United States or other countries; that the other creditors of the Embreeville Company who are *citizens of other States of the United States*, and who contracted with the said Embreeville Company as located and doing business in the State of Tennessee, are entitled to share ratably in the assets of the defendant Embreeville Company being administered in this cause after the payment of the Pittsburgh Iron & Steel Engineering Company and the Tennessee creditors (except the coke stopped *in transitu*)." And the decree in the Chancery Court of Appeals contained, among other provisions, the following: "That all of the holders and owners of the debenture bonds of the company are simple contract creditors of said company, and stand upon the same footing in reference to the distribution of the assets of the company as all other of its creditors residing out of the State of Tennessee;" and that "the portion of the chancellor's decree giving priority of payment to such of the creditors of

said company who reside in the United States of America, but not in the State of Tennessee, and to such creditors now residents of Tennessee who dealt with the company in relation to its Tennessee office, over all alien creditors of said company, be, and the same is hereby, reversed, it being here adjudged that all the creditors of said company residing out of the State of Tennessee must share equally and ratably in the distribution of the funds of said company *after the Tennessee creditors shall have been paid in full.*"

The cause was carried to the Supreme Court of Tennessee, and so far as the plaintiffs in error are concerned was heard in that court upon appeal from the Chancery Court of Appeals, as well as upon writs of error to the Chancery Court.

It was adjudged by the Supreme Court of the State that the act of March 19, 1877, was in all respects a valid enactment, and not in contravention of paragraph 2 of Article IV or of the Fourteenth Amendment of the Constitution of the United States, nor in contravention of any other provision of the National Constitution; that all of the holders and owners of the debenture bonds of the Embreeville Company were simple contract creditors of the company, and stood upon the same footing with reference to the distribution of its assets as all of its other creditors who "reside out of the State of Tennessee," whether they be residents of other States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Company "who resided in the State of Tennessee" are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company who do not reside in the State of Tennessee, whether they be residents of other States of the United States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Freehold Land, Iron & Railway Company who reside out of the State of Tennessee, whether they reside in other States of the United States or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company after the residents of the State of Tennessee shall have been first paid in full.

The plaintiffs in error contend that the judgment of the state court, based upon the statute, denies to them rights secured by the second section of the Fourth Article of the Constitution of the United States providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," as well as by the first section of the Fourteenth Amendment, declaring that no State shall "deprive any person of life, liberty or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws."

We have seen that by the third section of the Tennessee statute corporations organized under the laws of other States or countries, and which complied with the provisions of the statute, were to be deemed and taken to be corporations of that State; and by the fifth section it is declared, in respect of the property of corporations doing business in Tennessee under the provisions of the statute, that creditors who are residents of that State shall have a priority in the distribution of assets, or the subjection of the same, or any part thereof, to the payment of debts, over all simple contract creditors, being residents of any other country or countries.

The suggestion is made that as the statute refers only to "residents," there is no occasion to consider whether it is repugnant to the provision of the National Constitution relating to citizens. We cannot accede to this view. The record shows that the litigation proceeded throughout upon the theory that the plaintiffs in error, Blake and the persons composing the firm of Rogers, Brown & Co., were citizens of Ohio, in which State they resided, transacted business and had their offices, and that the plaintiff in error, the Hull Coal and Coke Company, was a corporation of Virginia. The intervening petition of the individual plaintiffs in error, as we have seen, states that they were residents of Ohio, engaged in business in that State, their residence, offices and places of business being at the city of Cincinnati, and that they were citizens of the United States, and not citizens of Tennessee. Although these allegations might not be sufficient to show that those parties were citizens of Ohio within the meaning of the statute

regulating the jurisdiction of the Circuit Courts of the United States, (*Robertson* v. *Cease*, 97 U. S. 646), they may be accepted as sufficient for that purpose in the present case, no question having been made in the state court that the individual plaintiffs in error were not citizens but only residents of Ohio. Looking at the purpose and scope of the Tennessee statute, it is plain that the words "residents of this State" refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that State, to return thereto; such residence as appertained to or inhered in citizenship. And the words, in the same statute, "residents of any other country or countries" refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other State or country. It is impossible to believe that the statue was intended to apply to creditors of whom it could be said that they were only residents of other States, but not to creditors who were citizens of such States. The State did not intend to place creditors, citizens of other States, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other States. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that State, whether the latter were citizens or only residents of some other State or country. Any other interpretation of the statute would defeat the object for which it was enacted. We must therefore consider whether the statute infringes rights secured to the plaintiffs in error, citizens of Ohio, by the provision of the second section of Article IV of the Constitution of the United States declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Beyond question, a State may through judicial proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other States from such distri-

bution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the State in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporations because of their being citizens of other States, and not citizens of the State in which such administration occurs?

These questions are presented for our determination. Let us see how far they have been answered by the former decisions of this court.

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities" in Article IV of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in *Conner* v. *Elliott*, 18 How. 591, 593, said: "We do not deem it needful to attempt to define the meaning of the word *privileges* in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention.

One of the leading cases in which the general question has been examined is *Corfield* v. *Coryell*, decided by Mr. Justice Washington at the circuit. He said: "The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sov-

ereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.'" 4 Wash. C. C. 371, 380.

These observations of Mr. Justice Washington were made in a case involving the validity of a statute of New Jersey regulating the taking of oysters and shells on banks or beds *within* that State, and which excluded inhabitants and residents of other States from the privilege of taking or gathering clams, oysters or shells on any of the rivers, bays or waters *in* New Jersey, not wholly owned by some person residing in the State. The statute was sustained upon the ground that it only regulated the use of the common property

of the citizens of New Jersey, which could not be enjoyed by others without the tacit consent or the express permission of the sovereign having the power to regulate its use. The court said: "The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the laws may prescribe."

Upon these grounds rests the decision in *McCready* v. *Virginia*, 94 U. S. 391, 395, sustaining a statute of Virginia prohibiting the citizens of other States from planting oysters in a river in that State where the tide ebbed and flowed. Chief Justice Waite, speaking for the court in that case, said: "These [the fisheries of the State] remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship." Consequently, the decision was that the citizens of one State were not invested by the Constitution of the United States "with any interest in the common property of the citizens of another State."

In *Paul* v. *Virginia*, 8 Wall. 168, 180, the court observed that "it was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same

freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon* v. *The People*, 20 N. Y. 607. Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

Ward v. *Maryland*, 12 Wall. 418, 430, involved the validity of a statute of Maryland requiring all traders, not being permanent residents of the State, to take out licenses for the sale of goods, wares or merchandise in Maryland, other than agricultural products and articles there manufactured. This court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property, to take and hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the

indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the *Slaughter-house cases*, 16 Wall. 36, 77, the court, referring to what was said in *Paul* v. *Virginia*, above cited, in reference to the scope and meaning of section 2 of Article IV of the Constitution, said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In *Cole* v. *Cunningham*, 133 U. S. 107, 113, 114, this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guarantee was to confer on the citizens of the several States "a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under like circumstances, and this includes the right to institute actions."

These principles have not been modified by any subsequent decision of this court.

The foundation upon which the above cases rest cannot however stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with

it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that State, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements and contracts." But, clearly, the State could not in that mode secure exclusive privileges to its own citizens in matters of business. If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the

power to contract with citizens residing in States other than the one in which it is located?

It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, (*Graham* v. *Railroad Co.*, 102 U. S. 148, 161) — not simply of stockholders and creditors residing in a particular State, but all stockholders and creditors of whatever State they may be citizens. In *Wabash, St. Louis &c. Railway Co.* v. *Ham*, 114 U. S. 587, 594, it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. In *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 385, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and that in such case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction *between them*. Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State.

We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens

of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States.

In *Lafayette Ins. Co.* v. *French*, 18 How. 400, 407, Mr. Justice Curtis, speaking for this court, said: "A corporation created by Indiana can transact business in Ohio only with the consent, expressed or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." It was accordingly adjudged in *Barron* v. *Burnside*, 121 U. S. 186, 200, that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that State, to stipulate that it would not remove into the Federal courts suits that were removable from the state courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. This principle was recognized in *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 111, in which, after referring to the constitutional and statutory provisions defining the jurisdiction of the Circuit Courts of the United States, this court said: "The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a State. *Hyde* v. *Stone*, 20 How. 170, 175; *Smyth* v. *Ames*, 169 U. S. 466, 516. It has therefore been decided that a statute, which requires all actions against a county to be brought in a county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action; Chief Justice Chase saying that 'no statute limitation of suability can defeat a jurisdiction given by the Constitution.' *Cowles* v. *Mercer*

County, 7 Wall. 118, 122; *Lincoln County* v. *Luning*, 133 U. S. 529; *Chicot County* v. *Sherwood*, 148 U. S. 529. So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void. *Home Ins. Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202." See *Ducat* v. *Chicago*, 10 Wall. 410, 415.

We must not be understood as saying that a citizen of one State is entitled to enjoy in another State *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. So, a State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and

for whom the Government of the Union was ordained and established.

Nor must we be understood as saying that a State may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens; nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other States of the assets there of an insolvent corporation doing business within its limits. For instance, if the Embreeville Company had property in Virginia at the time of its insolvency, the Tennessee court administering its assets in that State could take into account what a Virginia creditor, seeking to participate in the distribution of the company's assets in Tennessee, had received or would receive from the company's assets in Virginia, and make such order touching the assets of the company in Tennessee as would protect Tennessee creditors against wrongful discrimination arising from the particular action taken in Virginia for the benefit of creditors residing in that Commonwealth.

It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the States requiring foreign insurance corporations, as a condition of their coming into the State for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the State are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policy holders in other States know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition of the right of the British corporation

to come into Tennessee for purposes of business that it should, at the outset, deposit with the State a fixed amount to stand exclusively or primarily for the protection of its Tennessee creditors. It allowed that corporation, after complying with the terms of the statute, to conduct its business in Tennessee as it saw fit, and did not attempt to impose any restriction upon its making contracts with or incurring liabilities to citizens of other States. It permitted that corporation to contract with citizens of other States, and then, in effect, provided that all such contracts should be subject to the condition (in case the corporation became insolvent) that creditors residing in other States should stand aside, in the distribution by the Tennessee courts of the assets of the corporation, until creditors residing in Tennessee were fully paid — not out of any funds or property specifically set aside as a trust fund, and at the outset put into the custody of the State, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors, but — out of whatever assets of any kind the corporation might have in that State when insolvency occurred. In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other States, those citizens cannot share in its general assets upon terms of equality with citizens of that State. If such legislation does not deny to citizens of other States, in respect of matters growing out of the ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result.

We adjudge that when the general property and assets of a private corporation, lawfully doing business in a State, are in course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation

of that State; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee.

As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the State creating such corporation; *Louisville, Cincinnati & Charleston Railroad Co.* v. *Letson*, 2 How. 497; *Covington Drawbridge Co.* v. *Shepherd &c.*, 20 How. 227, 232; *Ohio & Miss. Railroad Co.* v. *Wheeler*, 1 Black, 286, 296; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 120; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the State under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Paul* v. *Virginia*, 8 Wall. 168, 178, 179; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, 573. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the state court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court.

Since, however, a corporation is a "person" within the meaning of the Fourteenth Amendment, (*Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394, 396; *Smyth* v. *Ames*, 169 U. S. 466, 522,) may not the Virginia corporation invoke for its protection the clause of the Amendment declaring that no State shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws?

We are of opinion that this question must receive a negative

answer. Although this court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, (*Ex parte Virginia*, 100 U. S. 339, 346–347; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Scott* v. *McNeal*, 154 U. S. 34, 45, and *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 233,) it does not follow that, within the meaning of that Amendment, the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that State. It had notice of the proceedings in the state court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of Article IV of the Constitution of the United States relating to the privileges and immunities of citizens in the several States, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation, the latter cannot be said to have been thereby *deprived* of its property without due process of law within the meaning of the Constitution.

It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws." That prohibition manifestly relates only to the denial by the State of equal protection to persons "within its jurisdiction." Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted

without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the People, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee, (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute,) to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the laws" secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed.

What may be the effect of the judgment of this court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the court on this writ of error.

The final judgment of the Supreme Court of Tennessee must be affirmed as to the Hull Coal & Coke Company, because it did not deny to that corporation any right, privilege or immunity secured to it by the Constitution of the United States. (*Rev. Stat.* § 709.) *As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.*

MR. JUSTICE BREWER, with whom MR. CHIEF JUSTICE FULLER concurred, dissenting.

I am unable to concur in the opinion of the court in this case. In my judgment it misconceives the language of the statute, the issues presented by the pleadings, and the decision of the state court. The act does not discriminate between citizens of Tennessee and those of other States. Its language is creditors "residents of this State shall have a priority . . . over all simple contract creditors being residents of any other country or countries." The allegation of the amended bill is, "your orators are all residents of the State of Tennessee and were such at the time the various debts sued on in this cause were created," and that by virtue of the statute they are entitled to priority over the "defendant, Rogers, Brown & Co., and all other creditors of said insolvent corporation who do not reside in the State of Tennessee, or did not so reside at the time their credits were given." The intervening petition of the plaintiffs in error, Blake and Rogers, Brown & Co., alleges "that they are residents of the State of Ohio, and were at the times and dates hereinafter named engaged in business in said State, their residences, offices and places of business being at the city of Cincinnati." The decree of the Chancery Court of Appeals adjudges "that all of the creditors of said company who resided in the State of Tennessee are entitled to priority of payment out of all of the assets of the company of every kind over all of the creditors of said company who do not reside in the State of Tennessee." And the decree of the Supreme Court of the State is in substantially the

same language, adjudging "that all of the creditors of the Embreeville Freehold Land, Iron and Railway Company, Limited, who reside in the State of Tennessee, are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company who do not reside in the State of Tennessee, whether they be residents of other States of the United States or of the Kingdom of Great Britain." So that neither the statute, the pleadings nor the decree raise any question of citizenship, or give any priority of right to the citizens of Tennessee over citizens of other States, but only discriminate between residents, and give residents of the State a priority. I think it improper to go outside of a case to find a question which is not in the record simply because it may be discussed by counsel for one party, who apparently decline to recognize any difference between residence and citizenship. For all this record discloses, the plaintiffs in error other than the corporation may have been citizens of the State of Tennessee, temporarily residing and doing business in Ohio, and the controversy one simply between citizens of the same State. It is not necessary in this court to refer to the difference between residence and citizenship. Neither is synonymous with the other, and neither includes the other. A British subject or a citizen of Ohio may be a resident of Tennessee, and entitled to the benefit of this statute. A citizen of Tennessee may, like these plaintiffs in error, be a resident of and doing business in Ohio and not entitled to its benefit. It will be time enough to consider the question discussed in the opinion when it appears that a State has attempted to discriminate between its own citizens and citizens of other States, and the courts of the State have affirmed the validity of such discrimination.

Taking the statute as it reads, and assuming that the legislature of Tennessee meant that which it said, the question is whether a State, permitting a foreign corporation which is not engaged in interstate commerce to come into its territory and there do business, has the power to protect all persons residing within its limits who may have dealings with such foreign corporation by requiring it to give them a prior security on its

assets within the State. The principle underlying this statute is that a State, which can have no jurisdiction beyond its territorial limits, has the power in reference to foreign corporations permitted to do business therein to protect all persons within those limits, whether citizens or not, in respect to claims upon the property thereof also within those limits. That a State may keep such a corporation out of its territory is conceded; and that, in permitting it to enter, the State may impose such conditions as it sees fit, is, as a general proposition, also admitted. In *Crutcher* v. *Kentucky*, 141 U. S. 47, 59, it was said:

"The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State. The cases to this effect are numerous. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall. 566; *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727; *Phila. Fire Association* v. *New York*, 119 U. S. 110."

Every one dealing with a foreign corporation is bound to take notice of the statutes of the State imposing conditions upon that corporation in respect to the transaction of its business within the State, just as he must take notice of any mortgage or other incumbrance placed by the corporation upon its property there situated. A State may and often does provide that persons furnishing supplies to and doing work for a corporation shall have a lien upon the property of that corporation prior to any mortgage. The validity of such legislation has always been sustained, and they who loan their money to the corporation do so with notice of the limitation, and have no constitutional right of complaint if their mortgage is thereafter postponed to simple contract obligations. If voluntarily the corporation placed a mortgage upon all its assets within the State to secure a debt to a single creditor residing within

the State, and such mortgage was duly recorded, no one would have the hardihood to say that a resident or citizen of another State could challenge its validity or its priority over his unsecured debt simply because he was a citizen of another State, or did not, in fact, know of its existence. And that which is true in case of a mortgage to a single creditor would be equally true in case such foreign corporation placed a mortgage upon its assets to secure every creditor within the State. The number of creditors secured does not change the validity of the security or affect the matter of notice or relieve the foreign creditor from the consequences of notice. If the corporation may voluntarily place a mortgage upon all its assets within the State to secure its creditors within the State, why may not the legislature require as a condition of its doing business that it give such a mortgage? Is the corporation more powerful than the State? Is a voluntarily executed mortgage more valid than a statute? If, in fact, in pursuance of such a statute a mortgage to each separate creditor was given and recorded as fast as the corporation came under obligation to him, could a non-resident creditor question the validity of the mortgage or the priority given thereby? And is the effect of the statute in controversy anything other than the imposition upon the assets of the corporation within the State of a single mortgage in favor of home creditors? If written out and recorded, who could question its validity or its priority? The statute in its spirit and effect does nothing more. That it is prospective in its operation is immaterial — statutes generally are. The validity of an after-acquired property clause in a mortgage has become settled; none the less valid is it in a statute.

It is conceded, in the opinion of the court, that a foreign insurance corporation might be required to make a special deposit with the state treasurer to secure local policy holders, but if it is within the constitutional power of the State to require such special deposit, and when made it becomes in fact a security to the home policy holders, I am unable to appreciate why the State may not require a general mortgage on all the assets within the State as like security. Looking at it

simply as a question of power on the part of the State, what difference can there be between a pledge of a special fund and a mortgage of the entire fund within the State? And that which is true in respect to an insurance corporation must also be true of any other corporation not engaged in interstate commerce business.

Indeed, aside from the demand made by the statutes of certain States of deposits by foreign corporations to secure home creditors, there are frequent illustrations of discrimination based upon the matter of residence. Often non-resident plaintiffs are required to give security for costs when none is demanded of resident suitors. Attachments will lie in the beginning of an action, authorizing the seizure of property upon the ground that the defendant is a non-resident, when no such seizure is permitted in case of resident defendants. These and many similar illustrations, which might be suggested, only disclose that it has been accepted as a general truth that a State may discriminate on the ground of residence, and that such discrimination is not to be condemned as one between citizens; and yet if the doctrine of the opinion of the court in this case be correct, I cannot see how those statutes can be sustained, for surely they discriminate between non-resident and resident suitors in the matter of fundamental rights, to wit, the right of equal entrance into the courts and equal security in the possession of property.

It may not be uninteresting to notice the case of *Fritts* v. *Palmer*, 132 U. S. 282. That case came from Colorado. The statutes of that State, as quoted in the opinion of the court, provided, among other things —

"Sec. 260. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of State, . . . and no corporation doing business in the State, incorporated under the laws of any other State, shall be permitted to mortgage, pledge or otherwise incumber its real or personal property situated in this State, to the injury or exclusion of any citizen, citizens or corporations of this State

who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State, shall take effect as against any citizen or corporation of this State until all its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished."

Commenting upon this section, and others, this court said (p. 288):

"No question is made in this case — indeed, there can be no doubt — as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign or interstate commerce. In *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, 732, this court said that 'the right of the people of a State to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this court.'"

It will be perceived that the statute of Colorado restrained a foreign corporation from mortgaging, pledging or otherwise incumbering its property situate in the State to the injury or exclusion of any citizen of the State, creditor of such corporation, and further provided that no mortgage given by such foreign corporation to secure a debt created in another State should take effect against any citizen of the State until all liabilities due to any person or corporation in the State had been paid and extinguished. But this court said, and I think correctly, that there could be no doubt of the validity of these statutory provisions. It may be said, and said truthfully, that the attention of the court was not specially directed to this particular portion of the statute, and hence that the decision cannot be taken as authority. Yet the section was spread before the court, it is quoted in its opinion, and it was so obviously constitutional that neither counsel nor court had any doubt thereof. I note this case in order to suggest the objectionable evolution of the thought that a State may not protect those persons who are within its jurisdiction in respect to property also within its jurisdiction, or impose conditions on

foreign corporations doing business therein, which amount to such protection. Ten years ago a statute of Colorado guaranteeing priority to citizens of the State over all other creditors, even those by mortgage, was by all parties, counsel and by court, conceded to be free from objection, while to-day a statute of Tennessee, in no way discriminating between citizens, but only between residents and in respect to foreign corporations, is declared to be so plainly at variance with the Constitution of the United States that it must be adjudged void.

The doctrine of this opinion is that a State has no power to secure protection to persons within its jurisdiction, citizens or non-citizens, in respect to property also within its jurisdiction, because, forsooth, such protection may in some cases work to the disadvantage of one who is not only a non-resident but also not a citizen of the State. It seems to me that the practical working out of this doctrine will be not that the State may not discriminate in favor of its own residents as against non-residents, but that the State must discriminate in favor of non-residents and against its own residents. Take this illustration: A corporation organized and having its home office in New York comes into California to do business. The State of California attempts to require that its assets within the State shall be kept as a primary security for home creditors. This court declares that such requisition is unconstitutional. The solvency or insolvency of that New York corporation will be known in New York by those who are nearer to its home office sooner than by people in California. Insolvency is impending. The creditors in New York, near the home office, and familiar therefore with its exact condition, ascertaining its approaching insolvency, send to California, where there are assets, and, availing themselves of the ordinary statutory provisions of that State, seize by attachment all the assets there situated. The insolvency is thereafter made public, and the California creditors find that all the assets of the corporation within their State have been seized by creditors outside the State, and they are driven to the State of New York, where the corporation was organized, where its home

office and home assets are, to see what share in the unappropriated assets they can obtain, while the New York creditors, by reason of their early information, secure full payment. Practically, the effect is to compel the State to discriminate in favor of the New York against the home creditors. The suggestion that after the New York creditors have perfected their liens upon the assets in California, the courts of that State will stay proceedings until they see that the New York courts have given full protection to the California creditors in the assets in New York, is visionary and impracticable. There may be assets in twenty States, and there is no control by the courts of one State over proceedings in the courts of other States. Of course, if the California courts can wait till the New York courts have acted, the converse is also true, and so a game of seesaw may be established between the courts of the two States. For these, among other reasons, I am constrained to dissent from this opinion and judgment.

I am authorized to state that the Chief Justice concurs in this dissent.

NORWOOD *v.* BAKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 34. Submitted May 3, 1898. — Decided December 12, 1898.

The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement.

The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation; but, unless such excess of cost over special benefits be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment.

The constitution of Ohio authorizes the taking of private property for the purpose of making public roads, but requires a compensation to be made therefor to the owner, to be assessed by a jury, without deduction for benefits. The statutes of the State, quoted or referred to in the opinion of the court, make provisions for the manner in which this power is to be exercised. In the case of the opening of a new road, they authorize a special assessment upon bounding and abutting property by the front foot for this entire cost and expense of the improvement, without taking special benefits into account. The alleged improvement in this case was the construction through property of the appellee of a street 300 feet in length and 50 feet in width, to connect two streets of that width running from each end in opposite directions. In the proceedings in this case the corporation of Norwood manifestly went upon the theory that the abutting property could be made to bear the whole cost of the new road, whether it was benefited or not to the extent of such cost, and the assessment was made accordingly. This suit was brought to obtain a decree restraining the corporation from enforcing the assessment against the plaintiff's abutting property, which decree was granted. *Held*, that the assessment was, in itself, an illegal one, because it rested upon a basis that excluded any consideration of benefits; that therefore a decree enjoining the whole assessment was the only appropriate decree; that it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede was the excess of costs over any benefits accruing to the property; and that the legal effect of the decree was only to prevent the enforcement of the particular assessment in question, leaving the corporation free to take such steps as might be within its power, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as might be found equal to the special benefits accruing to the property.

The case is stated in the opinion.

Mr. William E. Bundy for appellant.

Mr. Charles W. Baker for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This case arises out of the condemnation of certain lands for the purpose of opening a street in the Village of Norwood, a municipal corporation in Hamilton County, Ohio.

The particular question presented for consideration involves the validity of an ordinance of that Village, assessing upon

the appellee's land abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings.

By the final decree of the Circuit Court of the United States it was adjudged that the assessment complained of was in violation of the Fourteenth Amendment of the Constitution of the United States forbidding any State from depriving a person of property without due process of law; and the Village was perpetually enjoined from enforcing the assessment. 74 Fed. Rep. 997.

The present appeal was prosecuted directly to this court, because the case involved the construction and application of the Constitution of the United States.

It will conduce to a clear understanding of the case to ascertain the powers of the Village under the constitution and statutes of Ohio, and to refer somewhat in detail to the proceedings instituted for the opening of the street through appellee's property.

By the constitution of Ohio it is declared: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money; . . . and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Const. Ohio, 1851, Art. 1, § 19, Bill of Rights; 3 Bates Anno. Ohio Stat. 3525.

Cities and villages in Ohio are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and light streets, alleys, public grounds and buildings, wharves, landing places, bridges and market spaces within the corporation, and to appropriate private property for the use of the corporation. And "each city and village may appropriate, enter upon, and hold real

estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: 1. For opening, widening, straightening and extending streets, alleys and avenues; also for obtaining gravel or other material for the improvement of the same, and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation, . . ." 1 Rev. Stat. Ohio, (1890) § 1692, sub. div. 18 and 33, and § 2232, pp. 429, 430, Title, Cities and Villages; Enumeration of Powers, and p. 572, Title, Appropriation by Cities and Villages of Private Property to Public Use.

Other provisions of the statute prescribe the steps to be taken in the appropriation by a municipal corporation of private property for public purposes. §§ 2233 to 2261 inclusive.

It is further provided by the statutes of Ohio, (1890) Title XII, Assessments, etc., chap. 4, as follows:

"§ 2263. When the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation.

"§ 2264. In the cases provided for in the last section, and in all cases where an improvement of any kind is made of an existing street, alley or other public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improve-

ment, *or* according to the value of the property assessed, *or* by *the front foot of the property bounding and abutting upon the improvement*, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more instalments, and at such times as the council may prescribe. . . ." 1 Rev. Stat. Ohio, p. 581.

Section 2271 provides: "In cities of the first grade of the first class, and in corporations in counties containing a city of the first grade of the first class, the tax or assessment especially levied or assessed upon any lot or land for any improvement, shall not, except as provided in § 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; . . . and whenever any street or avenue is opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed *only on the lots and lands bounding and abutting on such part or parts of said street or avenue* so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one half in width of any street or avenue has been dedicated for such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from lots and lands on the other side thereof, no part of the cost and expense thus increased [incurred] shall be assessed upon the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, but said special assessment shall not be in any case in excess of benefits." 1 Rev. Stat. Ohio, p. 586.

Section 2272 relates to assessments for improvements made in conformity with the petition of the owners of property.

By section 2277 it is provided that "in cases wherein it is determined to assess the whole or any part of the cost of an improvement upon the lot or lands bounding or abutting

upon the same, or upon other lots or lands benefited thereby, as provided in § 2264, the council may require the board of improvements, or board of public works, as the case may be, or may appoint three disinterested freeholders of the corporation or vicinity, to report to the council an estimated assessment of such cost on the lots or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection."

Section 2284 is in these words: "The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when the same has been acquired by purchase, or the value thereof as found by the jury, where the same has been appropriated, the costs and expenses of the proceedings, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

By an ordinance approved October 19, 1891, the Village declared its intention to condemn and appropriate, and by that ordinance condemned and appropriated, the lands or grounds in question for the purpose of opening and extending Ivenhoe Avenue: and in order to make such appropriation effectual, the ordinance directed the institution of the necessary proceedings in court for an inquiry and assessment of the compensation to be paid for the property to be condemned.

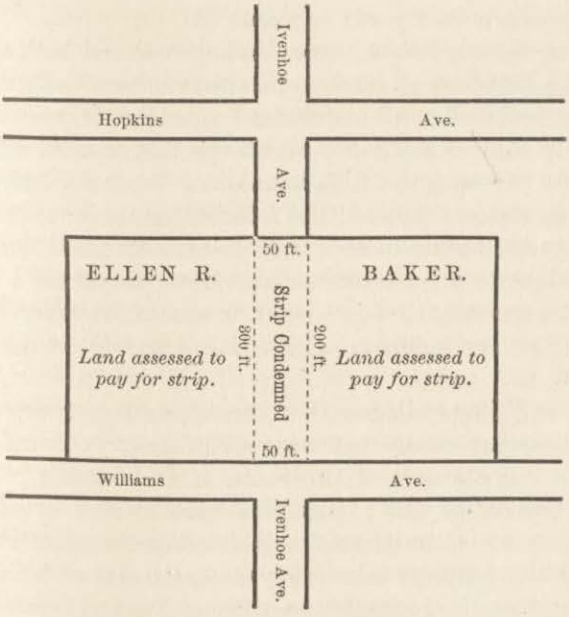
The ordinance provided that the cost and expense of the condemnation of the property, including the compensation paid to the owners, the cost of the condemnation proceedings, the cost of advertising and all other costs and the interest on bonds issued, if any, should be assessed "*per front foot* upon the property bounding and abutting on that part of Ivenhoe

Avenue, as condemned and appropriated herein" — the assessments payable in ten annual instalments if deferred, and the same collected as prescribed by law and in the assessing ordinance thereafter to be passed.

Under that ordinance, application was made by the Village to the probate court of Hamilton County for the empanelling of a jury to assess the compensation to be paid for the property to be taken. A jury was accordingly empanelled, and it assessed the plaintiff's compensation at $2000, declaring that they made the "assessment irrespective of any benefit to the owner from any improvement proposed by said corporation."

The assessment was confirmed by the court, the amount assessed was paid to the owner, and it was ordered that the Village have immediate possession and ownership of the premises for the uses and purposes specified in the ordinance.

The property condemned is indicated by the following plat:



After the finding of the jury the Village council passed an ordinance levying and assessing "*on each front foot* of the several lots of land bounding and abutting on Ivenhoe Avenue, from Williams Avenue to a point 300 feet north," certain sums for each of the years 1892 to 1901 inclusive, "to pay the cost and expense of condemning property for the extension of said Ivenhoe Avenue between the points aforesaid [from Williams Avenue to a point 300 feet north], together with the interest on the bonds issued to provide a fund to pay for said condemnation."

By the same ordinance provision was made for issuing bonds to provide for the payment of the cost and expense of the condemnation, which included the amount found by the jury as compensation for the property taken, the costs in the condemnation proceedings, solicitor and expert witness fees, advertising, etc.; in all, $2218.58.

The present suit was brought to obtain a decree restraining the Village from enforcing the assessment in question against the abutting property of the plaintiff.

It was conceded that the defendant assessed back upon the plaintiff's 300 feet of land upon either side of the strip taken (making 600 feet in all of frontage upon the strip condemned) the above sum of $2218.58, payable in instalments, with interest at six per cent, the first instalment being $354.97 and the last or tenth instalment $235.17, lessening the same from year to year in an amount of about $13 per annum; and the Village admitted that the assessment had been placed upon the tax duplicate, and sent to the county treasurer for collection, *as a lien and charge against the abutting property* owned by the plaintiff.

But the Village alleged that the appropriation proceedings and consequent assessment were all in strict conformity with the laws and statutes of the State of Ohio and in pursuance of due process of law; that the opening and extension of Ivenhoe Avenue constituted a public improvement for which the abutting property was liable to assessment under the laws of Ohio; that the counsel fees, witness fees and costs included in such total assessment were a part of the legitimate ex-

penses of such improvement; and that in any event an expense had been incurred by the municipal corporation in opening the street "equal to the full amount of the said assessment, which is a proper charge against the complainant's abutting property."

It was agreed at the hearing of the present case that the sum awarded by the verdict of the jury was paid to and received by the plaintiff, and that it was that sum, together with the costs and charges, that the Village undertook to assess back upon the land upon either side of said strip of land.

The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio.

It has been adjudged that the due process of law prescribed by that Amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 241; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695.

The taking of the plaintiff's land for the street was under the power of eminent domain — a power which this court has said was the offspring of political necessity, and inseparable from sovereignty unless denied to it by the fundamental law. *Searl* v. *Lake County School District*, 133 U. S. 553. But the assessment of the abutting property for the cost and expense incurred by the Village was an exercise of the power of taxation. Except for the provision of the constitution of Ohio above quoted, the State could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use. But

does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?

Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property — such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 202; *Bauman* v. *Ross*, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams* v. *Eggleston*, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of

what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

In *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 202, — where it was held that a provision in the charter of a railroad company exempting it from taxation did not exempt it from a municipal assessment imposed upon its land for grading and paving a street, — the decision rested upon the ground that a special assessment proceeds on the theory that the property charged therewith derives an increased value from the improvement, "the enhancement in value being the consideration for the charge."

In Cooley on Taxation, (2d ed. c. xx,) the author, in considering the subject of taxation by special assessment, and of estimating benefits conferred upon property by a public improvement, says that, while a general levy of taxes rests upon the ground that the citizen may be required to make contribution in that mode in return for the general benefits of government, special assessments are a peculiar species of taxation, and are made upon the assumption that "a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay." Again, the author says: "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation."

In *Macon* v. *Patty*, 57 Mississippi, 378, 386, the Supreme Court of Mississippi said that a special assessment is unlike an ordinary tax, in that the proceeds of the assessment must be expended in an improvement from which "a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."

So, *In the Matter of Canal Street*, 11 Wend. 154, 155, 156, which related to an assessment to meet the expenses of opening a street, the court, after observing that the principle that private property shall not be taken for public use without just compensation was found in the constitution and the laws of the State, and had its foundation in those elementary principles of equity and justice which lie at the root of the social compact, said: "The corporation may see the extent of the

benefit of any improvement, before proceedings are commenced; but the extent of injury to be done to individuals cannot be known to them until the coming in of the report of the commissioners; they may then be satisfied that the property which is to be benefited will not be benefited to the extent of the assessment necessary to indemnify those whose property is taken from them. What are they to do? If they proceed, they deprive some persons of their property unjustly; if the report of the commissioners is correct, the amount awarded to the owners of property taken cannot be reduced without injustice to them. If the assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their own property, and all such excess is private property taken for public use without just compensation."

In *McCormack* v. *Patchin*, 53 Missouri, 33, 36, the Supreme Court of Missouri said: "The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." See also *Zoeller* v. *Kellogg*, 4 Mo. App. 163.

In *State &c.* v. *Hoboken*, 36 N. J. L. 291, 293, which was the case of the improvement of a street and a special assessment to meet the cost, — such cost being in excess of the benefits received by the property owner, — it was held that to the extent of such excess private property was taken for public use without compensation, because that received by the landowner was not equal to that taken from him.

It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without

compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property.

The views we have expressed are supported by other adjudged cases, as well as by reason and by the principles which must be recognized as essential for the protection of private property against the arbitrary action of government. The importance of the question before us renders it appropriate to refer to some of those cases.

In *State* v. *Newark*, 37 N. J. L. 415, 416, 420–423, the question arose as to the validity of an assessment of the expenses incurred in repairing the roadbed of a portion of one of the streets of the city of Newark. The assessment was made in conformity to a statute that undertook to fix, at the mere will of the legislature, the ratio of expense to be put upon the owners of property along the line of the improvement. Chief Justice Beasley, speaking for the Court of Errors and Appeals, said: "The doctrine that it is competent for the legislature to direct the expense of opening, paving or improving a public street, or at least some part of such expense, to be put as a special burthen on the property in the neighborhood of such improvement, cannot, at this day, be drawn in question. There is nothing in the constitution of this State that requires that all property in the State, or in any particular subdivision of the State, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits, is perfectly indisputable. It is upon this principle that taxes raised in counties, townships and cities are vindicated. But while it is thus clear that the burthen of a particular tax may be placed on any political district to whose benefit such tax is to enure, it seems to me it is equally clear that, when such burthen is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the

line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to a narrower bound than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the lawmaking power to concentrate the burthen of a tax upon specified property, does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed."

After referring to a former decision of the same court, in which it was said that special assessments could be sustained upon the theory that the party assessed was locally and peculiarly benefited above the ordinary benefit which as one of the community he received in all public improvements, the opinion proceeds: "It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned,

both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when a property is specified, out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax."

So, in *Bogert* v. *Elizabeth City*, 27 N. J. Eq. 568, 569, which involved the validity of a provision in the charter of a city directing the whole cost of special improvements to be put on the property on the line of the street opposite such improvements, the assessments to be made in a just and equitable manner by the common city council, the court said: "The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burthen is to be borne by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to legal rules now at rest in this State, cannot be executed. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities, but are nullities."

In *Hammett* v. *Philadelphia*, 65 Penn. St. 146, 151, 153, the court, speaking by Judge Sharswood, said that it was a point fully settled and at rest in that State, that the legislature has the constitutional right to confer upon municipal corporations the power of assessing the costs of local improvements upon the properties benefited, and that on the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water pipes, in proportion to their respective fronts, has been repeatedly recognized, and the liens for such assessments enforced. "These cases," the court said, "all fall strictly within the rule as originally enunciated — local taxation for local purposes — or, as it has been elsewhere expressed, taxation on the benefits conferred, and *not beyond the extent of those benefits*. . . . If the sovereign breaks open the strong box of an individual or corporation and takes out money, or, if, not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon and *measured by, the extent of his particular benefit*, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation."

In *Barnes* v. *Dyer*, 56 Vermont, 469, 471, which involved the validity of a statute relating to the construction and repair of sidewalks in a city of Vermont, under the authority of its common council, and directing the expense to be assessed on the owners of property through which or fronting which such sidewalks should be constructed, it was said: "The act in question made no express allusion to assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet, as we have seen, the right to assess at all depends solely on benefit, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land specially benefited."

In *Thomas* v. *Gain*, 35 Michigan, 155, 162, Chief Justice Cooley, speaking for the Supreme Court of Michigan, said:

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in *Tide-Water Co.* v. *Coster*, 18 N. J. Eq. (3 C. E. Green) 519, which has often been cited with approval in other cases. It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed; if it is not conceivable that the rule prescribed is one which will apportion the burthen justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

In the case of *Tide-Water Co.* v. *Coster*, *supra*, 518, 527, 528, referred to by the Supreme Court of Michigan, it was said: "Where lands are improved by legislative action on the ground of public utility, the cost of such improvement, it has frequently been held, may, to a certain degree, be imposed on the parties who, in consequence of owning the lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burthen, when that which is received by the landowner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then *to that extent*, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate, as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest. The owners of these lands have a special concern in such improvements so far as particular lands will be in a peculiar manner benefited.

Beyond this their situation is like the rest of the community. The consideration for the excess of the cost of improvement over the enhancement of the property within the operation of the act is the public benefit. The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle that will permit the expense incurred in conferring such benefit on the public to be laid in the form of a tax upon certain persons."

In Dillon's Treatise on Municipal Corporations there is an extended discussion of this whole subject. In section 761 he states the general results of the cases in the several States concerning special assessments for local improvements. After stating that a local assessment or tax upon the property benefited by a local improvement may be authorized by the legislature, he says: "Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and *to the extent of special benefits* it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again, the author says: "When not restrained by the constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied. But the adjudged cases do not agree upon the extent of legislative power." While recognizing the fact that some courts have asserted that the authority of the legislature in this regard is quite without limits, the author observes that "the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." He further says:

"Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, *was the only principle upon which such assessments can justly rest*, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just and reasonable doctrine*, that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.*"

It is said that the judgment below is not in accord with the decision of the Supreme Court of Ohio in *Cleveland City* v. *Wick*, 18 Ohio St. 303, 310. But that is a mistake. That case only decided that the owner whose property was taken for a public improvement could not have his abutting property exempt from its due proportion of an assessment made to cover the expense incurred in making such improvement; that his liability in that regard was not affected by the fact that he was entitled to receive compensation for his property actually

taken for the improvement without deduction on account of benefits to his other property. That the decision covered no other point is shown by the following extract from the opinion of the court: "The mischief which existed under the old constitution was, that the benefits which were common to his neighbors, without charge, were deducted from the price paid to the owner of land taken. The evil might well be denominated inequality of benefits and burdens among adjoining landowners. You paid for the owner's land in privileges, and left him still liable, equally with his neighbors whose lands were untaken, to any and all local assessments that might afterwards be imposed. This was unequal, and therefore deemed unjust. Experience proved, moreover, that it led to much abuse of the power of condemnation. A full remedy is to be found for these evils in the provision in question, without at all making it to interfere with the power of assessment. Construed thus, it is in perfect accordance with the leading principle of taxation in the new constitution — uniformity and equality of burdens. It simply guarantees to the owner of land condemned a full price. When that is paid, he stands on a perfect equality with all other owners of adjoining lands, equally liable, as he ought to be, to be taxed upon his other lands with them. He has the full price of his land in his pocket, and is an equal participant with them in benefits to adjoining lands. To throw the whole burden upon the others, in such a case, would be to do them the precise injustice which was done to him under the old constitution. To do so, would be to avoid one evil only to run into another. It would be to avoid the evil of withholding from him a full and fair price for his lands, only to run into the equal evil of paying him two prices for it, the second price being at the expense of his neighbors."

If the principles announced by the authorities above cited be applied to the present case, the result must be an affirmance of the judgment.

We have seen that, by the Revised Statutes of Ohio relating to assessments, the Village of Norwood was authorized to place the cost and expense attending the condemnation of the plaintiff's land for a public street on the general tax list of the

corporation, section 2263; but if the Village declined to adopt that course, it was required by section 2264 to assess such cost and expense "on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvement *or* according to the value of the property assessed, *or* by *the front foot* of the property bounding and abutting upon the improvement;" while by section 2271, whenever any street or avenue was opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, "shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood." It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the Village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost.

It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show nor offer to show by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the Village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the

abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the Village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one.

Nor is the present case controlled by the general principle announced in many cases that a court of equity will not relieve a party against an assessment for taxation unless he tenders or offers to pay what he admits or what is seen to be due. That rule is thus stated in *National Bank* v. *Kimball*, 103 U. S. 732, 733: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be *plainly seen he ought to pay;* that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice, he must first do equity by paying so much as it is *clear he ought to pay*, and contest and delay only the remainder. *State Railroad Tax cases*, 92 U. S. 575." The same principle was announced in *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, 272.

In *Cummings* v. *National Bank*, 101 U. S. 153, 157, which was the case of an injunction against the enforcement in Ohio of an illegal assessment upon the shares of stock of a national bank, this court, after observing that the bank held a trust

relation that authorized a court of equity to see that it was protected in the exercise of the duties appertaining to it, said: "But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of them. § 5848 of the Revised Statutes of Ohio, 1880; vol. liii, Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden* v. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced, on the equity side of the court." Again: "Independently of this statute, however, we are of opinion that when a *rule* or *system of valuation* is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power." These observations are pertinent to the question of the power and duty of a court of equity to interfere for the plaintiff's relief. The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the constitution, in that the entire cost of the street improvement was imposed upon the abutting property, by the front foot, without any reference to special benefits.

Mr. High, in his Treatise on Injunctions, says that no principle is more firmly established than that requiring a taxpayer, who seeks the aid of an injunction against the enforcement or collection of a tax, first to pay or tender the amount which is conceded to be legally and properly due, or which is

plainly seen to be due. But he also says: "It is held, however, that the general rule requiring payment or tender of the amount actually due as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed."

The present case is not one in which — as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments — it can be plainly or clearly seen, from the showing made by the pleadings, that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a *rule* of assessment that infringed upon her constitutional rights. In our judgment the Circuit Court properly enjoined the enforcement of the assessment as it was, without going into proofs as to the excess of the cost of opening the street over special benefits.

It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the Village, in its discretion, to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to

the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State. Such a decree was more appropriate than one enjoining the assessment to such extent as, in the judgment of the Circuit Court, the cost of the improvement exceeded the special benefits. The decree does not prevent the Village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion, namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation.

It has been suggested that what has been said by us is not consistent with our decision in *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 56. But this is an error. That was the case of a special assessment against land in the District of Columbia, belonging to the plaintiff Parsons, as a water main tax, or assessment for laying a water main in the street on which the land abutted. The work was done under the authority of an act of Congress establishing a *comprehensive system for the District*, and regulating the supply of water and the erection and maintenance of reservoirs and water mains. This court decided that "it was competent for Congress to create a *general system* to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was, not to make assessments upon abutting properties, nor to give notice to the prop-

erty owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such power cannot be reviewed by the courts." One of the points in the case was presented by the contention that "the assessment exceeded the actual cost of the work." But that objection, the court said, overlooked "the fact that the laying of this main was part of the *water system*, and that the assessment prescribed was not merely to put down the pipes, *but to raise a fund to keep the system in efficient repair.* The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system; and there is no such *disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.* A similar objection was disposed of by the Supreme Judicial Court of Massachusetts in the case of *Leominster* v. *Conant*, 139 Mass. 384. In that case the validity of an assessment for a sewer was denied because the amount of the assessment exceeded the cost of the sewer; but the court held that the legislation in question had created a sewer system, and that it was lawful to make assessments by a uniform rate which had been determined upon for the sewerage territory." If the cost of laying the water mains in question in that case had exceeded the value of the property specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented.

Nor do we think that the present case is necessarily controlled by the decision in *Spencer* v. *Merchant*, 125 U. S. 345, 351, 357. That case came here upon writ of error to the highest court of New York. It related to an assessment, by legislative enactment, upon certain isolated parcels of land, of a named aggregate amount which remained unpaid of the cost of a street improvement. In reference to the statute, the validity of which was questioned, the court said: "By the statute of 1881 a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was

ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment." Again: "The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled." The point raised in that case — the only point in judgment — was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case.

We have considered the question presented for our determination with reference only to the provisions of the National Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed "without deduction for benefits to any property of the owner," would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits.

The judgment of the Circuit Court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered.

Mr. Justice Brewer dissenting.

I dissent from the opinion and judgment of the court in this case and for these reasons:

First. The taking of land for a highway or other public uses is a public improvement, the cost of which, under the constitution of Ohio, may be charged against the property benefited. *Cleveland* v. *Wick*, 18 Ohio St. 304.

Second. Equally true is this under the Constitution of the United States. *Shoemaker* v. *United States*, 147 U. S. 282, 302; *Bauman* v. *Ross*, 167 U. S. 548.

Third. The cost of this improvement was settled in judicial proceedings to which the defendant in error was a party, and having received the amount of the award she is estopped to deny that the cost was properly ascertained.

Fourth. A public improvement having been made, it is, beyond question, a legislative function, (and a common council duly authorized, as in this case, has legislative powers,) to determine the area benefited by such improvements, and the legislative determination is conclusive. *Spencer* v. *Merchant*, 100 N. Y. 585, in which the court said:

"The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reasons. . . . By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne

none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final."

Same Case, 125 U. S. 345, 355, in which the judgment of the Court of Appeals of the State of New York was affirmed, and in which this court said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 14 Wall. 676; *Davidson* v. *New Orleans*, 96 U. S. 97; *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Hagar* v. *Reclamation District*, 111 U. S. 701."

Williams v. *Eggleston*, 170 U. S. 304, 311, in which this court declared: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

Parsons v. *District of Columbia*, 170 U. S. 45, in which this court sustained an act of Congress in respect to the District of Columbia, not only determining the area benefited by a public improvement, to wit, the ground fronting on the street in which the improvement was made, but also assessing the cost of such improvement at a specified rate, to wit, $1.25 per front foot on such area.

In this case we quoted approvingly from Dillon's Municipal

Corporations, 4th edition, volume 2, section 752, in reference to this matter of assessment, (p. 56): "Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

In the case at bar the question of apportionment is not important because the party charged owned all of the land within the area described, all of the land abutting upon the improvement. The rule would be the same if one hundred different lots belonging to as many different parties faced on the new street.

The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost. It is unnecessary to inquire how far courts might be justified in interfering in a case in which it appeared that the legislature had attempted to cast the burden of a public improvement on property remote therefrom and obviously in no way benefited thereby, for here the property charged with the burden of the improvement is that abutting upon such improvement, the property *prima facie* benefited thereby, and the authorities which I have cited declare that it is within the legislative power to determine the area of the property benefited and the extent to which it is benefited. It seems to me strange to suggest that an act of the legislature or an ordinance of a city casting, for instance, the cost of a sewer, or sidewalk in a street, upon all the abutting property, is invalid unless it provides for a judicial inquiry whether such abutting property is in fact benefited, and to the full cost of the improvement, or whether other property might not also be to some degree benefited, and therefore chargeable with part of the cost.

Again, it is a maxim in equity that he who seeks equity must do equity, and as applied to proceedings to restrain the collection of taxes, that the party invoking the aid of a court of equity must allege and prove payment, or an offer to pay such portion of the taxes or assessment as is properly chargeable upon the property. This proposition has been iterated and reiterated in many cases. In *State Railroad Tax cases*, 92 U. S. 575, 617, it was laid down "as a rule to govern the courts of the United States in their action in such cases." Further, the mere fact that tax proceedings are illegal has never been held sufficient to justify relief in equity. These propositions have been uniformly and consistently followed. See among late cases *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, 272. There is nothing in *Cummings* v. *National Bank*, 101 U. S. 153, 163, in conflict with the foregoing propositions. In that case it appeared that the local assessors of Lucas County, in which the bank was situated, agreed upon a rule of assessment by which money or invested capital was assessed at six tenths of its value, while the shares of national banks were assessed at their full cash value. It was held that an unequal rule of assessment having been adopted by the assessors, and that rule "applied not solely to one individual, but to a large class of individuals or corporations," equity might properly interfere. But in that case the bank had paid to the county treasurer the tax which it ought to have paid, as shown by the closing words of the opinion of the court: "The complainant having paid to the defendant, or into the Circuit Court for his use, the tax which was its true share of the public burden, the decree of the Circuit Court enjoining the collection of the remainder is affirmed." If that creates an exception to the general equity rules in respect to tax proceedings, I am unable to perceive it.

Here the plaintiff does not allege that her property was not benefited by the improvement and to the amount of the full cost thereof; does not allege any payment or offer to pay the amount properly to be charged upon it for the benefits received, or even express a willingness to pay what the courts shall determine ought to be paid. On the contrary,

so far as the record discloses, either by the bill or her testimony, her property may have been enhanced in value ten times the cost of the condemnation. Neither is it charged that any other property was benefited in the slightest degree. It is well to quote all that is said in the bill in this respect:

"Your complainant complains of the defendant corporation that the said corporation, through its officers, its council, clerk and mayor, undertook and has undertaken to assess back upon this plaintiff's 300 feet upon either side of the said strip so taken, not only the said two thousand dollars, the amount adjudged to this plaintiff as the value of her property so taken, but also counsel fees, expenses of the suit, expenses and fees of expert witnesses, and other costs, fees and expenses to this complainant unknown, and has proceeded to assess for opening and extending the said Ivenhoe street or avenue for the 300 feet upon each side upon her premises, making 600 feet in all of frontage upon the said strip so condemned by the defendant corporation, the sum of $2218.58, payable in instalments, with interest at six per cent, the first instalment being $354.97 and the last or tenth instalment $235.17, lessening the same from year to year in an amount of about $13 per annum.

"That is to say, the said defendant corporation has undertaken to take 300 by 50 feet of this complainant's property, and, fixing the valuation upon it by proceedings at law, now undertakes to assess upon the complainant's adjacent property, 300 feet upon each side, the said $2000, the value of the same as adjudged by the court in the said condemnation proceedings, with all of the costs incidental thereto, including counsel and witness fees, so that in effect the property of this complainant has been taken and is sought to be taken by the defendant corporation for the uses of itself and the general public without any compensation in fact to the complainant therefor, but at an actual expense and outlay in addition — that is to say, the corporation purposes by assessment to make this complainant not only pay for her own property taken for the benefit of the defendant, but also to pay the costs of so taking it without compensation.

"Wherefore she invokes her remedy given her by statute by injunction. She avers that the said seizure and taking of her said property and the pretended condemnation of the same and assessment of the same with added costs back upon her own property for the benefit of the defendant corporation and the general public is a seizure of her property without compensation; not only that, but at costs to her besides, in that the defendants have undertaken to make her pay for the taking of her property without a compensation in addition to the value of the property, and that she is without remedy and powerless unless she may have and invoke the equitable interference, as the statute authorizes her, of this honorable court."

The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvement, and belonging to plaintiff, is in the slightest degree benefited thereby. Nor is there an averment or a suggestion that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that a legislative act charging the cost of an improvement in laying out a street, (and the same rule obtains if it was the grading, macadamizing or paving the street,) upon the property abutting thereon, is adjudged not only not conclusive that such abutting property is benefited to the full cost thereof, but further, that it is not even *prima facie* evidence thereof, and that before such an assessment can be sustained it must be shown, not simply that the legislative body has fixed the area of the taxing district, but also that, by suitable judicial inquiry, it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void because the rule of assessment is erroneous, implies that it is *prima facie* erroneous to cast upon property abutting upon an improvement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement, is *prima facie* void;

that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity cancelling *in toto* the assessment without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement.

In this case no tender was made of any sum, no offer to pay the amount properly chargeable for benefits, there was no allegation or testimony that the legislative judgment as to the area benefited, or the amount of the benefit was incorrect, or that other property was also benefited, and the opinion goes to the extent of holding that the legislative determination is not only not conclusive but also is not even *prima facie* sufficient, and that in all cases there must be a judicial inquiry as to the area in fact benefited. We have often held the contrary, and I think should adhere to those oft-repeated rulings.

MR. JUSTICE GRAY and MR. JUSTICE SHIRAS also dissented.

WINSTON *v.* UNITED STATES.

STRATHER *v.* UNITED STATES.

SMITH *v.* UNITED STATES.

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

Nos. 431, 432, 433. Argued November 28, 1898. — Decided January 3, 1899.

Under the act of Congress of January 15, 1897, c. 29, § 1, by which "in all cases where the accused is found guilty of the crime of murder," "the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life," the authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circum-

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stances; but it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment.

These were three cases of indictments, returned and tried in the Supreme Court of the District of Columbia, for murders committed since the passage of the act of Congress of January 15, 1897, c. 29, by the first section of which, "in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487.

Winston was indicted for the murder of his wife by shooting her with a pistol on December 13, 1897. At the trial, the government introduced testimony that while the defendant and his wife were together in their bedroom about noon, with the door fastened, a pistol shot was heard, followed by a loud cry from her, and by two or three other pistol shots; that, on breaking open the door, the wife was found lying on the bed, killed by a pistol ball in the brain, and the defendant lying near her, unconscious, badly wounded by a pistol ball in the side of the head, and with a pistol near his hand; that earlier in the day he had taken a pistol from a place where he had left it; that he had previously threatened to kill her; and that he afterwards confessed that he had killed her, and said that he had shot her because he was jealous of her and another man, and wanted to shoot both her and her lover, and that he afterwards shot himself. The defendant, being called as a witness in his own behalf, testified that he and his wife lived happily together, except that she was jealous of him; that he did not shoot her, and never said that he had shot her; that she shot him, and he immediately became unconscious, and so remained for a week after.

The judge instructed the jury that if they believed from the evidence that the woman took her own life, or that the

defendant did not fire the fatal shot, their verdict must be not guilty; but that if they were satisfied beyond a reasonable doubt that she met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, their verdict should be "guilty as indicted," "for there would be a presumption of malice arising from the fact that her death was accomplished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any palliating or mitigating circumstances, there could be but one reasonable inference from the fact of the shooting, and that would be that the act was committed with malice aforethought."

The judge further instructed the jury as follows: "You have been told, and it is the law since the act of Congress, passed in January, 1897, that a jury is authorized, when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words 'without capital punishment.'

"Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,' it is your duty so to do. But the law was not so intended. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances, the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfulness and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offence, palliating circumstances that tend to show that the crime is not heinous in its

character, the jury may add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain; and it is only in those cases where the circumstances indicate to the jury that propriety, and the necessity, perhaps, or the duty of making such qualification, that the jury should add the qualifying words 'without capital punishment.' In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it."

"If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted, or guilty with the qualification."

Strather was indicted for the murder with a hatchet on October 15, 1897, of a woman with whom he lived as his wife, but who was the wife of another man. At the trial, the government introduced evidence tending to prove these facts, and that for several nights before the homicide she failed to join the defendant, and he threatened to kill her. The testimony of the defendant and of other witnesses called by him tended to prove the defendant's previous reputation as a peaceful and law-abiding citizen, and the deceased's previous reputation as a quarrelsome and violent woman; that she had on previous occasions assaulted him, on one occasion throwing at him a beer mug, and on another occasion cutting him with a

penknife; that she had previously threatened his life, and he knew of the threat; that immediately before the homicide, there had been a quarrel between them; and that upon his arrest, immediately after the homicide, there was a bleeding wound upon his face. The defendant, in his testimony, admitted that he inflicted upon the woman the wounds which caused her death; but denied that he had ever threatened her life; and affirmed that he inflicted those wounds while under fear of his life, and during the heat and excitement of the quarrel, and while suffering pain from a blow by her on his left jaw, where there was an ulcerated sore at the time he received the blow.

At the close of the evidence, the defendant requested the judge to give certain instructions to the jury, including this one: "In case the jury find the prisoner guilty of murder, they are instructed that they may qualify their verdict by the words 'without capital punishment,' no matter what the evidence may be." The judge declined to give that instruction, and, after defining murder and manslaughter, and the right of self-defence, instructed the jury as follows:

"If you should reach the conclusion that your verdict should be 'guilty as indicted,' it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.' The jury have this power in any given case. The court cannot control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believed a man was guilty, and simply out of pity or sympathy or mercy rendered a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty of murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it. Doubtless the intention

of the legislature was this: that if, in a case in which the jury reach the conclusion that the party on trial is guilty for murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances, and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the district attorney. Suppose a man knowing that his wife had been in improper relations with another man, and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder, a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict.

"If you reach the conclusion of guilt, 'guilty as indicted,' it is your duty to return that verdict; and, unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourselves is this: Are the circumstances in this case such, if you reach the conclusion that the defendant is guilty as indicted, as to require you, upon your oaths, to interfere with the penalty fixed by law?"

Smith was indicted for the murder with a hatchet on November 15, 1897, of the wife of another man. At the trial, the government introduced circumstantial evidence tending to support the indictment; and also evidence that the defendant hired a room in the dwelling-house of the husband and wife;

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that, some time before the homicide, the two men had a quarrel about her, and both were arrested, convicted and imprisoned on charges of assault; that the defendant at one time threatened to kill her if she ever resumed living with her husband; and that the defendant was quarrelling with her just before her death.

The judge instructed the jury as follows: "Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes." "The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

"If you find that the defendant is guilty, you will vindicate the law and uphold it by returning a verdict of 'guilty as indicted.' Whether you qualify it or not is a matter for you to determine. If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors."

In each case, the defendant excepted to the instructions of the court concerning the act of Congress of January 15, 1897; and, after verdict of "guilty as indicted," and sentence of death, appealed to the Court of Appeals of the District of Columbia, which affirmed the judgment, Justice Shepard dissenting. 26 Wash. Law Rep. 469. Writs of certiorari were thereupon granted by this court under the act of Congress of March 3, 1897, c. 390. 29 Stat. 692; 171 U. S. 690.

Mr. George Kearney for Winston. *Mr. Charles H. Turner* was on his brief.

Mr. Samuel D. Truitt for Strather. *Mr. Tracy L. Jeffords* was on his brief.

Mr. Henry E. Davis for the United States. *Mr. Assistant Attorney General Boyd* was on his brief.

Mr. F. S. Key Smith for Smith.

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

By section 5339 of the Revised Statutes, reënacting earlier acts of Congress, "every person who commits murder" "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States," "shall suffer death."

The act of January 15, 1897, c. 29, entitled "An act to reduce the cases in which the penalty of death may be inflicted," provides, in section 1, that in all cases in which the accused is found guilty of the crime of murder under section 5339 of the Revised Statutes "the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487.

The question presented and argued in each of the three cases now before the court is of the construction and effect of this act of Congress.

The hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death. That end has been generally attained in one of two ways.

First. In some States and Territories, statutes have been passed establishing degrees of the crime of murder, requiring

the degree of murder to be found by the jury, and providing that the courts shall pass sentence of death in those cases only in which the jury return a verdict of guilty of murder in the first degree, and sentence of imprisonment when the verdict is guilty of murder in the lesser degree. See *Hopt* v. *Utah*, 104 U. S. 631, and 110 U. S. 574; *Davis* v. *Utah*, 151 U. S. 262, 267–269.

For instance, the statutes of the Territory of Utah contained the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evincing a depraved mind regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Compiled Laws of Utah of 1876, §§ 1919, 1920, pp. 585, 586.

In the leading case of *Hopt* v. *Utah*, this court held that evidence that the accused was in a state of voluntary intoxication at the time of the killing, (which would not have been competent in defence of an indictment for murder at common law,) was competent for the consideration of the jury upon the question whether he was in such a condition as to be capable of deliberate premeditation, constituting murder in the first degree under the statute. 104 U. S. 631. Upon a second trial of the same case, the territorial court, in charging the jury, having used this language, "That an atrocious and dastardly murder has been committed by some person is

apparent, but in your deliberations you should be careful not to be influenced by any feeling," the conviction was again reversed by this court, saying that this observation was naturally regarded by the jury as an instruction that the offence, by whomsoever committed, was murder in the first degree; whereas it was for the jury, having been informed as to what was murder, by the laws of Utah, to say whether the facts made a case of murder in the first degree or murder in the second degree. 110 U. S. 582. And in *Calton* v. *Utah*, 130 U. S. 83, a sentence of death upon a conviction of murder in the first degree was reversed, because the judge had not called the attention of the jury to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death; and without a recommendation of the jury to that effect the court could impose no other punishment than death. While those decisions have no direct bearing upon the question now in judgment, they are important as illustrating the steadfastness with which the full and free exercise by the jury of powers newly conferred upon them by statute in this matter has been upheld and guarded by this court as against the possible effect of any restriction or omission in the rulings and instructions of the judge presiding at the trial.

Second. The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment. This method has been followed by Congress in the act of 1897.

The act of Congress confers this right upon the jury in broad and unlimited terms, by enacting that "in all cases in which the accused is found guilty of the crime of murder," "the jury may qualify their verdict by adding thereto 'without capital punishment,'" and that "whenever the jury shall return a verdict qualified as aforesaid" the sentence shall be to imprisonment at hard labor for life.

The right to qualify a verdict of guilty, by adding the words

"without capital punishment," is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

The decisions in the highest courts of the several States under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion. *State* v. *Shields*, 11 La. Ann. 395; *State* v. *Melvin*, 11 La. Ann. 535; *Hill* v. *State*, 72 Georgia, 131; *Cyrus* v. *State*, 102 Georgia, 616; *Walton* v. *State*, 57 Mississippi, 533; *Spain* v. *State*, 59 Mississippi, 19; *People* v. *Bawden*, 90 California, 195; *People* v. *Kamaunu*, 110 California, 609.

The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words "without capital punishment," unless mitigating or palliating circumstances were proved.

This court is of opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted either by the express

words or by the apparent purpose of the statute; and therefore in each of these cases

Judgment must be reversed, and the case remanded to the Court of Appeals with directions to reverse the judgment of the Supreme Court of the District of Columbia, and to order a new trial.

MR. JUSTICE BREWER and MR. JUSTICE MCKENNA dissented.

BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY *v.* NEW WHATCOM.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 96. Argued December 16, 1898. — Decided January 3, 1899.

An answer by the defendant in an action in a state court brought to enforce a lien created by a reassessment of taxes upon its real estate, which sets up that the notice of the reassessment was insufficient, and that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the Fourteenth Amendment to the Constitution, raises a Federal question of which this court has jurisdiction.

When a notice is duly given to landowners by municipal authorities in full accordance with the provisions of the statutes of the State touching the time and place for determining the amounts assessed upon their lands for the cost of street improvements, such notice, so authorized by the legislature, will not be set aside as ineffectual on account of the shortness of the time unless the case is a clear one.

In view of the character of the improvements in this case, of the residence of the plaintiff in error, of the almost certainty that it must have known of the improvements, and of the action of the Supreme Court of the State, ruling that the notice was sufficient, it is held by this court to have been sufficient.

Before proceedings for the collection of taxes, sanctioned by the Supreme Court of a State, are stricken down in this court, it must clearly appear that some one of the fundamental guarantees of right contained in the Federal Constitution has been invaded.

PRIOR to February 16, 1891, there were in the State of Washington two cities known as Whatcom and New Whatcom. On that date they were consolidated in conformity

with the general laws of the State, the consolidated city taking the title of the "City of New Whatcom." In July, 1890, and prior to the consolidation, New Whatcom ordered the improvement of Elk street, between Elk street east and North street. The contract therefor was let in August, 1890. The contract was completed and the improvement accepted by the city, and in October, 1890, an assessment was levied upon the abutting property. After the consolidation the present city of New Whatcom commenced several suits in the superior court of Whatcom County against various defendants owning lots abutting on the improvement, and sought to obtain decrees foreclosing the liens created by the assessment. On January 13, 1894, the superior court entered decrees annulling the assessment, and these decrees were affirmed by the Supreme Court of the State on February 14, 1895. The ground of the decision was, as stated by the trial court in its conclusions of law, "that said assessments were not made or apportioned in accordance with the benefits received by the property, but were made upon an arbitrary rule, irrespective of the benefits." On March 9, 1893, the legislature passed a general act providing for the reassessment of the cost of local improvements in case the original assessment shall have been or may be directly or indirectly set aside, annulled or declared void by any court. Laws Wash. 1893, p. 226.

Sections 4, 5 and 8 bear upon the matter of notice, and are as follows:

"SEC. 4. Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

Statement of the Case.

"SEC. 5. At the time appointed for hearing objections to such assessment the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such reassessment and to the correctness of the amount of such reassessment, or of the amount levied on any particular lot or parcel of land; and the council shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm or set aside, and to order that such assessment be made *de novo*, and such council shall pass an order approving and confirming said proceedings and said reassessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said reassessment, to the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses the hearing shall be had before a joint session, but the ordinance approving and confirming the reassessment shall be passed in the same manner as other ordinances."

"SEC. 8. Any person who has filed objections to such new assessment or reassessment, as hereinbefore provided, shall have the right to appeal to the superior court of this State and county in which such city or town may be situated."

On March 18, 1895, the city council passed an ordinance prescribing the mode of procedure for collecting the cost of a local reassessment upon the property benefited thereby. On June 10, 1895, it ordered a new assessment upon the blocks, lots and parcels of land benefited by the improvement on Elk street, hereinbefore described, and directed the various officers of the city to take the steps required by the general ordinance of March 18. These steps were all taken in conformity to such ordinance, and on August 7, 1895, a further ordinance was passed reciting what had been done, approving it and confirming the reassessment.

The recital in that ordinance in respect to notice was as follows:

"Whereas, said city council did on the 8th day of July, 1895, order said assessment roll filed in the office of the city

clerk, and fixed Monday, July 22, 1895, at 7.30 P.M., as a time at which they would hear, consider and determine any and all objections to the regularity of the proceedings in making such assessments, or to the amount to be assessed upon any block, lot or tract of land for said improvements; and

"Whereas, notice of such hearing was duly published in the official paper of the city of New Whatcom, to wit: in the Daily Reveille, in three consecutive issues thereof, the same being the issues of July 9, 10 and 11, 1895."

The Bellingham Bay and British Columbia Railroad Company was a private corporation, organized under the laws of the State of California, but authorized to do business in the State of Washington, and having its principal office in the city of New Whatcom. It was the owner of certain property abutting upon the Elk street improvement, and which by the proceedings of the city council was held benefited by such improvement and charged with a portion of the cost. Failing to pay this charge, the city of New Whatcom instituted suit in the superior court of Whatcom County to foreclose the liens created by the reassessment. A decree was rendered in favor of the city, which, on appeal, was affirmed by the Supreme Court on December 8, 1896, 16 Wash. St. 131, whereupon this writ of error was sued out.

Mr. L. T. Michener for plaintiff in error. *Mr. W. W. Dudley* and *Mr. John B. Allen* were on his brief.

No appearance for defendant in error.

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

By its answer the defendant raised a Federal question, inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law and in conflict with the terms of the Fourteenth Amendment to the Constitution. This court, therefore, has jurisdiction of the case.

That notice of the reassessment was essential is not questioned, *Davidson* v. *New Orleans*, 96 U. S. 97, 105; *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; Cooley on Taxation, 266; and that constructive notice by publication may be sufficient is conceded, *Lent* v. *Tillson*, 140 U. S. 316, 328; *Paulsen* v. *Portland*, 149 U. S. 30; but the contention is that the notice, which was provided for, and which was in fact given, was insufficient, because it was only a ten days' notice. We quote from the brief of counsel:

"While we concede in the first instance to the legislature the authority to prescribe the time of the notice, we assert that this is not an absolute authority relieved from judicial review. The shortening of the time and the limiting of opportunity to be informed through constructive notice may be such as to render the notice unavailing for the purpose for which notice is designed. If that be the case it is not notice. To prescribe that within ten days after the contingency of a three days' publication the landowner is left without redress for any kind of burden that may be placed upon his property in the way of taxation amounts to a taking of property without due process of law. Under the pretence of prescribing and regulating notice, all practical notice cannot be taken away. There is a limit to legislative power in shortening the time of notice, and if that limit is transcended the courts will hold it void."

We are unable to concur in these views. It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed

and when and where he may be heard. And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections. Here no question is made of the form of the notice. It was published in three successive issues of the official paper of the city. So the statute required. What more appropriate way of publishing the action of a city than in its official paper? Where else would one interested more naturally look for information? And is not a repetition in three successive issues of the paper sufficient? How seldom is more than that required? Indeed, we do not understand that any challenge is made of the sufficiency of the publication. But when that is made and is sufficient, notice is given. The fact that the owner after being notified is required to appear and file his objections within ten days, is thus the sole ground of complaint. But how many days can the courts fix as a minimum? How much time can be adjudged necessary as matter of law for preparing and filing objections? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. No hardship to a particular individual can invalidate a general rule. A reassessment implies not merely the fact of the improvement, but also that one attempt had been made to collect the cost and failed. Inquiry had been had in the courts, and the one assessment set aside. The facts were known. Ten days' time, therefore, does not seem unreasonably short for presenting objections to a reassessment.

And there is nothing in the case of this plaintiff in error to suggest any injustice. It, though a corporation of the State of California, was doing business in the State of Washington, and having its principal office in the city of Whatcom. In other words, it was domiciled in the city in which the improvement was made. The improvement made on the street, on which its lots abutted, consisted in grading, planking and sidewalking. It is, to say the least, highly improbable that it could have been ignorant of the fact that they were made. It must have known also that such improvements have to be paid for, and that the ordinary method of payment is by local

assessment on the property benefited — the abutting property being primarily the property benefited. A previous assessment had been made for the cost of these improvements. Litigation followed, which was carried to the Supreme Court of the State, and resulted adversely to the city. It is true this plaintiff in error was not a party of record in that litigation, and counsel criticise a statement in the opinion of the Supreme Court in this case, that "it appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed;" yet it may be that the court was advised by counsel that it had contributed to the cost of that litigation, and at any rate it is difficult to believe that it was ignorant all these years of what was going on.

In view, therefore, of the character of the improvements, the residence of the plaintiff in error, the almost certainty that it must have known of the improvements and that it would be expected to pay for them, it is impossible to hold that a ten days' notice was so short as to be absolutely void. And especially is this true when the Supreme Court of the State in which the proceedings were had has ruled that it was sufficient. Before proceedings for the collection of taxes sanctioned by the Supreme Court of a State are stricken down in this court it must clearly appear that some one of the fundamental guarantees of right contained in the Federal Constitution has been invaded.

The judgment of the Supreme Court of the State of Washington is

Affirmed.

Bellingham Bay Improvement Company *v.* New Whatcom. Same *v.* Same. Nos. 97 and 98. Argued with No. 96.

Mr. Justice Brewer. These cases involve the same questions, and the same judgments of affirmance will be entered in them.

UNITED STATES *v.* BLISS.

APPEAL FROM THE COURT OF CLAIMS.

No. 394. Submitted December 12, 1898. — Decided January 3, 1899.

The appellee's testator contracted with the United States in 1863 to construct war vessels. Owing to changes in plan and additional work required by the Government, the time of the completion of the work was prolonged over a year, during which prices for labor and materials greatly advanced. Full payment of the contract price was made, and also of an additional sum for changes and extra work. In 1890 Congress authorized the contractor's executor to bring suit in the Court of Claims for still further compensation. The act authorizing it contained this proviso: "Provided, however, That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draught monitors Squando and Nauset and the side-wheel steamer Ashuelot in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: Provided, That such additional cost in completing the same, and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work, were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid; and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors." *Held*, that the petitioner's right of recovery for advance in prices was limited to the prolonged term, and the Court of Claims could not consider advances which took place during the term named in the contract.

If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this, although such prior judgment may have been rendered by the same court.

On August 22, 1863, Donald McKay contracted with the United States for the construction of the gunboat Ashuelot, the contract to be completed in eleven months from that date. On account of changes and additional work required by the Government, and other details for which it was responsible,

the completion of the vessel was delayed from July 22, 1864, to November 29, 1865, a period of sixteen months and seven days beyond the contract term. Full payment of the contract price was made and also of an additional sum for changes and extra work. On August 30, 1890, Congress passed an act, 26 Stat. 1247, c. 853, submitting to the Court of Claims the claims of the executors of Donald McKay for still further compensation. Such act contains this proviso:

"Provided, however, That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draught monitors Squando and Nauset and the side-wheel steamer Ashuelot in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: Provided, That such additional cost in completing the same, and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors."

Under this act this suit was brought. Upon the hearing the Court of Claims, in addition to the facts of the contract, performance, time of completion and payment, found that —

"During the contract period of eleven months, and to some extent during the succeeding sixteen months and seven days, the Government made frequent changes and alterations in the construction of the vessel and delayed in furnishing to the contractor the plans and specifications therefor, by reason of which changes and delay in furnishing plans and specifications the contractor, without any fault or lack of diligence on his part, could not anticipate the labor, nor could he know the

kind, quality or dimensions of material which would be made necessary to be used in complying with said changes:

"While the work was so delayed during and within the period of the contract as aforesaid the price of labor and material greatly increased, which increased price thereafter continued without material change until the completion of the vessel sixteen months and seven days subsequent to the expiration of the contract period. The increased cost to the contractor as aforesaid was by reason of the delays and inaction of the Government and without any fault on his part:"

And rendered judgment in favor of the petitioner for, among other things, the increased cost of the labor and material furnished by him, consisting of two items of $12,608.71 and $14,815.66. From this judgment the United States appealed to this court.

Mr. Assistant Attorney General Pradt and *Mr. Charles C. Binney* for appellants.

Mr. John S. Blair for appellee.

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

No question is made except as to so much of the judgment as is for the increased cost of labor and material. The allowance for that is challenged under the clause of the act of 1890, "but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid." The finding is that there was an advance in the price of labor and material during the contract term of eleven months, and that such increased price continued thereafter without material change during the sixteen months and seven days between the close of the contract term and the actual completion of the vessel. Of course, but for the act of August 30, 1890, no action could be maintained against the

Government. The statute of limitations would have been a complete defence. The petitioner's right, therefore, is measured, not by equitable considerations, but by the language of that statute. Beyond that the court may not go. If equitably the petitioner is entitled to more compensation, it must be sought by direct appropriation or further legislation of Congress.

It seems to us clear that the Court of Claims was not permitted to consider any advance in the price of labor or material during the term named in the contract, to wit, eleven months. Evidently Congress thought that the contractor took the risk of such advance when he signed the contract. The contract term is one thing; the prolonged term another. If Congress intended to allow for all advances in the price of labor or material at any time between the execution of the contract and the completion of the work, the proviso quoted was unnecessary. The fact that the proviso discriminates as to the term, an advance during which entitles to allowance, is conclusive upon the question. There are no terms to be distinguished except the contract term of eleven months and the subsequent prolonged term of sixteen months and seven days. Of course, no change in the price of labor and material after the work was finished could have been considered, and if Congress intended to either permit or forbid an allowance for any advance in the price of labor and material during the entire progress of the work, it was easy to have said so. That it qualified such a general provision by limiting it to a particular term, and that term one created by the action of the Government, excludes all doubt as to the meaning of the words "prolonged term." Obviously the petitioner himself understood that they refer to the period commencing at the time fixed in the contract for the completion of the work, for in his petition it is said that "during the term specified by the contract, and also through the prolonged term, there was a continuous rise in the prices of all labor and material entering into said vessel and machinery." He did not then doubt the meaning of the statute, and the only difficulty is that according to the findings of the Court of Claims his proof did

not establish all his allegations. We deem it unnecessary to follow the investigation made by counsel of the various proceedings before Congress to see if there cannot be disclosed some unexpressed intent on its part to authorize payment for every advance in the cost of labor and material. The language of the act is too plain to justify such investigation.

One other matter requires consideration: Attached to the record certified to us by the Court of Claims is a stipulation signed by the counsel for both parties, which stipulation commences in these words:

"It is hereby agreed by and between the parties to this cause that the following facts appear in the records of the Court of Claims, and that they may be added to the record in this cause and be treated upon the hearing with the same effect as if they had been included in the facts found by the Court of Claims."

This stipulation seeks to introduce into the record of this case the proceedings of the Court of Claims in another suit brought under the same act of 1890, by the same petitioner, to recover additional compensation for the construction of a vessel other than the one described in the present suit, and this notwithstanding that this court is, at least in other than equity cases, limited to a consideration of the facts found by the Court of Claims. This additional record contains the findings of facts in that case, the conclusion and judgment, which was in favor of the petitioner, and states that such judgment was not appealed from by either party. The tenth finding of fact reads as follows:

"The cost to the contractor because of the enhanced price of labor and material which occurred during the prolonged term for completing the work is $61,571.67. Said prolonged term resulted from the delays of the defendants. The exercise of ordinary prudence and diligence on the part of the contractor would not have avoided said enhanced price of material and labor."

The final clause in this stipulation of counsel seeks to explain this tenth finding in this way:

"The $61,571.67 set forth in the tenth of the final findings

in the *Nauset case* (see X finding above) was composed of $24,634 enhanced cost after February 10, 1864, the expiration of the contract term for the construction of the Nauset, and the remainder, $36,937.67, was enhanced cost of labor and material furnished by Donald McKay within the contract term (June 10, 1863, to February 10, 1864), but the court did not separate the allowance in its findings."

Upon this the doctrine of *res judicata* is invoked to uphold the judgment. A sufficient answer is that neither by pleadings nor evidence were the proceedings in this other case brought before the Court of Claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, suggests nothing contrary to this, for there the prior judgment was offered in evidence, and the only question considered and decided by this court was the effect of an alleged failure to fully plead *res judicata*.

But further, not only did the petitioner fail to either plead or prove the former judgment, but also the record when produced disclosed that the court found that the advance in price was during the prolonged term. Counsel propose by stipulation to change that finding so as to make it show that part of the sum named therein was for the advance during the contract term, and the other part for the advance during the prolonged term. In other words, counsel seek without pleading or proof to use a prior judgment as *res judicata*, and also by stipulation to change the findings of fact which were made in that case. It is clear this cannot be done.

The judgment of the Court of Claims will be reversed, and the case remanded to that court with directions to enter a judgment for the claimant, less the two amounts of $12,608.71 *and* $14,815.66, *the increased cost of labor and material.*

Counsel for Appellants.

UNITED STATES *v.* INGRAM.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Argued December 9, 1898. — Decided January 3, 1899.

In 1890, appellee, under the Desert Land act of 1877 applied to reclaim and enter a tract of land, which was part of an even-numbered section of lands within the limits of the grant to the Union Pacific Railway Company. The entry was approved, the claimant made the preliminary payment thereon and received a certificate of entry. Subsequently he abandoned the entry, and it was cancelled in 1895. This action was brought to recover the sum so paid. *Held*, that, as he had voluntarily abandoned the entry, he had no cause of action for the sum which he paid to initiate it.

United States v. *Healey*, 160 U. S. 136, examined and shown not to be inconsistent until this decision.

On August 2, 1890, the appellee, William F. Ingram, applied to the local land office at Salt Lake City, Utah, under the Desert Land act of March 3, 1877, 19 Stat. 377, c. 107, to reclaim and enter a tract of land containing 236.55 acres. The land so sought to be reclaimed and entered was a part of an even-numbered section of lands within the limits of the grant to the Union Pacific Railway Company. The entry was approved by the local land office; the claimant paid the sum of $118.28, being 50 cents per acre, the preliminary payment thereon, and received an ordinary certificate of entry. He failed, however, to reclaim the land by conducting water on to it, as provided by the Desert Land act, and abandoned his entry, which, on December 19, 1895, was cancelled. Thereafter this suit was brought to recover the money which he had paid to the local land officers. The Court of Claims, while expressing an opinion, on a demurrer to the petition, adversely to the contention of the petitioner, 32 C. Cl. 147, finally entered a decree in his favor, from which decree the United States appealed to this court.

Mr. George Hines Gorman for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Russell Duane for appellee. *Mr. Harvey Spalding* and *Mr. E. W. Spalding* were on his brief.

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

The contention of the appellee is that no valid entry can be made under the Desert Land act of land within the place limits of a land grant to railroad corporations; that therefore the attempted entry was absolutely void, and that if he had fully complied with the provisions of that act he could not have acquired a good title to the lands entered; that he was therefore justified in abandoning the entry which he had attempted to make; that the Government had received money which it had no right to receive, and was under an implied obligation to return it — an obligation which could be enforced by an action in the Court of Claims. His main reliance is on *United States* v. *Healey*, 160 U. S. 136; but the singular fact is that in that case a title by patent to an even-numbered section within the limits of a railroad land grant acquired under the Desert Land act was not questioned, and a claim of the patentee to recover the difference between $2.50 per acre, which he had paid in accordance with the statute in respect to railroad land grants, and $1.25 which he insisted was all he was required to pay under the Desert Land act, was rejected. Counsel for appellee pick out a sentence or two in the opinion in that case, and, severing them from the balance, insist that this court decided that land within the place limits of a railroad land grant is wholly removed from the operation of the Desert Land law, as much so as if it had already been conveyed to a private owner, and conclude that, being so wholly separated from the reach of that law, an attempted entry thereunder is absolutely void, and may be abandoned by the entryman at any time. It seems a little strange to have this contention pressed upon us in view of the fact that a patent for lands within a railroad land grant was not disturbed by that decision, and a claim to recover an excess payment was repudiated. Nowhere in the

opinion is there an intimation that the patentee did not acquire a perfect title, no suggestion that the whole proceeding was void and the land patented still the property of the Government, or even that it had the right to maintain a suit to set aside the patent as a cloud upon its title. And certainly if the title conveyed by the patent was absolutely void, then the patentee had paid not only the half which he sought to recover but the entire purchase money for nothing, and should at least have been allowed to recover the half which he sued for.

It may be well to refer to the several statutes of Congress. The general policy in respect to railroad grants, expressed in the many statutes making such grants, and finally carried into the Revised Statutes in section 2357, is that while the ordinary price of public lands is $1.25 an acre, "the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be $2.50 per acre." One hundred and sixty acres might be preëmpted at that price, or eighty acres homesteaded. (Rev. Stat. sec. 2289.) In other words, Congress, in no manner limiting either the right of preëmption or homestead, simply declared that these alternate reserved lands should be considered as worth $2.50 instead of $1.25, the ordinary price of public lands. All appropriations by individuals were based upon that valuation, but the right to appropriate was in no manner changed. The reason for this addition to the price of alternate reserved sections within a railroad grant has been often stated by this court, and is referred to in the opinion in *United States* v. *Healey*, *supra*. It is that a railroad ordinarily enhances the value of contiguous lands, and when Congress granted only the odd sections to aid in the construction of one it believed that such construction would make the even and reserved sections of at least double value.

This difference in price was based, as will be perceived, solely on the matter of location, and not at all upon any distinction in the character or quality of the land, and the difference in price was the only matter that distinguished between an entry of lands within and those without the place

limits of a railroad. Such being the general policy of the Government in respect to public lands, Congress in 1877 passed the Desert Land act. This act, while limited in its operation to certain States and Territories, in terms applied to "any desert land" within them. It provided for reclamation by irrigation, gave three years in which to accomplish such reclamation, and permitted the entry of not exceeding 640 acres. The only substantial advantages of an entry under the Desert Land act over an ordinary preëmption were in the amount of land and the time of payment. Six hundred and forty acres could be taken under the one, and only one hundred and sixty under the other. The price was the same, but under the one only twenty-five cents per acre was payable at the time of the entry, and the balance was not required until, at the end of three years, the reclamation was complete; while under the other the entire $1.25 was payable at the time of the entry. These advantages were offered to induce reclamation of desert and arid lands.

Now, it is a well-known fact that along the lines of many land grant railroads are large tracts of arid lands — desert lands within the very terms of the statute. Indeed, nearly every transcontinental line runs for long distances through these desert lands. Did Congress act on the supposition that no inducement was necessary to secure the reclamation of the arid public lands within the place limits of those grants? Do not the reasons for legislation in respect to lands remote from railroads have the same potency in respect to lands contiguous thereto? If Congress had intended to exclude lands within the place limits of railroads from the scope of this act would it have said "any desert land," or defined "desert lands" as broadly as it did by section 2, which reads:

"Sec. 2. That all lands, exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act, which facts shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated."

The reasons which established and justified the policy of double price for the former apply as fully to lands which had to be reclaimed before they could be cultivated as to lands which needed no reclamation. Contiguity to the railroad is the same fact in each. The significance of this was recognized in the *Healey case*. Indeed, the whole controversy in that case was as to the matter of price, and grew out of the fact that after the passage of the Desert Land act the Interior Department at first ruled that its effect was to reduce the price of even sections within railroad place limits, entered under it, from $2.50 to $1.25 an acre, while in 1889 a change was made in its rulings, and it was thereafter held that the act worked no such reduction. Secretary Noble, in *Tilton's case*, decided March 25, 1889, 8 Land Dec. 368, 369, said, and his language was quoted in our opinion:

"Under such construction, section 2357 of the Revised Statutes and the Desert Land act do not conflict, but each has a separate and appropriate field of operation; the former, regulating the price of desert lands reserved to the United States along railway lines; and the latter, the price of other desert lands not so located. There is nothing in the nature of the case which renders it proper that desert lands be made an exception to the general rule any more than lands entered under the preëmption laws. Lands reserved to the United States along the line of railroads are made double minimum in price because of their enhanced value in consequence of the proximity of such roads. Desert lands subject to reclamation are as much liable to be increased in value by proximity to railroads as any other class of lands, and hence the reason of the law applies to them as well as to other public lands made double minimum in price. To hold desert lands an exception to the general rule regulating the price of lands reserved along the lines of railroads would be to make the laws on this subject inharmonious and inconsistent."

Other rulings of the Land Department were cited, in no one of which was there any denial of the right to enter lands along a railroad under the Desert Land law. It was after these citations that the language referred to by counsel was used.

That language must be interpreted in view of the fact that the only contention was as to the price. It means simply that the court did not consider the Desert Land act applicable as a whole and solidly to the reserved sections along a railroad so as to subject them all to its provisions. In other words, the Desert Land act did not supersede and destroy the proviso of section 2357 in reference to a double price for such reserved sections. We closed the discussion in reference to this matter in these words:

"Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore, did not embrace alternate sections reserved to the United States by a railroad land grant.

"It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than $2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?" 160 U. S. 147.

The first of these paragraphs is one of the sentences referred to by counsel and quoted in their brief. In it we do say "that Secretaries Lamar and Noble properly decided that the act of 1877 . . . did not embrace alternate sections reserved to the United States by a railroad land grant," but the full meaning of that language is disclosed only when we replace the omitted words "did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore." And when we turn to what Secretaries Lamar and Noble decided, we find that they ruled, not that lands within the place limits of a railroad land grant could not be entered under the Desert Land law, but simply that they could not be entered for the price named in that law, $1.25 per acre, but were subject to the general provision of double price. The other sentence referred to by counsel is similar, and while taken literally and disconnectedly may give some countenance to their contentions, yet when read in the light of the entire opinion, manifestly was intended

to mean no more than that the Desert Land act was not applicable in the matter of price to the reserved sections within a railroad land grant. This conclusion appears also in the last paragraph above quoted, where we say that "lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than $2.50 per acre." Not that they could not be disposed of at all under the Desert Land law, but only not at the price fixed by that law.

The same conclusion appears subsequently, when reviewing the act of 1891, it was held that it had no effect upon the price of lands entered before its date, our language being —

"We are of opinion that cases initiated under the original act of 1877, but not completed, by final proof, until after the passage of the act of 1891, were left by the latter act — at least as to the price to be paid for the lands entered — to be governed by the law in force at the time the entry was made. So far as the price of the public lands was concerned, the act of 1891 did not change, but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect of all entries initiated before the passage of that act." 160 U. S. 149.

We may remark in passing that the entry in this case was before the act of 1891, and therefore, under the language just quoted, it is unnecessary for us to notice any of its provisions.

It follows from these considerations that if the petitioner Ingram had fully complied with the terms of the Desert Land act he could, by the payment of $2.50 an acre, have acquired title to the lands he sought to enter. Voluntarily abandoning his entry, he has no cause of action for the sum which he paid to initiate it. There is nothing in *Frost* v. *Wenie*, 157 U. S. 46, which conflicts with this conclusion, for there the decision simply was that lands which Congress held under a trust to sell for the benefit of Indians could not be given away under the homestead law, and hence that such law must be limited,

in its application to the Fort Dodge reservation, to such lands as were not covered by the trust.

The judgment of the Court of Claims is reversed, and the case remanded to that court, with directions to enter a judgment for the defendant.

CLARK *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 402. Argued December 13, 1898. — Decided January 3, 1899.

As the laws of Kansas permit an amendment of the plaintiffs' pleadings in the court below after the overruling by the Supreme Court of a demurrer to them, and as the Supreme Court of the State, in deciding this case, did not take that right away, it follows that the judgment of the state court was not final, and that this case must be dismissed for want of jurisdiction.

THE case is stated in the opinion.

Mr. A. L. Williams for plaintiffs in error. *Mr. Winslow S. Pierce* and *Mr. N. H. Loomis* were with him on the brief.

Mr. F. D. Hutchings and *Mr. Thomas A. Pollock* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Kansas to review a judgment of that court overruling a demurrer of the *nisi prius* court to the petition of plaintiffs in error for an injunction to restrain the collection of taxes, levied by the city of Kansas City, on lands brought into that city under the act of the legislature of Kansas authorizing cities of the first class having a population of 30,000 or more, which shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such

city, or is so situated as to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made part of the city by ordinance duly passed. There was a provision in the law as follows: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

An ordinance was passed, pursuant to the statute, extending the city boundaries so as to include large tracts of land belonging to the Union Pacific Railway. A portion of the lands was used for right of way and other railroad purposes, and a large part of them was vacant and unoccupied, which was held by the company for its future uses.

Taxes were levied by the city upon the property, and this suit was brought to enjoin their collection. The petition presented the facts, and contained the following allegation:

"Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

"And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States, which reads as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The defendants, other than the township of Wyandotte and school district No. 9, filed a general demurrer to the petition, which was overruled. The defendants, the township of Wyandotte and school district No. 9, did not plead in any way.

The demurring defendants electing to stand upon their demurrer, a perpetual injunction was granted as prayed for against them. They appealed to the Supreme Court, where the judgment of the lower court was reversed, and an order was made directing that court to sustain the demurrer.

The question of the constitutionality of the statute was presented to the Supreme Court of Kansas, and that court held that it violated neither the Federal or state constitutions. The same question is presented here in six assignments of errors. The specific contention is that the Kansas statute violates that portion of the Fourteenth Amendment which provides: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The defendants in error, however, object to the jurisdiction of this court, and urge that the judgment appealed from is not a final one, and is not therefore reviewable in this court.

It is further urged that the record does not show that anything was done in the lower court after decision in the Supreme Court, but that error is prosecuted directly to the judgment of the Supreme Court, and that that determined only a question of pleading, and that its direction has not yet been acted on, and that no judgment of any kind has been entered against Wyandotte township or school district No. 9.

The law of Kansas prescribing action on demurrer is as follows: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

In *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, it was decided that "the rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had

already rendered." For the support of which many cases were cited, and further: "If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error." Also citing cases.

This case and those it cites have been applied many times, but we will confine our notice to instances of demurrer. *De Armas* v. *United States*, 6 How. 103, was of this kind, but the grounds of demurrer urged there made the rule when applied to them not very disputable, and the case is not of much aid.

In *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608, the demurrer was overruled with leave to answer over. Upon appeal to the Supreme Court the order overruling the demurrer was affirmed with costs. The rule of the Supreme Court provided that "upon the reversal, affirmance or modification of any order or judgment of the District Court by this court, there will be a *remittitur* to the District Court, unless otherwise ordered." Held, that the plaintiffs in error upon the return of the case to the court could plead over, and hence judgment was not final.

In *Werner* v. *Charleston*, 151 U. S. 360, the announcement by the Chief Justice was: "The writ of error is dismissed. *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608; *Rice* v. *Sanger*, 144 U. S. 197; *Hume* v. *Bowie*, 148 U. S. 245."

The statement of the case shows that it was analogous to the case at bar. The motion to dismiss stated that —

"The judgment brought here by writ of error for review is a judgment of the Supreme Court of the State of South Carolina, which simply affirmed a decision of the lower court overruling a demurrer, and thereby remanded the case to the court below for a hearing on the merits. It is, therefore, an interlocutory judgment, and is in no sense a final decree.

"To this the plaintiff in error replied: 'The judgment brought here by writ of error for review is the judgment of the Supreme Court of the State of South Carolina, holding that a certain act of the general assembly of the State of South Carolina, entitled, "An act to authorize the city coun-

cil of Charleston to fill up low lots and grounds in the city of Charleston in certain cases and for other purposes," approved on the 18th of December, 1830, is not in violation of the Constitution of the United States, thereby affirming the judgment of the trial court and so ending the constitutional defence interposed by the plaintiff in error.'

"An examination of the record will show that the main ground of the demurrer, interposed in the court below by the plaintiff in error, was the unconstitutionality of the act of 1830. It was claimed both there and in the court above, as well as in this court, to be in violation of due process of law." *Rice* v. *Sanger* and *Hume* v. *Bowie*, cited by the Chief Justice, were not rulings on demurrer, and we have confined our notice to cases of that kind, not because they are separable in principle from the other cases decided, but to observe and explain the rule in its special application. That rule is in its utmost generality that no judgment is final which does not terminate the litigation between the parties to the suit. If anything substantial remain to be done to this end, the judgment is not final. The law of the case upon the pleadings, and hence as presented by the demurrer, may be settled, but if power remain to make a new case, either by the direction of the Supreme Court or in the absence of such direction by the statutes of the State, the judgment is not final.

The statute of Kansas permitted such amendment, and the order of the Supreme Court did not take it away. Its order proceeds no further than a direction to sustain the demurrer to the petition. That done, the lower court had and has all of its power under the statute, and may exercise it at the invocation of plaintiffs in error. What they may be advised to do we cannot know. We can only consider their right and the power of the court. These existing, if we should affirm the judgment of the Supreme Court, that court, and maybe this court, may be called upon to determine other issues between the parties.

It follows from these views that the judgment of the Supreme Court is not final, and the writ of error must be dismissed; and it is so ordered.

UNITED STATES *v.* BUFFALO NATURAL GAS FUEL COMPANY.

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

No. 64. Submitted December 2, 1898. — Decided January 3, 1899.

Under the tariff act of October 1, 1890, natural gas is entitled to be admitted free of duty.

THE case is stated in the opinion.

Mr. Assistant Attorney General Hoyt for the United States.

Mr. Herbert P. Bissell for the Buffalo Natural Gas Fuel Company.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The defendant gas company, doing business at Buffalo, in the State of New York, imports natural gas from the Dominion of Canada, for the purpose of supplying its customers with that article. The gas is brought in pipes under the Niagara River, and is used for consumption as fuel and for illuminating purposes.

In 1893 the gas imported by the company was assessed for duty by the collector of the port of Buffalo as a non-enumerated unmanufactured article, at ten per cent, under section 4 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, at p. 613.

The importers claimed that the gas was entitled to free entry under section 2 of the above act, providing for a free list, either under paragraph 496, (p. 604,) as crude bitumen, or under paragraph 651, (p. 607,) as a crude mineral, not advanced in value or condition by refining or grinding, or by any other process of manufacture, not specially provided for

in the act. The importers made proper protest, and obtained a review of the decision of the collector by the board of general appraisers. That board, on a second hearing, after testimony had been given as to the character of the gas, decided that natural gas was a crude mineral, and the board on that ground sustained the claim that it was exempt from duty under paragraph 651 of the tariff act of 1890.

The Circuit Court affirmed that decision, and upon a review by the Circuit Court of Appeals for the Second Circuit, 45 U. S. App. 345, the decision was again affirmed. The latter court, by Circuit Judge Lacombe, said: "We do not undertake in this case to decide whether or not natural gas is a 'crude bitumen.' If it be such, the provisions of paragraph 496 would control its classification, being more specific than those of paragraph 651. Both paragraphs are in the free list, and since natural gas comes fairly within the general provision for crude minerals, and is therefore free, it is unnecessary now to inquire whether it is also within the more specific description 'crude bitumen,' which is also free. The board of general appraisers properly reversed the collector's assessment of the article for duty; it is not a 'raw or unmanufactured article not enumerated.'"

Circuit Judge Wallace, while concurring in the affirmance of the decision of the Circuit Court, was of the opinion that the importation in controversy ought to be classified under paragraph 496 as crude bitumen, and exempt from duty on that ground.

The decision having been duly entered, this court upon the petition of the Government issued a writ of certiorari, and the case has been brought here for review.

We are of opinion that the Circuit Court of Appeals was right in its disposition of the case. The substance that is taken from the bosom of the earth and which burns brightly without any further labor put upon it, is popularly designated as natural gas. This name is not contained in the tariff act, but there are two paragraphs thereof which it is claimed do properly and sufficiently characterize and embrace natural gas, and they are in the free list, and are known as paragraphs 496

and 651. The language used in each, when taken in its popular and commonly received sense, or according to the sense in which it is used commercially, would cover and include the substance generally spoken of and loosely described as natural gas. The fact that it is not thus named in the act compelled the collector to assess it as a raw or unmanufactured article not enumerated, a description which does not fit nearly so well as that which is contained in each of the paragraphs mentioned above. We think the evidence shows that natural gas is included in the language of one or both of those paragraphs.

The rule is familiar that in the interpretation of laws relating to the revenues the words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word. *Two Hundred Chests of Tea, Smith, Claimant*, 9 Wheat. 430.

Mr. Justice Story, in that case, in delivering the opinion of the court, said: "The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." See also *Lutz* v. *Magone*, 153 U. S. 105, and cases there cited.

Prior to 1890 natural gas had not been imported, although its existence in this country and in foreign countries was well known. After the passage of the tariff act of 1890, this corporation commenced its importation from Canada as stated. It appeared in the evidence that an analysis of the gas thus imported had been made by competent chemists, and it was found to contain methane, or marsh gas, to the extent of 95.6 per cent, the balance being made up principally of hydrocarbons other than methane.

In the opinion of some of the witnesses the natural gas thus

examined was a crude bitumen. It was stated "that bitumens are mixtures of hydrocarbons of various kinds, mixed with other materials in varying proportions; a crude bitumen as found in nature is mixed with other materials." It was also testified that this natural gas contains 97.2 per cent of natural hydrocarbon, and the balance of 2.8 per cent is composed of substances usually found with the hydrocarbons in crude bitumen; that the term "bitumen" does not refer to any substance of definite chemical composition, but is distinctively a generic term applied to a large number of natural substances which consist largely or chiefly of hydrocarbons. These substances may be gaseous, as natural gas or marsh gas; fluid, as petroleum or naphtha; viscous, as the semifluid asphaltum; elastic, as elaeterite, found in Utah and elsewhere; solid, as some forms of asphaltum, bituminous or anthracite coal; that the common compositions of crude bitumen are naturally classified as above stated. The deposits of bitumen occur in various portions of the earth's crust; they differ naturally in appearance, in consistency, in various physical and chemical properties; but they are everywhere found to consist essentially of hydrocarbons, and they are correctly designated as crude bitumens. That natural gas should be designated as a crude bitumen was the opinion of some of the witnesses.

Evidence on the part of the Government was given by witnesses who were connected with the Government Geological Survey, and their evidence would tend to show that the word "minerals" in the mineralogical sense of the word almost invariably refers to solids; that in the mineralogical definition gases would not be included, but that there was a wider definition, which according to some authorities includes all the constituents of the earth's crust, and that would include gases. It was also stated that if a scientific man wants to be precise he confines his use of the term "mineral" to a certain homogeneous substance, a chemical entity, having a definite composition, just as the mineralogist does. But nevertheless minerals are both solids and liquid, according to most definitions, and that some authorities include gases among minerals and others exclude them.

One witness for the Government said if you exclude from the mineral kingdom the gases included in the atmosphere, you must set up some fourth class of substances; the division being, generally, the vegetable kingdom, the animal kingdom and the mineral kingdom; but no such fourth division is ordinarily designated, and the constituents of the atmosphere are not vegetable and they are not animal, and ordinarily they are included in the mineral kingdom.

We think the evidence in this case shows that, within the language of paragraph 651 of the act of Congress, interpreting that language in accordance with the rule above mentioned, natural gas would fairly come under the head of a crude mineral, if there were no more limited classification in the act; but that the classification as crude bitumen is more limited, and we are of opinion that, upon the evidence, natural gas is properly thus described. If it be within the more specific classification, it would be controlled thereby. It is not important in this case to conclusively decide which classification covers it, because both are on the free list. As the gas is described in one or both of the paragraphs, it cannot come under section 4 of the act, which provides for the levy, collection and payment on the importation of all raw or unmanufactured articles, not enumerated or provided for in the act, a duty of ten per centum *ad valorem*.

The judgment of the Circuit Court of the United States for the Northern District of New York was right, and should be

Affirmed.

SCOTT *v.* UNITED STATES.

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

No. 80. Submitted December 5, 1898. — Decided January 3, 1899.

The plaintiff in error, defendant below, a letter carrier, upon his trial charged with purloining a letter containing money, offered himself as a witness on his own behalf, denying that he had purloined the money.

On cross-examination he said that he had enemies in the office, and named two persons. The Government called both as witnesses, and both denied that they bore ill will to him. Their evidence was objected to on the ground that the defendant's evidence on this point was collateral, brought out by cross-examination, and that the Government was bound by the answer. *Held*, that the evidence was admissible.

A decoy letter, containing money, addressed to a fictitious person, mailed for the purpose of discovering the frauds of a letter carrier, is to be treated as a real letter, intended to be conveyed by the mail, within the meaning of the statutes on that subject.

THE case is stated in the opinion.

Mr. T. C. Campbell for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

Henry W. Scott, the plaintiff in error, was indicted under section 5467, Revised Statutes, for stealing a letter and its contents from the mail, and the indictment alleged that he unlawfully and wilfully secreted and embezzled a certain letter intended to be conveyed by mail and directed to Miss Mary Campbell, Cottonwood, Yavapai County, Arizona, he being a letter carrier in the city of New York and the letter having been entrusted to him and having come into his possession in his capacity as such carrier. The letter contained $3.50 in two silver certificates of the United States, each of the denomination of one dollar, and a United States Treasury note of the denomination of one dollar, and a fifty-cent piece of the silver coinage of the United States. The evidence showed that the letter was what is termed a decoy letter; that the money was placed therein by one of the inspectors of the Post Office Department; that it was sealed, stamped and addressed as above mentioned, and deposited about 2.30 o'clock P.M. in one of the street letter boxes in the city of New York, in the district from which the defendant collected such letters. Within a few moments after it was deposited in the letter box by the inspector, he saw the defendant come to the box, un-

lock it, take out its contents, put them in his bag and continue on his route. The carrier returned to the branch post office, station E, where he was employed, a little after three o'clock, turned the contents of his bag upon the proper table for distribution, and hung the bag and also his coat on a peg, and left the room and was gone about half an hour. One of the clerks of the department had been told before the defendant's arrival with his letter bag to look out for a letter addressed, as above described, and withdraw it from the mail, and in obedience to such instructions and during the defendant's absence he looked through the letters thus taken from his bag, and the letter was not to be found. Upon the defendant's return to the distributing room, he took his coat and bag and started on his route for another collection of letters, and while on the street he was met by the officers of the Government about five minutes after four o'clock P.M., and was then arrested and brought to the station. He was charged with having the letter, and was asked to show what he had in his pockets. The letter was not found, but the defendant took from his right-hand trousers pocket, among other things, the three bills which had been placed in the letter. The fifty-cent piece was found loose among other coins in another pocket. The officers identified the bills by marks which had been placed on them, and also by reason of the numbers of the bills, a memorandum of which had been taken. The coin had been marked and was identified by the officers.

In relation to the letter, it appears that it was prepared by an inspector of the department, who addressed the same to Miss Mary Campbell. The inspector wrote the body of the original letter. He did not know Mary Campbell, and never saw her; it was addressed to her at Cottonwood, Arizona, at which place there is a post office, but there was no one of the name of Miss Mary Campbell residing at Cottonwood, Arizona, to his knowledge. The address on the letter was to a fictitious person; the money placed in the letter was the money of Mr. Morris, one of the inspectors.

Upon the trial the defendant was sworn in his own behalf, and upon his direct examination testified that when he was

arrested and the money found upon him, he said to the inspectors, "Somebody has done me a dirty trick;" to which one of the inspectors replied, "Do you think I am concerned in that?" The defendant says that he answered him, "I did not think or did not know whether he was; but if he was not, some enemy of mine in that office was." He denied, on the witness stand, that he abstracted, or took from the collection table, or at all, any letter such as is described in the indictment, or any money belonging to any other person in the world.

Upon cross-examination the district attorney endeavored to obtain a fuller statement from the defendant as to what he meant when he said on his direct examination that somebody had done him a dirty trick, and that some enemy of his in the office was concerned in it, and to that end the district attorney asked him: "Have you any enemies among the employés at that station?" and the defendant answered that he had one by the name of Augustus Weisner and another named John D. Silsbee, his former superintendent; that he was an enemy of his and so was Weisner, and that those two were all that he regarded as enemies in that office, both being employed in the same branch office as the defendant, and he said that for a month before he was arrested he was not on speaking terms with Weisner.

The court asked the defendant: "What is the trick that you mean to suggest to the jury that was played upon you?" and the defendant answered: "The only solution that I can give of it is that that two dollars had been abstracted from my pocket and these marked three dollars put in the place of it. Three dollars and a half placed there; fifty cents in with this change." The witness had just previously stated that he left two one-dollar bills belonging to himself in his coat pocket at the time he hung his coat upon the peg in the sorting room and left it there to go down stairs, and from which room he was absent about twenty-five minutes.

When the defendant rested the Government called as witnesses John D. Silsbee and Augustus Weisner, the two men named by the defendant as his enemies, both of whom testi-

fied, under the objection and exception of defendant's counsel, that they had no ill will whatever towards the defendant, and that they had never had any quarrels with him, and Weisner said, on the contrary, that he had liked the man. The counsel for the defendant objected to this testimony on the ground that the evidence of the defendant upon this subject was collateral, brought out by the Government on his cross-examination, and that the Government was bound by his answers.

After the evidence was all in the counsel for the defendant requested the court to charge, "That a letter intended to be conveyed by mail, under the statute, must be addressed to an existing person, at an existing place, or to a real and genuine address." The court refused so to charge, and the defendant excepted.

The defendant's counsel further requested the court to charge, "That a letter with an impossible address, which can never be delivered and which the sender, acting conjointly with post office officials, determined should be intercepted in the mail, is not such a letter as was, in the meaning of the statute, 'intended to be conveyed by mail.'" This was also refused, and an exception to such refusal taken by defendant's counsel.

The jury having convicted the defendant, he has brought the case here by writ of error.

Regarding the objections taken by the defendant to the evidence of Silsbee and Weisner, above alluded to, we think they were properly overruled. The evidence objected to was not irrelevant, and the Government was not bound by the answers of the defendant as to Silsbee and Weisner being his enemies. When arrested the defendant had upon his person the three bills and the fifty-cent piece which had been marked by the post office inspectors and placed in the letter and deposited in the letter box, addressed as stated. Appreciating his position, the defendant endeavored then and there to account for his possession of the money, and he accounted for it by saying that some one, some enemy of his at the office, had done him a dirty trick, by which, as he testified, he meant to say that some one had deposited that money in

his coat pocket while his coat hung up in the sorting room, and while he was absent from that room. This evidence of defendant was an attempt to raise a suspicion, at least, that some enemy of his in the building had placed this money in his coat, and thereby to relieve himself from the suspicion of having stolen it and to show his own innocence. It was an attempt at an explanation showing an honest possession of the money. It was therefore admissible, upon cross-examination, for the purpose of showing the improbability of the explanation, to obtain from the witness all the circumstances which might throw light upon the subject. For that purpose he was asked if he had any enemies in the department, and he said that he had, naming two employés at this particular station, one the superintendent and the other a fellow letter carrier.

If this were true, it might have been argued to the jury that the explanation of defendant was strengthened, and the inference that one or both of these enemies had done this trick might for that reason have been maintained with more plausibility. To show that no such inference could properly be drawn, the Government proved that the men the defendant named as enemies were not such in fact. The evidence was not collateral to the main issue of guilt or innocence, nor was the subject first drawn out by the Government. The district attorney on the cross-examination simply obtained the names of those upon whom the defendant attempted to cast a suspicion by his statement in chief. He could not escape from the possibility of being contradicted, by the failure to name the enemies on his direct examination. That examination suggested an explanation which, if believed, showed an innocent possession, and however improbable it was, the Government had the right to pursue the subject and to show that it was unfounded. The objection to the evidence cannot therefore be sustained.

We think the court below was also right in its refusal to charge as above requested regarding the decoy letter. The correctness of the ruling has in substance been already upheld in this court.

In *Montgomery* v. *United States*, 162 U. S. 410, we not only decided that, upon an indictment against a letter carrier, charged with secreting, etc., a letter containing money in United States currency, the fact that the letter was a decoy was no defence, but it was also held that the further fact that the decoy letters (mentioned in the case) and the moneys enclosed therein, although belonging to the inspectors who mailed them and by whom they were to be intercepted and to be withdrawn from the mails before they reached the persons to whom they were addressed, was no defence, and that such letters were in reality intended to be conveyed by mail within the meaning of the statute on that subject. In that case the court, speaking through Mr. Justice Shiras, said:

"Error was likewise assigned to the refusal of the court to charge that there was a fatal variance between the indictment and proof in respect to the description of the letters, for the stealing or embezzling of which the defendant was indicted.

"In the indictment it was averred that the letters in question had come into the defendant's possession as a railway postal clerk, *to be conveyed by mail*, and to be delivered to the persons addressed. It was disclosed by the evidence that the letters and money thus mailed belonged to the inspectors who mailed them, and were to be intercepted and withdrawn from the mails by them before they reached the persons to whom they were addressed.

"There is no merit in this assignment. The letters put in evidence corresponded, in address and contents, to the letters described in the indictment, and it made no difference, with respect to the duty of the carrier, whether the letters were genuine or decoys with a fictitious address. Substantially this question was ruled in the case of *Goode* v. *United States*, above cited."

In the last cited case, which is reported in 159 U. S. 663, the court said, at p. 671, speaking through Mr. Justice Brown:

"It makes no difference, with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession, as such carrier it

is his duty to treat it for what it appears to be on its face — a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employé in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be — in other words, it is not for him to judge of its genuineness."

In this case, the letter was addressed, although to a fictitious personage, yet to a post office within the Territory of Arizona. It was properly stamped, and it was placed and came within the jurisdiction and authority of the Post Office Department by being dropped into a United States street letter box, in the city of New York. The duty of the defendant was, as above stated, precisely the same in regard to that as to any and all other letters that came into his possession from these various letter boxes. The intention to convey by mail is sufficiently proved in such a case as this, by evidence of the delivery of a letter into the jurisdiction of the Post Office Department by dropping it in a letter box as described herein.

Section 5468, Revised Statutes, provides that the fact that any letter has been deposited in any post office, or branch post office, or in any authorized depository for mail matter, etc., shall be evidence that it was intended to be conveyed by mail, within the meaning of the two preceding sections. This *prima facie* evidence is not contradicted or modified by proof, as in this case, that the letter was a decoy and addressed to a fictitious person. It was deposited in a proper letter box, and it was intended that it should be taken and conveyed by defendant, a mail carrier, and his duty as such carrier was to convey it to the station post office, and while so being carried it was being conveyed by mail, and was under the protection of the Post Office Department, and its safety provided for by the statute under consideration. An intention to have the

letter thus conveyed by the carrier is, within the statute, an intention to have it conveyed by mail. The difficulties of detecting this kind of crime are very great, and the statute ought not to be so construed as to substantially prevent a conviction under it. A decoy letter is not subject to the criticism frequently properly made in regard to other measures sometimes resorted to, that it is placing temptation before a man and endeavoring to make him commit a crime. There is no temptation by a decoy letter. It is the same as all other letters to outward appearance, and the duty of the carrier who takes it is the same.

The fact that it is to a fictitious person is in all probability entirely unknown to the carrier, and even if known is immaterial. Indeed, if suspected by the carrier, the suspicion would cause him to exercise particular care to ensure its safety, under the belief that it was a decoy.

The other objections taken upon the trial we have examined and are of opinion they are without merit, and the judgment is therefore

Affirmed.

MISSOURI, KANSAS & TEXAS TRUST COMPANY *v.* KRUMSEIG.

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

No. 66. Argued December 2, 1898. — Decided January 3, 1899.

Usury is a statutory offence, and Federal courts, in dealing with such a question, must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts.

When a State thinks that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, as in this case, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity, or at law; and the local law, consisting of the applicable statutes, as construed by the Supreme Court of the State, furnishes the rule of decision.

These views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal.

Whether the contract between the parties in this case was, as a contract of life insurance, void because the defendant had not complied with the statutes of Minnesota, has not been considered by the court.

In May, 1894, Theodore M. Krumseig and Louise Krumseig filed in the district court of the eleventh judicial district of Minnesota a bill of complaint against the Missouri, Kansas and Texas Trust Company, a corporation of the State of Missouri, praying that, for reasons alleged in the bill, a certain mortgage made by complainants on the 5th day of September, 1890, and delivered to the defendant, and by it recorded, and certain notes therein mentioned, might be cancelled, and the defendant be permanently enjoined from enforcing the same. The defendant thereupon, by due proceedings, removed the cause to the Circuit Court of the United States for the District of Minnesota, where the Union Trust Company of Philadelphia was made a co-defendant, and the case was so proceeded in that, on October 22, 1895, a final decree was entered, granting the prayers of the complainants, declaring the said mortgage and notes to be void, and enjoining the defendants from ever taking any action or proceeding for their enforcement. 71 Fed. Rep. 350.

From this decree an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, where, on November 5, 1896, the decree of the Circuit Court was affirmed. 40 U. S. App. 620. On March 20, 1897, on petition of the Missouri, Kansas and Texas Trust Company, a writ of certiorari was awarded whereby the record and proceedings in said cause were brought for review into this court.

Mr. William C. White for the Trust Company.

Mr. J. B. Richards for Krumseig.

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

The bill of complaint alleged that on July 27, 1890, Theodore M. Krumseig, one of the complainants, made a written

application to defendant, a corporation of the State of Missouri, for a loan of $2000, to be secured upon real estate in the city of Duluth, Minnesota, and among the conditions in the said application was the following:

"In consideration of the above premises, I agree to execute and deliver to the said company ten promissory notes, each of the sum of $360, payable in monthly instalments of $30, commencing at date of signing contract. The said notes aver principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements. The contract hereafter to be entered into, if my application shall be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above notes shall contain a clause guaranteeing in case of my death before payment of any unpaid instalments, a release of unpaid portion of debt, if I shall have promptly paid previous instalments and kept other conditions. As part of foregoing condition I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual $3 fee therefor, and to pay all fees for recording deed of trust or mortgage."

The bill further alleged that thereupon Krumseig passed the medical examination required, paid the fee demanded, and complainants then executed ten certain promissory notes, each for the sum of $360, dated September 5, 1890, payable in monthly instalments of $30, with interest at ten per cent after due, forty-one of which instalments, amounting to $1230, have been paid; on the same day, in order to secure these notes, they executed and delivered to the defendant a mortgage on the premises, with the usual covenants of warranty and defeasance, reciting the indebtedness of $3600, in manner and form aforesaid, and containing the following clause:

"And it is further understood and agreed by and between the said parties of the first part, their executors, administrators or assigns, and the said party of the second part, the Missouri,

Kansas and Texas Trust Company, that in case the said Theodore M. Krumseig, one of the parties of the first part, should die after the execution and delivery of the said notes and this mortgage, and within ten years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied; provided, however, that said parties of the first part shall have promptly paid each monthly instalment that shall have become due prior to his death according to the terms of the notes hereinbefore mentioned, and that he has not committed suicide within two years, and has not without written consent of the party of the second part visited the torrid zone, or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train, or on a steam or sailing vessel for two years."

The bill further alleged that the sole consideration for the notes and mortgage was: 1st, the sum of $1970, together with the interest thereon from date until maturity of the instalment notes; and, 2d, the clause in the mortgage last referred to, which latter was in fact an arrangement between the respondent and the Prudential Life Insurance Company of Newark, New Jersey, to save the former harmless from any loss that might occur to it in case of the death of the complainant, Theodore M. Krumseig, during the term covered by the mortgage. It was also alleged that the defendant company had not complied with the laws of the State of Minnesota governing life insurance companies, and that the contract was therefore void. The bill prayed that the mortgage be cancelled of record and the remaining notes should be delivered up to them.

The answer denied that the contract was usurious, and alleged that the sum of $1970, received by complainants with the legal interest thereon and the cost of the guaranty of defendant to cancel the loan in case of the death of Theodore M. Krumseig during the continuance of the contract, consti-

tuted a full and ample consideration for the notes and mortgage in question, and that the same was so understood and agreed to by complainants at the time of the execution of the contract.

The Circuit Court did not consider it necessary to pass upon the question whether the contract was one of life insurance, and hence void, for the admitted fact that the defendant company had not complied with the laws of Minnesota respecting life insurance companies; but regarded the contract as one for the security and payment of borrowed money, and, under the facts, as usurious and void under the statute of Minnesota; and granted the relief prayed for in the bill. 71 Fed. Rep. 350.

The Circuit Court of Appeals affirmed the decree of the Circuit Court. Two of the judges concurred in holding that the contract was usurious, and that the complainants were therefore entitled to the relief prayed for. One of the two judges so holding construed the contract as one of life insurance, and hence also void under the Minnesota laws. The third judge, while apparently concurring in the view that the contract was usurious, thought that the complainants were not entitled to a remedy for a reason which we shall presently consider. 40 U. S. App. 620.

Usury is, of course, merely a statutory offence, and Federal courts in dealing with such a question must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts. *De Wolf* v. *Johnson*, 10 Wheat. 367; *Scudder* v. *Union National Bank*, 91 U. S. 406.

Section 2212, General Statutes of Minnesota of 1894, provides that upon the loan of money any charge above ten per cent shall be usurious; and section 2217 provides that "whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceedings thereon, and shall order the same to be cancelled and given up."

As was said in *De Wolf* v. *Johnson*, above cited, it does not,

in general, comport with a negotiation for a loan of money that anything should enter into the views of the parties, but money, or those substitutes which, from their approximation to money, circulate with corresponding, if not equal, facility. Still, however, like every other case, it is open to explanation, and the question always is whether it was or was not a subterfuge to evade the laws against usury. The books contain many cases where artful contrivances have been resorted to, whereby the lender is to receive some other advantage or thing of value beyond the repayment of the loan with legal interest. Sometimes the agreement has taken the form of the purchase of an annuity. More frequently there is a collateral agreement whereby the borrower is to purchase an article of property and to pay therefor more than its intrinsic value. It has been frequently held that to constitute usury, where the contract is fair on its face, there must be an intention knowingly to contract for or to take usurious interest, but mere ignorance of the law will not protect a party from the penalties of usury. *Lloyd* v. *Scott*, 4 Pet. 205.

The precise character of the contract between the present parties is not clear. It has some of the features of a loan of money; in other respects it resembles a contract of life insurance. But our examination of its various provisions and of their legal import has led us to accept the conclusion of courts below, that the scheme embodied in the application, notes and mortgage was merely a colorable device to cover usury. The Supreme Court of Minnesota has more than once had occasion to consider this very question. In the case of *Missouri, Kansas & Texas Trust Co.* v. *McLachlan*, 59 Minn. 468, that court said:

"The peculiar and unusual provisions of this contract themselves constitute intrinsic evidence sufficient to justify the finding of the existence of every essential element of usury, viz., that there was a loan; that the money was to be returned at all events, and that more than lawful interest was stipulated to be paid for the use of it. The only one of these which could be seriously claimed to be lacking was that the money was not to be paid at all events, but only upon a contingency,

to wit, the continuance of the life of McLachlan; but the facts warrant the inference that this contingency was not *bona fide*, but was itself a mere contrivance to cover usury. The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury."

Similar views were expressed in the subsequent case of *Matthews* v. *Missouri, Kansas & Texas Trust Co.*, 72 N. W. Rep. 121, where the Supreme Court of Minnesota again reached the conclusion that the notes and mortgage, forming a contract between the same trust company and one Matthews, were usurious and void.

The next question for our consideration is one not free from difficulty. Can a borrower of money upon usurious interest successfully seek the aid of a court of equity in cancelling the debt without making an offer to repay the loan with lawful interest?

Undoubtedly the general rule is that courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. *Tiffany* v. *Boatman's Institution*, 18 Wall. 375.

But what, in such a case, is held to be the law by the courts of the State of Minnesota? Under the statutory provision already cited, that whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, security or evidence of debt has been taken or received in violation of the provisions of this act the court shall declare the same to be void, and enjoin any proceeding thereon, and shall order the same to be cancelled and given up, the Supreme Court of Minnesota has repeatedly held that a plaintiff suing to cancel a Minnesota contract for usury need not offer to repay the money loaned. *Scott* v. *Austin*, 36 Minn. 460;

Exley v. *Berryhill*, 37 Minn. 182; *Matthews* v. *Missouri, Kansas & Texas Trust Co.*, 72 N. W. Rep. 121.

Under statutes providing that, in cases of usury, the borrower is entitled to relief without being required to pay any part of the usurious debt or interest as a condition thereof, it has been held by the courts of New York and of Arkansas that courts of equity are constrained by the statutes, and must grant the relief provided for therein without applying the general rule that a bill or other proceeding in equity, to set aside or affect a usurious contract, cannot be maintained without paying or offering to pay the amount actually owed. *Williams* v. *Fitzhugh*, 37 N. Y. 444; *Lowe* v. *Loomis*, 53 Ark. 454.

But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.

We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State. It seems to be conceded, or, if not conceded, it is plainly evident, that if the cause had remained in the state court where it was originally brought, the complainant would have been entitled, under the public policy of the State of Minnesota, manifested by its statutes as construed by its courts, to have this usurious contract cancelled and surrendered without tendering payment of the whole or any part of the original indebtedness. The defendant company could not, by removing the case to the Federal court, on the ground that it was a citizen of another State, deprive the complainants of such a substantive right. With the policy of the state

legislation the Federal courts have nothing to do. If the States, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision.

In *Clark et al.* v. *Smith*, 13 Pet. 195, it was said that "where the legislature declares certain instruments illegal and void, as the British annuity act does; or as the gaming acts do; there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature. . . . The state legislatures have, certainly, no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts. . . . The undoubted truth is that when investigating and decreeing on titles in this country we must deal with them in practice as we find them and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and to the character of the equities involved in the controversy; so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery."

The question in *Brine* v. *Insurance Co.*, 96 U. S. 627, 633, was whether a state statute which allowed to the mortgagor twelve months to redeem, after a sale under a decree of foreclosure, and to his creditor three months after that, conferred a substantial right; and it was so held, and that such right of redemption after sale was as obligatory on the Federal courts

sitting in equity as on the state courts; and that their rules of practice must be made to conform to the law of the State so far as may be necessary to give full effect to the right. The opinion of the court was delivered by Mr. Justice Miller, who said:

"It is denied that these statutes [giving the right to redeem] are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the Circuit Courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale on the rights acquired by the purchaser and those of the mortgagor and his subsequent grantees are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will or by judicial proceedings, are subject to, and may be governed by, the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned

are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the Federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form." See also to the same effect the case of *Holland* v. *Challen*, 110 U. S. 15.

Of course, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal. Nor has it been found necessary to consider whether the agreement between these parties was, as a contract of life insurance, void because the defendant had not complied with the statutes of Minnesota.

The decree of the Circuit Court of Appeals, affirming that of the Circuit Court, is accordingly

Affirmed.

WASHINGTON MARKET COMPANY *v.* DISTRICT OF COLUMBIA.

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

No. 83. Argued December 9, 12, 1898. — Decided January 3, 1899.

In the provision in the 16th section of the act of May 20, 1870, c. 108, "to incorporate the Washington Market Company," that "the city government of Washington shall have the right to hold and use, under such

rules and regulations as the said corporation may prescribe, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets as a market," etc., the words "the said corporation" refer to the city government of Washington, and not to the Market Company.

The correspondence between the Market Company and the city government respecting the use and improvement of this tract which is printed below as a note to the statement of the case, creates no easement in the tract in favor of the Market Company; and the company recognized the fact that Congress might lawfully dispossess it from the use and occupancy of it.

THE Washington Market Company was incorporated by act of Congress, approved May 20, 1870. 16 Stat. 124, c. 108. Authority was conferred upon the company to construct suitable buildings and operate a public market on the site of the "Centre Market Space," situated in the northwest section of the city of Washington, between Seventh and Ninth streets and B street and Pennsylvania and Louisiana avenues. With the exception of the sixteenth section, the provisions of the statute related solely to the public market thus authorized and the operation and duration of the franchise.

The sixteenth section is as follows:

"SEC. 16. *And be it further enacted*, That the city government of Washington shall have the right to hold and use, under such rules and regulations as the said corporation may prescribe, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets as a market for the purchase and sale of the following articles, to wit: Hay, straw, oats, corn, corn-meal, seed of all kinds, wood for sale from the wagon, cattle on the hoof, swine on the hoof, country produce sold in quantities from the wagon, and such other bulky and coarse articles as the said corporation may designate. And from and after sixty days from the passage of this act marketing of the products named herein shall be excluded from Pennsylvania and Louisiana avenues and the sidewalks and pavements thereon."

The present litigation was begun on January 17, 1892, by the filing on behalf of the Washington Market Company of a bill in the Supreme Court of the District, the defendant

named therein being the District of Columbia. The bill averred that the complainant was vested by the section above quoted with authority to establish the rules and regulations therein referred to for the government of the wholesale market authorized to be established. It was also averred that under authority of what was claimed to be a contract arising from correspondence had with the District, complainant, in 1871, entered into possession of a part of the open market space referred to in said section 16, and, in 1886, of the entire space. The correspondence relied on is set out in the margin.[1] It

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[1] WASHINGTON MARKET COMPANY, *November* 8, 1871.

Hon. Henry D. Cooke, Governor of the District of Columbia.

SIR: In section 16 of the charter of this company of May 20, 1870, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets is assigned as a market for cattle and bulky and coarse articles to be sold in quantities from the wagon, and the marketing of such products in Pennsylvania and Louisiana avenues is prohibited.

Notwithstanding this prohibition dealers are continuing to occupy Louisiana avenue in defiance of law and to the great injury of property holders on that avenue. This company has been unable to enforce the prohibition because the open space above referred to has not been properly prepared to enable dealers to occupy the grounds for market purposes as provided in the law.

By the act of Congress the Washington Market Company is entitled to establish the rules and regulations which shall govern the market upon the open space, but it is a question whether or not it was the intention of Congress that this company should derive any income therefrom.

Under these circumstances, to meet a pressing public necessity, this company purposes, with your permission, properly to grade the grounds and to place thereon suitable platforms of inexpensive construction, which will enable the marketmen to do business on the open space as contemplated by the act, charging them for the use of their stands such sums as you and the District authorities may prescribe not to exceed the interest on the actual outlay and the actual expenditures for keeping the market in order.

There can be no possible objection to this course of action, and we trust you will give it your approval at once, as there is a necessity for immediate action.

We have the honor to be, very respectfully,

T. C. CONNELLY,
HALLETT KILBOURN,
ADOLF CLUSS,
WM. E. CHANDLER,
Committee of the Washington Market Company.

was alleged that the complainant graded the grounds and made valuable structures thereon; that it had operated and was still operating a wholesale market thereon, and that it had received and was receiving the sources of revenue men-

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Approved, subject to such regulations as the Legislative Assembly may hereafter prescribe. H. D. Cooke, Governor.

WASHINGTON MARKET COMPANY, *April* 8, 1872.

To the Governor and Board of Public Works of the District of Columbia:

The Washington Market Company is now in possession of the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets, in accordance with the sixteenth section of the act of Congress of May 20, 1870, and the agreement made with the Governor of the District, as per agreement of November 8, 1871, as follows.

(Here follows a copy of the letter and approval printed above.)

Since taking possession of the open space thus assigned for a wholesale market the company have purchased from the District authorities the buildings thereon belonging to the city of Washington; have suitably graded the surface, and have also commenced the erection of structures thereon necessary for wholesale market purposes, having already completed an open market or platform shed on the north side of B street over 200 feet long; also an open platform shed 200 feet long on the north side of the grounds, with eating-house and storehouses, and have in addition made arrangements to erect a large open building for loads of hay, grain and wood, and suitable stables, pens and cattle yards, as soon as the concrete paving company, now occupying the western portion of said ground, shall vacate the same; all to be done to the satisfaction of the District authorities, and in such manner as to furnish creditable accommodations for a wholesale market.

In order to more effectually carry out the foregoing arrangement, entered into November 8, 1871, the company now propose to the Governor and to the Board of Public Works, which by law has control of the streets and avenues of the District, that the said company shall be allowed to collect of dealers in said wholesale market the following sums:

	Amount per day.
Each one-horse team	$0.10
Each two-horse team	15
Each three-horse team	20
Each four-horse team	25
Each head of neat cattle	20
Each cow and calf	25
Each swine	05
Each sheep	05

The Market Company also to charge such reasonable rent for storage as may be agreed upon with the parties using their buildings.

tioned in the alleged contract, except as to certain charges which it was averred defendant had wrongfully abolished.

It was charged that not only by the abolition of tolls, above referred to, but by other acts of interference by the District and also by recent public assertions of an exclusive right to possess and regulate said market, the receipts from the operation of the same had been greatly diminished, so that the expenses of maintaining the market had been largely in excess of the sum received from its operation. It was prayed that an account might be taken and the District decreed to pay the losses occasioned by it; that the District might also be restrained from prescribing or attempting to prescribe rules and regulations for said market, from interfering with the sources of revenue mentioned in the contract, and from forcibly ousting or resorting to legal proceedings to ob-

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The company will also keep an office open at all hours of the day and night for the accommodation of dealers, where produce can be measured and weighed, and will furnish suitable watchmen to take charge of the market and collect the revenues thereof.

From the revenues collected the Market Company will retain sufficient to pay all expenses of managing and keeping in repair and good condition the buildings and grounds, with ten per cent annually on the cost of improvements, (which are to be made at the company's charge,) and the company shall pay over to the District authorities the residue or balance of the revenue by them collected.

If by authority of Congress the company should at any time be dispossessed of the use and occupancy of the market grounds, it shall be entitled to receive a fair compensation for its buildings and improvements thereon.

WASHINGTON MARKET COMPANY,
By M. G. EMERY, *President.*

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *April* 26, 1874.

The Washington Market Company:

In reply to your communication of April 8, 1872, I have to inform you that the Board have this day passed the following vote: "To approve the arrangement with the Washington Market Company, proposed in the company's letter of April 8, 1872, relative to the open space at the intersection of Ohio and Louisiana avenues and Tenth and Twelfth streets, used as a wholesale market; this arrangement not to prejudice any lawful future action of the Board, of the Legislative Assembly or of Congress."

Very respectfully,
ALEX. R. SHEPHERD, *Vice President.*

tain possession of the premises. General relief was also prayed.

The answer of the District asserted the invalidity of the alleged contract; averred that the District alone was entitled to occupy said market space and to establish rules and regulations respecting the conduct of the market; and further averred the legality of any action taken by or on its behalf respecting said market space and the tolls imposed in the operation of the market.

The court entered a decree dismissing the bill; and, on appeal, its action was affirmed by the Court of Appeals of the District. (6 App. Cas. D. C. 34.) An appeal was then taken to this court.

Mr. William Birney for appellant.

Mr. S. T. Thomas for appellee. *Mr. A. B. Duvall* was on his brief.

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

It is difficult to determine precisely the theory upon which appellant predicates its right to relief at the hands of a court of equity. In the bill what is termed a "title to possession" of the market grounds is asserted to be in complainant, and its right not only to prescribe rules and regulations with respect to the market is averred, but also a right to the sources of revenue mentioned in the alleged contract. Despite, however, the position thus taken in the pleadings, and the fact that the complainant demanded that the District be compelled to account for the losses which it is alleged the complainant had sustained by claimed wrongful interferences of the District, counsel, in the argument at bar, bases the right to relief solely upon the prayer for general relief contained in the bill. In consequence of this abandonment of the specific grounds stated in the bill, the argument at bar is that whilst the Market Company, under the section above referred to, had not

obtained a general power to regulate and control the market, it was by said section vested with the power to locate and assign stands therein, and that the facts averred and shown by the proofs established an implied contract, by which the District constituted the company an agent to manage and control the market and collect and disburse the revenues therefrom. And, it is then argued, that from these facts such a situation resulted as that it would be inequitable to permit the District to interfere in any wise with the possession, control and management of the market, without antecedently "reimbursing appellant for moneys expended as its agent in the administration of the wholesale market of Washington city."

Disregarding the fact that the claims asserted in the pleadings on the one hand and at bar on the other are divergent, we shall examine the contentions urged in the order in which they have been made.

As to the claim that the Market Company is the corporation empowered by section 16 *of the charter to establish rules and regulations with respect to the market therein authorized.*

We do not find in the text of the statute anything justifying a construction of the words "rules and regulations" as employed in section 16, which would attach to them a less broad signification than is given to the word "regulations" in the second section, in which section, with reference to the public market authorized to be constructed and maintained by the Washington Market Company, it was provided that "the municipal government of said city shall at all times have the power to make and enforce such regulations with regard to said market and the management thereof as in their judgment the convenience, health and safety of the community may require." The fact that the power to establish and enforce regulations with respect to the market to be erected by the Market Company was vested in the municipality, and the further fact that a voice in the establishment of the amount of rent to be paid for stalls in the market of the company was expressly conferred upon the District authorities, prevents the inference that, with reference to the market which the city itself was "to hold and use," the city was deprived

of the power to make rules and regulations, or that a broad and comprehensive authority to establish such rules and regulations was vested in the Market Company. The grammatical structure of the sentence also supports the view that the corporation referred to in the sixteenth section was the city government, for the nearest antecedent to the word "corporation" is the city government of Washington, the Market Company not being named at all in the section.

As respects the alleged contract stated in the bill to have been initiated in 1871 *and perfected in* 1874.

By the written proposal concerning the use and occupancy of the open market space, bearing date November 8, 1871, addressed to the Governor of the District, the Washington Market Company stated: "This company proposes, with your permission, properly to grade the grounds and to place thereon suitable platforms of inexpensive construction, which will enable the marketmen to do business on the open space as contemplated by the act, charging them for the use of their stands such sums as you and the District authorities may prescribe, not to exceed the interest on the actual outlay and the actual expenditures for keeping the market in order." And it was added: "There can be no possible objection to this course." Upon this letter was placed the following indorsement: "Approved, subject to such regulations as the Legislative Assembly may hereafter prescribe. H. D. Cooke, Governor."

Irrespective of what may have been the power possessed by the Governor concerning the market grounds or market, it is clear that there is nothing in this proposal of the Market Company, or in the qualified approval of the Governor importing a surrender by the Legislative Assembly of any rights which by law were vested in it, such as the power to establish and alter at pleasure the rules and regulations with respect to the manner of occupancy and the tolls to be exacted for the use of stands. Certainly no easement was attempted to be created in favor of the Market Company in the land; at most, there was a mere revocable license to hold and use the grounds. So, also, the language of the communication was carefully

framed to permit no inference that the District would incur any pecuniary liability for the cost of grading or the erection of the "inexpensive" platforms. The Market Company was evidently interested in the placing of the grounds in suitable condition for occupancy by dealers, and was willing to assume the risk of making expenditures, in reliance upon fair treatment and good faith on the part of the District authorities.

The communication of April 8, 1872, evidenced the fact that the Market Company had gone into possession of the grounds, had graded the surface and erected two platforms, one of which contained an eating-house and storehouses. The company solicited authority to collect certain tolls and charges, including storage fees, and agreed to keep an office upon the grounds and furnish suitable watchmen, and after applying the revenues to the expenses of management and keeping in repair and good condition the grounds, with ten per cent annually on the cost of improvements, promised to pay over the balance of revenue, if any, to the District. That the company did not consider itself in the light of an agent or employé of the city in making improvements on the grounds, is shown in the communication. Thus, the buildings for the use of which it solicited authority to charge storage rent are referred to as "their" buildings. It is expressly stated in connection with the stipulation that the company might retain from the revenue ten per cent annually on the cost of improvements, that such improvements were "to be made at the company's charge;" and it is also stated that the company should be entitled to receive a fair compensation for "its" buildings and improvements on the market grounds, if by authority of Congress the company should at any time be dispossessed of the use and occupancy of the grounds. While this latter arrangement is said to have been orally acquiesced in, it was not until April 6, 1874, that formal official action was taken approving the same, with the proviso, however, that the arrangement was "not to prejudice any lawful future action of the Board, of the Legislative Assembly or of Congress."

Assuming that authority was vested in the Governor and

Board of Public Works to enter into the arrangement suggested in the second proposition of the company, it is clear that thereby no easement was created in the land in favor of the Market Company, and the company recognized the fact that Congress might lawfully dispossess the Market Company from the use and occupancy of the grounds. The qualified acceptance of the proposal at most only constituted an implied assurance on the part of the Governor and Board of Public Works that the company, so far as those officials had the power, would not be disturbed in its possession without just cause. There was no agreement that a source of revenue would be supplied adequate to meet the expenditures, or that the District assumed liability for any deficit in the revenue. If, however, the correspondence and action taken thereon could be construed as importing an agreement to impose a pecuniary liability on the District, an inspection of the terms of the organic act of February 21, 1871, c. 62, 16 Stat. 419, providing a government for the District of Columbia, clearly establishes that it was without the power of the officials undertaking to enter into the arrangement. The making of regulations with respect to the use of the market grounds and the establishment of a tariff of charges with the power to subsequently alter or abolish the same, and the authority to incur a pecuniary liability with respect to the improvement of the market grounds, the erection of market buildings and the operation of the market, were beyond question within the province of the Legislative Assembly, and any assumption on the part of the Governor, either with or without the sanction of the Board of Public Works, of authority to conclude the Legislative Assembly in such matters, would have been purely *ultra vires.*

There was nothing in the conduct of the District subsequent to 1874 which, if it possessed the power, could be construed as a ratification of the alleged contract or as importing binding efficacy upon the District. There was certainly no recognition of the Market Company as a mere employé making expenditures and disbursing revenues solely as the agent of a principal, and the District authorities were never notified that the

Market Company would look to it for repayment of any deficit in revenues. So long as the company was willing to care for the grounds and to operate the market, while the annual revenues were less than the ordinary expenses of management, as appears to have been the case, without calling upon the District to assume the responsibility for a deficit, there was no occasion for the District to take decisive action. The furnishing of accounts, beginning with 1888, possesses no weight, as manifestly the District was interested in the ascertainment of the fact whether or not there was any surplus revenue to which it was entitled.

The facts in the case at bar bear no analogy to those which were present in the cases referred to in Pomeroy's Equity Jurisprudence,[1] (Vol. 1, sec. 390,) to which our attention has been directed by counsel for the appellant. There individuals, acting on the supposition that they had a title to or interest in lands, expended money in erecting buildings or other improvements thereon, while the real owner stood by and made no protest. No ground exists for the pretence that such was the case here. A court of equity will not relieve an individual from the operation of the Statute of Frauds which requires that interest in lands be created by an instrument of writing, and impose an equitable lien upon land in favor of one who makes improvements thereon, knowing that the title is in another, especially where the money is expended under an express understanding with reference thereto had with the owner, but will leave the party to the remedies, if any, which a court of law provides.

These views dispose of the case and require an affirmance of the decree of the Court of Appeals of the District of Columbia.

Decree affirmed.

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[1] *Powell* v. *Thomas*, 6 Hare, 300; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.

SIMPSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 51. Argued October 19, 20, 1898. — Decided January 3, 1899.

The plaintiffs contracted with the United States to construct a dry dock at the Brooklyn Navy Yard according to plans and specifications, and to be built upon a site that was available. No provision was made in regard to quicksands should they come upon such in making the foundations. The main features of the contract are stated in detail in the statement of the case below. In executing the contract the contractors came upon shifting quicksands, by reason of which the work was made more difficult, and was much increased; and being unable to complete the work within the time specified in the contract, they asked for an extension, which was granted. On completion a settlement was had, all the money remaining due under the contract, and some that was due for extra work, was paid. It was not until about three years later that the claim for compensation for the extra labor and materials made necessary by the quicksand was made; and, when it was refused, this action to recover it was brought in the Court of Claims, and there decided adversely to the claimants. *Held*, That the contract imposed upon the contractors the obligation to construct the dock according to the specifications within a designated time, for an agreed price, upon a site to be selected by the United States, and contained no statement, or agreement or even intimation that any warranty, express or implied, in favor of the contractor was entered into by the United States concerning the character of the underlying soil; and that the judgment of the court below should be affirmed.

This appeal presents for review the action of the lower court rejecting a claim of the appellants. 31 C. Cl. 217.

The essential facts as found by the court below are summarized as follows: Pursuant to an act of Congress appropriating a stated sum for building two "timber dry docks to be located at such navy yards as the Secretary of the Navy may indicate," act of March 3, 1887, c. 390, 24 Stat. 580, 584, the Navy Department on April 19, 1887, advertised for proposals for the building of two dry docks to be located, one at the Brooklyn and the other at the Norfolk Navy Yard. The advertisement, whilst pointing out the general nature of the structures and their dimensions, contained no detailed plan of

the contemplated work, but announced that "dry dock builders are invited to submit plans and specifications with proposals for the entire construction and their completion in all respects," and, moreover, it was said "bidders will make their plans and specifications full and clear, describing the kinds and qualities of the materials proposed to be used." Besides, the advertisement stated that "for information in regard to the location and site of the docks bidders are referred to the commandants of the Brooklyn and Norfolk Navy Yards." On May the 23d, pending the publication, the Navy Department addressed to the commandant of the Brooklyn Navy Yard the following letter:

"To enable the dry dock builders who may apply at the yard under your command for information concerning the proposed new timber dry dock, particularly regarding the foundation of the site selected for the dock, I am instructed by the chief of the bureau to request you to direct the civil engineer of the yard to have the necessary borings made at once with a view of ascertaining the nature of the soil to be excavated for the pit or basin of the dock, as well as to what depth, if any, below the line of water mark it will be necessary to have the piling driven to secure a proper foundation for the structure."

Conforming to these instructions, Mr. Asserson, a civil engineer attached to the Navy Department, made an examination of the soil, making borings to a depth of from thirty-nine to forty-six feet at a distance of fifty feet along a certain length in the middle of a portion of the ground of the navy yard. The result of these borings was delineated on a profile plan purporting to show the character of the underlying soil. It may be conceded that this plan indicated that the soil at the point referred to was stable and contained no quicksand. Simpson & Co., who were experienced dock builders, applied for information as to the proposed site, and a copy of the plan was handed to the firm. Simpson & Co. never knew of the above letter until after this suit was brought, and they did not intimate to any one that the bid which they proposed to submit for doing the work was to be conditioned on the exist-

ence in the soil of the site to be selected of the characteristics indicated by the profile plan. It is true, however, that Simpson & Co. in making up their estimate and in preparing their specifications took into view the presumed condition of the soil, and that the amount of their bid was made up upon the assumption that the soil underlying the dock would prove to be like that indicated by the plan.

In June, 1887, Simpson & Co. bid for the construction of the docks. The first two sentences of their proposal were as follows:

"The undersigned, J. E. Simpson & Co., contractors and builders of Simpson's patent timber dry docks, of the city of New York, in the State of New York, hereby offer to furnish, under your advertisement, dated April 19, 1887, and subject to all the requirements of the same, and of the specifications, instructions and plans to which it refers, two timber dry docks of like dimensions, to be built in accordance with plans and specifications herewith submitted. One of said dry docks to be located at the United States navy yard, Brooklyn, in the port of New York, and the other at the United States navy yard, Portsmouth, in the port of Norfolk, Virginia, upon available sites to be provided by the Government, for the sum of one million and sixty-one thousand six hundred ($1,061,600) dollars, United States currency."

The price asked for the two docks was very near the sum authorized by Congress to be expended for the purpose.

The specifications referred to were prepared by the firm, and contained the following recital:

"Location. — These dry docks shall be located as follows: One at the United States navy yard, Brooklyn, in the port of New York, and the other at the United States navy yard, Portsmouth, in the port of Norfolk, Virginia, upon available sites to be provided by the Government. The length of each dry dock, respectively, shall be five hundred (500) feet inside of head to outer gate sill."

Such other portions of the specifications as are material to be noticed are contained in the subdivision headed "General Construction," and are as follows:

Statement of the Case.

"Piles. — All foundation, brace and cross-cap piles shall be of sound spruce or pine, not less than twelve inches diameter at butt and six inches at top, and of such length as may be required for the purpose, and well driven to a firm bearing.

"Sheet piling for cut-offs shall be of sound spruce, pine or other suitable material, four inches and five inches in thickness, as shown on plans, dressed to a uniform thickness, grooved and fitted with white pine tongues, driven close and to such depths as may be found necessary to make good work, and closely fitted to square piles at intersections.

* * * * *

"Should the character of the bottom be found such as to warrant a modification of the pile system of floor construction, a concrete bed of not less than six feet in thickness may be substituted for the foundation piles, and the floor stringers and cross timbers imbedded therein and firmly secured thereto with iron bolts and anchors."

The bid was accepted, and a written contract was executed. In this contract recital was made of the advertisement for proposals, the making of the bid with accompanying specifications and the acceptance thereof, and these documents thus referred to were annexed and made a part of the contract.

The contract contained in its first clause the following:

"The contractors will, within twenty days after they shall have been placed in possession and occupancy of the site by the party of the second part, which possession and occupancy of the said site during the period of construction, and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractors by the party of the second part, commence, and within twenty-four calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, New York, as shall be designated by the party of the second part; and will, at their own risk and expense, furnish and provide all labor, material, tools, implements and appliances of every description — all of which shall be of the best kind and quality adapted for the work as described in the specifications — nec-

essary or requisite in and about the construction of said dry dock."

The seventh clause of the contract is stated in the margin.[1]

In addition, penalties were stipulated for delay in the performance of the work, and a discretion was vested in the Secretary of the Navy to allow an extension of time for any failure to complete the dock within the contract period.

The work was to be paid for in instalments, upon proper estimate, as it progressed, and ten per cent was to be retained by the Government until its final completion.

The construction was commenced in November, 1887, and

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[1] The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereunto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect when the cost of such change shall exceed five hundred dollars, except upon the written order of the Secretary or acting Secretary of the Navy; and if changes are thus made the actual cost thereof, and the damage caused thereby, shall be ascertained, estimated and determined by a board of naval officers appointed by the Secretary of the Navy, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation, which they (the contractors) shall be entitled to receive, if any, in consequence of such change or changes; it being further expressly understood and agreed that such working plans and drawings, and such additional detailed plans and specifications as may be necessary, shall be furnished by and at the expense of the contractors, subject to the approval of the chief of the Bureau of Yards and Docks, and that if during the prosecution of the work it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the contractors and by the officer in charge of the work, the agreement to set forth fully the reasons for such change and the nature thereof, and to be subject to the approval of the party of the second part.

after considerable labor had been expended and material used, "about August 31, 1888, it first became apparent that a portion of the dry dock structure had sunk and moved inward towards the excavation, and had thereby sustained damage, and that this damage was caused by encountering a stratum of water-bourne sand, in the excavation, which flowed from beneath and undermined the banks forming the side of the dock excavation." Thereupon it was ascertained that the "sand stratum hereinbefore described underlay the entire area of the site of the dock, and beginning at a depth of from twenty-six to thirty feet below the grade of the side extended to a depth of seventy feet below the same." . . . "Between August, 1888, and October, 1889, portions of the dry dock structure completed by the plaintiffs during that period continued to settle and move inward towards the excavation." . . . "This was caused by the presence of the said sand stratum which continued to undermine the side of the dry dock excavation; hence, portions of the dry dock structures were destroyed or greatly damaged." . . . "During the period aforesaid the sand flowed into the excavation made for the dry dock, delaying the completion thereof, and increased the cost of the dock. The character of the soil underlying said site was not as it appeared in the profile plan in the report of the said Asserson, in so far as the said sand stratum is concerned, and both parties were surprised in encountering the difficulty and expense caused by the presence of the said sand stratum. After the discovery of the said sand stratum, as aforesaid, Commodore Harmony, Chief of the Bureau of Yards and Docks, inspected the work upon the site of the dry dock, and directed the plaintiffs to complete the dock. By reason of the presence of the said stratum of sand and the difficulties caused thereby the completion of the dock was delayed seven months."

Simpson & Co. in the meanwhile addressed a letter to the Navy Department, stating that, owing to "circumstances beyond our control," the existence of the quicksand, they had been unable to complete the dock within the time fixed by the contract, and requesting an extension of four months. This request was granted.

Statement of the Case.

"During the entire period in which the plaintiffs were engaged in the construction of the work they did not at any time give notice of any claim, or claim or demand any sum of money on account of any extra work or materials furnished by them in or about the construction of the said dry dock; nor was any officer or agent of the Government apprised of such a claim until the receipt of the letter of Messrs. Goodrich, Deady & Goodrich, attorneys for the assignees of the plaintiffs, dated April 11, 1893."

As the work progressed estimates thereof were made as required by the contract, and the amount, less the ten per centum reserved, was regularly paid to the contractors. Moreover, additional piling being required, a supplementary estimate thereof was made, the price for the same fixed, and the amount was paid to the contractors.

The dock was completed May, 1890, and a board was appointed to inspect it, and upon a favorable report the dock was finally received by the United States, and a claim for ten per cent, which had been retained on the amount of the whole work was presented by the contractors, was audited and paid, and a full and final receipt was given on June 17, 1890. The relations between the contracting parties in reference to the dock then terminated, and no question was raised between them as to any extra claim or allowance until nearly three years after the final settlement, that is, on April 11, 1893, when the attorneys of the Simpson Dry Dock Company, as assignees of the claim of J. E. Simpson & Co., addressed a letter to the Secretary of the Navy, claiming for extra services rendered and material furnished in the construction of the dry dock. This claim was based upon the theory that the site of the dry dock was not "available, owing to the unfavorable and unstable character of the soil," and hence that the Government was liable to the contractors in the sum of $174,322. This demand not having been complied with, the present suit was brought, the claim being for a much larger sum than that stated in the letter of the attorneys, and being made on behalf of the members of the firm of J. E. Simpson & Co., as owners thereof.

Mr. James H. Hayden for appellants. *Mr. Joseph K. McCammon* was on his brief.

Mr. George Hines Gorman for appellees. *Mr. Assistant Attorney General Pradt* was on his brief.

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

Considering the facts above stated, it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation. The rule by which parties to a written contract are bound by its terms, and which holds that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders by reference to the negotiations which preceded the making of the contract, or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement. The principle was clearly announced in *Brawley* v. *United States*, 96 U. S. 168, 173, where it was said:

"All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

Before measuring the claim by the contract, it is essential to clearly define the exact predicate upon which the demand necessarily rests. Reducing all the contentions of the claim-

ant to their ultimate conception, they amount simply to the proposition that the United States by the written contract guaranteed the nature of the soil under the site of the proposed dock, and assumed the entire burden which might arise in case it should be ascertained, during the progress of constructing the dock, that the soil under the selected site differed to the detriment of the contractors from that delineated upon the profile plan which had been made by an officer of the United States. Considering the contract itself, it is clear that there is nothing in its terms which supports, even by remote implication, the premise upon which the claimants must rest their hope of recovery. The contract imposed upon the contractors the obligation to construct the dock according to the specifications within a designated time for an agreed price upon a site to be selected by the United States. We look in vain for any statement or agreement or even intimation that any warranty, express or implied, in favor of the contractors was entered into concerning the character of the underlying soil. The only word which it is claimed supports the contention that a warranty was undertaken by the United States as to the condition of the soil is the statement, found in the opening portions of the specifications, that the dock was to be built in the navy yard upon a site which was "available," and great stress was laid in the argument at bar upon this word. But the word "available" intrinsically has no such meaning as that sought to be given it. It certainly cannot be said that the site selected for the dock was not available for the purpose, since one has been actually erected thereon. It is conceded in argument that the word "available" has not naturally the meaning which must be attributed to it in order to support the contention that there was a warranty as to the condition of the soil. But it is said the word should be construed as having such signification, because bidders were referred to the commandants of the navy yards for information as to the sites of the docks, and the plan showing the result of the examination made upon a portion of the yard was submitted to them. In other words, whilst admitting the rule that the contract is the law of the case, and

that the rights and obligations of the parties are to be alone determined from its context, the argument invokes a departure from that rule, and asks that the contract be so construed as to create a right in favor of one of the parties in conflict with the natural significance of the language of the contract, because of antecedent negotiations which took place between the parties.

Aside from the contradiction which this contention involves, the meaning now claimed for the word "available" cannot be adopted without departing from the intention of the parties as manifested by the terms of the contract, and the documents forming part of it, and such meaning cannot moreover be sanctioned without doing violence to the context of the contract. The advertisement for bids was made in April, 1887. The bid and specifications which accompanied it were drawn by the firm, and were submitted in June, 1887. The advertisement to which they were an answer called for a full and explicit statement of what was proposed to be done by the contractors and what were the requirements upon which they expected to rely. The contractors were experienced and competent dock builders. If it had been their intention to only undertake to build the dock for the price stipulated, provided a guarantee was afforded them by the United States that the soil upon which the dock was to be constructed was to be of a particular nature conforming to a plan then existing, a purpose so important, so vital, would necessarily have found direct and positive expression in the bid and specifications, and would not have been left to be evolved by a forced and latitudinarian construction of the word "available," used only in the nature of a recital in the specifications and not in the contract. The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States without any express stipulation that there was a warranty in their favor that the ground selected should be of a defined character, precludes the conception that the terms of the contract imposed such obligation on the Government in the absence of a full and clear expres-

sion to that effect, or at least an unavoidable implication. This is made clearer by other portions of the contract and specifications.

The seventh paragraph of the contract contained a stipulation that "the construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid." Now, the recital in the specifications as to an "available" site is only contained in the opening clause thereof, and naturally suggests only that it relates solely to some place in the yard which should be selected in the discretion of the Government suitable for the erection of a dry dock. So also in the specifications as to the materials to be furnished, which follow the recital as to the location of the dock, there is not contained a word implying that a particular piece of ground in the navy yard, having soil of a specially stable character, was to be the site on which the dock was to be placed. The contrary, however, is clearly implied from the provisions as to foundation and other piling which were to be used in supporting and enclosing the structure. The foundation, brace and cross-cap piles, it was stipulated, were to be "of such length as may be required for the purpose, and well driven to a firm bearing," while it was stipulated that the sheet piling should be "driven close and to such depth as may be found necessary to make good work;" and these provisions were followed by a clause reciting that "should the character of the bottom be found such as to warrant a modification of the pile system of floor construction, a concrete bed of not less than six feet in thickness may be substituted for the foundation piles."

Light is thrown upon the plain meaning of the contract by the conduct of the parties in the execution of the work. It is not pretended that, when the character of the subsoil was discovered, the slightest claim was preferred that this fact gave rise to an extra allowance. The fact is that the contractors proceeded with the work, obtained delay for its completion, made their final settlements and received their last payment without ever asserting that any of the rights which they now claim were vested in them. Without deciding that such con-

duct would be decisive if the claim was supported by the contract, it is nevertheless clear that it affords a just means of adding forceful significance to the unambiguous letter of the contract and the self-evident intention of the parties in entering into it.

Judgment affirmed.

HOME FOR INCURABLES *v.* NOBLE.

COLVILLE *v.* AMERICAN SECURITY AND TRUST COMPANY.

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

Nos. 57, 61. Argued November 9, 10, 1898. — Decided January 3, 1899.

Mrs. Ruth died on the 16th of June, 1892, having on the first day of the same month and year executed both a will and a codicil. After revoking all previous wills and codicils and directing the payment of debts and funeral expenses, the will bequeathed all the real, personal or mixed property to the American Security and Trust Company for the benefit of a granddaughter, Sophia Yuengling Huston, during her natural life. On the death of the granddaughter the will provided that the trust should end, and that it should be the duty of the trustee to pay over to the Hospital of the University of Pennsylvania the sum of five thousand dollars for purposes stated, and to deliver all the "residue and remainder of the estate of whatever kind" to the Home for Incurables, to which corporation such residue was bestowed for a stated object. The codicil was as follows: I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress. *Held*, That the effect of the codicil was to revoke the bequest of five thousand dollars, made by the will in favor of the Hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil.

Mary E. Ruth died on the 16th of June, 1892, having on the first day of the same month and year executed both a will

and a codicil. After revoking all previous wills and codicils and directing the payment of debts and funeral expenses, the will bequeathed all the real, personal or mixed property to the American Security and Trust Company for the benefit of a granddaughter, Sophia Yuengling Huston, during her natural life. On the death of the granddaughter the will provided that the trust should end, and that it should be the duty of the trustee to pay over to the Hospital of the University of Pennsylvania the sum of five thousand dollars for purposes stated, and to deliver all the "residue and remainder of the estate of whatever kind" to the Home for Incurables, to which corporation such residue was bestowed for a stated object. The codicil unquestionably gave to Emeline Colville a bequest of five thousand dollars. The will and codicil are printed in full in the margin.[1]

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[1] I, Mary Eleanor Ruth, residing in the city of Washington and the District of Columbia, being of sound and disposing mind and memory, do make and publish and declare this to be my last will and testament, hereby revoking and making null and void any and all former wills and codicils by me at any time made.

First. I direct my executor hereinafter named to first pay out of my estate my funeral expenses and all just debts.

Second. I give, devise and bequeath all of my estate, real, personal or mixed, whether in possession, reversion or remainder, now acquired or hereafter to be acquired, and wheresoever situate, to the "American Security and Trust Company" of Washington city, District of Columbia, its successors and assigns, in trust nevertheless for the following uses and purposes only, that is to say —

To invest and to reinvest the proceeds of my said estate in its discretion from time to time in any of the following classes of securities; that is either in United States bonds or in municipal or state bonds or in first mortgage bonds of dividend paying railroads or in loans secured by first trusts upon real estate in the District of Columbia, said loans not to exceed three fourths market value of said real estate; and to pay over so much of the annual income from said investments and reinvestments to the guardian or guardians of my granddaughter Sophia Yuengling Huston, as may be sufficient to provide for her maintenance, education and support until she becomes of the full age of twenty-one years, after which period the entire income so annually received from said investments and reinvestments shall be paid over by said trustee to my said granddaughter for her sole use and benefit for and during the period of her natural life. Provided, however, that the income thus provided for my said granddaughter for and during

Statement of the Case.

In October, 1895, the American Security and Trust Company, alleging the death of the granddaughter and the termination of the trust, filed a bill to obtain a construction of the will and codicil, to the end that it might be enabled to distribute the estate, and thus be legally discharged from all

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the term of her natural life shall sooner cease and determine at any time when it is ascertained by my said trustee that any part of my said income shall have been given by said granddaughter, or in anywise expended by or through her for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston given absolutely to her said mother. In case the income shall so cease and determine before the death of my said granddaughter then said income, and all accumulations thereof and the entire principal of said trust estate shall be disposed of as provided in the next succeeding item of this my last will and testament.

I further authorize my aforesaid trustee to sell any portion of the estate herein conveyed to it in trust as aforesaid and to invest and reinvest the proceeds as hereinbefore provided, giving to purchasers good and sufficient deeds or other evidences of title, without obligation upon the part of said purchasers to see to the application of the purchase money.

Third. In the event of the death of my said granddaughter Sophia Yuengling Huston, or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the "American Security and Trust Company" shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security and Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

All the residue and remainder of my said estate of whatever kind after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the "Home for Incurables" at Fordham, New York city, in the State of New York, its successors and assigns, forever to be used by said "Home for Incurables" to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth.

Fourth. I nominate and appoint Mary Robinson Wright, wife of J. Hood Wright, of New York city, and Mary Robinson Markle, wife of John Markle, of Hazleton, Pennsylvania, and the survivors of them, to be the guardians or guardian of the property and the person of my said granddaughter Sophia Yuengling Huston, they and each of them being my valued friends and having consented to act in that behalf.

Fifth. I hereby nominate and appoint the "American Security and

obligations in the premises. The bill charged that, considering the will and codicil together, there was uncertainty whether the five thousand dollars given by the codicil to Mrs. Colville revoked the bequest in favor of the University of Pennsylvania or substituted Mrs. Colville, in whole or only in part, in the place and stead of the Home for Incurables as to the gift in the will to that institution.

The Hospital of the University of Pennsylvania, the Home for Incurables, Emeline Colville and the heirs at law of the decedent were made parties to the bill. The Hospital of the University of Pennsylvania by its answer denied that there was any ambiguity in the will in regard to the bequest made to it, and averred that such bequest was in nowise impaired by the codicil. The Home for Incurables, although conceding by its answer that there was an ambiguity arising from the will and codicil considered in juxtaposition, yet alleged that the codicil did not in any respect diminish the bequest and devise of the residuum made to it by the will, or, if it did, operated to do so only to the amount of five thousand dollars. Emeline Colville, by her answer, whilst admitting that there was ambiguity in the will and codicil considered together, averred that such ambiguity was patent, and was resolvable by settled rules of construction. She averred that, applying such rules, it was clear that the codicil operated to revoke the bequest and devise of the residuum of the estate made in favor of the Home for Incurables, and

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Trust Company" of Washington city, District of Columbia, to be the sole executor of my estate.

I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will.

Counsel for Parties.

had substituted Mrs. Colville as the residuary devisee after the payment of the amount of the bequest in favor of the Pennsylvania institution. The heirs at law by their answer, whilst admitting that the codicil gave Emeline Colville five thousand dollars, also asserted that the gift of the residue made by the will, in favor of the Home for Incurables, was revoked by the codicil, and therefore that after payment of the legacy of five thousand dollars given to the Hospital of the University of Pennsylvania, and a like amount due to Mrs. Colville under the codicil, the remainder of the estate passed to them, since as to such remainder the decedent was intestate.

The trial court found that the codicil gave Emeline Colville five thousand dollars, and substituted her to the bequest made in favor of the Hospital of the University of Pennsylvania; hence, it decreed Mrs. Colville entitled to the five thousand dollars and that the Pennsylvania corporation took nothing. It further decreed that the other provision of the will, that is, the disposition of the residuary estate in favor of the Home for Incurables, was unaffected by the codicil.

The Court of Appeals, to which the controversy was taken, whilst agreeing that the codicil gave Mrs. Colville five thousand dollars, and that she was entitled to this sum, held (the Chief Justice dissenting) that the effect of the codicil was to revoke the bequest and devise of the residuum in favor of the Home for Incurables, and therefore that Mrs. Ruth, as to the entire remainder of her estate, after paying the legacies to the University of Pennsylvania and Mrs. Colville, had died intestate, consequently that the residue of the estate should be distributed among the heirs at law. 10 App. D. C. 56.

Mr. George H. Yeaman and *Mr. J. S. Flannery* for the Home for Incurables. *Mr. George C. Kobbe* was on their brief.

Mr. Henry P. Blair for the Hospital of the University of Pennsylvania.

Mr. Henry Thompson for Mrs. Colville. *Mr. Edwin Sutherland* filed a brief for same.

Mr. Henry Randall Webb and *Mr. John Sidney Webb* for Mrs. Noble and others.

Mr. William A. McKenney submitted on behalf of the American Security and Trust Company.

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

It will subserve clearness of understanding to accurately define at the outset the real contentions which underlie the issues presented.

It is not gainsaid by either of the beneficiaries under the will that the plain intention of the testatrix expressed in the codicil was to give Mrs. Colville the sum of five thousand dollars. Indeed, assertion that there was doubt on this subject could not reasonably be made in view of the explicit terms of the codicil. The uncertainty which it is alleged exists in the codicil is solely as to which one of the beneficiaries, named in the will is to be affected by the payment of the sum given by the codicil. Each of those benefited by the will in substance asserts that the codicil is certain in so far as it manifests the intention of the testatrix to give, and that it is equally certain as to the fund from which the payment is to be made, provided such fund is found to be the provision made by the will in favor of the other. The arguments hence at once resolve themselves into the single assertion that, although the gift made by the codicil is certain, its enforcement may or may not be possible, depending on the particular fountain from which it may be concluded the testatrix intended the stream of her benefaction should flow. And although differing in form of statement, the contentions upon which the legal heirs and Mrs. Colville base their claim of right to the residuary estate substantially conduce to a like, although more aggravated, result. The first (the legal heirs) concede the certainty of the intention of the testatrix as expressed in the codicil to give a specific sum to Mrs. Colville, but claim that in the execution of this defined purpose the testatrix

brought about uncertainty as to the entire residuum of her estate, since intestacy, it is claimed, was created in that regard. The second (Mrs. Colville), whilst equally granting the clear purpose of the testatrix, by the codicil, to give her only the sum of five thousand dollars, yet argues that this purpose has been so expressed as not only to give the sum intended but the entire remainder of the estate besides.

Before approaching the text of the will and codicil we will notice an erroneous statement of the rule of law by which it is claimed the assertion that the codicil is uncertain is to be tested, and will also state the general scope of the power which courts of equity will exert to correct mistakes in wills and the cardinal rule of construction which they adopt in so doing.

It is strenuously argued that unless it be found that the codicil takes away from one of the beneficiaries named in the will the whole or a portion of what the will gives, by language as clear and as free from ambiguity as that contained in the will, the codicil is void for uncertainty, and the provisions of the will remain unaffected. This broad proposition is unsound, and the authority by which it is apparently supported has been explained or qualified. Thus in *Randfield* v. *Randfield*, 8 H. L. 225, Lord Campbell (p. 234) stated the rule as follows:

"The *ratio decidendi*, upon which it is said that the Vice Chancellor held that no operation is to be given to the limitation over on the death of the son without issue, 'If you have a clear gift it shall not be cut down by anything subsequent, unless it is equally clear,' appears to me to be insufficient. If there be a clear gift, it is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down, but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity."

And in the same case, Lord Wensleydale, at p. 237, said:

"The gift being in terms absolute cannot be cut down, unless there is a sufficiently clear indication of an interest [intent?] to defeat it by the subsequent clause. I quite agree with the Lord Chancellor in the construction of those words

to which he referred, that you need not have a clause equally clear, but it must be reasonably clear, and the clause to which that effect is attributed by the respondents is capable of a construction confining its effect to the real estates only."

And this rule of reasonableness is applicable, with peculiar potency, to a case like the one now before us, where the effect of defeating the codicil for uncertainty will confessedly frustrate the clear intention of the testatrix. In this connection the language of Lord Brougham, concurred in by the House of Lords in *Winter* v. *Perratt*, 6 Mann. & Gr. 314, 359, is pertinent:

"We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than another, before we reject the whole. It is true the heir at law shall only be disinherited by clear intention; but if there be ever so little reason in favor of one construction of a devise rather than any other, we are, at least, sure that this is nearer the intention of the testator, than that the whole should be void and the heir let in.

"The cases where courts have refused to give a devise any effect, on the ground of uncertainty, are those where it was quite impossible to say *what* was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested, and seemed equally entitled to the preference. . . . On this head, it may further be observed, that the difficulty of arriving at a conclusion, even the grave doubt which may hang around it, certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility; the doubt so great that there is not even an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to

regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases, where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty."

No less clearly marked out is the conceded authority of a court of equity to correct mistakes in wills and to enforce the real intention of the testator by giving that construction which accomplishes such purpose. Story, 1 Eq. Jur. 12th ed. p. 174, says:

"SEC. 179. In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the Statute of Frauds, which requires wills to be in writing, (whatever may have been the case before the statute,) parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.

"SEC. 180. But the mistake, in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will. Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity. So, if there is a mistake in a name, or description, or number of the legatees, intended to take, or in the property intended to be bequeathed, equity will correct it."

In *Hardenbergh* v. *Ray*, 151 U. S. 112, at p. 126, the court, through Mr. Justice Jackson, thus stated the doctrine:

"The cardinal rule for the construction of wills, to which all other rules must bend, as stated by Chief Justice Marshall in *Smith* v. *Bell*, 6 Pet. 68, 75, is, that 'the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the *will* of the person who makes it, and is

defined to be "the legal declaration of a man's intentions, which he wills to be performed after his death." These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.'" See also *Colton* v. *Colton*, 127 U. S. 300.

We come then to the text of the will and codicil in order to consider, first, whether the bequest and devise of the remainder, which the will makes, is in whole or in part affected by the codicil; and, second, if not, whether the codicil substitutes Mrs. Colville to the bequest in favor of the Hospital of the University of Pennsylvania, thereby revoking the gift of five thousand dollars made to the said hospital and conferring that sum upon Mrs. Colville.

The language of that portion of the will with which we are now concerned is as follows:

"Third. In the event of the death of my said granddaughter Sophia Yuengling Huston or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the 'American Security and Trust Company' shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security and Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

"All the residue and remainder of my said estate of whatever kind after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the 'Home for Incurables' at Fordham, New York city, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables,' to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth."

The codicil says:

Opinion of the Court.

"I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

"In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will."

It is apparent that the portions of the will which are in question contain but two provisions, first, a bequest of five thousand dollars to the Hospital of the University of Pennsylvania, and, second, a bequest and devise of the entire remainder of the estate to the Home for Incurables. This is so self-evident as to require nothing but statement. The codicil, it is obvious, makes one bequest only, that is, five thousand dollars to Mrs. Colville. It points out the source whence this sum is to be taken, by designating the particular fund created by the will from which the same is to be obtained. This designation is made in a twofold way : First, by naming the person in whose favor the will gives a right, thereby pointing out that it is the fund given to such person which is to be drawn on in order to execute the gift in favor of Mrs. Colville. Second, it also designates the source whence the five thousand dollars is to be taken, by describing the character of the bequest in the will which is to be used to pay the legacy created by the codicil. As a result the codicil revokes the bequest in the will upon which it operates and substitutes the beneficiary named in the codicil for the beneficiary under the will. The controversy arises from the fact that there is conflict between the two designations made by the codicil, the name on the one hand and the character of the thing given on the other.

This conflict plainly appears from a consideration of the text of the codicil: "I hereby revoke and annul the bequest therein" (that is, in the will) "made by me to the Home for Incurables at Fordham, New York city, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville." That these words show a change of purpose as to a gift of five thousand dollars found in the will and a substitution of the new beneficiary for the one mentioned in the will, is beyond reasonable doubt demonstrated by the text. The revocation made by the codicil is but consequent on the gift to the new legatee of "the" sum "heretofore in my will bequeathed," and thus makes it patent that the revocation and the gift are truly one and the same act of volition, and that they arise from and depend one on the other. Which then of the two designations in the codicil contained is the controlling one, or, otherwise stated, which was mistakenly used by the testatrix?

The language revoking and annulling in the codicil is "the bequest therein (that is in the will) made by me." The gift by the codicil is a bequest of "the five thousand dollars heretofore in my will bequeathed." Now the only clause in the will to which this description can possibly apply is the single and only specific bequest found in the will, that is, the five thousand dollars given by the will to the Hospital of the University of Pennsylvania. It follows that the only possible subject to which the codicil can apply is the only one found in the will to which the description can possibly relate, and which it defines with certainty and clearness. To adopt the designation which the codicil gives when it states the name of the beneficiary of the provision in the will would absolutely destroy the description of the character of the thing stated in the codicil, since there is nothing given by the will to the Home for Incurables which comes under or can possibly be embraced within the specific description contained in the codicil of the object of gift to be affected. Now, as it is manifest from the codicil that the purpose of the testatrix was but, in making the codicil, to change the benefit by her

conferred under the will only to the extent of the bequest found in the will of five thousand dollars, and that her sole intent was to confer this gift on a new person, it would follow if the mention by the codicil of the name of the supposed recipient of the gift were allowed to control, that the thing revoked would be dominated by the mere name, the representative would be greater than the thing it stood for, and the plain intent and purpose of the testatrix, apparent on the face of the codicil, would be frustrated. Moreover, a yet more serious departure from the words and intention of the testatrix would result. It is plain from the will that the fixed design of the testatrix was to provide for the disposition of her entire estate; that is, that she assiduously sought to avoid intestacy as to any portion thereof. But if the name mentioned in the codicil be allowed to destroy the accurate description of the nature of the thing upon which the codicil operates, intestacy as to the remainder of the estate would arise, since such result must flow from the assumption that the revocation made by the codicil relates to the devise of the remainder of the estate made by the will. To hold that the name in the codicil controlled the description would be tantamount to saying that although the testatrix intended, and had stated such intention in clear language, to dispose of all her estate, yet by writing the codicil she had become intestate to the full limit of all the remainder. Besides, to thus construe the will would be to declare that the greater portion of the codicil was wholly unnecessary and meaningless; for, if the intention had been that the sum given should be paid by diminishing the remainder, then all reference to the particular gift which was to be operated upon was superfluous.

The intention of the testatrix as shown by the entire codicil is greatly fortified by considering that the context of the will and codicil establish, beyond cavil, that they were written by one familiar with the technical legal terms, and hence that the provisions found in both instruments were carefully made to conform to legal phraseology. Now, the thing revoked is called in the codicil "the bequest" made in the will, which contradistinguishes it from the bequest and devise of "all

the residue and remainder" of the estate of the testatrix "of whatever kind," which the will contains.

The reasoning by which it is contended that the designation by name found in the codicil must be held as dominant and must be construed as obliterating the clear and legally precise indication of the thing intended to be revoked, which the codicil itself affords, does not commend itself to our approval. That reasoning thus proceeds: The codicil contains a revocation and a gift. The two are wholly distinct, the one from the other. As therefore the revocation refers by name to the bequest made to the Home for Incurables, and revokes it, therefore the provision made by the will for testacy as to the entire remainder is destroyed, even although the gift made by the codicil is only of five thousand dollars, and despite the fact that it plainly, by its terms, refers solely to a bequest of that amount made in the will. But to adopt this view compels a distortion of the language of the codicil, a mutilation of its context, and a division of its provisions into two distinct and substantive matters, when in fact on the face of the codicil it contains but one provision, a revocation and a gift, the one dependent upon the other, the one caused by the other; that is to say, a revocation made in order to give and a gift made solely of the thing revoked. Indeed, to support the view that because the name of the Home for Incurables is stated in the codicil, that instrument had reference to the bequest and devise of the remainder of the estate made by the will, requires not only the arbitrary division of a single sentence in the codicil into two parts, although they are indissolubly connected, but also necessitates a misconstruction of another portion of the will. This follows from the fact that even although the revoking part of the sentence be alone taken into view, dissevered from that with which it is connected in the codicil by a union of thoughts and of words which cannot be disassociated, the codicil cannot be said to apply to the gift of the remainder without destroying the signification of its language. The thing annulled and revoked by the codicil is not the bequest and devise of the remainder, but *the bequest* by the will made. The language of the codicil

is: "I hereby revoke and annul the bequest therein made by me." But only one "bequest," that is, the one for five thousand dollars, existed in the will. To cause the word "bequest" to refer to the remainder is to enlarge its scope and significance beyond its legal import. True, to justify the construction that the word "bequest" is synonymous with a bequest and devise of the remainder, it is said that the testatrix by her will "directed" the trustee to sell the real property and to convert all the estate into personal property, and therefore that it might well have been contemplated by her that when the time arrived for a distribution of the estate that the remainder would consist solely of personal property, and therefore, in mental contemplation, the testatrix may naturally have assumed that the transmission of the remainder would be but a bequest exclusively of personal property. This overlooks the fact that the will and codicil were written on the same day; that the period when the life estate was to cease and the gifts made by the will were to become operative was necessarily wholly uncertain, and that the terms of the will and codicil evidently relate to the condition of the estate at the time that they were made and not to that which might exist at a subsequent and uncertain period. The reasoning moreover must rest on a self-evident disregard of the terms of the will, which does not, as is expressly asserted to be the case, "*direct*" the trustee to convert the real estate into personal property, but simply "*authorized*" it to so do.

And this analysis which demonstrates that the terms of the codicil do not apply to the bequest and devise of the remainder so as to bring about intestacy, also with equal conclusiveness shows that the codicil cannot be construed as reducing the bequest and devise of the remainder to the extent of the five thousand dollars which the codicil gives. To so construe it would be to obliterate the words "the five thousand dollars heretofore in my will bequeathed." It would be to assume that a revocation of a gift in the will had been made by the codicil when there was no necessity for so doing, for if the testatrix had intended simply to give five thousand dollars out of the residue, the mere expression of an intention to give

five thousand dollars would have been entirely sufficient in law to effect such purpose without the slightest necessity of any revocatory clause whatever. This is but to state in another form the abounding reason we have already mentioned, that the express result of the words of the codicil was not alone to revoke a provision of the will, but to do so solely to the extent and for the purpose of executing the new intention conceived by the testatrix by dedicating a particular and named bequest made by the will to the new purpose, and, hence, that the thing selected for revocation and substitution was accurately described in the codicil, omitting the name of the beneficiary thereof, as "*the* bequest" . . . "of five thousand dollars heretofore in my will bequeathed." Considered in its ultimate aspect, the proposition that the codicil gave five thousand dollars to the legatee named therein out of the remainder necessarily affirms that the codicil relates to the remainder, and therefore asserts that the testatrix intended not simply to revoke in order to substitute the new beneficiary to the specific sum revoked, but to create an independent provision wholly disconnected from the bequest made by the will. But this cannot be maintained without striking out the major part of the codicil, and thus frustrating the plain intention of the testatrix unambiguously expressed in the letter and obviously within the spirit of the instrument.

As, then, the codicil does not, in whole or in part, refer to the bequest and devise of all the residue and remainder made by the will in favor of the Home for Incurables, it remains only to consider whether it operates upon the bequest of five thousand dollars made by the will in favor of the Hospital of the University of Pennsylvania. If it does, it substituted the legatee named in the codicil for the institution in question. If it does not, the codicil is void for uncertainty, since there is no other source from which the sum to execute the gift which it makes can be taken. Conversely it results that all the reasoning by which it has become manifest that the codicil did not either apply to the gift of the remainder, establishes that it does so apply to the gift made by the will in favor of the Hospital of the University of Pennsylvania. In

the first place the gift to that corporation is the only specific bequest found in the will, and in the second place it is of the same amount as that named in the codicil. It is therefore embraced within the strictest letter of the description given by that instrument, "the bequest therein (in the will) made by me," and "the five thousand dollars heretofore in my will bequeathed." And a consideration of the whole scope of the will strengthens the force of the language of the codicil. The bequest of five thousand dollars given by the will to the Hospital of the University of Pennsylvania was to be used by it "to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth." The bequest and devise of "all the residue and remainder of my said estate of whatever kind" in favor of the Home for Incurables was "to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth." The purpose then of both gifts was the same. Now, the declared motive generating the making of the codicil in favor of Mrs. Colville was "on account of her kindness to my son and myself during his and my illness and my distress." The natural interpretation of the intention upon which the three provisions rests is reasonably as follows: Having provided for the perpetuation of the memory of the son by the execution of works of charity of substantially the same nature by two different institutions, the one by the use of five thousand dollars to support one bed, and the other and more important by the application of all the residue and remainder of the estate to support one or more beds, when the mind of the testatrix came to the conclusion that her tenderness to the memory of her son should be manifested by a gift to one who had befriended him, the means of executing this thought which she selected was this, not the revocation or impairment of the greater provision made by the will for honoring the memory of the son, but the transfer of the previous and lesser provision of five thousand dollars to the new legatee. By this means the general plan expressed by the will was unaltered,

despite the execution of the conception which the codicil embodied. It may, in consonance with reason, be considered that the testatrix, whose mind, as the codicil shows, was charged with the recollection of the purposes expressed in her will, should have inadvertently used a wrong name, especially as each of the beneficiaries under the will were to apply the thing given to a like good work. It cannot, however, without denying the reason of things, be successfully asserted that although the testatrix specifically pointed out the clause in her will which she revoked, nevertheless by the mere mistaken use of the name of the person she destroyed or intended to destroy the plain and specific description which she vividly embodied in the very sentence where the name was inadvertently stated.

From the foregoing, it results that the use of the name Home for Incurables, in the codicil, was but a mere mistaken designation, dominated and controlled by the description of the character of thing to be affected by the codicil stated therein. Guided by the principles enunciated in the authorities to which reference at the outset was made, such mere mistake may be corrected, in construing the will, by disregarding the error and following the full and accurate description which will then be contained in the instrument; and hence that the effect of the codicil was to revoke the bequest of five thousand dollars, made by the will in favor of the Hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil.

The decree of the Court of Appeals of the District of Columbia must be reversed, and the cause remanded to that court with directions to affirm the decree of the Supreme Court of the District, the costs of all parties to be paid out of the estate, and it is so ordered.

Mr. Justice Gray, not having heard the argument, took no part in the decision of this case.

SONNENTHEIL *v.* CHRISTIAN MOERLEIN BREWING COMPANY.

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

No. 45. Argued October 18, 19, 1898.—Decided January 3, 1899.

A suit against a marshal of the United States, for acts done in his official capacity, is a suit arising under the laws of the United States; and the joinder of another defendant, jurisdiction over whom is dependent upon diversity of citizenship, does not deprive the marshal of rights he would otherwise possess.

In an action assailing the validity of an assignment by an insolvent debtor with preferences, if there be a conflict as to the words used, or if the words themselves be ambiguous, the question of intent must be left to the jury.

There is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud.

Under the peculiar circumstances of this case, it was not error to submit to the jury the question of fraud referred to in the opinion of the court.

This was an action at law, brought by Sonnentheil, trustee under a deed of trust executed December 16, 1892, by Freiberg, Klein & Co., of Galveston, Texas, against the Christian Moerlein Brewing Company, an attaching creditor, and one Dickerson, whose Christian name is unknown, marshal of the United States for the Eastern District of Texas, to recover the value of a stock of goods seized by the marshal under writs of attachment in favor of the Brewing Company.

Prior to December 16, 1892, Moses Freiberg, Sam Klein and Joseph Seinsheimer were, under the firm name of Freiberg, Klein & Co., conducting a wholesale liquor and cigar business at Galveston, Texas. Having become embarrassed and unable to meet their liabilities, upon the date above named, they conveyed by deed of trust to the plaintiff Sonnentheil their stock of goods, together with their other property and the debts due them, authorizing him to take immediate possession thereof, to sell the property and collect the debts, and apply the proceeds to the payment of certain creditors named in the deed of trust. This deed was filed as a

chattel mortgage with the county clerk of Galveston County, Texas, on the day it was executed, and the plaintiff in error as trustee took immediate possession of the property therein conveyed.

Another deed of trust, dated December 17, was executed by the same parties to the same trustee to secure the same debts. This deed differed from the first only in inserting some words which had been erased from the first deed, in giving the trustee the power to compromise or sell the debts due the firm, and in binding the grantors, and each of them, in the name of the firm, to make such further assurances as to the property conveyed as would speed the execution of the trust.

Sonnentheil was holding the property in question under both of these deeds when, on December 23, 1892, a United States deputy marshal seized and took it from his possession against his protest. This seizure and dispossession were made by virtue of a writ of attachment from the Circuit Court for the Eastern District of Texas, in a suit for debt by the Brewing Company against Freiberg, Klein & Co., and the seizure was directed by an agent of the company. The Brewing Company was not secured in the deeds of trust. This suit was brought by Sonnentheil, the trustee, against the marshal and the Brewing Company to recover the value of the goods thus seized and taken from him.

The defendant demurred to the jurisdiction of the court; pleaded a general denial, and attacked the deeds of trust as void on their face, and as not having been accepted by the trustee or preferred creditors, and as having been made with the intent to defraud the unpreferred creditors of the firm, of which fraud they alleged the trustee and preferred creditors had knowledge. The specific objections urged to the deeds were that a provision allowing the trustee to compound and compromise doubtful debts due the makers was erased from the first deed before filing, as well as one authorizing each of the makers to make further assurances of title and transfer with the same effect as if made by each in person. That the makers of the first deed had, a short time prior to its execution, represented to two commercial agencies that

they were solvent, and had thereby deceived the defendant company into selling them a large amount of goods on credit; that the deeds conveyed property exceeding in value the debts secured; that the claims provided for in the deeds were also secured by solvent indorsers; that the makers had, not long before the execution of the first deed, conveyed to L. Fellman a large amount of real estate for a feigned consideration and in secret trust for themselves, and for the purpose of removing the same from the reach of their creditors, and had conveyed to others a large amount of assets to hold for their benefit; that they had made to H. Kempner a deed of trust to secure a pretended debt; that the makers of the deeds had, long prior to their execution, and whilst insolvent, entered into a conspiracy with L. Fellman, who was indorser on a large amount of Freiberg, Klein & Co.'s paper, and, with other persons, to remove the then present embarrassments of the firm and to continue business; and then, after enlarging their stock by purchases to a sufficient amount, to fail, and secure Fellman and other home creditors, and that the deeds of trust were the result of this conspiracy.

The plaintiff replied, denying the allegations of the answer, and alleging acceptance of the deed of trust before levy of the attachment. Upon the trial it was shown that the deeds of trust under which Sonnentheil claimed were duly executed; that the first was duly filed for record, and that Sonnentheil was in possession of the property as trustee at the time the second deed was executed; that the debts preferred in the deeds amounted to about $140,000, all of which, except $10,000, were secured by the accommodation indorsement of Fellman & Grumbach, and none was secured otherwise; that several of the creditors had accepted the deed of trust before the levy of the attachment, and some of the secured debts were paid thereafter.

The jury returned a verdict for the defendants, whereupon the case was taken by the plaintiff to the Circuit Court of Appeals, and the judgment of the court below was there affirmed. 41 U. S. App. 491. Thereupon the plaintiff sued out a writ of error from this court.

Mr. A. H. Willie and *Mr. J. M. Wilson* for plaintiff in error.

Mr. F. Charles Hume for defendants in error.

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

1. At the last term of this court motion was made to dismiss the writ of error upon the ground that under section 6 of the act of Congress of March 3, 1891, establishing the Circuit Courts of Appeals, the judgment of the Court of Appeals affirming the judgment of the Circuit Court was final. By this section the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction depends entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States. In this case the plaintiff Sonnentheil was a citizen of the State of Texas; the defendant Brewing Company was a corporation created by the laws of Ohio, and a citizen of that State, and Dickerson a citizen of the State of Texas; but it also appears upon the face of the original petition that Dickerson was marshal of the United States for the Eastern District of Texas, and that he made the seizure of the goods in question through his deputy, John H. Whalen, and under a writ of attachment sued out by the Brewing Company against Freiberg, Klein & Co. as defendants. It thus appears that the jurisdiction of the Circuit Court did not depend entirely upon diversity of citizenship between the plaintiff and the Brewing Company, but upon the fact that one of the defendants was marshal of the United States, and was acting in that capacity when he seized the goods in question.

Had the action been brought against the marshal alone there can be no doubt that the Circuit Court would have had jurisdiction of the case as one arising under the Constitution and laws of the United States. *Feibelmann* v. *Packard*, 109 U. S. 421; *Bachrack* v. *Norton*, 132 U. S. 337. It is true that in these cases the action was against the marshal and

the sureties upon his bond, but there is no difference in principle. The right of action in both cases is given by the laws of the United States, which make the marshal responsible for trespasses committed by him in his official character. *Bock* v. *Perkins*, 139 U. S. 628; *Buck* v. *Colbath*, 3 Wall. 334; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593. If suits against a bank or railways chartered by Congress are suits arising under the laws of the United States, as was held in *Osborn* v. *U. S. Bank*, 9 Wheat. 738, and in *Pacific Railway Removal cases*, 115 U. S. 1, with even greater reason must it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category.

The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was *one*, and that a case in which the jurisdiction was not dependent *entirely* upon the opposite parties to the suit being citizens of different States. Had two suits been brought, one of them would undoubtedly have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendants in a single action, jurisdiction of that action was not *wholly* dependent upon either consideration. Had the jurisdiction of the Circuit Court been originally invoked solely upon the ground of diversity of citizenship as applied to the Brewing Company, the case would have fallen within the *Colorado Central Mining Company* v. *Turck*, 150 U. S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application.

The record contains twenty-three assignments of error, most of which it will be unnecessary to consider separately. For the purposes of this decision they are reducible to three.

2. Several of these assignments are based upon an alleged error of the court in submitting to the jury the question whether the deed of trust was accepted by any of the preferred creditors before the levy of the attachment.

Under the laws of Texas it is conceded that the instruments in question were deeds of trust, in the nature of chattel mortgages, under which the proceeds of the property sold were, after paying expenses, to be appropriated to the payment of the debts enumerated in the deeds, and any surplus remaining to be turned over to the makers of the instrument, and that such a deed of trust must be accepted by some *bona fide* creditor secured therein in order to give it effect.

In this connection the plaintiff requested the court to charge that "the deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, *bona fide* debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent."

This the court refused, and in lieu thereof charged that the deed, upon its face, was a legal instrument; that it differed under the laws of Texas from an assignment in the fact that an assignment presumes that "all the creditors named accepted it. In order to make a deed of trust operative it is necessary that the parties for whose benefit it is made should accept it. It is not necessary that the acceptance should be in writing, nor is there any particular form of acceptance. By the term 'acceptance' it is simply meant that when they understand what has been done, they consent to it; they agree to it, no matter in what form that may be done. Anything that shows that after being informed of what has been done, that with a knowledge of these facts, they assent to it, or they agree to it, constitutes and is, in fact, an acceptance. . . . I hold as a matter of law that if you find as a matter of fact that if *any creditor* accepted the terms of this instrument before the levy of the attachment, and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed that the entire property named in this deed

passed to the trustee, and in this action he may recover for whatever it is shown the property was worth at the time and place it was taken."

To the charge as thus given exception was taken upon the ground that it left the question of the acceptance of the deed of trust by the beneficiaries to the determination of the jury, when such acceptance was a question of law which should have been determined by the court; that the entire and uncontradicted proof showed that before the levy of the attachment, the deed of trust had been accepted by a portion of the beneficiaries named therein, and also by the trustee, and that there was no question of fact for the jury to determine.

The evidence upon this point was that the deed was made on December 16, 1892, and filed in the county clerk's office the same night, and that the goods were seized by the marshal under the attachment of the Brewing Company on December 23; that one Fry was one of the creditors secured in the deed; that he was informed of the deed of trust the night it was executed, and that he was secured in it. He answered that it was all right, and repeated the same thing next day.

Of the firm of Adoue & Lobit, who were also *bona fide* creditors secured by the deed, Adoue testified as follows: "The assignee, Sonnentheil, came to our office in the morning before twelve o'clock and told me that we were one of the secured creditors in the trust deed, and he would expect me to give him my assistance in the management of the business. I said I would, and for that purpose he would call a meeting later on. That was my notice of the failure. I answered him in a few words. Cannot exactly recall them. I said it was all right; very glad he was assignee; hoped we would get our money back. I attended two or three meetings. . . . I did more than indicate my acceptance of the security that was given me by the deed of trust. We acted there as if it were our own property. We were discussing how it was best to dispose of it so as to get our money out of it; that was my idea."

Lobit, his partner, testified as follows: "When I learned of the failure I also learned that the notes which we held were secured by the deed of trust. This I also learned from the

newspaper. I also talked with Moses Freiberg a few days after the deed of trust was made. He regretted the failure and was sorry. I told him that I was satisfied, inasmuch as they had protected us in the deed of trust, and that I supposed they had done the best they could, and we were satisfied with it."

One Marx, the Galveston agent of S. A. Walker, a creditor of the firm, also testified: "I learned of it next morning after it occurred. Did not know of it before. I talked to Fellman about the deed of trust. He was endorser of Walker's paper; did not talk particularly to any member of the firm of Freiberg, Klein & Co.; I accepted under the deed of trust, probably the next day, I think to Joe Seinsheimer. I assented to the deed of trust securing Walker. I was authorized to do so for Walker."

Of course, if the acceptance had been in writing, the construction of such writing would have been a question for the court. With reference to parol understandings, the rule is that if there be any conflict as to the words used, or if the words themselves be ambiguous, the question of intent must be left to the jury. Notwithstanding the testimony of these witnesses was so positive to the effect that they accepted the trust, we are of opinion that it was not improper to submit the question to the jury. In its charge the court instructed the jury that the creditors who accepted the deed of trust must themselves be free from the taint of fraud, and the question of fraud was so connected with that of acceptance that it was possible for the jury to have found that the accepting creditors had knowledge of the fraud at the time of their acceptance. They were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, *Lomer* v. *Meeker*, 25 N. Y. 361, 363; *Elwood* v. *Western Union Tel. Co.* 45 N. Y. 549, 553, the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.

Munoz v. *Wilson*, 111 N. Y. 295, 300; *Dean* v. *Metropolitan Elevated Railway*, 119 N. Y. 540, 550; *Canajoharie Bank* v. *Diefendorf*, 123 N. Y. 191, 200; *Volkmar* v. *Manhattan Railway*, 134 N. Y. 418, 422; *Rumsey* v. *Boutwell*, 61 Hun, 165, 168; *Roseberry* v. *Nixon*, 58 Hun, 121; *Posthoff* v. *Schreiber*, 47 Hun, 593, 598.

3. Upon the trial it was insisted that the deeds were void upon their face, but the court held them to be valid, and we see no reason to question the correctness of its conclusion. Upon the question of actual fraud, which was the main issue in the case, the court charged the jury as follows: "If you find from the evidence that any one creditor had accepted the deed of trust before the levy of attachment, and that such creditor was not guilty of fraud himself and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff; but on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find for the defendant."

This instruction was excepted to by the plaintiff upon the ground that it left to the jury the fact whether any of the creditors had knowledge of the fraudulent intent — if any there were — in the making of the deed of trust, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of any such fraudulent intent — if it existed — or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence; but, on the contrary, the uncontradicted evidence was that they had no knowledge of any such fraud, if any there was, or of any fact that would have put them upon inquiry with reference to the same.

With regard to the question of fraud in fact there was considerable testimony, but it was insisted by the plaintiff that,

so far as concerned the creditors who accepted the deed of trust, there was not a scintilla of evidence tending to show either direct knowledge of the fraud, or such information as would put a reasonably prudent person upon inquiry as to the existence of such fraud.

It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. So much depends upon the character of the business transacted by the insolvent firm, the circumstances under which the deeds are executed, the relation of the parties to one another and to the preferred creditors, the manner in which the business is subsequently conducted, the opportunities the preferred creditors had of informing themselves of the facts, that it is rarely safe to withdraw the question from the jury. Parties contemplating a fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors, that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of the fraud, might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value.

The testimony in this case indicates that as early as February, 1891, it had been discovered by Freiberg that the firm had lost considerable sums of money through Seinsheimer, one of the partners, and was in an embarrassed condition; and arrangements were made with the principal creditor of the firm, a kinsman of Freiberg, by which it was hoped to extricate themselves. This proving ineffectual, a meeting was called at the residence of one Fellman, in Galveston, which was attended by the members of the firm and by Fellman, Kempner and Grumbach, indorsers for the firm. Seinsheimer and Grumbach married sisters and were sons in law of Fellman; Kempner was a brother in law of Seinsheimer. At the time of this meeting Fellman and Grumbach, who were part-

ners in the dry goods business, were indorsers for Freiberg, Klein & Co. to the extent of $135,000. At this and other meetings which were held, the question of the solvency of the firm, and the means which should be used to protect it from failure, were considered, and arrangements were made to reduce their debts so that they could continue business. After these meetings the firm continued business as before, buying and selling goods for cash and upon credit. At these meetings it was determined that the firm should endeavor to carry on their business, but if it had to fail that Fellman should be protected at all hazards. There was also evidence to the effect that a short time prior to the failure Fellman promised to buy out their goods and let them carry on the business in his name. The testimony also tended to show that before making the deeds, a conveyance of land for something less than its value was made by the firm to Fellman for cash paid by him. Also that Seinsheimer, one of said firm, had kept from the trustee some of the bills receivable by the firm, but that the trustee, upon finding this out, had made him turn the bills over to him.

In March, 1891, a request for a report of the financial condition of the firm by a commercial agency was answered by a statement, made under the direction of Seinsheimer, showing that the assets of the firm exceeded its liabilities by $200,000, when in truth the firm was insolvent. The business of the firm was continued by the purchase and sale of goods, and the Fellman indorsements were continued by extensions and renewals.

In February, 1892, it was discovered that the firm was hopelessly insolvent, but another call from the commercial agencies for an annual report was again met by a false statement, showing assets in excess of liabilities of more than $200,000. Fellman, Grumbach and Kempner had full notice from members of the firm of all these matters.

In the summer of 1892 the failure of the firm became evident, and goods were purchased and placed in stock, with a knowledge that they could not be paid for. The credits of the firm were restricted; in some instances entirely cut off, and rumors of its insolvency circulated throughout the com-

munity. The dangerous condition of the firm became a matter of discussion among business men in Galveston, and inquiries continued to be made from abroad of the local commercial agencies as to their solvency. A demand was again made by a commercial agency in September, 1892, at the instance of the defendant Brewing Company, and was answered by another statement, showing an excess of $200,000 over all liabilities; and the Brewing Company was thereby induced to extend a further credit to the firm.

Notwithstanding the apparently desperate condition of the firm, during the months of September, October and November and up to the 16th day of December, 1892, the day of its failure, the firm made large purchases upon credit, and, early in December, Fellman, who was then in New York, was called home to participate in and direct the business. He came immediately and assumed the practical superintendence of affairs. Upon consultation with attorneys, he had the original purpose of the firm to transfer its property directly to him changed to a trust deed in favor of the creditors whose paper he had endorsed. At his request Sonnentheil, a relative of his wife, was employed as trustee, at a salary of $150 per month. He had been a business man in Galveston, but was without knowledge or experience in the particular business for which he was selected. A deed of trust was thereupon executed to Sonnentheil, as trustee, to secure home creditors and two who were not home creditors, already secured, save in a few and relatively unimportant instances, by the indorsements of Fellman and Grumbach. The property covered by the deed of trust, which exceeded in value the secured debts by about $75,000, was turned over to the trustee in pursuance of an arrangement between the firm and Fellman that the business should be continued either in Fellman's name or in the name of some one else, until a settlement could be obtained, when it was to revert to the firm.

The possession of the trustee consisted in his having the key to the storehouse in which the goods were situated, and in attending at the store some hours every day. He signed all the letters and checks, and kept control of the general

cash. The three members of the firm were each employed at a salary of $300 per month, Seinsheimer as correspondent. He also had the keeping of the daily cash receipts. The other two acted as collectors. All the employés of the firm, including the drummers, were retained in their respective positions, and at their former salaries. The firm's sign, prominently displayed over the door of the storehouse, was not removed. The business (exclusive of the purchase of goods) was conducted, with the consent of the beneficiaries, in the usual way by selling in small parcels, sometimes on credit and sometimes for cash, to the regular customers of the firm. Such customers consisted largely of barrooms throughout the State of Texas, and the purpose of the trustee was in accordance with the wish of the beneficiaries to keep these barrooms going in the usual way by selling them goods on time, so as not to interrupt their usual business, and gradually collect what they owed.

The books of the firm, the trustee claimed, were in his charge, but he admitted that all entries made in the books after the date of the failure were made therein by Seinsheimer, and not under his (the trustee's) direction, but in his capacity as a member of the firm. In fact, he claimed to be ignorant of such entries, although they showed that the books had been regularly kept just as though no change had been made in the ownership of the property.

While there is nothing in all this which proves either direct knowledge of the fraud to the accepting creditors, or positive knowledge of facts which necessarily put them upon inquiry, there is a strong probability that these creditors, who were all business men resident in Galveston, were possessed of the same information that others had regarding the failing condition of the firm. As one of the witnesses stated: "Rumors were afloat that they were slow in payments, owing largely to banks and individuals; credit refused them in some quarters, and generally that their business was not healthful. Inquiries as to the financial standing of the firm came from Northern and Eastern cities, local banks and firms. There were rumors in Galveston, general in their character and dis-

cussed among brokers, banks and merchants." It is scarcely possible that these rumors could have escaped the ears of their local creditors. It is not improbable that the peculiar relationship of the firm to Fellman was known to these creditors, as well as the fact that the assignment was intended primarily to protect Fellman, and secondarily to secure a settlement with the creditors upon terms favorable to the firm, and the subsequent return of the property to them. It is by no means impossible that they knew that the firm were making large purchases of goods on credit just before their assignment; that false representations had been made to commercial agencies of their financial standing; that the debts secured by the deed of trust were already secured by Fellman's indorsement; that the firm still remained in open possession of the stock and practically retained direction of the business, and that to the public at large there was no apparent change in its conduct or headship. Under the peculiar circumstances of this case it was not error to submit this question to the jury, and there is no criticism to make of the charge of the court in that particular. Indeed, in another case arising out of the same failure the Supreme Court of Texas held that the question of fraud was properly left to the jury. *Sonnentheil* v. *Texas Guaranty & Trust Co.*, 30 S. W. Rep. 945.

4. Error is also assigned in admitting the statement of one Werner as to interviews had between him and Freiberg and Seinsheimer subsequent to the execution of the deeds of trust, in which Freiberg is said to have asked Werner, as agent of the Moerlein Brewing Company, to give him, Freiberg, the agency for the sale of the beer, saying that "after they got a settlement they would go right ahead; the beer would not change hands at all; go to the same customers; and that the firm was in such a shape that they had to fail." This evidence was objected to upon the ground that it related to statements made by the firm after the execution of the deeds of trust, and was not known or assented to by the trustee or the beneficiaries of the trust deed, and was incompetent to affect their interests.

Werner, the witness, was agent for the Brewing Company,

living in Cincinnati. Hearing of the failure, he left home and reached Galveston three or four days after the assignment. He went immediately to the office, and met Seinsheimer and Freiberg. At this interview Freiberg made the statement in question. There is no doubt of the general proposition laid down by this court in *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161, that in an action by the vendee of personal property against an officer attaching it as the property of the vendor, declarations of the vendor to a third party, made after the delivery of the property, are inadmissible to show fraud or conspiracy to defraud in the sale, unless the alleged collusion be established by independent evidence, and the declarations fairly form part of the *res gestæ*.

The same question was again considered in *Jones* v. *Simpson*, 116 U. S. 609, in which declarations of the vendor made after delivery of the property to the vendee, but on the same day and fairly part of the *res gestæ*, were held to be admissible to show intent to defraud the vendor's creditors by the sale, it being also shown by independent evidence that the vendee shared the intent to defraud with the vendor.

In the case under consideration there was independent evidence that the vendors, Freiberg, Klein & Co., and the vendee, Sonnentheil, were engaged in a common purpose to defraud the creditors of the vendors, and the declarations in question were not mere admissions of what had already taken place, but were propositions for a further continuance of business with the Brewing Company, upon a basis which indicated that after they had obtained a settlement with their creditors, they would assume their ownership and charge of the stock and continue business as they had done before. While the propriety of admitting these declarations as against the plaintiff Sonnentheil and the secured creditors may be open to some doubt, it is entirely clear that they were admissible against Freiberg, Klein & Co., and the rights of the secured creditors were so carefully guarded in the charge to the jury that we think no harm could have resulted from allowing the jury to consider them.

We have examined the remaining assignments of error, of

which there are a large number, but the disposition we have made of the others renders it unnecessary to consider them. While the propriety of some of the rulings may admit of doubt, the objections made were extremely technical in their character, and the majority of the court are of opinion that no error was committed prejudicial to the plaintiff and to the secured creditors, and that the judgment of the Circuit Court of Appeals must therefore be

Affirmed.

UTTER *v.* FRANKLIN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 94. Argued and submitted December 12, 1898. — Decided January 3, 1899.

It was within the power of Congress to validate the bonds in question in this proceeding, issued by the authorities of the Territory of Arizona, to promote the construction of a railroad.

This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor and secretary of the Territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent bonds and coupons issued in July, 1883, in compliance with an act of the Territory "to promote the construction of a certain railroad," approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs

had been declared, both by the Supreme Court of the Territory and by this court, to be void, and therefore the petition of the relators should be dismissed.

The petition being denied by the Supreme Court of Arizona, the relators appealed to this court. No opinion was filed in the Supreme Court of the Territory.

Mr. John F. Dillon for appellants. *Mr. Harry Hubbard*, *Mr. John M. Dillon* and *Mr. William H. Barnes* were on his brief.

Mr. C. W. Wright for appellees.

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

The bonds now held by the relators were declared to be invalid by this court in *Lewis* v. *Pima County*, 155 U. S. 54, upon the ground that bonds issued in aid of railways could not be considered debts or obligations "necessary to the administration of the internal affairs" of the county, within the meaning of the act of June 8, 1878, c. 168, 20 Stat. 101.

Whether the loan commissioners of the Territory can be required to refund these obligations, and issue new bonds to the holders thereof, depends upon the effect given to certain legislation upon this subject, both by Congressional and territorial statutes. These statutes were enacted both before and after the decision in *Lewis* v. *Pima County*, *supra*.

It seems that doubts were entertained as to the validity of bonds issued in aid of railroads, in view of the fact above stated, that, under the Congressional act of 1878, the power of municipalities to incur debts or obligations was limited to such as were necessary to the administration of their internal affairs. To put this question at rest, Congress on July 30, 1886, passed an act, c. 818, to limit territorial indebtedness, 24 Stat. 170, in the second section of which it was declared "that no Territory of the United States now or hereafter to be organized, or any political or municipal corporation, or subdivision of any such Territory, shall hereafter make any sub-

scription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association." This section was undoubtedly designed to put a stop to the practice, which had grown quite common in the Territories, of incurring debts in aid of railway and other corporations.

The fourth section provided for a limit of municipal indebtedness, and then declared "that nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any Territory as to any bonds heretofore issued or contracted to be issued." This section evidently left the law where it stood before. It did not assume to pass upon the validity of any territorial act previously enacted, or of any obligations thereunder incurred; nor preclude the issue of bonds already contracted for under express provisions of law, leaving the courts to determine the validity of such acts and obligations, and the further question whether such bonds had been contracted for *in pursuance of express provisions of law.* It simply withheld its assent to, as well as its negative upon, such transactions, and declined to commit itself one way or the other. Nor did it assume to prevent the territorial legislature from legalizing the acts of any subordinate municipality as to bonds theretofore issued or contracted to be issued, leaving it to the territorial legislature to determine whether they should attempt to legalize such issues, and to the courts to pass upon the question whether this could be lawfully done. The bonds theretofore issued were left precisely where they stood before, and no attempt was made either to legalize or avoid them. Congress merely stayed its hand, and left the matter open for future consideration.

In this state of affairs the legislature of Arizona, on March

10, 1887, passed an act (Rev. Stat. Arizona, p. 361) constituting the governor, auditor and secretary of the Territory loan commissioners of the Territory, with the duty of providing "for the payment of the existing territorial indebtedness, due and to become due, and for the purpose of paying, redeeming and refunding all or any part of the principal and interest, or either, of the existing or subsisting territorial legal indebtedness," with power to issue negotiable bonds therefor. This power, however, was limited to the *legal* indebtedness of the *Territory*, and apparently had no bearing upon the indebtedness of its municipalities, certainly not upon indebtedness which had been illegally contracted. Indeed, the act is only pertinent as showing the authority under which the loan commissioners were appointed.

On June 25, 1890, c. 614, Congress passed an act, (26 Stat. 175,) approving with amendments this funding act of Arizona, "subject to future territorial legislation," the second section of which declared it to be the duty of the loan commissioners "to provide for the payment of the existing territorial indebtedness due, and to become due, or that is or may be hereafter authorized by law, and for the purpose of paying, redeeming and refunding . . . the existing and subsisting territorial indebtedness, etc." The tenth section of this act provided that the boards of supervisors of the counties, and the municipal and school authorities, should report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and that said loan commissioners should "provide for the redeeming or refunding of the county, municipal and school district indebtedness, *upon the official demand of said authorities*, in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may hereafter be allowed by law to said county, municipality or school-district, upon official demand by said authorities."

In compliance with the permit thus given by Congress for future territorial legislation, the legislature of Arizona on March 19, 1891, (Laws of 1891, p. 120,) enacted a new funding act, only the following sections of which are material:

"SECTION 1. That the act of Congress entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, be, and the same is hereby, now reënacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States."

"SEC. 7. Any person holding bonds, warrants or other evidence of indebtedness of the Territory or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at no less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

It seems, however, that the existing legislation upon the subject was not deemed adequate by the territorial legislature, since in 1895 it adopted a memorial, (Laws of 1895, p. 148,) to the effect that, under various acts of the assembly, the counties were authorized to and did issue railroad aid bonds, which were sold in the open market at their face value, and were then held at home and abroad by *bona fide* purchasers; that the validity of these bonds, though questioned, was acknowledged by the payment of interest thereon; that a repudiation of the same would work a great hardship to the holders and affect the credit of the Territory, and therefore the general assembly urged upon Congress the propriety of passing such curative legislation as would protect the holders of all bonds issued under authority of its acts, the validity of which had been acknowledged, and relieve the people from

the disastrous effects of repudiation. The memorial is printed in full in the margin,[1] and in construing the act of Congress passed in response thereto it may probably be considered as

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[1] MEMORIAL.

To the Senate and House of Representatives of the United States of America in Congress assembled:

Your memorialists, the legislative assembly of the Territory of Arizona, beg leave to submit to your honorable bodies; that —

Whereas, under various acts of the legislative assembly of the Territory of Arizona, certain of the counties of the Territory were authorized to issue in aid of railroads and other *quasi* public improvements and did under such acts issue bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons who, in good faith, invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are holders of the same; and

Whereas the validity of these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and

Whereas there has recently been raised a question as to whether these acts of the legislative assembly were valid under the organic law of the Territory, which had led to movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and

Whereas we believe that such repudiation would, under the circumstances, work great wrong and hardship to the holders of such bonds, and at the same time seriously affect the credit and standing of our people for honesty and fair dealing and bring us into disrepute:

Therefore we most strongly urge upon your most honorable bodies the propriety and justice of passing such curative and remedial legislation as will protect the holders of all bonds issued under the authority of acts of the legislative assembly, the validity of which has heretofore been acknowledged, and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and relieve the people of the Territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the Territory, and that you may so further legislate as to validate all acts of the legislative assembly of the Territory which have held out inducements for the investment of capital within the Territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the Territory, and thus relieve the honest people of the Territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people.

Resolved, That our delegate to Congress be, and he is hereby, instructed

bearing upon the intention of Congress and the exigencies the act was designed to meet.

In compliance with this memorial Congress on June 6, 1896, 29 Stat. 262, c. 339, passed an act extending the provisions of the act of June 25, 1890, and the amendatory act of 1892, (not here in question,) the first section of which provided that the above acts "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June 25, 1890, until January 1, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June 25, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided until January 1, 1897: *Provided*, That nothing in this act shall be so construed as to

to use all honorable means to bring this subject to the earnest consideration of Congress; that the secretary of the Territory be, and he is hereby, requested to transmit a copy of the foregoing to each house of Congress and to our delegate in Congress.

make the government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

This is the act upon which the relators place their chief reliance. Its evident purpose was to authorize the funding of *all outstanding bonds* of the Territory, and its municipalities, which had been *authorized by legislative enactments*, whether lawful or not, provided such bonds had been "sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized." The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved and validated, and might be funded until January 1, 1897.

We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a state legislature has over its municipal corporations. *American Ins. Co.* v. *Canter*, 1 Pet. 511; *National Bank* v. *Yankton County*, 101 U. S. 129.

Curative statutes of this kind are by no means unknown in Federal legislation. Thus, in *National Bank* v. *Yankton County*, *supra*, this court sustained an act of Congress nullifying a legislative act of the Territory of Dakota authorizing the issue of railway bonds, but validating action theretofore taken by the county voting subscription to a certain railroad company, holding it to be "equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute." In *Thompson* v. *Perrine*, 103 U. S. 806,

we also sustained a similar act of the State of New York ratifying and confirming the action of commissioners in issuing similar bonds. In *Read* v. *Plattsmouth*, 107 U. S. 568, a similar ruling was made with regard to an act of the legislature of Nebraska validating an issue of bonds by the city of Plattsmouth for the purpose of raising money to construct a high school building. See also *New Orleans* v. *Clark*, 95 U. S. 644; *Grenada County* v. *Brogden*, 112 U. S. 261; *Otoe County* v. *Baldwin*, 111 U. S. 1; 1 Dillon Municipal Corporations, § 544; Cooley's Const. Lim. 6th ed. 456; *Bolles* v. *Brimfield*, 120 U. S. 759; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Dentzel* v. *Woldie*, 30 California, 138, 145.

The fact that this court had held the original Pima County bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and of the legislation then existing.

Nor was the act intended to be confined to the outstanding *legal* indebtedness of the county. The first section of the act *requires* the funding of all outstanding obligations of said Territory and its municipalities, and all outstanding bonds, etc., of the Territory and its municipalities, "heretofore authorized by legislative enactments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 5, 1890," which said bonds, etc., "have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized;" and the second section confirms, approves and validates all bonds and other evidences of indebtedness theretofore issued under the authority of the legislature, and authorized to be funded by the first section, and declares that they "may be funded, as in this act provided, until January 1, 1897." Construing this in the light of the surrounding circumstances, and, particularly, in view of the memorial, it

is entirely clear that it was intended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of the county, whether in fact legal or not; and to put the matter still further beyond question, they are expressly declared to be legal and valid. It is true that, by the tenth section of the act of Congress of June 25, 1890, the loan commissioners were authorized to refund municipal bonds "upon the official demand of said authorities" of the municipalities, but there is no limitation of that kind in section seven of the territorial funding act of March 19, 1891, which declares that "any person holding bonds, etc., . . . may exchange the same for the bonds issued under the provisions of this act at not less than their face or par value and the accrued interest at the time of the exchange."

In addition to this, however, the act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants and other evidences of indebtedness of the Territory and its municipalities *shall* be funded with the interest thereon, etc.

We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that

The order of the Supreme Court of the Territory must be reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court.

CAPITAL NATIONAL BANK OF LINCOLN *v.* FIRST NATIONAL BANK OF CADIZ.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 72. Argued December 2, 5, 1898. — Decided January 3, 1899.

A writ of error from this court to revise the judgment of a state court can only be maintained when within the purview of section 709 of the Revised Statutes.

If the denial by the state court of a right under a statute of the United

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States is relied on as justifying the interposition of this court, before it can be held that the state court thus disposed of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which, the judgment could not have been rendered.

Though a Federal question may have been raised and decided, yet if a question, not Federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment.

No Federal right was specially set up or claimed in this case at the proper time or in the proper way; nor was any such right in issue and necessarily determined; but the judgment rested on non-Federal grounds entirely sufficient to support it.

The record discloses no Federal question asserted in terms save in the application to the Supreme Court for a rehearing, when the suggestion came too late.

The petition did, indeed, allege that the Capital National Bank was organized under the banking act, and that a receiver was appointed, who took possession of the bank's assets and of all trusts and moneys held by it in a fiduciary capacity, and the answer admitted these averments, respecting which there was no controversy; yet no right to appropriate trust funds was claimed by defendant under any law of the United States, nor was it asserted that any judgment which might be rendered for plaintiff would be in contravention of any provision of the banking act.

California Bank v. *Kennedy*, 167 U. S. 362, distinguished from this case.

THIS was an action brought by the First National Bank of Cadiz, Ohio, against the Capital National Bank of Lincoln, Nebraska, and Macfarland, the receiver thereof, in the district court of Lancaster County, Nebraska.

The petition contained five counts for moneys belonging to plaintiff received by defendant from notes transmitted to it for collection and remittance.

Each of the counts concluded thus:

"Plaintiff further says that on or before the 21st day of January, 1893, the said defendant bank then and there became and for some time prior thereto had been insolvent, and that under and in pursuance of the laws of the United States the said defendant, Macfarland, was duly appointed and is now acting as a receiver thereof, and that all the assets and trusts in and belonging to said bank and the beneficiaries thereof

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passed into the possession of and are now held by the said Macfarland for the said bank, and all trusts or moneys held or obtained by said bank in a fiduciary capacity passed into the hands of said defendant, Macfarland, and he now holds the same in the same capacity that the said bank did before he took possession thereof.

"That in the collection of said note the said Capital National Bank was acting as the agent of this plaintiff for the purpose aforesaid, and the money so collected was the property of and belonged to this plaintiff; that said amount so collected never was a part of the assets of said bank and never belonged to the stockholders thereof; that whether or not said amount was ever mixed or mingled with the true assets of said bank plaintiff is unable to state, but does allege that if the same was mixed or mingled with the assets of said bank that the same was done wrongfully and fraudulently by the officers of said bank and without the knowledge or consent of this plaintiff; that a part of the business and powers of said bank was the collection and remittance of moneys for persons and corporations, and that the said defendant bank was acting as agent for that purpose as hereinbefore alleged."

The prayer was "that an account may be taken of the trust funds to which the plaintiff may be entitled, and that a decree be entered against the said Capital National Bank and the said John D. Macfarland, directing the payment or delivery to plaintiff of the amount of said collections, and that the said amount be decreed to be a trust fund in the hands of said bank and receiver to be first paid to this plaintiff, together with interest thereon, as damages, out of any money that may have passed to or afterwards come into the possession of said bank or receiver as a preferred or special claim, and that plaintiff may have such other or further relief as in equity it may be entitled to."

Macfarland having resigned the receivership, Hayden was appointed to succeed him, and filed an answer, (stating preliminarily that he answered "as well for the said defendant bank as for and on his own account as receiver thereof,") admitting the insolvency of the defendant bank, the appoint-

ment of Macfarland as receiver and his taking possession of the bank, "with all and singular its rights, credits, effects, trusts and duties," and setting up his own subsequent appointment. With the exception of the admissions, the answer amounted to a general denial, there being a special denial of the receipt or collection by the bank or the receiver of the note mentioned in the first count.

The cause came on for hearing, and, after the default of the bank was taken and entered, was tried by the court, which made certain findings of fact, and entered the following judgment: "It is, therefore, considered, ordered, adjudged and decreed by the court that the said plaintiff, the First National Bank of Cadiz, Ohio, do have and recover of and from the said defendant, the Capital National Bank of Lincoln, Nebraska, the amount of the trust fund hereinbefore found to belong to plaintiff, to wit, eight thousand and fifty (8050) dollars, with interest thereon, at the rate of seven per cent per annum, from January 20, 1893, principal and interest amounting to the sum of eight thousand and seven hundred twenty-two and $\frac{95}{100}$ ($8722.95) dollars at the date of this decree. And it is further ordered, adjudged and decreed by the court that the said defendant, Kent K. Hayden, receiver of the said defendant, the Capital National Bank, be, and he is hereby, ordered to pay the plaintiff the amount of said trust fund in his hands, as hereinbefore found, to wit, the sum of eight thousand and fifty dollars, together with seven per cent interest thereon from January 20, 1893, as damages for the detention thereof, the said principal and interest at the date of this decree amounting to the sum of eight thousand seven hundred twenty-two and $\frac{95}{100}$ ($8722.95) dollars, out of any money now in his hands or that may come into his hands as such receiver; that when said money or any part of it is paid under this order, the same shall apply on the above judgment against said defendant bank; that the said defendant bank and said defendant, Hayden, pay the costs of this action, taxed at $50.03."

Thereupon the defendant bank, "by Kent K. Hayden, its receiver," moved for a new trial on these grounds: "1. The judgment is not sustained by sufficient evidence. 2. The judg-

ment is contrary to law. 3. Errors of law occurring at the trial duly excepted to. 4. There is error in the assessment of the amount of recovery in this, that the judgment allows the plaintiff interest on his claim from and after the failure of the Capital National Bank." The motion was overruled, a bill of exceptions duly taken, and the cause carried to the Supreme Court of Nebraska on error.

The application to that court for the writ of error assigned twenty-seven errors. Some of these asserted that certain enumerated findings of fact were not "sustained by the law;" and the 21st, 22d, 23d, 24th, 25th, 26th and 27th were:

"21. The court erred in rendering judgment against the plaintiff in error for interest upon the amounts collected by the plaintiff in error for the defendant in error.

"22. The court erred in rendering judgment against the plaintiff for the costs.

"23. The court erred in holding that money collected by the Capital National Bank was a trust fund in the hands of the receiver for the benefit of the defendant in error.

"24. The court erred in rendering judgment against the plaintiff in error for the full amount of the notes collected by the Capital National Bank.

"25. The court erred in rendering a judgment which had the effect of making the defendant in error a preferred creditor over the other creditors of the Capital National Bank.

"26. The court erred in ordering that the amount of the judgment should be paid out of any money then in the hands or that might thereafter come into the hands of the plaintiff in error.

"27. The court erred in rendering a judgment which would become a lien upon all the assets of the Capital National Bank."

The Supreme Court affirmed the judgment of the district court, and, its judgment having been entered, the receiver applied for a rehearing, assigning five reasons therefor, of which the fifth was as follows: "Because said judgment and decree of said district court so affirmed by said judgment and decree of this court adjudged the amount found due the

plaintiff therein to be a lien upon the property and assets now in the possession of the appellant or which shall hereafter come into his possession, and to be paid out of the proceeds thereof in preference and priority to other creditors of said bank, and is in violation of the provisions of the 'national bank act' of the United States under whose authority this appellant was appointed and is acting."

The petition for rehearing was denied, and thereafter this writ of error was allowed.

After the case had been docketed, the death of Hayden was suggested, and the appearance of John W. McDonald, appointed his successor as receiver, was entered.

Mr. A. E. Harvey and *Mr. John H. Ames* for plaintiffs in error. *Mr. Amasa Cobb* was on their brief.

Mr. L. C. Burr for defendant in error. *Mr. Newton C. Abbott* and *Mr. Arthur W. Lane* filed a brief for same.

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

The writ of error from this court to revise the judgment of a state court can only be maintained when within the purview of section 709 of the Revised Statutes.

If the denial by the state court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the state court thus disposed of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which, the judgment could not have been rendered.

Moreover, even though a Federal question may have been raised and decided, yet if a question, not Federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment.

Opinion of the Court.

In our opinion no Federal right was specially set up or claimed in this case at the proper time or in the proper way; nor was any such right in issue and necessarily determined; but the judgment rested on non-Federal grounds entirely sufficient to support it.

The record discloses no Federal question asserted in terms save in the application to the Supreme Court for a rehearing, when the suggestion came too late.

The petition did, indeed, allege that the Capital National Bank was organized under the banking act, and that a receiver was appointed, who took possession of the bank's assets and of all trusts and moneys held by it in a fiduciary capacity, and the answer admitted these averments, respecting which there was no controversy, yet no right to appropriate trust funds was claimed by defendant under any law of the United States, nor was it asserted that any judgment which might be rendered for plaintiff would be in contravention of any provision of the banking act.

The motion for new trial pursued a common formula, and one of the grounds assigned was that the judgment was "contrary to law," but this cannot be construed as having a single meaning, and distinctly referring to the denial of a right claimed under an act of Congress, consistently with the requirements of section 709 of the Revised Statutes as expounded by numerous decisions of this court.

California Bank v. *Kennedy*, 167 U. S. 362, is not to the contrary, as counsel seem to suppose. There the question was whether a national bank could purchase or subscribe to the stock of another corporation, and the answer averred that if the stock in question appeared to have been issued to the national bank, it was "issued without authority of this corporation defendant, and without authority of law." The grounds presented on motion for new trial, and in the specifications of error which formed the basis of the appeal to the Supreme Court of the State, asserted the want of power under the laws of the United States; and the California Supreme Court said in its opinion that the bank appealed on the ground "that, by virtue of the statutes under which it is

organized, it had no power to become a stockholder in another corporation." The general rule was not questioned that if the alleged right was not claimed before judgment in the highest court of the State, it could not be asserted in this court.

This rule was not complied with here, nor was any Federal question in terms decided, while on the contrary the judgment was explicitly rested on non-Federal grounds.

The contention of plaintiff was that the Capital National Bank had money in its hands which belonged to plaintiff; did not belong to the bank; had never formed part of its assets; and was held by the bank in trust for plaintiff.

The right to the money was considered by the trial court in the light of general equitable principles applicable on the facts, and the court adjudged that the money constituted a trust fund to which plaintiff was entitled.

The decision did not purport to affect the assets of the bank, or attempt to direct the distribution thereof, or in any way to interfere with the disposition of assets actually belonging to the bank; nor did it affect the receiver as receiver, or his appointment or authority under the banking act. As the trial court found that certain moneys held by the bank in trust for plaintiff had come into the receiver's hands, he was directed to return them, for he had no stronger title to the trust fund as against the plaintiff than the bank had.

When the case came to the Supreme Court, that court, finding no reversible error in the record, affirmed the judgment of the district court, and filed an opinion, 49 Neb. 795, stating: "This case is of the same general nature as *Capital Nat. Bank et al.* v. *Coldwater Nat. Bank*, 49 Neb. 786. It was submitted upon the same argument, and, governed by the result reached in that case, this is affirmed." From the opinion in the case thus referred to, it appears that that case, now on our docket and numbered 73, was submitted to the Supreme Court of Nebraska with this case numbered 72, and with three others, also brought here, and numbered 74, 75 and 76, and that the five cases were disposed of by the opinion in No. 73.

The Supreme Court there held that:

"A fund which comes into the possession of a bank with respect to which the bank had but a single duty to perform, and that is to deliver it to the party thereto entitled, is a trust fund, and is therefore incapable of being commingled with the general assets of such bank subsequently transferred to its receiver.

"Under the circumstances above indicated, the receiver of the bank is merely substituted as trustee, and its funds in his hands should be devoted to discharging such trust before distribution thereof is made to the general creditors of the bank."

Among other things, the court said: "It is conceded by the plaintiff in error that the relief granted by the district court was in conformity with the views expressed more or less directly by this court in *Wilson* v. *Coburn*, 35 Neb. 530; *Anheuser-Busch Brewing Association* v. *Morris*, 36 Neb. 31; *Griffin* v. *Chase*, 36 Neb. 328; and *State* v. *State Bank of Wahoo*, 42 Neb. 896, but it is urged that a reëxamination of the principles involved should satisfy us that these cases proceeded upon an erroneous view of the law as now settled. A very careful examination has been made of all cases cited in respect to the pivotal question which has already been sufficiently indicated as having been acted upon by the district court." And after reviewing these cases the court announced that it was not convinced that it should recede from the line of its former decisions.

We know of no provision of the banking act which assumes to appropriate trust funds in the possession of insolvent banks, or other property in their possession to which they have no title, and it is clear that the state courts had jurisdiction to determine whether this money was or was not a trust fund belonging to plaintiff.

The receiver made no effort to remove the litigation to the Circuit Court, contested the issues on a general denial, and set up no claim of a right under Federal statutes withdrawing the case from the operation of general law.

In these circumstances the result is that this court has no jurisdiction to revise the judgment of the Supreme Court of

Nebraska, and we, necessarily, intimate no opinion in respect of the views on which the case was disposed of.

Writ of error dismissed.

CAPITAL NATIONAL BANK OF LINCOLN *v.* COLDWATER NATIONAL BANK. CAPITAL NATIONAL BANK OF LINCOLN *v.* COLDWATER NATIONAL BANK. MCDONALD *v.* SAMUEL CUPPLES WOODEN WARE COMPANY. MCDONALD *v.* GENESEE FRUIT COMPANY. Nos. 73, 74, 75, 76.

THE CHIEF JUSTICE: For the reasons given in the opinion in *Capital National Bank* v. *First National Bank of Cadiz*, just decided, *ante*, 425, the writs of error in these cases are severally

Dismissed.

KECK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15. Argued November 10, 1898. — Decided January 9, 1899.

An indictment based upon that portion of Rev. Stat. § 3082, which makes it an offence to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise contrary to law," charging that the defendant, on a date named, "did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia," diamonds of a stated value, "contrary to law, and the provisions of the act of Congress in such cases made and provided" is clearly insufficient, as the allegations are too general, and do not sufficiently inform the defendant of the nature of the accusation against him.

An indictment for a violation of Rev. Stat. § 2865, which charges that the defendant "did knowingly, wilfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia," certain "diamonds" of a stated value, which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of the defendant and with intent to defraud the revenue, were not invoiced

Statement of the Case.

nor the duty paid or accounted for, sufficiently describes the offence to make it clear what articles were charged to have been smuggled.

Under the tariff act of 1894, c. 349, diamonds were subject to duty.

Mere acts of concealment of merchandise, on entering the waters of the United States, do not, taken by themselves, constitute smuggling or clandestine introduction.

The offence described in Rev. Stat. § 2865, is not committed by an act done before the obligation to pay or account for the duties arises.

The word "smuggling" had a well understood import at common law; and, in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at its meaning.

A review of the principal statutes enacted in this country regulating the collection of customs duties establishes that, so far as they embraced legislation designed to prevent the evasion of duties, they proceeded upon the theory of the English law on the same subject; that is, that they forbade all the acts which were deemed by the lawmaker means to the end of smuggling, or clandestinely introducing dutiable goods into the country in violation of law, and which were likewise considered as efficient to enable the offender to reap the benefits of his wrongful acts; and that therefore they forbade and prescribed penalties for everything which could precede smuggling or follow it, without specifically making a distinct and separate offence designated as smuggling, or clandestine introduction.

Whether we consider the testimony of the captain alone, or all the testimony contained in the record, it unquestionably establishes that there was no passage of the package of diamonds through the lines of the customs authorities, but, on the contrary, that the package was delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose, and that the offence of smuggling was not committed within the meaning of the statute.

THIS case was first argued on the 18th of December, 1896. On the 18th of January, 1897, it was restored to the docket for reargument, with leave to submit to the full bench on printed briefs at any time prior to the first Monday of the next March. On the 15th of February, 1897, a motion to fix a day for reargument, made by *Solicitor General Conrad* on the 1st of that month, was granted, and the case was assigned for argument on the second Monday of the next term. On the 19th and 20th of January, 1898, the case was reargued. On the 7th of the following March it was announced that the judgment below was affirmed by a divided court. On the 21st

of the same month it was announced that a motion for rehearing, in order to allow the submission of the cause to a full bench, was granted, and that the cause was taken on submission. On the 25th of April, 1898, the cause was restored to the docket for reargument, and assigned for argument on the second Monday of the next term. On the 10th of November, 1898, it was reargued.

The case then made is stated in the opinion.

Mr. Francis B. James for plaintiff in error. *Mr. Rankin Dilworth Jones* was on his brief.

Mr. James M. Beck for defendants in error. *Mr. Assistant Attorney General Hoyt* was on his brief.

Mr. Justice White delivered the opinion of the court.

The plaintiff in error was prosecuted under an indictment consisting of three counts. The first was intended to charge a violation of section 3082 of the Revised Statutes, by the alleged unlawful importation into the port of Philadelphia of certain diamonds. The second averred a violation of section 2865 of the Revised Statutes, by the smuggling and clandestine introduction, on the like date, and into the same port, of the articles which were embraced in the first count. The third count need not be noticed, since as to it the trial judge, at the close of the evidence, instructed the jury to return a verdict of not guilty.

The sufficiency of the first and second counts was unsuccessfully challenged by the accused, both by motion to quash and by demurrer. The jury returned a general verdict of guilty; and, after the court had overruled motions for a new trial and in arrest of judgment, the accused was duly sentenced. Error was prosecuted, and the case is here for review.

The assignments of error are numerous, but we need only consider the questions as to the sufficiency of the first and second counts of the indictment and the propriety of the conviction under the second count.

Opinion of the Court.

Was the first count sufficient?

This count was based upon that portion of section 3082 of the Revised Statutes, which made it an offence to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise, contrary to law."

It was charged in the count that Keck, on the date named, "did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia," diamonds of a stated value, "contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States."

As is apparent, the alleged offence averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States* v. *Carll*, 105 U. S. 611, 612; *United States* v. *Hess*, 124 U. S. 483; and *Evans* v. *United States*, 153 U. S. 584, 587, the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words "contrary to law," contained in the statute, clearly relate to legal provisions not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, "import and bring into the United States," did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the *Hess case*, at p. 486:

"The statute upon which the indictment is founded only describes the general nature of the offence prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence states no matters upon which issue could be formed for submission to a jury."

As to the sufficiency of the second count.

In this count it was charged in substance that Keck "did knowingly, wilfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia," certain "diamonds" of a stated value, which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of Keck and with intent to defraud the revenue, were not invoiced nor the duty paid or accounted for.

Two objections were urged against this count: first, that diamonds, under the law then in force, were on the free list, and hence not subject to duty; and, second, that if all diamonds were not on the free list, at least some kinds of diamonds were on such list, and the count should therefore have specifically enumerated the kinds or classes of diamonds which were subject to duty by law.

With respect to the first objection, counsel for plaintiff in error contends that all diamonds were free of duty, because of the following provision contained in the free list of the tariff act of August 27, 1894, c. 349, 28 Stat. 509, to wit:

"Par. 467. Diamonds; miners', glaziers' and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

Paragraph 338 imposes duties as follows:

"Precious stones of all kinds, cut but not set, twenty-five per centum ad valorem; if set, and not specially provided for in this act, including pearls set, thirty per centum ad valorem; imitations of precious stones, not exceeding an inch in dimensions, not set, ten per centum ad valorem. And on uncut precious stones of all kinds, ten per centum ad valorem."

It is apparent that it was not the intention of Congress to put one of the most valuable of precious stones on the free list, while all others were made dutiable. The word "diamonds," which is but the commencement of paragraph 467, was plainly designed as a heading, for convenient reference, and the semicolon following should be read as though a colon.

The other ground of objection to the second count is con-

trolled by the decision in *Dunbar* v. *United States*, 156 U. S. 185. In that case, paragraph 48 of section 1 of the tariff act of 1890 provided that opium containing less than nine per cent of morphia, and opium prepared for smoking, should be subject to a duty of twelve cents per pound. Counts charging the smuggling of "prepared opium . . . subject to duty by law, to wit, the duty of twelve cents per pound," were held to sufficiently describe the smuggled goods. Here, as in the *Dunbar case*, the words of description made clear to the common understanding what articles were charged to have been smuggled; and, for that reason, we hold the objection just considered to be without merit.

Was the conviction under the second count of the indictment proper?

The principal witness for the government was one Frank Loesewitz, a resident of Antwerp, Belgium, and captain of the steamer Rhynland, of the International Navigation Company, which vessel plied between Philadelphia and Liverpool. He testified, in substance, that on January 21, 1896, late in the afternoon, while at the residence of one Franz von Hemmelrick, a jeweller in Antwerp, he for the first time met the accused; that in his company and that of Von Hemmelrick he went to a café in the neighborhood; that during the conversation which followed Von Hemmelrick took from his pocket a small package and handed it to the witness with the statement, made in the hearing of Keck, that it belonged "to that gentleman here" (Keck); that it did not contain any valuables, and Von Hemmelrick asked the witness to oblige him by taking it over to America. The captain further testified that Keck also said that the package did not contain any valuables. The witness asked Keck where he wished the package sent, whereupon he tore off a piece of card which was lying on the table, and wrote on it the address of a person in Cincinnati, whom it subsequently developed was associated in the diamond business with Keck. The card and the package in question were produced in court and identified by the witness. Subsequently, on leaving the place, Keck requested the witness to send the package to Cincinnati from

Philadelphia by Adams Express. There was no address upon the package, and the card handed by Keck to the witness was placed by him in his pocket book or card case. Soon after, the witness crossed to Liverpool and joined his vessel there. The package was by him placed in a drawer in his (the captain's) room, where it remained undisturbed until the arrival of the ship at her dock in Philadelphia. Just as the vessel was approaching her moorings, a special agent of the Treasury Department boarded her. This special agent thus describes in his testimony what then ensued:

"Acting on information received that, at the instance of Herman Keck, the captain of the Rhynland had endeavored to smuggle diamonds, I met the steamship Rhynland upon her arrival here on the eleventh day of last February, about four or five o'clock in the afternoon. I went aboard and examined the passenger list to see if Keck was on board, or any one under that name, and I also examined the manifest to find if there were any diamonds. I found no one particularly on the passenger list corresponding to the name of Herman Keck, and no diamonds appeared on the manifest.

"The weather was very rough that day, and the boarding officers boarded just as she was coming into the dock. I then asked one of the custom inspectors to examine closely the baggage of one or two of the cabin passengers, whom I suspected, to ascertain whether they had any large quantity of jewelry, after which I went into the chart room where the captain was with Special Agent Cummings."

What occurred in the chart room between the captain and the special agent of the Treasury Department is thus testified to by the captain:

"When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'Yes.' I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally, on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that's a package of dia-

monds you have got, to be sent to Cincinnati,' and if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The special agent thus states what passed in the chart room:

"I spoke of the weather and other topics, and then I said: 'Captain,' — to whom I was unknown — 'you have a package for the Coeterman Diamond Company, the Coeterman-Keck Diamond Company, 24 West Fourth street, Cincinnati, Ohio?' I repeated the name of the company. He said, 'No; I have no such package.' I said, 'I beg leave to differ with you;' and, indicating with my fingers, I said, 'You have a small package which you received while in Antwerp.' He said, 'I have a package for Van Reeth, of 21 West Fourth street, Cincinnati, Ohio, and I will give it to you if you have an order for it.'

"At that time, I understand you to say he did not know you were a Treasury agent?

"No, sir; I was unknown.

"Had you ever met him before?

"Never met him before to know him.

"I then said, 'Captain, I have an order for them.' He said, 'Show me the order, and I will go and get the package.' I replied, 'Captain, I would like to see the package first before delivering the order, and I want to speak to you in private.'

"Was there anything on your clothes like a badge or anything else to show what you were?

"No, sir; none whatever. He was doing some writing at the time — I think finishing the log — and he asked me to wait until he finished, and I said, 'Certainly.' After the lapse of about five minutes the captain arose and said, 'You remain here, and I can go and get the package.' As soon as the captain left the chart room I quietly and unperceived by him followed him, and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it I said, 'Captain, that is the package I want.' He said, 'Where is your order?' I produced my card as United States Treasury agent.

He refused to let me have it until I was identified as a custom house officer. A young man (being) present at the conversation opposite the captain's room, who represented the steamship company, we agreed to go back to the chart room, where I again insisted on getting this package, and this young man who represented the steamship company, who was present, advised the captain to give the package to me, which the captain did."

The package referred to was found to contain five hundred and sixty-three cut diamonds of the value of about seven thousand dollars, which were subject to a duty of twenty-five per cent. The diamonds were subsequently sold under forfeiture proceedings instituted by the government, and no claimant for them appeared.

Exception was taken on behalf of the accused to the following instruction given by the trial judge to the jury: "If the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offence charged." An exception was also noted to the refusal of the court to direct the jury to return a verdict of not guilty upon the second count, and the questions reserved by these two exceptions are pressed as clearly giving rise to reversible error.

The contention on behalf of the accused is that there was error in refusing to instruct a verdict and in the instruction given as to the captain's testimony, because even although all the acts of the captain of the Rhynland done in relation to the package of diamonds were believed by the jury to be imputable to Keck, they did not constitute the offence of smuggling within the intendment of the statute. At best, it is argued, the legal result of the testimony was to show only an unexecuted purpose to smuggle, a concealment of the diamonds on the ship, and a failure to put them on the manifest of the vessel, all of which, although admitted to be unlawful acts subjecting to a penalty and entailing forfeiture of the goods, were not, it is claimed, in themselves alone the equivalent of the crime of smuggling or clandestine introduction

which the indictment charged. This crime, it is insisted, is a specific offence arising from the evasion of custom duty by introducing goods into the United States without making entry thereof and without paying or securing payment of the duties, and thus passing them beyond the line of the customs authorities, where the obligation to pay the duty arose, and is not, consequently, established by proving antecedent acts of concealment preparatory to the commission of the overt act of smuggling when these antecedent acts were not followed by the introduction of the goods into the United States, but where, on the contrary, the goods, before or at the time when the obligation to pay the duty arose, were surrendered to the customs authorities.

The United States, on the contrary, maintains that the facts were sufficient to justify a conviction for smuggling or clandestine introduction, as those words embrace all unlawful acts of concealment or other illegal conduct tending to show a fixed intent to evade the customs duty by subsequently passing the goods through the jurisdiction of the customs officials without paying the duties imposed by law thereon. It is hence contended by the prosecution that the crime of smuggling or clandestine introduction was complete if the acts of concealment were in existence when the vessel entered the waters of the United States, even although at such time the period for making entry and paying or securing the duties had not arisen and even although subsequently and before or at the time when the obligation to make entry and pay duties arose the goods were delivered to the customs authorities.

The questions for determination, therefore, are: Did the testimony of the captain justify the court in giving the instruction that there was a legal duty to convict, if the jury believed such testimony? and, did the court, admitting the testimony of the special agent to be true, err in refusing to instruct a verdict as requested?

The charge of smuggling was based on section 2865, Revised Statutes, which is as follows:

"If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or

clandestinely introduce, into the United States, any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom house, any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both at the discretion of the court."

This section in its complete state is but a reproduction of section 19 of the tariff act of August 30, 1842, c. 270, 5 Stat. 548, 565. That portion of the section which made it an offence to smuggle or clandestinely introduce articles into the United States was omitted in the revision of 1874, but the act of February 27, 1877, c. 69, 19 Stat. 240, 247, which recites that it was enacted "for the purpose of correcting errors and supplying omissions in the revision," reinstated the omitted clause by an amendment to section 2865.

Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law: First. That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offence referred to. It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offence and its actual commission. If this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offence would become the offence itself; that is to say, that one would be guilty of an offence without having done the overt act essential to create the offence, because something had been done which, if

carried into further execution, might have constituted the crime. Second. That the smuggling or clandestine introduction of goods referred to in the statute must be "without paying or accounting for the duty," is also beyond question.

From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. From the second, it results that as the words, "without paying or accounting for the duty" imply the existence of the obligation to pay or account at the time of the commission of the offence, which duty is evaded by the guilty act, it follows that the offence is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. If this were not a correct construction of the statute, it would result that the offence of smuggling or clandestine introduction might be committed as to goods, although entry of such goods had been made and all the legal duties had been paid before the goods had been unshipped. The soundness of the deductions which we have above made from the statute is abundantly demonstrated by the line of argument which it has been necessary to advance at bar to meet the dilemma which the contrary view necessarily involves. For, although it was contended that the offence was complete the moment the concealment existed when the ship arrived within the waters of the United States, it was yet conceded that if in legal time the duties were subsequently paid or secured, there would have been no offence committed. But the contention and the admission are completely irreconcilable, since if the subsequent act becomes necessary in order to determine whether an offence has been committed, it cannot in reason be said that the offence was complete and had been committed before the subsequent and essential act had taken place.

These conclusions arising from a consideration of the text of the statute are rendered yet clearer by taking into view the definite legal meaning of the word "smuggling." That term had a well understood import at common law, and in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at the meaning of the word. *Swearingen* v. *United States*, 161 U. S. 446, 451; *United States* v. *Wong Kim Ark*, 169 U. S. 649.

Russell, in his work on Crimes (Vol. I, p. 277, 6th English edition), thus speaks of the offence:

"Amongst the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or carrying from the shore, goods, wares or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs to society."

This definition is substantially adopted from the opening sentence of the title "Smuggling and Customs" of Bacon's Abridgment, and in which, under letter F, it is further said:

"As the offence of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offence.

"For the sake of preventing or putting a stop to such practices, penalties and forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end, without providing at the same time against the means of accomplishing it."

So also Blackstone defines smuggling to be "the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise" (4 Black. Com. 154), the words "importing without paying the duties" obviously implying the existence of the obligation to pay the duties at the time the offence is committed, and which duty to pay is evaded by the commission of the guilty act.

A reference to the English statutes sustains the statement

of the text writers above quoted, that the words "smuggling" and "clandestine introduction," so far at least as respected the introduction of dutiable goods from without the kingdom, signified the bringing of the goods on land, without authority of law, in order to evade the payment of duty, thus illegally crossing the line of the customs authorities. Thus, in 1660, by statute 12 Car. II, c. 4, sec. 3, dutiable goods were to be forfeited if brought into any port, etc., of the kingdom and "unshipped to be laid on land" without payment of duties, etc. So, in 1710, by statute 8 Anne, c. 7, sec. 17, dutiable goods "unshipped with intention to be laid on land" without the payment of duties, etc., were to be forfeited, treble the value of the goods was to be forfeited by those concerned in such unshipping, and the vessels and boats made use of "for landing" were also to be forfeited. In 1718, by statute 5 Geo. I, c. 11, entitled "An act against clandestine running of uncustomed goods, and for the more effectual preventing of frauds relating to the customs," provision was made in the fourth section for the seizure and forfeiture of goods concealed in ships from foreign parts "in order to their being landed without payment of duties;" and in section 8 ships of a certain burthen, laden with customable and prohibited goods, hovering on the coasts "with intention to run the same privately on shore," might be boarded, and security exacted against a violation of the laws. In 1721, by statute 8 Geo. I, c. 18, a forfeiture of twenty pounds was imposed upon those receiving or buying any goods, etc., "clandestinely run or imported," before legal condemnation thereof, knowing the goods to have been clandestinely run or imported into the kingdom; while in 1736, by statute 9 Geo. II, c. 35, sec. 21, watermen, etc., employed in carrying goods, "prohibited, run, or clandestinely imported," and found in possession of the same, were to forfeit treble the value of the same; and by section 23 of the same statute penalties were provided to remedy the evil recited in the preamble of unshipping goods at sea, without the limits of any port, "with intent to be fraudulently landed in this kingdom." In 1786, by statute 26 Geo. III, c. 40, sec. 15, bond was required to be given by the master and mate of a

vessel before clearing the vessel for foreign parts, not "to land illegally any goods, or take on board any goods with that intent." In 1762, by statute 3 Geo. III, c. 22, the object of the statute, as recited in the title, was, among other things, "for the prevention of the clandestine running of goods into any part of his majesty's dominions;" while the preamble of the first section recited the advisability of increasing the share of customs and excise officers in forfeited goods so that they should have "equal encouragement to be vigilant in the exertion of their duty, to suppress the pernicious practice of smuggling;" and in the fourth section, "for the more effectual prevention of the infamous practice of smuggling," provision was made looking to the proper distribution among the officers and seamen of public vessels and ships of war of the moiety allowed of the proceeds of goods, etc., seized and condemned.

The statutes just referred to and cognate statutes make it clear, as said above in the passage cited from Bacon's Abridgment, although they contained no express penalty for smuggling *eo nomine*, that the aim was to prevent smuggling, and that to accomplish this result every conceivable act which might lead up to the smuggling of dutiable goods, that is, their actual passage through the lines of the custom house without paying the duty, and every possible act which could follow the unlawful landing, was legislated against, and each prohibited act made a distinct and separate offence, entailing in some cases forfeiture of goods and in others pecuniary penalties and criminal punishments, the forfeitures and punishments varying in nature and extent according as it was deemed that the particular offence to which they were applied was of minor or a heinous character, (such as armed resistance to customs officers,) or was calculated to bring about the successful smuggling of the goods, and so defraud the revenue and cause injury to honest traders. Hence it is, that although the statute law of England made it clear that smuggling was the clandestine landing of the goods within the kingdom in violation of law, Parliament sought to prevent its commission, not by the specific punishment of smuggling, but by legislation

aimed at all acts which could precede or follow the consummation of the unlawful landing of the goods. In other words, the statutes establish not only what was meant by smuggling, but, to use the language of Bacon, also make it certain that provision against the "end," smuggling, was made by the enactment of numerous distinct and separate offences "against the means of accomplishing it."

This theory upon which the English law rested is indicated by a statute enacted in 1558, 1 Eliz. c. 11. The statute contained twelve sections, and provided specific and distinct penalties for various acts tending to lead up to the carrying from English soil of goods prohibited to be exported, and the introduction by clandestine landing of goods prohibited to be imported or of customable goods without the payment of duties thereon. Numerous provisions of the same nature are contained in a statute, consisting of thirty-eight sections, enacted in 1662, 13 and 14 Car. II, c. 11. Other statutes may be found referred to in 6 Geo. IV, (1825,) c. 105, which specifically and separately refers to 442 statutes, and repeals so much and such parts thereof "as relate to the trade and navigation of this kingdom, or to the importation and exportation of goods, wares and merchandise, or as relate to the collection of the revenue of customs or prevention of smuggling."

The distinction between smuggling — the ultimate result — and the various means by which it might be accomplished or by which its accomplishment could be made beneficial, is aptly shown by the recital of a statute enacted in 1736, 9 Geo. II, c. 35, by which all penalties and forfeitures were remitted which had before a date named in the act been incurred "in, by, or for the clandestine running, landing, unshipping, concealing or receiving any prohibited goods, wares, or merchandise, or any foreign goods liable to the payment of the duties of customs and excise, or either of them, and who are or may be subject to any information or other prosecution whatsoever for the duties of such goods, or for the penalties for the running, landing, unshipping, concealing or receiving thereof," as also for many other offences specifically enumerated which had been enacted with the object of preventing the illegal

exportation of goods or the importation of prohibited goods or the illegal landing of customable goods. And it is highly suggestive to observe that the modern English statutes serve but to make clear the purport of the English revenue laws from the beginning concerning the smuggling of dutiable goods. By the statute of 1876 to consolidate the customs laws, 39 and 40 Vict. c. 36, in a subdivision headed, "As to the restrictions on small craft and the regulations for the prevention of smuggling," it was made a specific offence, by section 186, to "import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, *whether the same be unshipped or not.*" While the bringing of dutiable goods within the jurisdiction of Great Britain, that is, into the waters of the kingdom, with an intent to smuggle or clandestinely introduce the same was not declared to be punishable, in the same section, immediately following the quoted clause, it was made an offence to "unship, or assist or be otherwise concerned in the unshipping of . . . any goods liable to duty, the duties for which have not been paid or secured." In other words, this statute demonstrates that where goods might by law be introduced into the kingdom on paying duties, a violation of the obligation to pay the duties was not committed by the mere entry of the vessel into the waters of the kingdom before the period for the payment or securing the payment of the duties had arisen.

A review of the principal statutes enacted in this country regulating the collection of customs duties establishes that so far as they embraced legislation designed to prevent the evasion of duties they proceeded upon the theory of the English law on the same subject, that is, that they forbade all the acts which were deemed by the lawmaker means to the end of smuggling or clandestinely introducing dutiable goods into the country in violation of law, and which were likewise considered as efficient to enable the offender to reap the expected benefits of his wrongful acts. Therefore, they forbade and prescribed penalties for everything which could precede

smuggling or follow it, without specifically making a distinct and separate offence designated smuggling or clandestine introduction.

The act of July 31, 1789, c. 5, 1 Stat. 29, was entitled "An act to regulate the collection of the duties imposed by law on the tonnage of ships or vessels and on goods, wares and merchandises imported into the United States." The act consists of forty sections, and among other things establishes ports of entry and delivery. By section 10 masters of vessels from foreign ports were required to deliver a manifest of the cargo to any officer who should first come on board; by section 11 the master, etc., was required within forty-eight hours after arrival of the vessel within any port of the United States, etc., to make entry, and also make oath to a manifest, and a forfeiture of $500 was imposed for each refusal or neglect; by section 12 goods unladen in open day or without a permit — except in case of urgent necessity — subjected the vessel, if of the value of $400, and the goods to forfeiture, and the master or commander of the vessel "and every other person who shall be aiding or assisting in landing, removing, housing or otherwise securing the same" were to forfeit and pay $400 for each offence, and were disabled for the term of seven years from holding any office of trust or profit under the United States; by section 22 goods fraudulently entered by means of a false invoice were to be forfeited; by section 24 authority was given to customs officials to make search of ships or vessels, dwelling-houses, etc., for dutiable goods suspected to be concealed, which when found were to be forfeited; by section 25 persons concealing or buying goods, wares or merchandise, knowing them to be liable to seizure under the statute, were to "forfeit and pay a sum double the value of the goods so concealed or purchased;" and by section 40 dutiable goods of foreign growth or manufacture brought *into the United States* except by sea and in certain vessels and landed or unladen at any other place than where permitted by the act, were to be forfeited, together with the vessels conveying them; and it was further provided that "all goods, wares and merchandise brought *into the United States* by land con-

trary to this act should be forfeited, together with the carriages, horses and oxen that shall be employed in conveying the same."

The act of August 4, 1790, c. 35, 1 Stat. 145, consists of seventy-five sections, and repealed the act of 1789, c. 5. The act was entitled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." The provisions of the prior act were substantially reënacted. Further offences were also defined, some of which only will now be referred to. Thus, by section 10, when imported goods were omitted from or improperly described in a manifest, the person in command of the vessel was subjected to a forfeiture of the value of the goods so omitted; by section 12 a penalty of not to exceed $500 was declared for the failure on arrival within four leagues of the coast, etc., to produce upon demand to the proper officer a manifest and furnish a copy of the same, or to refuse to give an account of or to make a false statement as to the destination of the ship or vessel; by section 13 a penalty of $1000 and forfeiture of goods was authorized for unlading goods before a vessel should come to the proper place for the discharge of her cargo and until the unshipping had been duly authorized by a proper officer of the customs; by section 14 vessels in which goods were so unladen were subjected to forfeiture and the master was to forfeit treble the value of the goods; by section 28 goods requiring to be weighed or gauged in order to ascertain the duties due thereon, if removed from the wharf or place upon which landed, without permission, were subjected to forfeiture; by section 30 inspectors were authorized to be kept on board of vessels until they were unladen, and among other duties specified enjoined upon such inspectors was one that they were not to "suffer any goods, wares or merchandise to be landed or unladen from such ship or vessel without a proper permit for that purpose;" by section 66 masters of vessels or others who should take a false oath were made liable to a fine of $1000 and to be imprisoned for not exceeding twelve months; and by section 23 manifests

under oath were required to be furnished by vessels bound to a foreign port, and the person in charge of the vessel departing without so clearing was to forfeit $200.

The act of March 2, 1799, c. 22, 1 Stat. 627, was entitled "An act to regulate the collection of duties on imports and tonnage." It consisted of 112 sections, repealed the act of 1790, c. 35, and substantially reënacted the provisions of that act, though amplifying those provisions, particularly by the insertion of forms of manifests, entries, certificates, etc. By section 32 the master in charge of a vessel in which had been brought goods destined for a foreign port was required, before departing from the district in which he first arrived, to give bond "with condition that the said goods, wares or merchandise, or any part thereof, *shall not be landed* within the United States, unless due entry thereof shall have been first made, and the duties thereupon paid, or secured to be paid according to law." In section 46 provision was made for the entry of baggage and mechanical implements, which were exempted from duty, and for the examination of such baggage; the section ending as follows:

"*And provided*, that whenever any article or articles subject to duty, according to the true intent and meaning of this act, shall be found in the baggage of any person arriving within the United States, which shall not, at the time of making entry for such baggage be mentioned to the collector before whom such entry is made by the person making the same, all such articles so found shall be forfeited, and the person in whose baggage they shall be found shall moreover forfeit and pay treble the value of such articles."

This proviso, it may be stated, has ever since remained on the statute books, being now section 2802 of the Revised Statutes.

By sections 49 and 62 of the act of 1799, entry was required to be made and duties paid or secured to be paid before permission to land goods, wares and merchandise should be granted; by section 103, provision was made as to vessels and packages in which certain articles were thereafter to be imported, a violation to entail a forfeiture of the vessel and

goods; by section 105 and succeeding sections authority was given to import goods and merchandise into districts established and to be established on the northern and northwestern boundaries of the United States, and on the rivers Ohio and Mississippi, "in vessels or boats of any burthen, and in rafts or carriages of any kind or nature whatsoever;" and like report was to be made, like manifests furnished, and entry made as in the case of goods imported into the United States in vessels from the sea, and except as specially provided in the act such importations were to be subject to like regulations, penalties and forfeitures as in other districts.

The requirements as to the production of invoices upon entry of goods subject to an *ad valorem* duty were supplemented by acts of April 20, 1818, c. 79, 3 Stat. 433, and March 1, 1823, c. 21, 3 Stat. 729, which later statute was enacted to take the place of the former, then about to expire by limitation. Original invoices were required to be furnished as a prerequisite to an entry; specific provisions were enacted as to the manner of making entry; in the case of non-residents invoices were required to be verified by the oath of the owner, unless such requirement was dispensed with by the Secretary of the Treasury; and the appointment of appraisers was provided for and the procedure by which the true value of goods was to be determined set forth; and a number of offences relating to the subject declared.

When the act of 1842, heretofore referred to, was enacted, the provisions of the act of 1799, as amended or supplemented by the act of 1823, were, in the main, in force, as they still are.

As we have seen, it was not until 1842 that a specific penalty for smuggling or clandestine introduction, *eo nomine*, was enacted. When the significance of the word "smuggling," as understood at common law, is borne in mind, and the history of the English legislation is considered and the development of our own is brought into view, it becomes manifest that the statute of 1842 was not intended to make smuggling embrace each or all of the acts theretofore prohibited which could precede or which might follow smug-

gling, and which had been legislated against by the imposition of varying penalties; in other words, that it had not for its purpose to cause the means to become the end, but to supplement the existing provisions against the means leading up to smuggling, or which might render it beneficial, by a substantive and criminal statute separately providing for the punishment of the overt act of passing the goods through the lines of the customs authorities without paying or securing the duties; that is, the statute was intended not to merge into one and the same offence all the many acts which had been previously classified and punished by different penalties, but to legislate against the overt act of smuggling itself. And this view makes clear why it was that the statute of 1842 related not generally to acts which precede smuggling or which might follow it, but to the concrete offence of smuggling alone. That this was the purpose which controlled the enactment of the act is cogently manifested by the use of the words "clandestinely introduce," since they, in the common law, were synonymous with smuggling. Indeed, in the English statutes the word "smuggling" and clandestine importation, clandestine running and landing, were constantly made use of, one for the other, as purely convertible terms, all relating to the actual passing of the goods across the line where the obligation to pay the duty existed, and which passing could not be accomplished except in defiance of the duty which the law imposed. The inference that the common law meaning of the word "smuggling" is to be implied, is cogently augmented by the fact that the statute also uses in connection with it words generally known in the law of England as a paraphrase for smuggling. In reason this is tantamount to an express adoption of the common law signification. Moreover, this view is fortified by the concluding portion of the statute which supplements the smuggling or clandestine introduction, by imposing a similar penalty upon every person who "shall make out or pass, or attempt to pass, through the custom house, any false, forged or fraudulent invoice;" all of which were acts connected with the actual entry of the goods, which, if the object intended to be accomplished was effected, would

result in the successful introduction of the goods into the country, without payment, in part at least, of the duties required by law. This relation of the act of 1842 to the then existing legislation and the remedy intended to be accomplished thereby were referred to and elucidated by the court in *United States* v. *Sixty-seven Packages of Dry Goods*, 17 How. 85. In that case, after observing that the provision making criminal the passing or attempting to pass goods through the custom house by means of false, forged or fraudulent invoices (now a part of section 2865) was manifestly directed against the production and use of simulated invoices and those fraudulently made up for the purpose of imposing upon the officers in making the entry, the court said (p. 93):

"The whole scope of the section confirms this view. It first makes the smuggling of dutiable goods into the country a misdemeanor; and, secondly, the passing or attempt to pass them through the custom house, with intent to defraud the revenue, by means of false, forged or fraudulent invoices; the latter is an offence which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It was then, therefore, in effect declared that the smuggling or clandestine introduction of dutiable goods into the United States with intent to defraud the revenue of the United States, against which the act of 1842 provided, was an act committed by passing the goods in defiance of and without conformity to the laws and regulations of the customs, or by preparing, attempting or actually passing the same through the custom house by means of false or fraudulent invoices.

The fact that the smuggling or clandestine introduction into the United States referred to in the act of 1842 had substantially the foregoing significance, is also shown by the case of *United States* v. *Jordan*, 2 Lowell, 537, (1876,) where Lowell, J., in considering the act of 1842 and other statutes, said:

"Under these statutes, smuggling, or bringing in, or introducing goods, has been held by both the Circuit and District Courts for this district for a long course of years to be proved by evidence of the secret landing of goods, without paying or

securing the duties, which, according to the argument here, would be quite inadmissible, if the importation in the sense contended for had no element of concealment about it. I have never known a case of smuggling in which any concealment on board the vessel was relied on by the Government. The gist of the offence is the evasion or attempted evasion of the duties, and they, to be sure, are due when the vessel arrives; but they are not payable until some time after, and it is the default in paying which is the fraud, or in omitting the acts which immediately precede the payment. . . . A bringing on shore without making entry, etc., is part of the importation or introduction of the goods, and makes it illegal."

It was earnestly contended in the argument at bar that the successful administration of the revenue laws would be frustrated unless the pains and penalties of smuggling be held to be applicable to all unlawful acts antecedent to the actual introduction of the goods into the United States. But this argument amounts only to the contention that by an act of judicial legislation the penalties for smuggling should be made applicable to a vast number of unlawful acts not brought within the same by the lawmaking power. And the result would be to control all acts done in violation of the revenue laws by a highly penal criminal statute, although the law has classified them into many distinct offences according to their gravity and imposed different penalties in one case than in others.

The contention that because the portion of the act of 1842, now found in section 2865, was omitted in the revision, and was only reënacted in 1877, therefore its language should be given a wider meaning than was conveyed by the same words when used in the act of 1842, is without merit. When the reenactment took place the act of 1842 in the particular in question had been considered by this court and had been enforced in the lower courts as having a specific purpose and meaning. The reënactment without change of phraseology, by implication, carried the previous interpretation and practice with it. Indeed, the reënactment of the provisions of the act of 1842 is the best indication of the judgment of Congress that the

portion of the statute restored should not have been dropped in the revision, and that its meaning should stand as though it had never been so omitted, but had always continued to exist.

It is settled that the rate of customs duty to be assessed is fixed by the date of importation and is not to be determined by the time when entry of the merchandise is made. But this throws no light on the meaning of the word "smuggling," since that word, both at common law and under the text of the acts of Congress, is an act by which the goods are introduced without paying or securing the payment of the duties, and hence concerns, not the mere assessment of duty, but the evasion of a duty already assessed, by passing the line of the customs authorities in defiance of law.

There remains only one further contention for consideration, that is, the assertion that, whatever may have been the meaning of the term "smuggling" at common law and its significance at the time when the statute of 1842 was adopted, that word as now found in section 2865 of the Revised Statutes is to have a more far-reaching significance, because it must be interpreted by the meaning affixed to the word in section 4 of the anti-moiety act of June 22, 1874, c. 391, 18 Stat. 186. The section relied on is as follows:

"SEC. 4. That whenever any officer of the customs or other persons shall detect and seize goods, wares or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs and charges connected therewith: *Provided*, That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." . . .

It suffices to say in answer to this contention that if the

anti-moiety act had the meaning claimed for it, by the very terms of that act such meaning was restricted to "the purposes" of that act alone. That statute had in view the reward to be reaped by informers under the revenue laws of the United States, and the words, "for the purposes of this act," can in reason only be construed as contemplating a more enlarged construction of the word "smuggling," for the purpose of stimulating efforts at detecting offenders against the revenue laws, and cannot be held applicable, in the absence of the clearest expression by Congress of a contrary intent, to a different and criminal statute. Indeed, if the word "smuggling" in the act of 1842 embraced, as asserted, every unlawful act which might lead up to smuggling, then the explanatory words found in the anti-moiety act would be wholly superfluous. Their insertion in the statute was evidently, therefore, a recognition of the fact that smuggling had at the time of the passage of the anti-moiety act a defined legal and restricted significance, which it was the intent of Congress to enlarge for a particular purpose only, and which enlargement would be absolutely without significance if the term before such enlargement had meant exactly what Congress took pains to state it intended the word should be construed, as meaning for the exceptional purposes for which it was legislating.

Examining the case made by the record, in the light of the foregoing conclusions, it results that, whether we consider the testimony of the captain alone or all the testimony contained in the record, as it unquestionably establishes that there was no passage of the packages of diamonds through the lines of the customs authorities, but that on the contrary the package was delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose, that the offence of smuggling was not committed within the meaning of the statute, and therefore that the court erred in instructing the jury that if they believed the testimony of the captain they should convict the defendant and in refusing the requested instruction that the jury upon the whole testimony should return a verdict for

the defendant. This conclusion renders unnecessary a consideration of the other questions of alleged error discussed in the argument at bar.

The judgment must therefore be reversed and the case remanded with directions to set aside the verdict and grant a new trial.

MR. JUSTICE BROWN, with whom were the CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE BREWER, dissenting.

I find myself unable to concur in the opinion of the court in this case, and particularly in a definition of smuggling, which requires that the goods shall be actually unladen and carried upon shore.

This definition rests only upon the authority of Hawkins' Pleas of the Crown, (A.D. 1716,) repeated in Bacon's Abridgment, (A.D. 1736,) and copied into Russell on Crimes, (A.D. 1819,) and Gabbet's Criminal Law, a work but little known. The diligence of counsel has failed to find support for it in a single adjudicated case in England or this country. If it were ever the law in England, it never found a lodgement in its standard dictionaries, either general or legal, and has never been recognized as such by writers upon criminal law, with the exceptions above stated. It was never treated as the law in America. The truth seems to be that smuggling *eo nomine* was formerly, whatever it may be now, not a crime in England, but a large number of acts leading up to an unlawful unlading of goods were made criminal. Smuggling appears to have been rather a popular than a legal term, and the fact that it was usually accompanied by the landing of goods on shore may have led to the definition made use of by Bacon and Hawkins. Indeed, in all the old English statutes cited in the opinion of the court it is recognized that the ultimate object of all smugglers is to get their goods ashore without payment of duties.

If, as stated by these authors, the actual unlading and carriage of the goods to the shore were an essential ingredient of the offence, it is somewhat singular that it should have escaped

the notice of so learned a writer as Sir William Blackstone, who defines it in accordance with the views of the other writers upon the subject as "the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise." 4 Bl. Com. 154. Dr. Johnson, with his customary disregard of conventionalities, defines the verb "to smuggle" as "to import or export goods without paying the customs," and a smuggler as "a wretch who, in defiance of justice and the laws, imports or exports goods, either contraband or without paying the customs." In Burns' Law Dictionary, (1792,) smugglers are said to be "those who conceal prohibited goods and defraud the King of his customs on the seacoast by running of goods and merchandise." In Brown's Law Dictionary, (Eng. 1874,) smuggling is defined as "importing goods which are liable to duty so as to evade payment of duty;" and in McClain's Criminal Law, (sec. 1351,) as importing dutiable goods without payment. There are similar definitions in the Encyclopædia and also in the Imperial Dictionary. In the Encyclopædia Britannica "smuggling" is said to denote "a breach of the revenue laws, either by the importation or the exportation of prohibited goods, or by the evasion of customs duties on goods liable to duty;" and Stephen, in his Summary of the Criminal Law, p. 89, defines smuggling as the "importing or exporting of goods without paying the duties imposed thereon by the laws of customs and excise, or of which the importation or exportation is prohibited." Similar definitions are given by Lord Hume in his Commentaries on the Laws of Scotland, as well as in Bell's Dictionary of Scottish Law, p. 225. In Tomlin's Law Dictionary, where smuggling is defined as "the offence of importing or exporting goods without paying the duties imposed thereon by the custom or excise laws," a list of some thirty or forty acts connected with the unlawful and fraudulent importation of goods is given, but in none of them is the word "smuggle" mentioned as an offence. In the sixth edition of his work on Crimes, Sir William Russell gives as his authority for the definition Hawkins, Bacon and Blackstone, the last of whom is against him, and also sets forth a large number of acts "for the prevention of

smuggling," passed during the present reign, none of which mention the word "smuggle" as a distinct crime. Indeed, the word seems to be a popular summing up of a large number of offences connected with the clandestine introduction of goods from foreign ports.

But conceding all that is claimed as to the law of England in that particular, the question is not what was the law of England during the last century, nor what it is to-day, but what was the law of the United States in 1842 when this act was passed, and in 1877 when it was incorporated in the Revised Statutes? If we are to rely for a definition upon our lexicographers and legal grammarians, there can be no doubt upon the subject, as by Webster, Worcester, the Century and the Standard Dictionaries, and in all the law lexicons, the offence is defined in somewhat varied phraseology as the clandestine importation of goods without the payment of duties. I know of no American authority, except the dictum of Judge Lowell in *United States* v. *Jordan*, 2 Lowell, 537, to the contrary.

It would seem from that case and from certain expressions in the opinion of the court in the case under consideration, that the offence is not complete even when the goods are unladen and put upon the shore, and that a failure to pay duty upon them is a necessary element to justify an indictment, or that, as the words "without paying or accounting for the duty," imply the existence of the obligation to pay or account at the time of the commission of the offence, which duty is evaded by the guilty act, it follows that the offence is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. It follows from this that if, as is the custom upon the arrival of trans-Atlantic steamers, a passenger's baggage is landed upon the wharf, and the trunks are filled with goods clandestinely imported, the owner cannot be convicted of smuggling them under this statute, since the obligation to pay the duties upon them does not arise until an attempt is made to carry them off the wharf.

Dissenting Opinion: Brown, J., Fuller, C.J., Harlan, Brewer, JJ.

In my view the act of smuggling is complete when the goods are brought within the waters of a certain port, with intent to land them without payment of duties. Whether, if the duties be subsequently paid, such payment would be a condonation of the offence is a question upon which it is unnecessary to express an opinion. It might depend upon the motives which induce the importer to pay the duties. If they were paid after detection, it might not be considered sufficient; if before detection it would be strong evidence of a change of purpose. If the testimony of the captain in this case is to be believed, he brought the package of diamonds into port wholly ignorant of the fact that it contained dutiable articles. Defendant himself was not on board the steamer, but took passage on another ship to arrive later at another port, thus putting it out of his power to pay or account for the duty. The guilty intent with which the package was delivered in Antwerp to an innocent party for transportation to this country must be held to have continued, since defendant had deliberately deprived himself of any *locus penitentiæ* by handing the package to the captain for transportation and delivery.

But we think it is unnecessary to look beyond the language of the statute itself to determine what is meant by the word "smuggle," since it is there defined as the clandestine introduction into the United States of "any goods, wares or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty." If the words "clandestinely introduce" are not intended as a definition of the prior word "smuggle," they are intended as a separate offence, and in either case the defendant would be liable if he clandestinely introduced the goods without paying or accounting for the duty thereon. What then is meant by a clandestine introduction? In at least two cases in this court, *United States* v. *Vowell*, 5 Cranch, 368; *Arnold* v. *United States*, 9 Cranch, 104, an "importation" to which the government's right to duty attaches was defined to be an arrival within the limits of some port of entry. Or, as stated by Mr. Justice Curtis in *United States* v. *Ten Thousand Cigars*, 2 Curtis, 436, "an importation is complete when the goods are

brought within the limits of a port of entry with the intention of unlading them there." A similar definition of an importation is given in the following cases: *Harrison* v. *Vose*, 9 How. 372, 381; *United States* v. *Lyman*, 1 Mason, 499; *McLean* v. *Hager*, 31 Fed. Rep. 602, 606; *The Schooner Mary*, 1 Gallison, 206, wherein it was said by Mr. Justice Story that "an importation is a voluntary arrival within some port with intent to unlade the cargo."

Such being the meaning of the word "import," a clandestine importation would be the bringing of goods into a port of entry with design to evade the duties. Should a narrower meaning be given to the words "clandestinely introduce"? I think not. The word "introduce" would strike me as entitled to an even broader meaning than the word "import." To introduce goods into the United States is to fetch them within the jurisdiction of the United States, or at least within some port of entry, and the requirement that they should be unladen or brought on shore is to import a feature which the ordinary use of language and the object of the act does not demand. If the construction of the words "clandestinely introduce" adopted by the court be the correct one, it would follow that a vessel loaded with goods, which the owner designed to import without payment of duty, leaving a European port, might be navigated up the St. Lawrence and through the chain of Great Lakes to Chicago, (a voyage by no means unknown,) or up the Mississippi to St. Louis, and be moored to a dock, and yet the goods be not introduced into the United States, because not actually unladen upon the wharf. I cannot give my consent to such a narrow definition.

Confirmation of the above meaning of the word "smuggle" may, I think, be found in the act of June 22, 1874, c. 391, 18 Stat. 186, commonly known as the "anti-moiety act." In section 4 of that act it is provided that the Secretary of the Treasury shall award to officers or others detecting or seizing smuggled goods a proportion of their proceeds, and that "for the purposes of this act smuggling shall be construed to mean the act with intent to defraud or bringing into the United States, or with like intent attempting to bring into the United

Counsel for Parties.

States, dutiable goods without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." It is true the definition is given "for the purposes of this act," and evidently with the object of including within its provisions not only the act of smuggling proper, that is, the act of importing with intent to defraud dutiable articles without passing, etc., but of an *attempt* to do the same, which would probably not be construed as smuggling under the provisions of other acts. It is scarcely possible that Congress should have contemplated wholly different interpretations of the same words in different acts.

But it is useless to prolong this discussion. The whole question turns upon the meaning of the words "smuggle" and "clandestinely introduce." I have given my reasons for believing that they include an importation of goods with an intent to evade the duties — the right to which has already attached — and I am at a loss to understand why an obsolete definition of the English law should be rehabilitated to defeat the manifest intention of Congress.

CHAPPELL CHEMICAL AND FERTILIZER COMPANY *v.* SULPHUR MINES COMPANY (No. 1).

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

No. 91. Argued December 16, 1898. — Decided January 9, 1899.

The decision of the Maryland Court of Appeals in this case rests on grounds other than those dependent on Federal questions, if any such questions were raised, and the writ of error must be dismissed.

THE case is stated in the opinion.

Mr. Thomas C. Chappell for plaintiff in error.

Mr. James M. Ambler and *Mr. Randolph Barton* for de-

fendant in error. *Mr. Skipwith Wilmer* and *Mr. Randolph Barton, Jr.*, were on their brief.

Mr. Justice McKenna delivered the opinion of the court.

This is a suit in equity to restrain the enforcement of a certain writ of attachment and execution issued on a judgment recovered against plaintiff in error. The original bill alleges that the judgment is absolutely void. The following are some of its allegations:

"That the said purported judgment was recovered by the said defendant against your orator in the superior court for Baltimore city, before the judge at large, and that said judgment is rendered *coram non judice*, and your orator herewith files a certified copy of the docket entries in said case, marked 'Complainants' Exhibit B,' reference being had thereto.

"That the entry on said docket, that the case was submitted to the judge, is absolutely fraudulent, and that there is a motion pending in said case to correct said fraudulent docket entry.

"That your orator is advised that the said case was not before said judge at large when said judgment was rendered, and said judge had no jurisdiction or authority at law to render said judgment.

"That the said judgment was made absolute by the said judge at large, while there was pending a motion to strike out the verdict and the judgment thereon, and your orator insists that said judgment is absolutely void, and rendered *ultra vires*, and said motion to strike out the judgment is still pending in said superior court."

It is also alleged that there was pending in the case a motion to quash the attachment. There were exhibits filed with the bill. A demurrer was interposed. Subsequently an amended and supplemental bill was filed, containing additional allegations of proceedings, and the prayer was also broadened.

To this bill a demurrer was again filed, and the ground of it stated to be that the bill did not state such a case as entitled plaintiff to any relief in equity.

Opinion of the Court.

The demurrer was sustained, and the bills dismissed on the 2d of June, 1896.

On the 22d of August, 1896, the plaintiff presented a petition for leave to file an ancillary bill in the following words:

"The said plaintiff, by Thomas C. Chappell, its attorney, reserving every manner of advantage and exception whatsoever, shows to this honorable court:

"I. That since the decree was passed in this case dismissing the bill of complaint herein, the motions of the said Chappell Chemical Fertilizer Company in the case of *The Sulphur Mines Company of Virginia* v. *The Chappell Chemical and Fertilizer Company*, which said motions are referred to in the original and supplemental bills filed herein, have been overruled.

"II. That an appeal from the order of the court in said action at law is not an adequate remedy, and that under art. 16, sec. 69, Code Pub. Gen. Laws of Maryland, the said plaintiff herein is entitled to an injunction to enjoin the said plaintiff herein from reaping any benefit from the said purported judgment, and from occasioning this plaintiff any damage by any proceedings in said pretended judgment.

"III. That while the filing of an amended or an ancillary or supplemental bill is in the discretion of the court, that discretion is to be exercised within prescribed legal and equitable limitations, according to the decision of the Court of Appeals.

"IV. That the property of this plaintiff is tied up and rendered *extra commercium*, and placed in such a position and its title so clouded by this invalid and illegal judgment delivered in a court without jurisdiction, and *coram non judice*, and in violation of the Seventh Amendment and the Fourteenth Amendment of the Constitution of the United States, under which the said plaintiff specially sets up and claims a right, privilege and immunity, that the said plaintiff is entitled to file an amended, supplemental and ancillary bill herein, fully setting forth all the facts, and insists that said illegal and invalid judgment should be cancelled by this honorable court, whose province is to prevent wrong and to do right, and the

said plaintiff claims that it is being deprived of its liberty and its property without due process of law, and that under the declaration of rights of the State of Maryland, art. 5, and the constitution of the State and law of the State as laid down by the Court of Appeals of Maryland, it was entitled to a trial by jury in said case at law, having demanded such trial, and that the action of the judge at large in denying that right and in trying said case after an appeal from an order affecting a constitutional right, without a jury and *ex parte* and without notice to this plaintiff, and without an opportunity to be heard, and without any trial of the facts, and the finding of a verdict by the judge at large upon the false and fraudulent testimony of the officer of the said Sulphur Mines Company of Virginia, at said *ex parte* trial, all of which this plaintiff charges is the enforcement of law and a regulation of the State abridging a privilege and immunity of this plaintiff, which is a citizen of the United States, and is repugnant to the Fourteenth Amendment of the Constitution of the United States, and every judge and all the people are bound by the Constitution of the United States, art. 2, declaration of rights of the State of Maryland, article 6, Constitution of the United States. Wherefore your petitioner prays leave to file an ancillary bill of complaint herein, and specially sets up and claims the privilege and specially sets up and claims that any denial of the said privilege will be a denial of the equal protection of the laws and repugnant to the Fourteenth Amendment of the Constitution of the United States.

"THOS. C. CHAPPELL,
"*Att'y for Plaintiff.*"

On the same day leave to file the bill was refused, and the plaintiff, on the 25th of August, 1896, filed the following:

"The said plaintiff, by Thomas C. Chappell, attorney, reserving every manner of advantage and exception whatsoever, excepts to the order of court requiring the demurrer filed in this case to be argued before all of the defendants had been served with subpœna, and to the order of court dismissing the original and supplemental bills of complaint herein, and to

the order of court refusing to the plaintiff the right and privilege to file an ancillary bill, and specially sets up and claims that said orders abridge a privilege and immunity of the said plaintiff, a citizen of the United States, and are repugnant to the Fourteenth Amendment of the Constitution of the United States, under which said plaintiff specially set up and claim a right, privilege and immunity.

"THOS. C. CHAPPELL,
"*Attorney for Plaintiff.*"

And on the same day the following:

"Mr. Clerk: Please enter an appeal from the decree in this case dated the 22d day of August, 1896.

"THOS. C. CHAPPELL,
"*Attorney for Plaintiff.*"

Then follow in the record certain papers which presumably were necessary to perfect the appeal.

The record contains two opinions and two judgments of the Court of Appeals, all dated the same day. The one which comes first in the record considers and affirms the decree of the lower court sustaining the demurrer and dismissing the bills entered June 2, 1896; the other affirms the order of the 22d of August, 1896, refusing leave to file the ancillary bill.

The following is the opinion of the court on the latter:

"The decree of the court sustaining the demurrer and dismissing the original and supplemental bills of The Chappell Chemical and Fertilizer Company against The Sulphur Mines Company of Virginia *et al.* was passed June 2, 1896. On the next day an appeal was entered, which we have just considered. On the 22d day of August, 1896, over two months and a half after the appeal was taken and while it was still pending, the appellant filed in the original case a petition asking leave to file 'an ancillary bill of complaint herein.' The court very promptly and properly refused to allow it to be done. From that order this appeal was taken.

"Even after a court of equity has sustained a demurrer to a bill, it can grant leave to amend if it can be seen that the de-

fects can be remedied by amendment, and the court is of the opinion that substantial justice requires it. But when an application to amend is not made within a reasonable time and the bill is dismissed, it is out of court, and there is nothing to amend. In this case, instead of asking the court to strike out the decree dismissing the bill so that it could amend, the appellant took an appeal. The case was thus beyond the right of the plaintiff to amend or to file a supplemental or 'ancillary' bill. But, in addition to that, the reasons assigned in the petition were not sufficient to authorize the interposition of a court of equity. The order of the court in refusing to allow the plaintiff to file an 'ancillary bill' must be affirmed.

"Order affirmed with costs to the appellee."

There is more confusion when we come to the petition for writ of error. It does not distinguish between these judgments except by a reference to the assignment of errors. The petition recites "that on or about the 5th day of June, 1897, this court [Court of Appeals] entered a decree herein in favor of the defendant, the appellee, and against this plaintiff." It then recites that there was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against the validity, and also the validity of a statute or an authority exercised under the State on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity, and that "certain errors were committed to the prejudice of this complainant, the appellant, all of which will more fully appear from the assignment of errors, which will be duly filed herein."

The assignment of errors is as follows:

"Afterwards, to wit, on the first Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes The Chappell Chemical and Fertilizer Company, by Thomas C. Chappell, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that the demurrer aforesaid and the matters therein contained are not sufficient in law for The Sulphur Mines Com-

pany of Virginia to have or maintain its aforesaid decree against the said The Chappell Chemical and Fertilizer Company. There is also error in this, to wit, that by the record aforesaid it appears that the decree aforesaid given was given for the said The Sulphur Mines Company of Virginia against the said The Chappell Chemical and Fertilizer Company, whereas by the law of the land the said decree ought to have been given for the said The Chappell Chemical and Fertilizer Company against the said The Sulphur Mines Company of Virginia; and the said The Chappell Chemical and Fertilizer Company prays the judgment and decree aforesaid may be reversed, annulled and held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment, etc."

The writ of error therefore is directed to the decree of the Court of Appeals affirming the decree of the lower court of the 2d of June, 1896, while the only appeal that the record contains is from the decree of the latter of the 22d of August, 1896.

But passing by this confusion, and regarding both decrees before us, we come to the motion to dismiss made by the defendants in error on the ground that no Federal question was raised in the state court.

This is true as to all the pleadings and papers, except the petition of the 22d of August, 1896, for leave to file an ancillary bill. If, however, a Federal question was raised by the petition and on the appeal from the order denying it, the motion to dismiss must nevertheless be granted, because the decision of the Court of Appeals rests on grounds other than those dependent on Federal questions. *Simmerman* v. *Nebraska*, 116 U. S. 54; *Eustis* v. *Bolles*, 150 U. S. 361; *California Powder Works* v. *Davis*, 151 U. S. 389; *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556; *Fowler* v. *Lamson*, 164 U. S. 252; see also *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, and *Miller* v. *Cornwall Railroad Co.*, 168 U. S. 131.

The writ of error is dismissed.

CHAPPELL CHEMICAL AND FERTILIZER COMPANY *v.* SULPHUR MINES COMPANY (No. 2).

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

No. 92. Argued December 16, 1898. — Decided January 9, 1899.

The Court of Appeals of Maryland, in dismissing this case, said: "The defendant, long after the time fixed by the rule of court, demanded a jury trial, and, without waiting for the action of the court upon his motion, and indeed before there was any trial of the case upon its merits and before any judgment, final or otherwise, was rendered, this appeal was taken from what the order of appeal calls the order of court of the 6th of February, 1896, denying the defendant the right of a jury trial; but no such order appears to have been passed. On the day mentioned in the order of appeal there was an order passed by the court below fixing the case for trial, but there was no action taken in pursuance of such order until subsequent to this appeal. There is another appeal pending here from the orders which were ultimately passed." *Held*, that no Federal question was disposed of by this decision.

THIS cause was argued with No. 91, the preceding case. The case is stated in the opinion.

Mr. Thomas C. Chappell for plaintiff in error.

Mr. James M. Ambler and *Mr. Randolph Barton* for defendant in error. *Mr. Skipwith Wilmer* and *Mr. Randolph Barton, Jr.*, were on their brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a writ of error to the Court of Appeals of the State of Maryland to review a judgment made by it, and which is hereafter set out.

The action was at law for the recovery of eight thousand dollars for money payable, goods sold and work done, and materials furnished by defendants in error (plaintiffs in the court below) to plaintiff in error, (defendant in the court below,) and was brought in one of the city courts of Baltimore,

Maryland. To the declaration a plea was filed February 12, 1895, averring that the defendant was never indebted and never promised as alleged. On January 13, 1896, under the Maryland practice, upon the suggestion of the defendant (plaintiff in error) that it could not have a fair trial, the case was "transmitted" to the Supreme Court of Baltimore, Maryland.

The record contains a number of motions and exceptions to the rulings on the motions. One of these exceptions was that the ruling of the court deprived plaintiff in error of a jury trial under a law of Maryland and the rules of court made in accordance therewith, which law and rules plaintiff in error alleges are repugnant to the Constitution of the United States. Another objection was to an order made on the 6th of February, 1896, requiring plaintiff in error to employ new counsel, the cause under the practice of the court having been peremptorily set for trial on the 20th of February, 1896, after having been twice postponed for the alleged sickness of counsel.

An appeal was entered from this order and perfected. The Court of Appeals dismissed it December 3, 1896, saying:

"The appeal in this case having been prematurely taken, the motion to dismiss it must prevail.

"The defendant, long after the time fixed by the rule of court, demanded a jury trial, and without waiting for the action of the court upon his motion, and indeed before there was any trial of the case upon its merits and before any judgment, final or otherwise, was rendered, this appeal was taken from what the order of appeal calls the order of court of the 6th of February, 1896, denying the defendant the right of a jury trial; but no such order appears to have been passed. On the day mentioned in the order of appeal there was an order passed by the court below fixing the case for trial, but there was no action taken in pursuance of such order until subsequent to this appeal. There is another appeal pending here from the orders which were ultimately passed.

"Appeal dismissed."

No Federal question was disposed of by this decision.

Writ of error dismissed.

CHAPPELL CHEMICAL AND FERTILIZER COMPANY *v.* SULPHUR MINES COMPANY (No. 3).

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

Argued December 16, 1898. — Decided January 9, 1899.

The claim made in the court below that the provision in the constitution of Maryland which abridged the right of trial by jury in the courts of the city of Baltimore without making a similar provision for the counties of the State denied to litigants of the city the equal protection of the laws, is not tenable.

The record does not contain the petition for the removal of this case from the state court to the Circuit Court of the United States, nor disclose the grounds on which it was founded, and this court does not pass upon the question whether the state court lost jurisdiction by reason of it.

This cause was argued with Nos. 91 and 92, preceding it. The case is stated in the opinion.

Mr. Thomas C. Chappell for plaintiff in error.

Mr. James M. Ambler and *Mr. Randolph Barton* for defendant in error. *Mr. Skipwith Wilmer* and *Mr. Randolph Barton, Jr.*, were on their brief.

Mr. Justice McKenna delivered the opinion of the court.

This is an action at law brought by plaintiff in error against defendant in error and another, for causes growing out of the matters sued on in No. 92. Here, as in No. 92, there was a series of motions which we do not think it is necessary to notice.

The case, on the appeal of plaintiff in error, reached and was passed on by the Court of Appeals of the State, and to its judgment affirming that of the lower court this writ of error is directed.

The judgment must be affirmed.

Claims under the Constitution of the United States were set

up in several of the motions and denied by the court. One claim was that the constitution of Maryland abridged the right of trial by jury in the courts of Baltimore city without making a similar provision for the counties of the State, and that this denies to litigants of the city the equal protection of the laws. This is not tenable. *Missouri* v. *Lewis*, 101 U. S. 22; *Hayes* v. *Missouri*, 120 U. S. 68.

The other claim was that the state courts lost jurisdiction by reason of the pendency of a petition filed under section 641, Revised Statutes, to remove the case to the United States Circuit Court. The petition for removal is not in the record, and we only know that it was filed by reason of the recital in other motions and its notice in the opinion of the Court of Appeals, and the grounds of it do not appear in any part of the record.

In all other matters the judgment of the Court of Appeals depends on questions of state practice and state laws.

Judgment affirmed.

COLUMBIA WATER POWER COMPANY *v.* COLUMBIA ELECTRIC STREET RAILWAY LIGHT AND POWER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 67. Argued December 6, 7, 1898. — Decided January 9, 1899.

Reading the complaint and the answer in this case together, the question whether the contract of the plaintiff was impaired by subsequent state action appears on the face of the pleadings, and this court has jurisdiction to hear and determine the case.

Under Rev. Stat. § 709 there are three classes of cases in which the final decree of a state court may be examined here: (1) where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity; (2) where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; (3) where any title, right, privilege or im-

Statement of the Case.

munity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority, and in this class the Federal right, title, privilege or immunity must, with possibly some rare exceptions, be specially set up or claimed to give this court jurisdiction.

But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, if the Federal question appears in the record and was decided, or if such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.

The provision in the act of the South Carolina legislature of December 24, 1887, that the right of the State to the five hundred horse power of water retained for the use of the penitentiary should be "absolute" authorized the leases of such portion thereof as was not required for the individual use of the penitentiary.

Whether the plaintiff had a legal title to the lands in question in this case was purely a local issue, and whether the erection of a steam plant by the defendant was an incident of its contract with the state penitentiary is not reviewable here.

This was a complaint in the nature of a bill in equity, filed in the Court of common pleas for Richmond County, South Carolina, by the Columbia Water Power Company, as plaintiff, to enjoin the Columbia Electric Street Railway, Light and Power Company from using certain water power for the propulsion of its cars, lighting its lamps and furnishing power motors, also from entering upon plaintiff's lands and erecting thereon its buildings, works and machinery; and also requiring the defendant to remove such as had already been erected, and for the payment of damages.

The bill set forth that a structure, known as the Columbia Canal, begins above the city, passes through the city near the western boundary, and empties into the Congaree River just beyond the limits of the city, passing around the shoals and falls in said river, and when constructed and in use made a continuous communication between the Broad and Congaree rivers; that the canal was begun by the State as a public work in the year 1824, and for the purpose of its construction

certain lands were purchased within the limits of the city, through which the canal was to be carried and constructed; that the canal was used for purposes of navigation for some time and remained, with the lands described, the property of the State until February 8, 1882, when the general assembly of the State by an act of that date authorized and directed the canal commission to transfer the canal, with the aforesaid lands, to the board of directors of the state penitentiary, with all the rights and appurtenances thereto acquired by the State; that the board was authorized and directed to, and subsequently did take possession of the canal and lands, and proceeded with the work of enlarging and developing the canal, expending large sums of money for that purpose, and widened and enlarged its banks, and remained in the full possession thereof until December 24, 1887, when the general assembly passed an act, (the material portions of which are printed in the margin,[1]) "to incorporate the board of trustees of the Columbia

[1] Act of December 24, 1887.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same*, That the board of directors of the South Carolina penitentiary are hereby authorized, empowered and required to transfer, assign and release to the board of trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the general assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said board of trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: *Provided*, That should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the State.

SEC. 2. That the said board of trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for

Canal, to transfer to the said board the Columbia Canal with the lands held therewith, with its appurtenances, and to develop the same," 19 So. Car. Stats. 1090; that by section one of the act the board of directors of the penitentiary was authorized to transfer and release to the board of trustees of the

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providing an adequate water power for the use of the penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same.

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SEC. 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep from the source of the canal down to Gervais street, *and furnish the State, free of charge, on the line of the canal*, 500 *horse power of water power*, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the canal commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: *Provided, That the right of the State to the free use of the said* 500 *horse power shall be absolute*, and any mortgage, assignment or other transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right.

* * * * * * *

SEC. 21. The said board of trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be "Board of Trustees of the Columbia Canal." Its officers shall be a chairman, and a secretary and treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; *may sell or lease the water power of the canal subject to such rules and regulations as it shall prescribe, having first provided for the State with* 500 *horse power of water power at the penitentiary*, and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the secretary and treasurer as they may deem proper.

Section 23 as amended by act of December 24, 1890. (20 S. C. Stats. 967.)

SEC. 23. That the said board of trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said board of trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alien-

canal the canal property and its lands, with their appurtenances, and that the same should vest in the trustees for the use and benefit of the city of Columbia; that such transfer was made and possession taken by the board of trustees, and the property so remained in their possession until the date and year hereinafter mentioned.

That by section twenty-one of the above act the board of trustees was declared a corporate body, and was authorized among other things to purchase, sell or lease lands adjoining the canal, useful for the purposes of the canal, to sell or lease the water power of the canal subject to such rules and regulations as it should prescribe; and that by virtue of such act the trustees became entitled to the exclusive franchise and right to sell or lease the water power developed by the canal for manufacturing and other industrial purposes, without let or hindrance, and without the right of any person or corporation to interfere or interrupt in any manner the use of such water power, save and except it should provide a certain amount of water power to certain persons and parties in said act nominated and mentioned, and that no person or corporation had a right to divert, disturb, impede or interfere with the flow of water down the said canal.

That by the twenty-third section of this act, as amended by the subsequent act of December 24, 1890, 20 So. Car. Stats. 967, the board of trustees was given full power and authority to sell, alienate and dispose of the canal, its lands and appurtenances, to any person or corporation, subject to all duties and liabilities imposed by the act, and to all contracts made by the board, prior to such transfer, upon the approval and con-

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ate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said board of trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and before such sale, alienation and transfer is made thirty days' notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia.

Approved December 24, A.D. 1890.

sent of nine members of the council of the city of Columbia; that in pursuance of such section, the trustees, before the completion of the canal, and on January 11, 1891, conveyed all of said property to the Columbia Water Power Company, the plaintiff, including the canal and all of the lands held therewith, easements, rights of way, rights of overflow and appurtenances acquired by the board of trustees, with their rights and franchises; that the plaintiff went into possession of all the property, and so remained in possession without any claim or assertion of an adverse right; and thereby became entitled to all the franchises, privileges and immunities conferred upon the board of trustees.

That the act of December 24, 1887, provided that upon the development and completion of the canal the board of trustees should furnish the State free of charge five hundred horse power of water power; and the twenty-third section of the act as amended provided that this duty should be imposed upon any person or corporation to whom the board of trustees should sell or transfer the property; that in March, 1892, the development and enlargement of the canal was completed, and on said date, and ever since, the plaintiff was and is ready to furnish the State with the five hundred horse power of water power as required by the act aforesaid.

That the defendant, a South Carolina corporation, was organized by the consolidation of three prior companies, and was authorized to construct through the city a street railway, and also to maintain a system of electric lighting; that in May, 1892, the plaintiff was informed by the board of directors of the penitentiary that the defendant company had been authorized by the said board to build a power house, with forbay, flumes and water wheels, for the purpose of utilizing the five hundred horse power to be furnished to the State, and that it was the purpose of such company to erect works under such authority to develop such power, and to furnish to the State, within the walls of the penitentiary, so much of said power as had been agreed upon by and between the board of directors of the penitentiary and the said company; that the plaintiff gave immediate notice to the said board and to the

defendant that it would object to the use of any of its lands or embankments on the west side of the canal by any person or corporation, except so much as would be necessary for the erection of the power house to furnish five hundred horse power for the use of the State; that the State should have full liberty to build such works upon the embankments of the canal as were necessary in furnishing such water power, but that such works should be strictly confined to such portion of the property of the plaintiff as should be necessary for that purpose, and that the plaintiff would not recognize the right of the State to assign such horse power, or any part thereof, to any corporation to be used for private purposes, outside of the walls of the penitentiary or any public institution of the State; and that it was under no obligation to furnish water power from the canal to be used by private corporations for private enterprises.

That subsequently the defendant, acting through the board of directors of the penitentiary, submitted plans and specifications for the erection of works for making the state water power available, and plaintiff approved of the same as not taking more of the land than was necessary for the development of the five hundred horse power for the use of the State, and allowed the defendant to proceed with its work, which was completed in accordance with the plans and specifications so submitted; but that thereafter the defendant, against the protests and objections of the plaintiff, proceeded to place in such works machinery intended solely for the purpose of running its electric lights and street railway, and furnishing power to divers persons in the city for their industries, against which plaintiff protested, and gave notice that proceedings would be taken to prevent such misapplication by the electric company, which, notwithstanding such protests, continues to place such machinery in its power house for its own private purposes; and that the plaintiff is wholly without power to prevent the action of the defendant in such misapplication of such power for its private purposes, owing to the duty of the plaintiff to furnish power for the use of the State and its penitentiary, as such power is furnished and made available at and by the same

water wheel; and that, unless such use be enjoined, it will suffer irreparable injury and damage, and its franchise to sell and lease water power for purposes of manufacturing and other industrial purposes will be affected and materially injured.

That the said defendant also in February, 1893, against the protest of the plaintiff, entered upon its premises on the western embankment of the canal and at the southern end of the power house above mentioned, and excavated and removed the earth, rock and works composing the foundation of such embankment to the great danger of the canal and embankment, and began erecting the foundations for the steam engine to be used in running generators, dynamos, etc., as above stated, and has placed portions of its machinery in such structure to be used in producing electric power, and in May, 1893, commenced to erect a boiler house and coal house for use in the same business.

The complaint further alleged that the plaintiff had performed all its obligations to the State and stood ready to continue the performance of the same, but the defendant in disregard of its rights has trespassed upon its property, excavated its embankment, and has interfered with the enjoyment of the franchises granted to it by the State; that a judgment at law against the company would be worthless, and hence the plaintiff prayed for an injunction against such use of the water power and against further trespasses upon its lands.

The answer put in issue the title of the plaintiff to the lands occupied by the defendant; denied that the board of trustees of the canal ever became entitled to the exclusive franchise and right to sell or lease water power developed by it for purposes of industrial enterprises; denied that the five hundred horse power reserved to the State was provided solely for the individual use of the State in its public institutions; denied any intent on its part to injure the plaintiff in its franchise and property by the erection of its works, and alleged that the State, being seized in fee simple of the land and entitled to the unrestricted use of the five hundred horse power referred to in the complaint, but being without means to

Counsel for Parties.

develop the same, entered into a contract dated May 26, 1892, with the defendant, whereby it was stipulated that the defendant should erect suitable works and machinery for the development of such horse power, furnish to the penitentiary so much as was necessary for its purposes, and as a consideration for this should be allowed to make use of the surplus power for its own purposes; that such contract was thereafter ratified and confirmed by an act of the general assembly, approved December 24, 1892, 21 So. Car. Stats. 94; and that the defendant was entitled under such contract to the unrestricted use of such horse power for the purposes contemplated by the contract.

The attorney general, appearing on behalf of the State, filed a suggestion to the effect that if the injunction were granted, defendant would be prevented from carrying out its agreement with the State, and the State would be deprived of the water power it was entitled to in the manner contracted for, and of the revenue it had secured under the contract. He did not, however, submit the rights of the State to the jurisdiction of the court, but insisted that the court had no jurisdiction of the subject, and asked that the complaint be dismissed.

The case came on for hearing upon the complaint, answer, the suggestion of the attorney general and the articles of agreement, and resulted in a decree dismissing the complaint. An appeal was taken to the Supreme Court of the State, which affirmed the decree of the court below, (43 So. Car. 154,) whereupon plaintiff sued out a writ of error from this court, assigning as error the decision of the Supreme Court affirming the validity of defendant's contract with the board of directors of the penitentiary, and the act of the general assembly ratifying the same.

Mr. LeRoy F. Youmans for plaintiff in error.

Mr. William H. Lyles for defendant in error. *Mr. John T. Sloan* was on his brief.

Opinion of the Court.

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

1. A preliminary motion was made to dismiss this writ of error upon the ground that no Federal question was involved, and even if there were such question, it was not "specially set up and claimed" in the state court, as required by Rev. Stat. § 709.

An examination of the complaint shows that the plaintiff relies upon the act of the general assembly of December 24, 1887. This statute (sec. 1) authorizes the board of directors of the South Carolina penitentiary, which had acquired the ownership of the canal under a previous act of February 8, 1882, to transfer the property to the board of trustees of the Columbia Canal, and (sec. 7) required the completion of the canal and *a reservation to the State, free of charge, on the line of the canal, of five hundred horse power of water power*, with a further proviso that the right of the State to the free use of the said five hundred horse power should be *absolute*, and any mortgage, assignment or other transfer of the said canal by the said board of trustees, or their assignees, should always be subject to this right. In section twenty-one this reservation is described as a provision for the State, with five hundred horse power of water power *at* the penitentiary. By section twenty-three, as amended in 1890, the board of trustees was given authority to *sell, alienate and transfer the canal*, with its appurtenances, lands and franchises, to any person or corporation, subject, however, to all contracts, liabilities and obligations made and entered into by said board prior to such sale and transfer. Pursuant to this authority, the board of trustees, on January 11, 1892, conveyed the canal and its appurtenances to the plaintiff.

The gist of the complaint is that, in 1892, the defendant, acting as the agent of the State through the board of directors of the penitentiary, submitted plans and specifications for the erection of works for making the said five hundred horse power of water power available, to which the plaintiff made no objection; but that thereafter, against its protests, proceeded to

construct in such works machinery intended for the purpose of running its electric lights and street railway and furnishing power to the citizens of Columbia for divers industries; and entered upon the premises of the plaintiff and laid foundations for a steam engine to be used in running its generators, etc., and began the erection of an engine house, boiler house and coal house for the purpose of establishing a steam plant.

The complaint did not set up the contract of the board of directors of the penitentiary with the defendant and the act of the general assembly of December, 1892, confirming the same, but these were both set forth in the answer and relied upon by the defendant as its authority for the erection of its works. In this contract the defendant agreed to erect, on the western bank of the canal opposite the penitentiary, suitable water wheels of sufficient capacity to utilize and develop the five hundred horse power of water power, and to transmit across the canal to some convenient point within the walls of the penitentiary not to exceed one hundred horse power for the use and benefit of the penitentiary. In consideration of this the board of directors agreed to allow the defendant the use of all their rights, title and interest to the land on the west side of the canal, and also to allow it the free and uninterrupted use of the said five hundred horse power of water power reserved to the penitentiary, with the exception of the one hundred horse power so reserved for its private use. This contract was subsequently ratified and confirmed by an act of the general assembly approved December 24, 1892.

While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case taken in connection with the answer is that the rights which it acquired to the five hundred horse power in question under the act of 1887 were impaired by the subsequent act of December 24, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant. The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading

the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent State action appears on the face of the pleadings.

In passing upon the case, the Supreme Court, speaking through Mr. Justice Gary, held that one of the objects of the plaintiff's action was to have the contract between the State and the defendant as to the five hundred horse power declared null and void on the ground that the State could not lease the same. In view of an intervening suggestion, filed by the attorney general, to the purport that the State had interests which would be affected by granting the relief prayed for, he held that the State, being an indispensable party and refusing to become a party, the cause of action on the equity side of the court could not be sustained; and in considering the cause of action on the law side of the court he reached the conclusion that the State was not an indispensable party. He then proceeded to consider whether the contract between the State and the defendant relative to the five hundred horse power was null and void, and held that the proviso to section seven of the act of 1887 being that the right of the State to the free use of this horse power should be *absolute*, the construction given to it by the legislature in the act of 1892 was correct, and that the word "absolute" was used for the purpose of creating a right in the State to this horse power separable and distinct from the ownership in other lands and not dependent upon any particular lands to which it might be appurtenant. It followed that the contract between the State and the defendant was not null and void.

He further held that the right of the defendant to erect the steam plant depended upon the fact whether it was merely incidental and essential to the enjoyment of the water power plant; that the parties had a right to trial by jury as to these issues, but as no demand was made therefor the court assumed that the Circuit Court properly decided all questions of fact upon which its judgment rested. The other justices concurred in the result, the Chief Justice saying that he was not satisfied that the plaintiff ever acquired title to the land upon which the works in question had been erected. There is nothing to

indicate that either of them dissented from the views expressed by Mr. Justice Gary, who presumably spoke for the court, with respect to the Federal question.

In holding that the contract with the defendant and the legislative act confirming the same were valid, the court proceeded upon the idea that the act of 1887 authorizing the transfer of the property to the board of trustees of the Columbia Canal made the reservation to the State of the five hundred horse power an absolute one; that the directors of the penitentiary could do with it as they pleased, and hence they had the right to turn it over to the defendant if, in their judgment, such course was warranted by a due regard for the interests of the State. While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question. *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.

To the argument that the Federal right was not "specially set up and claimed" in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be reëxamined here:

(1) "Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;"

(2) "Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;"

(3) "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority."

There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. *Spies* v. *Illinois*, 123 U. S. 131, 181; *French* v. *Hopkins*, 124 U. S. 524; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Baldwin* v. *Kansas*, 129 U. S. 52; *Leeper* v. *Texas*, 139 U. S. 462; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648.

But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. *Miller* v. *Nicholls*, 4 Wheat. 311; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Satterlee* v. *Matthewson*, 2 Pet. 380, 410; *Fisher's Lessee* v. *Cockerell*, 5 Pet. 248; *Crowell* v. *Randell*, 10 Pet. 368; *Harris* v. *Dennie*, 3 Pet. 292; *Farney* v. *Towle*, 1 Black, 350; *Hoyt* v. *Shelden*, 1 Black, 518; *Railroad Co.* v. *Rock*, 4 Wall. 177; *Furman* v. *Nichol*, 8 Wall. 44; *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 254.

The case under consideration falls within the second class,

and, as it appears from the record and from the opinion of the court, which may be examined for that purpose, (*Kreiger* v. *Shelby Railroad*, 125 U. S. 39,) that the question was presented and decided, that the act of 1892, affirming the validity of defendant's contract with the board of directors of the state penitentiary did not impair the obligation of plaintiff's contract, evidenced by the act of 1887, because that act properly construed conveyed no exclusive rights, we think the Federal question sufficiently appears.

2. Upon the merits the case presents but little difficulty. The argument of the plaintiff is that under the act of 1887 the board of trustees of the Columbia Canal, of which plaintiff is the successor, took an absolute title to the canal and appurtenant lands, with the right to "purchase, sell or lease lands adjoining the canal useful for purposes of the canal," and to "sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided the State with five hundred horse power of water power at the penitentiary," for the individual use of the penitentiary alone, and with no right to lease or sublet it to others for private gain. In support of this contention, plaintiff relies not only upon the act of 1887, under which it takes title, but upon certain prior acts of the general assembly.

Thus, under section two of the act of September 21, 1866, "to provide for the establishment of a penitentiary," 13 So. Car. Stats. No. 4797, p. 393, it was made the duty of the commission "to select and procure a proper site, at some point if practicable where water power may be made available for manufacturing purposes within the enclosure, on which to erect suitable penitentiary buildings." And by a subsequent act, approved December 19, 1866, 13 So. Car. Stats. 408, the commissioners, who had been authorized by a previous act of December 18, 1865, to sell and convey the Columbia Canal, were authorized to sell it at public or private sale, at their discretion, provided that at any sale that may be made by said commissioners, there be made a reservation to the State of water power *sufficient for the purposes of the state penitentiary* for all time free of charge. In a subsequent act of

September 21, 1868, 14 So. Car. Stats. 83, the commissioners were vested by section four with like authority to sell at public or private sale, with a similar reservation to the State of water power sufficient for the purposes of the state penitentiary for all time free of charge. In another act, approved March 12, 1878, 16 So. Car. Stats. 444, to provide for the disposal of the Columbia Canal, there was also a proviso in section four that, "in all grants that may be made, sufficient power shall be reserved to the State *for the use of the penitentiary and the* city of Columbia." So, too, in an act of February 8, 1882, 17 So. Car. Stats. 855, to authorize the canal company to transfer the canal and lands to the board of directors of the penitentiary, it was provided that the board of directors should take possession on behalf of the State of the canal with its appurtenances, and, *for the purpose of providing an adequate water power for the use of the penitentiary*, were authorized to improve and develop the same. By section six of the same act they were authorized "to furnish to the city of Columbia, for the purpose of operating its water works and other purposes, five hundred horse power of water power; . . . and after reserving *for the use of the penitentiary* a power sufficient to meet *the demands of its ordinary operations and other industries conducted and carried on within its walls*, they are further authorized, with the comptroller general on behalf of the State, to lease to other persons or corporations water power upon such terms and upon such annual rental per horse power as in their judgment may be proper, and also to lease such mill sites along the line of the said canal as may be owned by the State, upon such terms as may be deemed most advantageous to the interest of the State."

It will be observed that these acts are progressively liberal to the State; that the earlier ones contemplated the use of the water power only for manufacturing purposes within the walls of the penitentiary, while the later ones indicated that such power was also reserved for the use of the city of Columbia, for the purpose of operating its water works and other purposes, as well as for leasing to others. But however cogent these acts might be to indicate that the object of the State

was to reserve to the individual use of the penitentiary the five hundred horse power, it is equally clear that the act of 1887 is decisive of a change of purpose in that regard; and in providing that the right of the State to the free use of its amount of water power should be *absolute*, it meant that the directors of the penitentiary should make such use of it as they pleased, regardless of prior acts, and the immediate requirements of the penitentiary. The clearer the reservation for the individual use of the penitentiary may have formerly been, the clearer the change of purpose becomes manifest by the use of the word "absolute." The theory of the plaintiff is that by the use of this word was meant simply the right of the State to the free use of the said five hundred horse power, unaffected by any mutations of ownership. This, however, was already secured to the State by the previous clause of section seven, requiring the board of trustees "to furnish to the State, free of charge, on the line of the canal, five hundred horse power of water power." Nor are the requirements of this word met by treating it as the equivalent of "perpetual" or "for all time." In construing statutes words are taken in their ordinary sense. No authority can be found for such a definition of the word "absolute;" nor does the context suggest it. Its most ordinary signification is "unrestricted" or "unconditional." Thus, an absolute estate in land is an estate in fee simple. 2 Bl. Com. 104; *Johnson* v. *McIntosh*, 8 Wheat. 543, 588; *Fuller* v. *Misroon*, 35 So. Car. 314, 332; *Johnson* v. *Johnson*, 32 Alabama, 637; *Converse* v. *Kellogg*, 7 Barb. 590, 599. In the law of insurance, that is an absolute interest in property which is so completely vested in the individual that there could be no danger of his being deprived of it without his own consent. *Hough* v. *City Fire Ins. Co.*, 29 Conn. 10; *Reynolds* v. *State Mutual Ins. Co.*, 2 Grant's Cases, 326; *Washington Fire Ins. Co.* v. *Kelly*, 32 Maryland, 421.

We have no doubt that in providing that the right of the State should be absolute, it was intended to permit the board of directors to do exactly what was done in this case, *i.e.* to lease such portion of the five hundred horse power as was not required for the individual use of the penitentiary. Indeed,

we perceive no other reason for the insertion of this clause. The right to use it in the penitentiary was already amply secured by clauses so frequently inserted in prior acts that no question of construction could be raised upon them, and when the act of 1887 went still further it was evidently upon the idea that the power not necessary for the penitentiary should not be wasted, but should be applied to such other uses as were conducive to the interests of the State. While the leasing of the same to the defendant may have been for private gain, the lighting of the city by electricity and the establishment of street railways was manifestly a public purpose.

If plaintiff's theory were sound the penitentiary would be unable to make use of its reserved water power unless it were also possessed of the requisite means to establish a plant, while under its actual arrangement with the defendant it grants to the latter its surplus water power, and in consideration thereof receives all such power as is necessary for its own purposes, and in addition thereto a substantial annual revenue for its other needs.

3. The remaining question as to injuries threatened and inflicted upon plaintiff's property by the entry of the defendant upon the western embankment of the canal, the digging, excavating and removal of the earth, and the erection of buildings and machinery thereon, does not demand an extended consideration. The court of common pleas found that plaintiff was owner of the property upon which these works were erected, but that the State, having the right to the five hundred horse power, had also the incidental right to lease the same to the defendant, which took thereby the right to put its electric plant upon the banks of the canal, as well as the supplementary right to put in a steam plant to be used at times when the water power was unavailable, by reason of freshets or by necessary repairs to the canal or other causes. The Supreme Court did not expressly pass upon the validity of plaintiff's title to the land, but held that whether the contract conferred upon the defendant the right to erect a steam plant depended upon the fact whether it was merely incidental to or essential to the enjoyment of the water

plant; and that no jury having been demanded, the court must assume that the Circuit Judge decided this question properly; and even if there were error on his part in the finding of fact, it was not the subject of review by the Supreme Court in a law case. It needs no argument to show that neither of these rulings involved a Federal question. Whether plaintiff had a legal title to the lands was purely a local issue, and whether the erection of a steam plant by the defendant was an incident of its contract with the state penitentiary is, for the reason stated by the Supreme Court, not reviewable here.

In addition to this, however, the deed through which the State and the plaintiff derived their title is not in evidence before us. The answer admitted that the State did acquire a strip of land lying within the boundaries described in the bill, but denied that the buildings erected by the defendant "at any point touched upon said strip of land." The State appeared to have derived title from one Rawls, whose deed was filed in the state court, but does not appear in the record before us, and the Supreme Court of the State found that it could not review the finding of the court below to the effect that the plaintiff was the owner in fee of the land.

The decree of the Supreme Court of South Carolina is therefore

Affirmed.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* LONG ISLAND LOAN AND TRUST COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 16. Argued April 11, 12, 1898. — Decided January 9, 1899.

In view of the statute giving this court authority to reëxamine the final judgment of the highest court of a State, denying a right specially set up or claimed under an authority exercised under the United States, this court has jurisdiction to inquire whether due effect was accorded to the

foreclosure proceedings in the Circuit Courts of the United States, under which the plaintiff in error claims title to the lands and property in question in this suit.

Under the circumstances stated in the finding of facts, Lynde acquired a good title (as between himself and the mortgagor company and the companies which succeeded it by consolidation,) to the thirty-six bonds purchased by him, as well as the right to claim the benefit of the mortgage executed to Parkhurst.

The state court having adjudged that there was no rule of law arising out of the public policy of the State, as manifested by state legislation, that required it to deny to the holders of those bonds the rights and privileges pertaining to commercial paper, purchased in good faith, in the ordinary course of business; and in view of the fact that the lien attending the thirty-six bonds purchased by Lynde did not arise after the institution of the foreclosure suits, but had its origin in the execution and delivery of the Parkhurst mortgage and the authentication by the trustee of the bonds named in it; and in view of the further fact that the trustee in the prior mortgage was not made a party to the foreclosure suits, and was not bound by the decree; under the well settled rule that a sale of real estate under judicial proceedings concludes no one who is not, in some form, a party to such proceedings, this court holds, that the pendency of the foreclosure suits did not interfere with the negotiation or transfer of the bonds secured by the prior Parkhurst mortgage; that the decree in those suits did not impair in any degree the lien created by that mortgage; that the purchase of the bonds by Lynde could not be regarded as hostile to the possession taken of the property embraced by the Roosevelt mortgage for the purpose of selling it in satisfaction of the debts secured thereby; and that the state court did not fail to give due effect to the several decrees in the Circuit Courts in the Roosevelt foreclosure suits, when it held that those decrees did not prevent the defendant in error from claiming the benefit of the lien created by the mortgage to Parkhurst to secure the payment of the bonds purchased by Lynde.

THE case is stated in the opinion.

Mr. Charles E. Burr and *Mr. Lawrence Maxwell, Jr.*, for plaintiff in error.

Mr. E. W. Kittredge and *Mr. Joseph Wilby* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a final judgment of the Supreme Court of Ohio affirming a judgment of the Circuit Court of Franklin County, in that State.

Opinion of the Court.

The general question presented for determination is whether certain railroad property may be sold in satisfaction of a judgment obtained in 1891 by Charles R. Lynde in the Circuit Court of the United States for the Southern District of Ohio for the amount of 36 coupon bonds, part of 1000 bonds issued by the Columbus and Indianapolis Central Railway Company, an Ohio corporation, in the year 1864.

The bonds were secured by a deed of trust, and were made payable to William D. Thompson or bearer, on the 1st day of November, 1904, each bond reciting, among other things, that it was one of an issue of not exceeding $1,000,000, and had a special lien on all of the railway property, equipments and franchises of the company, as mentioned in the above deed of trust, subject to prior mortgage liens of $3,200,000; that it should "be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner;" also, that it "shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee."

To each bond was attached this certificate: "I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. — A. Parkhurst, *Trustee.*"

The property and rights covered by the above deed of trust, and which were ordered to be sold by the decree in this case if the Columbus, Chicago and Indiana Central Railway Company did not, by a named day, pay the amount found due to the plaintiff, was a line of railroad extending from Columbus, Ohio, to Indianapolis, Indiana, including a branch from Covington to Union, together with the franchises, equipment, property, tolls and interests appertaining thereto.

The case made by the record is set forth in an extended finding of facts covering sixteen pages of the present transcript. Many of the facts so found are not necessary to be here stated. Those which bear more or less upon the present inquiry may be thus summarized:

The Columbus and Indianapolis Central Railway Company prepared, signed and sealed the 1000 bonds referred to, (part of which were the 36 bonds held by Lynde,) and to secure the same executed and delivered the mortgage or deed of trust to Archibald Parkhurst, as trustee.

The above deed recited the consolidation of the Columbus and Indianapolis Railroad Company and the Indiana Central Railway under the name of the Columbus and Indianapolis Central Railway Company, the consolidated company becoming liable for and assuming all the just debts and liabilities of the respective constituent companies; that, for certain purposes, a new series of bonds, 1000 in number, and each for $1000, should be issued, dated November 1, 1864, to be secured by a deed of conveyance covering the mortgagor company's road, its appurtenances, franchises, equipments, property, tolls, income and interest, to a trustee to secure the payment of said bonds and interest warrants. Such a deed was made, and conveyed to A. Parkhurst, trustee, for the "purpose of assuring the punctual payment of the said 1000 bonds and each of them to each and every person who may become the holder of the same or any of them," the mortgagor company's entire railroad from Columbus to Indianapolis, including the branch from Covington to Union, its franchises, etc., in trust to secure the bonds about to be issued by it. The deed contained all the provisions usually found in such instruments.

Parkhurst accepted the trust, and the mortgage or deed of trust was duly recorded in Ohio and Indiana.

Shortly after the signing and sealing of the 1000 bonds they were all duly certified by the trustee in the form above stated.

Prior to January 1, 1867, of the 1000 bonds 790 had been duly issued *in exchange* for a like number and amount of the existing second and third mortgage bonds of the Columbus and Indianapolis Railroad Company as provided in said mortgage, and 31 of said bonds had been duly issued and sold by the railway company. The highest serial number of the 821 bonds so exchanged and sold was No. 833. The remaining 179 of the 1000 bonds, including the 36 bonds described in the petition, having been delivered prior to 1870 by the trustee, Park-

hurst, to Benjamin E. Smith, as president of the company, remained in the latter's possession as president, and the companies into which the same was successively consolidated as hereinafter set forth, until the months of November and December, A.D. 1875, and the happening in those months of the events to be presently stated.

On or about the 11th day of September, 1867, the Columbus and Indianapolis Central Railway Company, which made the above mortgage of 1864, was consolidated with the Union and Logansport Railroad Company and the Toledo, Logansport and Burlington Railroad Company, and became the Columbus and Indiana Central Railway Company; and on or about the 12th day of February, 1868, the latter company and the Chicago and Great Eastern Railroad Company were consolidated and became the Columbus, Chicago and Indiana Central Railway Company, one of the defendants in this action.

No authority or consent was thereafter given by the board of directors of the Columbus, Chicago and Indiana Central Railway Company for the issue or sale of the above 179 bonds or any of them.

The Columbus, Chicago and Indiana Central Railway Company on or about the 20th day of February made and executed its 15,000 bonds of that date, each for the sum of $1000, bearing interest at the rate of seven per cent per annum; and in order to secure their payment executed and delivered its mortgage or deed of trust of that date to James A. Roosevelt and William R. Fosdick, trustees, conveying to them all its property — such conveyance including the property formerly belonging to the Columbus and Indianapolis Central Railway Company that had been previously conveyed to Parkhurst, trustee. That mortgage was recorded in the States of Ohio, Indiana and Illinois immediately after its execution.

Afterwards, and before Roosevelt and Fosdick, trustees, began the foreclosure suit hereinafter mentioned, the Columbus, Chicago and Indiana Central Railway Company issued and sold of the 15,000 bonds so secured, bonds to the amount of $10,428,000 or more.

On or about the 15th day of December, A.D. 1868, the

Columbus, Chicago and Indiana Central Railway Company made and executed its 5000 bonds each for the sum of $1000, of that date and due upon the 1st day of February, A.D. 1909, with interest at seven per cent per annum, and for the purpose of securing their payment executed and delivered its second mortgage or deed of trust to Frederick R. Fowler and Joseph T. Thomas, trustees, conveying to them all its property including the property described in the petition; which mortgage was immediately thereafter duly recorded in Ohio, Indiana and Illinois.

It was set forth in the latter instrument that the mortgagor, in addition to $15,000,000 of first mortgage bonds, was then indebted for outstanding bonds as follows, to wit: Second mortgage bonds of the Columbus and Indianapolis Central Railway Company, $821,000; income bonds of the Columbus and Indiana Central Railway Company, $1,243,000, and Chicago and Great Eastern Railway Company construction and equipment bonds, $400,000; total, $2,464,000; and that it was further indebted in other liabilities in the estimated sum of $2,500,000. It was provided in the Fowler-Thomas mortgage that of the issue of $5,000,000 of bonds, the sum of $2,500,000, being bonds numbered 2501 to 5000 inclusive, should be set aside and used only in exchange for and to satisfy the above $2,464,000 of bonds.

The 821 second mortgage bonds of the Columbus and Indianapolis Central Railway Company referred to in said mortgage were part of the bonds secured by the mortgage to Parkhurst, trustee.

On or about the 22d day of January, 1869, the Columbus, Chicago and Indiana Central Railway Company leased to the Pittsburgh, Cincinnati and St. Louis Railway Company its entire railroad and property, including the railroad and property here in question, for the term of ninety-nine years from the 1st day of February, A.D. 1869, renewable forever. And on or about the 1st day of February, 1869, possession of the leased railroad and property was delivered to the Pittsburgh, Cincinnati and St. Louis Railway Company, which continued to hold possession thereof and to operate the same

as lessee till after the sale to which reference will be presently made.

It was provided in that lease that no bonds beyond the $15,000,000 of first mortgage bonds, secured by the mortgage to Roosevelt and Fosdick, and the $5,000,000 of second mortgage bonds, secured by the mortgage to Fowler and Thomas, and the said $2,000,000 of income bonds, should be issued by the lessor company without the consent of the board of directors of the respective parties to the lease. This lease was duly recorded in the States of Ohio, Indiana and Illinois on or about the 29th day of May, 1873.

On the first and second days of February, 1875, Roosevelt and Fosdick commenced their actions concurrently in the Circuit Courts of the United States for the Southern District of Ohio, the District of Indiana and the Northern District of Illinois for the foreclosure of the mortgage made to them as trustees, and for other purposes, "but," the finding states, "not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured."

In those actions William L. Scott appeared and filed a cross-bill in October, 1881, claiming to be the owner of certain bonds secured by the mortgage to Roosevelt and Fosdick, and praying, among other things, for its foreclosure. But he asked no relief against the Parkhurst mortgage or the bonds secured thereby. Prior to the beginning of the foreclosure suit Thomas resigned his trust under the mortgage made to Fowler and himself, and thereafter that trust was administered by Fowler alone.

In said actions the Columbus, Chicago and Indiana Central Railway Company, Fowler and others were made parties defendant, and were duly served with process or entered their appearance therein.

In the bills of foreclosure the plaintiffs among other things prayed for the appointment of a receiver or receivers of all the railroad, equipment and appurtenances and other mortgaged premises, and of the earnings and income, rents, issues and profits thereof; that the net amount of such earnings should be first applied to the payment of the interest on all the bonds

issued under the mortgage to the plaintiffs, and to the payment of the interest on all mortgage bonds having prior liens on the property, in such order as the court might direct; and that the balance should be applied to the payment of the sums due and in arrears to and for the sinking fund provided for in the mortgage to them for the redemption of the bonds issued under said mortgage.

Such proceedings were had in the foreclosure suits brought in the Circuit Courts of the United States that, on the 2d and 3d days of February, 1875, Roosevelt and Fosdick were duly appointed receivers of the railroad, equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage, and of the earnings, income, rents, issues and profits thereof; and they were directed not to disturb the possession of the mortgaged premises by the Pittsburgh, Cincinnati and St. Louis Railway Company under the lease to it, but should collect and receive the rental payable by the lessee, and apply the same as provided by the further orders of the court. And in the order of appointment it was further directed that the Columbus, Chicago and Indiana Central Railway Company forthwith transfer and convey to the receivers the said railroad equipment and appurtenances and other mortgaged premises embraced by the mortgage, and including the income, rents, issues and profits thereof. The conveyance so ordered was duly executed and delivered to Roosevelt and Fosdick as receivers, on or about May 25, 1875.

That deed was not recorded, and the plaintiff Charles R. Lynde had no actual knowledge of its existence until the commencement of this action in 1891.

Immediately after their appointment the receivers in pursuance of the above order took possession and control of all said railroad and property, its income, rents, issues and profits, subject, however, to the physical possession and operation of the railroad by the lessee. They continued in possession and control until after the sale of the railroad and the property hereinafter set forth.

Such further proceedings were had in the foreclosure suits that on the 15th, 16th and 23d days of November, 1882, in the

several Circuit Courts, similar decrees were entered, wherein it was adjudged that in case the Columbus, Chicago and Indiana Central Railway Company failed for ten days to pay the sum found due in the decree, the mortgage should be foreclosed and the property conveyed by it — which, as we have seen, *included all the property described in the petition herein* — should be sold for the payment of the principal and interest of said bonds, *subject to the outstanding sectional bonds prior in lien to the mortgage to Roosevelt and Fosdick, and to all other if any paramount liens thereon*, but free from the lien of the mortgage to Roosevelt and Fosdick; that the decree should not in any manner affect, prejudice or preclude *the holders of the paramount liens or any of them*, but should be without prejudice to the rights of them and each of them. It was also adjudged that the purchaser of the mortgaged premises should be invested with, and should hold, possess and enjoy the same and all the rights, privileges and franchises appertaining as fully and completely as the Columbus, Chicago and Indiana Central Railway Company *at the commencement of the suit by Roosevelt and Fosdick held or then held and enjoyed, or was entitled to hold or enjoy, but free from liens then represented by any party to said cause.*

In that decree it was further adjudged that the sale decreed to be made, and the conveyance, after confirmation thereof, to be executed and delivered, should be valid and effectual forever, and that thereby *the defendants in said suits*, respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of the suits by Roosevelt and Fosdick*, as purchasers, incumbrancers or otherwise howsoever, should be forever barred and foreclosed of and from all rights, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof.

On or about the 10th day of January, 1883, in conformity with the decree, the said property and every part thereof was sold by masters, theretofore appointed to execute the order of sale, William L. Scott, Charles J. Osborn and John S. Kennedy, for the sum of $13,500,000, which sum was insufficient

to pay the outstanding bonds and interest, secured by the mortgage to Roosevelt and Fosdick.

Afterwards, and on or about the 30th day of January, 1883, the Circuit Courts for the Northern District of Illinois and the District of Indiana, and on the 31st day of January, 1883, the Circuit Court for the Southern District of Ohio — the said purchase money having been paid — by orders entered in those causes, duly confirmed and approved the sale, and ordered said premises and property, rights and franchises, to be conveyed to the purchasers, in fee simple, in accordance with the former decrees of those courts. Such a conveyance was made February 21, 1883.

Subsequently, on or about the 17th day of March, 1883, Scott, Osborn and Kennedy, with their respective wives, executed and delivered their deed of that date, conveying said premises and property, rights and franchises, to the Chicago, St. Louis and Pittsburgh Railroad Company, which was authorized to purchase and own the same.

On or about the 10th day of June, 1890, the Chicago, St. Louis and Pittsburgh Railroad Company was duly consolidated with the Pittsburgh, Cincinnati and St. Louis Railway Company, together with other railway companies, under the name of and thereby became the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

The latter company was, at the commencement of this suit, and through its predecessors in title have been ever since the conveyance to Scott Kennedy and Osborn, in the actual, peaceable and undisputed possession of all said railroad, premises and property, rights and franchises, including that described in the petition.

The history of the 36 bonds in suit is as follows:

On and before the 1st day of November, 1864, Benjamin E. Smith was the president of the Columbus and Indianapolis Central Railway Company. He continued to be president of that corporation, and of its successors into which it was successively consolidated, until the sale of the railroad hereinbefore mentioned in 1883.

In the months of November and December, 1875, Smith bor-

rowed for his own purposes $48,000 from W. H. Newbold, Son & Co., brokers in Philadelphia, executing and delivering to them his individual notes. At that time he had, as president of the Columbus, Chicago and Indiana Central Railway Company, the custody and possession of the 179 bonds hereinbefore described; and without the knowledge, authority or consent of that company, but falsely pretending to W. H. Newbold, Son & Co. that he was individually the owner of such bonds, delivered certain of them, including the 36 described in the plaintiff's petition, as collateral security for the payment of his notes. He subsequently renewed his notes with the same collateral from time to time until about the 14th day of January, 1878, when the 36 bonds were sold by W. H. Newbold, Son & Co., and the proceeds applied to the payment of Smith's notes. The balance was paid over to him or for his use, and no part of it was used for the benefit of the railway company.

At the time the bonds were so pledged all the past-due coupons had been cut off, and while they were so held as collateral security the subsequent coupons, as they fell due, were cut from the bonds and delivered to Smith, but were never presented for payment.

At the sale of the bonds, Newbold, Son & Co. themselves became the purchasers of the 36 bonds, paying the full market price, and buying them in good faith without knowledge of any defect in them; and thereafter they sent them to New York for sale.

In the months of May, July and August, 1878, Lynde purchased the 36 bonds in good faith in the usual course of business for valuable consideration, (being about ninety cents on the dollar, which was at the time the usual market price for them,) without knowledge or notice of the unauthorized or fraudulent acts of Smith, and without any knowledge or notice that the bonds had not been sold by the Columbus and Indianapolis Railway Company, and thereby became the *bona fide* holder and owner of the bonds and the coupons thereto belonging. Before the 36 bonds had been purchased by him the railway company had not made default in the payment

of interest on them, and no holder prior to Lynde had elected that the principal sum should become due.

At the time Lynde purchased the bonds the coupons due May 1, 1878, were still attached to the bonds and were unpaid.

On or about the 27th day of August, 1878, Lynde presented the 36 bonds for registration to the secretary of the Union Trust Company, New York, which had been designated by the Columbus, Chicago and Indiana Central Railway Company as registering agent for such bonds in the city of New York — to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer; and the secretary then caused the same to be registered in the name of Lynde. At the time of such registration no inquiry was made by the secretary as to whether or not the bonds had been regularly issued by the Columbus and Indianapolis Central Railway Company.

The coupons maturing May 1, 1878, on these 36 bonds which were attached to them when Lynde purchased, were paid to the latter by the firm of A. Iselin & Co., Wall street, New York, upon presentation by Lynde of the coupons in October, 1878; and the 36 coupons maturing November 1, 1878, were paid to Lynde by the same firm upon the presentation of the coupons in April, 1879. Iselin & Co. were acting for the receivers and a bondholders' committee — that committee furnishing the money for taking up the coupons, and being afterwards reimbursed by the receivers. In October, 1879, Lynde presented the coupons falling due May 1, 1879, on the 36 bonds, but Iselin & Co. then declined to pay them, which was the first knowledge or notice of any kind that he had of any discrimination against or difference between those bonds and any other bonds of the same series. And he has never received payment of any coupon on the 36 bonds or any of them since the payment to him as aforesaid of the coupons maturing in November, 1878. At the time the May and November, 1878, coupons were paid, Iselin & Co. had no knowledge but that the 36 bonds had been regularly issued and sold by the Columbus and Indianapolis Central Railway Company.

From the year 1871 until after the purchase by him of the

36 bonds, Lynde held and owned other bonds secured by the mortgage of the Columbus and Indianapolis Central Railway Company to Parkhurst, trustee, above referred to, being some of the 821 bonds before described.

The Columbus, Chicago and Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the first day of May, 1875, and on the first day of November, 1875, and the interest coupons were not paid until after June 30, 1876, when they were paid by or on behalf of the receivers hereinbefore mentioned, all which facts were known to Lynde at the time he purchased the 36 bonds described in the petition.

At the time of the demand made by Lynde upon Parkhurst, trustee, hereinafter set forth, and at the time of the commencement of this action, interest coupons which had theretofore fallen due upon more than seven hundred of said one thousand bonds described in said mortgage had been paid.

On or about the 27th day of June, A.D. 1891, at Newark, in the State of New Jersey, Lynde made a personal request and demand in writing of Parkhurst as trustee, to commence an action for the foreclosure and sale of the premises in accordance with the provisions of the deed of trust, for and on account of the default made by the Columbus and Indianapolis Central Railway Company in the payment of the coupons upon the 36 bonds; and then and there offered to the trustee sufficient security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of the premises. Parkhurst as such trustee refused to take the action requested.

The Columbus, Chicago and Indiana Central Railway Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company have neglected and refused to pay the coupons due upon each of the bonds described in the petition, being coupons from and including coupons maturing May 1, 1879, to and including coupons maturing May 1, 1892, the last two of which fell due since the commencement of this suit.

Opinion of the Court.

On the 1st day of October, 1890, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company made its mortgage to the Farmers' Loan and Trust Company of New York, and to W. N. Jackson of Indiana, as trustee, for the purpose of securing an issue of bonds to be made by that company to amount in the total to 75,000 bonds at the par value of $1000 each, to be issued as in said mortgage set out, and upon the property described in the answer and cross-petition of the said Farmers' Loan and Trust Company filed in this cause, including the line of railroad and other property connected therewith, described in the petition of the plaintiff herein; that said mortgage was duly recorded as required by law in all of the counties in the several States through or into which that line runs; that by virtue of that mortgage there have been issued bonds to the total number of 5318, being the bonds numbered from 1501 to 6818, both inclusive, and amounting in the total to $5,318,000; and that said bonds are now outstanding and in full force, and no default has been made in the payment of interest thereon.

As conclusions of law from the foregoing facts, the court of common pleas found the equities of the case in favor of Lynde. It held that the 36 bonds and the coupons thereto annexed were the valid and binding obligations of the Columbus and Indianapolis Central Railway Company and of the Columbus, Chicago and Indiana Central Railway Company; that Lynde was the owner and holder of those bonds and coupons, and each of them, as well as the coupons that accrued May 1, 1879, to May 1, 1891, inclusive; that there was due to him on such coupons, down to the entry of the decree, the sum of $47,673.37; and that under and by virtue of the said mortgage or deed of trust described in the petition Lynde had a valid and subsisting lien, to secure said bonds and coupons, upon the railroad property described in the petition as of November 1, 1864, and was entitled to a decree for the payment of the sum so found due. A decree was subsequently entered in conformity to these conclusions. Upon a writ of error to the Circuit Court of Franklin County that judgment was affirmed. The judgment of the latter court was

also affirmed upon writ of error to the Supreme Court of Ohio.

While the cause was pending in the Supreme Court of the State, Lynde died, and the Long Island Loan and Trust Company qualified as his executor.

The first question to be considered relates to the jurisdiction of this court to review the final judgment of the Supreme Court of Ohio.

The contention of the defendant in error is that the record presents no Federal question which this court will review; and that the state court based its decision upon an independent ground, not involving a Federal question, but depending upon principles of general law and broad enough to sustain its judgment. Its further contention is that the Supreme Court of Ohio rightly held that neither Lynde nor the trustee, Parkhurst, were affected by the proceedings in the foreclosure suits instituted in the Circuit Courts of the United States.

Upon looking into the record, we find that the defendant railway company claimed in its answer that if a lien at any time attached to the property in question to secure the 36 bonds purchased by Lynde, such lien was wholly divested and discharged by the above proceedings in the Federal courts under which that company claims title. This, it would seem, was such an assertion of a right and title under an "authority exercised under the United States" as gives this court jurisdiction to reëxamine the final judgment of the state court. Rev. Stat. § 709.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134, 135, — which was a suit to subject certain lands in satisfaction of a debt secured by mortgage, and for the amount of which debt judgment had been obtained, — the defence was rested upon the ground that the defendant purchased the property at a sale made under a judgment of the Circuit Court of the United States for the Eastern District of Louisiana, in a named case, "free of all mortgages and incumbrances and especially from the alleged mortgage of the plaintiff." This defence was not recognized by the Supreme Court of Louisiana, and the case was brought to this court by writ of error. One of the ques-

tions considered was as to the jurisdiction of this court under the act of February 5, 1867, which gives a writ of error to the highest court of a State in which a decision in the suit could be had, "where any title, right, privilege or immunity is claimed under or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed under . . . such authority." Rev. Stat. § 709; act of February 5, 1867, c. 28, 14 Stat. 385. Mr. Justice Bradley, delivering the opinion of the court, said: "Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which under the act of 1867 may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts." Having disposed of the question of jurisdiction, the court then inquired whether the state court, in overruling the defence, had given proper validity and effect to the judgment of the Circuit Court of the United States. Upon this point the court said: "The only effect that can be justly claimed for the judgment in the Circuit Court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the Circuit Court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the state courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the

Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances. If by the laws of the State a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the Circuit Court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court. We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a state court. We have examined this question with some care, and have come to the conclusion that it would not."

The same question was again before this court in *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 146, which was an action for malicious prosecution, the defence being that the existence of probable cause had been previously determined by a judgment in the Circuit Court of the United States. It was contended that the Supreme Court of the State failed to give proper effect to that judgment, and thereby denied to the defendant a right arising under the authority of the United States. The case came here upon writ of error, and the jurisdiction of this court to review the final judgment was sustained. Mr. Justice Matthews, speaking for the court, said: "It must, therefore, be conceded that the sole question to be determined is, did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this court? It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that State is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final;

and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135, 'no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in a like case, under similar circumstances.' *Embry* v. *Palmer*, 107 U. S. 3. It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question. The decree of the Circuit Court was relied upon in the state court as a complete defence to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The Supreme Court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever."

According to these decisions and in view of the statute giving this court authority to reëxamine the final judgment of the highest court of a State denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the Circuit Courts of the United States under which the plaintiff in error claims title to the lands and property in question.

The plaintiff in error contends that the state court did not give due effect to the decrees of the Circuit Courts of the United States in the suits instituted by Roosevelt and Fos-

dick, in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question, but postponed or subordinated those rights to a lien upon such property which, it is alleged, was created or attempted to be created, while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for purposes of being administered.

Did Lynde, under the circumstances stated in the finding of facts, acquire a good title, as between himself and the mortgagor company, and the companies which succeeded it by consolidation, to the 36 bonds purchased by him from Newbold & Son, as well as the right to claim the benefit of the mortgage executed to Parkhurst? Referring to the facts recited in the finding, the Supreme Court of Ohio said: "Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to the sale or delivery of the bonds, and as an owner cannot be deprived of his property without his consent, no title passed. It is true that these bonds were negotiated to Newbold & Son without the knowledge or consent of the company; but such consent and knowledge is not indispensable to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. *Railway Co.* v. *Sprague*, 103 U. S. 756; *Fearing* v. *Clark*, 16 Gray, 74. Independently of the rules of law designed to protect and give currency to negotiable paper, those principles of natural justice univer-

sally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He found them for sale, before they were due, in the market, where such securities are usually offered for sale, and bought them at their fair market value without notice of any infirmity in their title. Soon thereafter he took them to the Union Trust Company, in New York city, the agents of the makers, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him? The maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined, powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee, and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was up to, and long after the time these bonds were negotiated, continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him? If the maker of these bonds and those who must abide by its title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon considerations of public policy." 55 Ohio St. 23, 45.

The state court adjudged that there was no rule of law arising out of the public policy of the State, as manifested by state legislation, that required it to deny to the holders of these bonds the rights and privileges pertaining to commer-

cial paper purchased in good faith in the ordinary course of business.

Assuming that this question of general law was correctly determined by that court, we are now to inquire what effect, if any, the proceedings in the foreclosure suits instituted by Roosevelt and Fosdick in the Circuit Courts of the United States had upon the right of Lynde, as the *bona fide* holder of the 36 bonds, to the security furnished by the Parkhurst mortgage?

We have seen that when Lynde purchased the 36 bonds, to secure which, with other bonds, the Parkhurst mortgage had been previously executed, the property described in that mortgage and here in question was in the actual custody of the Circuit Courts of the United States by receivers appointed in the foreclosure suits brought by Roosevelt and Fosdick. The contention of the plaintiff in error is that the property was a fund in those courts to abide the event of the litigation in them, and that, pending the proceedings in those courts and their actual possession of the property, it was impossible that Lynde, by purchasing the 36 bonds, could have acquired any lien thereon which the law would recognize and enforce.

The principal authority cited in support of this contention is *Wiswall* v. *Sampson*, 14 How. 52, 68, in which it was held that while real estate is "in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose." If the rule were otherwise, the court said, the whole fund might pass from its hands before final decree, and the litigation become fruitless. We do not perceive that the principle announced in *Wiswall* v. *Sampson* controls the determination of the present case. If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser. But nothing was done by Lynde, after the institution of the foreclosure suits and pending proceedings

therein, which was inconsistent with or tended to defeat the object of those suits. He only purchased the bonds in question, and such purchase was not hostile to the possession by the Circuit Courts in the foreclosure suits of the property mortgaged to secure them, simply because by such purchase he succeeded to an interest in the Parkhurst mortgage. The foreclosure suits proceeded to a final decree without any attempt to interfere with the custody and control of the property for the purposes avowed in those suits; for the bill filed by Roosevelt and Fosdick showed, upon its face, that no relief was asked as against the Parkhurst mortgage, or the bonds secured by it. It was distinctly found, and it is not disputed, that the Roosevelt-Fosdick suits were for the foreclosure of the mortgage in which they were named as trustees, "but not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured." And by the final decree in those suits the mortgaged property was directed to be sold subject to the outstanding bonds prior in lien to the Roosevelt-Fosdick mortgage, and to all other if any paramount liens thereon. The Parkhurst mortgage was prior in date to the Roosevelt-Fosdick mortgage; and the decree in the foreclosure suits expressly declared that nothing contained in it should "in any manner affect, prejudice or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the rights of them and each of them." Thus the decree expressly saved the rights of those who held bonds secured by mortgage prior in date to the mortgage to Roosevelt and Fosdick. It bound only the defendants in the foreclosure suits, and all persons claiming or to claim under them or any of them, subsequent to the institution of those suits. Strictly speaking, the lien that attended the 36 bonds purchased by Lynde did not arise after the institution of the foreclosure suits, although Lynde's purchase was pending the proceedings in those suits, and while the property was in the hands of receivers. That lien had its origin in the execution and delivery of the Parkhurst mortgage and the authentication by the trustee of the bonds named in it, and when any of those bonds became the property of a *bona fide*

holder, the lien given to secure them related back to the date of the mortgage, which was long prior to the institution of the foreclosure suits. Besides, Parkhurst, the trustee in the prior mortgage, was not made a party to the foreclosure suits, and neither he nor those whose interests he was appointed to represent were bound by the decree or any of its provisions. The rule is well settled that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to such proceedings. *United Lines Telegraph Co.* v. *Boston Deposit & Trust Co.*, 147 U. S. 431, 448. It would seem, therefore, clear that the pendency of the foreclosure suits did not interfere with the negotiation or transfer of the bonds secured by the prior Parkhurst mortgage, nor did the decree in those suits impair in any degree the lien created by the Parkhurst mortgage, which antedated the mortgage to Roosevelt and Fosdick. The mere purchase of the 36 bonds by Lynde, and the acquisition by him in consequence of such purchase of an interest in the Parkhurst mortgage, cannot be regarded as hostile to the possession taken by the Circuit Courts of the United States of the property embraced by the Roosevelt-Fosdick mortgage for the purpose of selling it in satisfaction of the debts secured by that mortgage, but subject to prior paramount liens, such as the lien created by the Parkhurst mortgage.

We are of opinion, for the reasons stated, that the state court did not fail to give due effect to the several decrees in the Circuit Courts of the United States in the foreclosure suits instituted by Roosevelt and Fosdick, when it held that those decrees did not prevent the defendant in error from claiming the benefit of the lien created by the mortgage to Parkhurst to secure the payment of the bonds purchased by Lynde from Newbold & Son.

The judgment below is

Affirmed.

FITTS *v.* McGHEE.

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

No. 130. Argued October 26, 1898. — Decided January 3, 1899.

A suit brought by the receivers of a railroad against the Attorney General of the State of Alabama and the Solicitor of the Eleventh Judicial Circuit of that State, to restrain them, as officers of the State, from taking steps to enforce against the complainants the provisions of a law of that State reducing the tolls which had been exacted of the public under a prior law for crossing on a bridge of the railroad over a river, is a suit against the State, and this court accordingly reverses the judgment of the court below, adjudging that the latter law was unconstitutional and void, and that the defendants should not institute or prosecute any indictment or criminal proceeding against any one for violating the provisions of that act, and directed the court below to dissolve its injunction restraining the institution or prosecution of indictments or other criminal proceedings so instituted in the state courts, and to dismiss the suit so brought by the receivers against the Attorney General of Alabama and the Solicitor of the Eleventh Judicial Circuit of that State.

An act of the General Assembly of Alabama, approved February 9, 1895, prescribed certain maximum rates of toll to be charged on the bridge across the Tennessee River between the counties of Colbert and Lauderdale in that State, and known as the Florence bridge. It also declared that should the owners, lessees or operators of the bridge, by themselves or agents, demand or receive from any person a higher rate of toll than was prescribed, he or they should forfeit to such person twenty dollars for each offence, to be recoverable before any justice of the peace or notary public and *ex officio* justice of the peace of either of the counties named.

When that act was passed the cases of *Samuel Thomas* v. *Memphis and Charleston Railroad Company* and *Central Trust Company of New York* v. *Memphis and Charleston Railroad Company* were pending in the court below; and on the 14th day of February, 1895, Charles M. McGhee and Henry Fink, receivers of the Memphis and Charleston Railroad in those causes — having first obtained leave to do so —

Statement of the Case.

filed a bill in the name of themselves and the railroad company against "the State of Alabama, William C. Oates, as Governor of the State of Alabama, and William C. Fitts, as Attorney General of the State of Alabama."

After setting out their appointment as receivers, the order of the court below authorizing the institution of the present suit, the official character of the several defendants, the ownership by the Memphis and Charleston Railroad Company of the bridge in question, the above act of February 9, 1895, the manner in which that company acquired the right to construct and own the Florence bridge, the charters of the railroad company granted by Tennessee and Alabama, the purchase in 1850 of the bridge by the railroad company under the charter granted by Alabama, and its management of the bridge under the charter of the Florence Bridge Company, the plaintiffs averred that the act incorporating the Bridge Company was a contract between the State and the owners of the bridge; that the rights acquired by that company under its charter passed to the Memphis and Charleston Railroad Company; that the rates of toll fixed by the act were arbitrary, unreasonable and amounted virtually to the confiscation of the plaintiffs' property, and that the act was in violation of the Constitution of the United States in that such a legislative enactment deprived the owners of the bridge of their property without due process of law, and denied to them the equal protection of the laws.

It was further alleged that the clause in the act imposing a penalty for demanding or receiving higher rates of toll than those prescribed was intended and had the effect to deter the plaintiffs from questioning by legal proceedings the validity of such legislation.

After stating that they were remediless except by a bill in equity, the plaintiffs prayed that "process of subpœna be issued to and served upon the State of Alabama, the said William C. Oates, as Governor of the State of Alabama, and William C. Fitts, as Attorney General of the State of Alabama," requiring them, "in behalf of the State," to answer the bill, and that an injunction be granted prohibiting and restrain-

ing said William C. Oates, as Governor of the State of Alabama, and said William C. Fitts, as Attorney General of the State of Alabama, and all persons whomsoever, from instituting any proceeding against the complainants or either of them under the forfeiture clause above set out in the second section of said act of the General Assembly of Alabama.

Subpœnas to appear, answer or demur to the bill were issued and served upon defendant Oates, as Governor, and upon defendant Fitts, as Attorney General of the State. A subpœna was also issued against the State, and served upon the defendant Oates, as Governor.

A temporary injunction was issued, restraining and enjoining William C. Oates, as Governor of Alabama, and William C. Fitts, as Attorney General of the State, and "all persons whomsoever, from instituting or prosecuting any proceedings" against the plaintiffs, or either of them, under the forfeiture clause contained in the above act of February 9, 1895.

The defendants appeared specially for the purpose of moving, and did move, that the bill be dismissed upon the ground that the suit was one against the State, and prohibited by the Constitution of the United States.

The plaintiffs, by leave of the court, amended their bill by adding thereto paragraphs to the effect that frequent and numerous demands had been made by persons on foot, on horseback and in vehicles of the toll-gate keeper at the bridge to pass them over at the rate of toll fixed by the act, and upon the refusal of the toll-gate keeper to permit them to pass by the payment of the rates so fixed, and his requiring them to pay the rates of toll fixed by the plaintiffs, they had paid the tolls so required of them under protest, and had threatened to institute suit or suits against the plaintiffs under the penalty clause of the act, and had also threatened to procure proceedings to be instituted in the courts by the Governor and Attorney General in the name of the State, by a mandamus or otherwise to compel the plaintiffs to pass people over the bridge at the rates fixed by the act; that those persons had also threatened to procure proceedings to be instituted in the name of the State for a forfeiture of the franchise of the Mem-

phis and Charleston Railroad Company in and to the bridge property because of the failure and refusal to observe and obey the requirements of the act in reference to the rates of toll to be charged over the bridge; and that the persons so protesting and threatening suits were too numerous to be made parties to that suit. Special reference was made to William H. Gilliam, a resident citizen of Colbert County, Alabama, as one of the parties or persons who had made threats of such suits and proceedings.

The bill was amended by making Gilliam a party defendant, and by adding before the prayer for general relief, a prayer "that an injunction be granted prohibiting and restraining said William C. Oates, as Governor of the State of Alabama, and said William C. Fitts, as Attorney General of the State of Alabama, and said William H. Gilliam and all persons whomsoever, from instituting or procuring the institution of any proceedings against these complainants, or either of them, by mandamus or otherwise, to compel the observance and obedience of said act in reference to the rate of tolls fixed thereby over the said bridge, and also from instituting or procuring to be instituted any proceeding against these complainants, or either of them, for the forfeiture of the franchise of the Memphis and Charleston Railroad Company in and to the said bridge on account of the refusal to charge the rates of toll over it fixed by said act."

Subsequently, an order was made, enjoining and restraining William C. Fitts, as Attorney General of the State of Alabama, and William H. Gilliam, and all persons whomsoever, until the further order of the court, from instituting or procuring the institution of any proceeding against the plaintiffs or either of them, by mandamus or otherwise, to compel the observance and obedience of the act in reference to the rate of tolls fixed thereby over the Florence bridge, and from instituting or procuring to be instituted any proceedings against the plaintiffs or either of them for the forfeiture of the franchise of the Memphis and Charleston Railroad Company in and to the bridge on account of the refusal to charge the rates of toll over it fixed by the act.

At a later date in the progress of the cause the plaintiffs, by leave of the court, inserted the following averments in the bill:

"Complainants would further show unto your honors that at the fall term 1895 of the Circuit Court of Lauderdale County, Alabama, a large number of indictments — some one hundred in number — were found by the grand jury of said court against Thomas Clem and G. W. Brabson, who are the toll-gate keepers at the public crossing of said bridge for complainants, the receivers of the Memphis and Charleston Railroad Company. These indictments were found under section 4151 of the Criminal Code of Alabama, which reads as follows: '4151 (4401). Any person who, being or acting as an officer, agent, servant or employé of any turnpike company, macadamized road company or other incorporated road or bridge company, takes, receives or demands any greater charge or toll for travel or passage over such road or bridge than is authorized by the charter of such company, or, if the charter does not specify the amount of toll to be charged or taken, fixes, prescribes, takes, receives or demands any unreasonable charge or toll, to be determined by the jury, must, on conviction, be fined not more than one hundred dollars.' Complainants allege and show unto your honors that these indictments were improperly and wrongfully found against said toll-gate keepers, and they are being improperly prosecuted thereby, because the rate of toll which they have charged is only the rate which has heretofore been fixed by the receivers, which was fixed by them before the passage of said unconstitutional act of the General Assembly of Alabama reducing the tolls, and is the same rate of tolls which have been charged for more than twenty years by the Memphis and Charleston Railroad Company for the use by the public of said bridge, and the tolls so charged by said toll-gate keepers were authorized by this court, and said indictments have been found and are being prosecuted in violation of the authority of this court and of its orders in the premises, and in violation of the constitutional rights and privileges under the Constitution of the United States, secured

to the owners of said bridge in the charging of tolls before crossing it. A. H. Carmichael is the Solicitor for said judicial circuit, and as such is engaged in the prosecution of said indictments."

The plaintiffs asked that Carmichael, as such solicitor, be made a party defendant; that all needful process issue against him; and that a restraining order be issued enjoining him and all other persons from the prosecution of said indictments.

By a supplemental bill it was averred that writs of arrest had been issued upon the above indictments against Clem and Brabson, and placed in the hands of the sheriff, who in execution thereof had arrested or would arrest the said employés of the receivers. It was further alleged that these criminal proceedings were in contempt of the order of the court below appointing the receivers, as well as in violation of the injunction which the court had issued, and which still remained in force, "enjoining the said Governor, Attorney General and all persons whomsoever from instituting any suits or proceedings" under the above act of the State.

After referring to the indictments and the purpose on the part of the state officers to proceed under them, the plaintiffs prayed that the act of February 9, 1895, be declared repugnant to the Constitution of the United States and invalid, inoperative, null and void, and that an injunction be granted "prohibiting and restraining William C. Oates, as Governor of the State of Alabama; William C. Fitts, as Attorney General of the State of Alabama, W. H. Gilliam and A. H. Carmichael, Solicitor as aforesaid, and all other persons whomsoever, from instituting any proceeding against these complainants or either of them, their servants or agents, under the forfeiture clause set out in said second section of said act of the General Assembly of Alabama;" that said officers "and all persons whomsoever be restrained and enjoined from instituting or procuring the institution of any proceeding against these complainants or either of them, their agents, servants or employés, by a mandamus or otherwise, to compel the observance and obedience to said act in reference to the rate of tolls fixed thereby over said bridge, and also from instituting

or procuring to be instituted any proceeding against these complainants or either of them for the forfeiture of the franchise of the Memphis and Charleston Railroad Company in and to said bridge on account of the refusal to charge the rates of toll over it fixed by the said act;" and that "the said defendants and said Carmichael, Solicitor as aforesaid, and all persons whomsoever, be restrained and enjoined from prosecuting said indictments against the said servants, agents and employés of the complainants, or from interfering in any way, under and by virtue of the color of said unconstitutional act, with the rights, privileges, and franchises and property of the complainants, their servants or agents, with regard to said bridge."

At this stage of the proceedings the plaintiffs dismissed the cause so far as the State was made a party defendant, and amended the bill by striking out its name as a defendant, as well as the words "in behalf of the State." The cause was then heard upon a motion by the Governor and Attorney General to dismiss the bill upon the ground that the suit was one against the State in violation of the Constitution of the United States.

Upon the filing of the last amendment to the original bill, it was ordered by the court that A. H. Carmichael, as Solicitor for the Eleventh Judicial Circuit of Alabama, be enjoined and restrained temporarily, and until the further orders of the court, "from instituting or prosecuting as such Solicitor any indictments or criminal proceedings against any one for a violation of the alleged unconstitutional act of the Legislature of Alabama described in the bill."

The next step in the proceedings was the suing out of writs of *habeas corpus* by Clem and Brabson, who were under arrest on process issued on the above indictments. Each of the petitioners was released upon his own recognizance in the sum of $150, conditioned that he would appear in court from day to day until discharged.

Gilliam filed an answer, insisting upon the validity of the act of the legislature which had been assailed by the bill as unconstitutional.

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A decree *pro confesso* was taken against the Governor and Attorney General of the State, as well as Carmichael as Solicitor aforesaid, all in their respective official capacities. But that decree was set aside, and the cause was heard upon demurrers by the various defendants. The demurrers were overruled, and answers were filed by the Governor and Attorney General of the State and by the Solicitor of the Eleventh Judicial Circuit. There were also motions to dissolve the injunction granted in the case, upon the ground that there was no equity in the bill, and that the injunctions were in violation of the Constitution and statutes of the United States.

The final decree in the case was as follows: "This cause coming on to be heard, the submission at the former term of the court is hereby set aside, and, it being made to appear to the court that the defendant William C. Oates has ceased to be the Governor of the State of Alabama, it is thereupon ordered that the said cause be discontinued as to him, and the cause is now resubmitted at this term of the court for final decree upon the pleadings and testimony offered by the parties, and upon due consideration thereof it is considered by the court that the complainants are entitled to relief. It is thereupon ordered, adjudged and decreed that the act of the Legislature of the State of Alabama referred to and set up in the original bill of complaint in the cause, which act was approved February 9, 1895, and entitled 'An act to fix the maximum of tolls to be charged by the owners, lessees or operators of the road bridge across the Tennessee River, between the counties of Colbert and Lauderdale, and known as the Florence bridge, and to fix the penalty for demanding or receiving a higher rate of tolls,' is violative of the constitutional rights of the owners of said bridge and of the complainants as their representatives, in that it fixes a rate of tolls for said bridge which are not fairly and reasonably compensatory, and it is therefore hereby declared to be invalid and inoperative, and the injunctions heretofore granted in the cause are hereby made perpetual. It is further ordered, adjudged and decreed that the defendants pay the costs of this proceeding, for which let execution issue."

Mr. William J. Wood for appellants. *Mr. William C. Fitts*, Attorney General of the State of Alabama, was with him on the brief.

Mr. Milton Humes for appellees. *Mr. Paul Speake* was with him on the brief.

Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court.

The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance consistently with the Constitution of the United States.

From the history given of the proceedings below it appears that the Circuit Court adjudged —

That the legislative enactment of February 9, 1895, was unconstitutional and void in that it did not permit the owners of the Florence bridge, and the plaintiffs as their representatives, to charge rates of toll that were fairly and reasonably compensatory; and,

That the defendants Fitts and Carmichael, holding respectively the offices of Attorney General of Alabama and Solicitor of the Eleventh Judicial Circuit of the State, should not institute or prosecute any indictment or criminal proceeding against any one for violating the provisions of that act.

Is this a suit against the State of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a State by citizens of such State. But it has been adjudged by this court upon full consideration that a suit against a State by one of its own citizens, the State not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a State by citizens of another State of the Union, or by citizens or subjects of foreign States. *Hans* v. *Louisiana*, 134 U. S. 1, 10, 15; *North Carolina* v. *Temple*, 134 U. S. 22. It is therefore an immaterial circumstance in

the present case that the plaintiffs do not appear to be citizens of another State than Alabama, and may be citizens of that State.

What is and what is not a suit against a State has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question. It is only necessary to ascertain, in each case as it arises, whether it falls on one side or the other of the line marked out by our former decisions.

We are of opinion that the present case comes within the principles announced in *In re Ayers*, 123 U. S. 443, 485, 496–500, 505. It appears from the report of that case that the Circuit Court of the United States for the Eastern District of Virginia in *Cooper* v. *Marye* made an order forbidding the Attorney General of Virginia and other officers of that Commonwealth from bringing suits under a certain statute of Virginia, in its name and on its behalf, for the recovery of taxes, in payment of which the taxpayers had previously tendered tax-receivable coupons. The state officers did not obey this order, and having been proceeded against for contempt of court, they sued out writs of *habeas corpus*, and asked to be discharged upon the ground that the Circuit Court had no power to make the order for disobeying which the proceedings in contempt were commenced. This court said that the question really was whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, the sole purpose and prayer of the bill therein being by final decree to enjoin the defendants, officers of Virginia, from taking any steps in execution of the statute the validity of which was questioned.

It was adjudged that although Virginia was not named on the record as a party defendant, nevertheless, when the nature of the case against its officers was considered, that Commonwealth was to be regarded as the actual party in the sense of the constitutional prohibition. The court said: "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the Circuit Court, reduced to the mere bringing of an ac-

tion in the name of and for the State against taxpayers who, although they may have tendered the tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such taxpayers." Again: "The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains — supposing that such a suit could be maintained — it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. *New Jersey* v. *New York*, 5 Pet. 284, 288, 290; *Kentucky* v. *Dennison*, 24 How. 66, 96, 97; Rule 5 of 1884, 108 U. S. 574. If a decree could have been rendered enjoining the State from bringing suits against its taxpayers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its Attorney General and the Commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

One of the arguments made in the *Ayers case* was that the Circuit Court had jurisdiction to restrain by injunction officers

of the State from executing the provisions of state enactments, void by reason of repugnancy to the Constitution of the United States. In support of that position reference was made to *Osborn* v. *Bank of the United States*, 9 Wheat. 738. But this court said: "There is nothing, therefore, in the judgment in that cause, as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout that case, in the argument at the bar and in the opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally, vainly seeking to defend themselves under the authority of a void act of the General Assembly of Ohio. One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since. But the very ground on which it was adjudged not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, because the authority under which they professed to act was void." And these were stated by the court to be the grounds upon which it had proceeded in other cases — citing *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311; *Poindexter* v. *Greenhow*, 114 U. S. 270, 282; *United States* v. *Lee*, 106 U. S. 196. The court further said: "The very object and purpose of the

Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

It was accordingly adjudged that the suit in which injunctions were granted against officers of Virginia was in substance and in law one against that Commonwealth, of which the Circuit Court of the United States could not take cognizance.

If these principles be applied in the present case there is no

escape from the conclusion that, although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the State. As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the State. In the case supposed, they would be compelled to make good the State's claim to the property, and could not shield themselves against suit because of their official character. *Tindal* v. *Wesley*, 167 U. S. 204, 222. No such case is before us.

It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were *Poindexter* v. *Greenhow*, 114 U. S. 270; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *In re Tyler*, 149 U. S. 164; *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362, 388; *Scott* v. *Donald*, 165 U. S. 58, and *Smyth* v. *Ames*, 169 U. S. 466. Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit

against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defence upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.

What has been said has reference to that part of the final decree which holds the act of February 9, 1895, to be invalid and inoperative. Whether the owners of the bridge, and the plaintiffs as their representatives, were denied by the statute

fair and reasonable compensation for the use of the property by the public, was a question that could not be considered in this case. This is not a matter to be determined in a suit against the State; for of such a suit the Circuit Court could not take cognizance.

It remains only to consider the case so far as the final decree assumes to enjoin the officers of the State from instituting or prosecuting any indictment or criminal proceedings having for their object the enforcement of the statute of 1895. We are of opinion that the Circuit Court of the United States, sitting in equity, was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court. This view is sustained by *In re Sawyer*, 124 U. S. 200, 209, 210. It was there said: "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, has been maintained, although both jurisdictions are vested in the same courts. *Fenn* v. *Holme*, 21 How. 481, 484–487; *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Heine* v. *Levee Commissioners*, 19 Wall. 655." Again: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes and misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative departments of the government." At the present term of the court, in *Harkrader* v. *Wadley*, 172 U. S. 148, 169, 170, we said: "In proceeding by indictment to enforce a criminal statute the State can only act by officers or attorneys, and to enjoin the latter is to enjoin the State." Again: "Much more are we of opinion that a Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a State to

enforce the criminal laws of such State." Undoubtedly, the courts of the United States have the power, under existing legislation, by writ of *habeas corpus* to discharge from custody any person held by state authorities under criminal proceedings instituted under state enactments, if such enactments are void for repugnancy to the Constitution, laws or treaties of the United States. But even in such case we have held that this power will not be exercised, in the first instance, except in extraordinary cases, and the party will be left to make his defence in the state court. *Ex parte Royall*, 117 U. S. 241; *New York* v. *Eno*, 155 U. S. 89; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284. But the existence of the power in the courts of the United States to discharge upon *habeas corpus* by no means implies that they may, in the exercise of their equity powers, interrupt or enjoin proceedings of a criminal character in a state court. The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. *Robb* v. *Connolly*, 111 U. S. 624. And if the question is determined adversely to the defendants in the highest court of the State in which the decision could be had, the judgment may be reëxamined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court.

It appears from the record that Clem and Brabson were indicted in the state court under section 4151 of the Criminal Code of Alabama. Having been arrested under those indictments, they sued out, as we have seen, writs of *habeas corpus* upon the ground that they were indicted for taking tolls in violation of the above act of February 9, 1895, which they alleged to be unconstitutional, and that their arrest was in dis-

regard of the injunction of the Circuit Court restraining the institution and prosecution of indictments or other criminal proceedings in execution of that act. The Circuit Court discharged the petitioners upon their own recognizances. It was error to discharge them and thereby interfere with their trial in the state court. As already indicated, the Circuit Court, sitting in equity, was without jurisdiction to prohibit the institution or prosecution of these criminal proceedings in the state court. Further, even if the Circuit Court regarded the act of 1895 as repugnant to the Constitution of the United States, the custody of the accused by the state authorities should not have been disturbed by any order of that court, and the accused should have been left to be dealt with by the state court, with the right, after the determination of the case in that court, to prosecute a writ of error from this court for the reëxamination of the final judgment so far as it involved any privileges secured to the accused by the Constitution of the United States. *Ex parte Royall*, *New York* v. *Eno*, *Whitten* v. *Tomlinson* and *Baker* v. *Grice*, above cited. There were no exceptional or extraordinary circumstances in these cases to have justified the interference by the Circuit Court, under writs of *habeas corpus*, with the trial of the indictments found in the state courts.

The judgment of the Circuit Court is reversed, with directions to dissolve the injunction restraining the institution or prosecution of indictments or other criminal proceedings in the state court, to dismiss the suit brought by the receivers against the Attorney General of Alabama and the Solicitor of the Eleventh Judicial Circuit of the State, and to remand Clem and Brabson to the custody of the proper state authority.

Syllabus.

WASHINGTON GAS LIGHT COMPANY *v.* LANSDEN.

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

No. 43. Argued October 17, 18, 1898. — Decided January 16, 1899.

In order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal.

A corporation can, however, also be held responsible for acts of its agent, not strictly within its corporate powers, which were assumed to be performed for it by an agent competent to employ the corporate powers actually exercised; but in such case, there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury, though this evidence need not necessarily be in writing.

When the only conclusion to be drawn from such evidence is a want of authority, the question is one for the court to decide without submitting it to the jury.

In this case the court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence on which to base a verdict against it.

The judgment in this case against Mr. Bailey also should be reversed, as it is not supported by the evidence.

In an action in tort brought in the District of Columbia, the common law rule prevails that those defendants who are sued together and found guilty are liable for the whole injury to the plaintiff, without examining the question of the different degrees of culpability; and as evidence of the wealth of the corporation defendant was admitted in evidence against all the defendants as a ground for punitive damages, and as the individual defendants were joined by the voluntary act of the plaintiff, the court is of opinion that it was not admissible as against them.

Evidence of the wealth of one of the defendants in an action of tort is inadmissible as a foundation for computing or determining the amount of such damages against all.

In a case of this character, where the line between compensatory and punitive damages is vague, it is impossible to say that, by merely charging the jury that punitive damages cannot be recovered, the effect of incompetent evidence received as to the wealth of one of the defendants was thereby removed, or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case.

Where a judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment *in toto*, and grant a new trial in regard to all the defendants.

Opinion of the Court.

THE case is stated in the opinion.

Mr. R. Ross Perry and *Mr. Walter D. Davidge* for plaintiffs in error.

Mr. J. J. Darlington for defendant in error. *Mr. J. Altheus Johnson* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the defendant in error, plaintiff below, in the Supreme Court of the District of Columbia, against the Washington Gas Light Company; John R. McLean, its president; Charles B. Bailey, its secretary; William B. Orme, its assistant secretary; and John Leetch, its general manager. The action was brought to recover damages for an alleged libel which the plaintiff stated the defendants had published or caused to be published of and concerning him in a periodical printed in the city of New York called The Progressive Age. The plaintiff recovered a verdict of $12,500 against the corporation defendant, its secretary Bailey, and its general manager Leetch. There seems to have been no finding as to the other defendants.

Those defendants against whom the verdict was rendered brought the case by appeal to the Court of Appeals for the District, where the judgment was affirmed, and the defendants then brought the case here on writ of error.

It appears from the declaration that a committee of the House of Representatives, in January, 1893, having in charge the sundry civil appropriation bill, had therein provided that not more than seventy-five cents per thousand feet should be paid for gas used in the government buildings in the District of Columbia. The gas company desired to defeat this provision in the bill, and the president, Mr. McLean, sent for the plaintiff below, who was general manager of the company, for the purpose of inquiring what the plaintiff could testify to in regard to the price of gas if called before the committee. The president asked the plaintiff to furnish him with a writ-

ten memorandum showing generally what he could testify to and which he might use as a basis for questions to be put to him by some member of the committee. The plaintiff wrote out such a memorandum, but did not mention therein the cost of gas to the defendant company, and when the president noticed the omission he asked the plaintiff what the cost would be, and plaintiff stated that that was a matter which should come from the chief officers of the company, and which was unknown to him.

The plaintiff did not testify before the committee at that session of Congress.

Thereafter and in February, 1894, and when not requested by the president of the company or any of its officers or agents, the plaintiff did appear before a committee of Congress, and did testify to figures at which plaintiff supposed gas could be actually produced and furnished in the city of Washington.

The plaintiff then alleged that the defendants in the month of February, 1894, published or caused to be published in a newspaper or periodical called The Progressive Age, which was printed in the city of New York, and widely circulated as an organ devoted to the interests of gas producers and manufacturers throughout the country, the libel in question.

The article states in substance as follows: The plaintiff had once filled the position of general manager of the gas company, which he had resigned in June, 1893, and that in his testimony before the Congressional committee in 1894 the plaintiff had arrayed himself within the ranks of those who sought to tear down and lay waste the business and emoluments of his former employers. He gave testimony which was reported through the land and was of such a nature as was calculated to do the utmost harm to gas interests everywhere. The figures supplied by Mr. Lansden of the cost of gas were startling, and only a year ago (in 1893) a similar inquiry emanating from the same quarter was instituted before a Congressional committee against the Washington Gas Light Company, and plaintiff appeared as a witness in behalf of the company; that he then occupied the position

of general manager of the company, and his testimony then, as compared with that given subsequently, was sadly at variance; that he had there testified before the committee that it cost 48.38 cents per thousand to manufacture gas in the holder, and 40.09 cents per thousand for distribution, and that he knew of but one way that a small amount could be saved, and that was by reducing the salaries of the clerks and the price paid to the laborers, which the company would not like to do. In 1894, before a committee of Congress, the plaintiff testified that from his knowledge of the business and the condition of affairs at Washington, the gas company could sell gas and pay a reasonable profit at a dollar a thousand. He stated that in his opinion the gas could be manufactured and put in the holder for about thirty-two cents a thousand feet, and that it ought to be distributed for from twenty to twenty-two cents a thousand, which would make the whole cost from fifty-two to fifty-four cents per thousand. The article then continued:

"From the foregoing extracts of this witness' testimony only one of two conclusions can be arrived at, and we are too sensible of the reader's power of analysis and feel too keenly for the witness to heap coals of fire on the head of one who, it is only too evident, has allowed his sense of justice to be distorted by real or fancied grievances. The testimony given by Mr. Lansden in 1893 states in effect that there is no way open to his company by which it could reduce the cost of manufacturing gas. In 1894 he tells the committee that —taxes and repairs added, items not considered in the inquiry of the previous year — the cost of gas delivered to the consumer could be brought within seventy cents, or about eighteen and one half cents less per thousand than he quoted as the lowest manufacturing and distributing cost the year before; and yet Mr. Lansden must know that the generating apparatus at the Washington works is the same as when he filled the position as superintendent; that the cost of all materials used, coal and labor are just the same, save only naphtha, which is now higher in price than when he testified a year ago."

For publishing or causing to be published this article the plaintiff brought this action.

The defendants joined in their plea of not guilty, and the plaintiff joined issue thereon. After verdict a motion for a new trial was made and denied, and judgment entered upon the verdict.

The questions which present themselves in this record relate primarily to the liability of each of the plaintiffs in error, and those questions depend for their proper solution upon the evidence set forth in the record.

And first in regard to the liability of the corporation. From the evidence it appears that at the time of the publication of the libel John Leetch was the general manager of the gas company. After the plaintiff had been sworn before the Congressional committee, in February, 1894, one E. C. Brown, who was the publisher of the periodical called The Progressive Age, and who lived in the city of New York, wrote a letter, under date New York, February 12, 1894, addressed on the inside to the Washington Gas Light Company, Washington, D. C. That letter reads as follows:

"Gentlemen: I have watched with great interest the continued reports of the proceedings against your company, as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Were his statements correctly reported in the Washington Star of 3d inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

"Very truly yours,

"E. C. Brown."

The envelope enclosing this letter was addressed to "John Leetch, Manager Washington Gas Light Co."

In reply to that letter, Mr. Leetch wrote the following:

Opinion of the Court.

"WASHINGTON, D. C., *Feb.* 13, 1894.

"E. C. BROWN, Esq, Publisher Progressive Age,

"280 Broadway, N. Y.

"Dear Sir: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former sup't of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

"As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

"As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for seventy cents and to the consumer for $1.00 per 1000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

"Under a former resolution of Congress, bearing date of February, 1893, Mr Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington, and made the following replies:

"'Q. What does gas cost to manufacture at your works?

"'A. It costs us 48.38 c. per thousand in the holder and 40.09 c. per thousand for distribution.

"'Q. Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

"'A. I know of but one way that a small amount could be saved — that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

"'Q. How do the prices charged for lamps in Washington compare with other cities?

"'A. They are as low as any where the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps.'

"You will notice that he makes a difference of about 18½ cents per 1000 feet then as compared with his statement now,

although he must know that the material used, coal and labor, is just the same now as then, except price of naphtha, which is higher. You can try to reconcile the two statements.

"Very truly, yours,

"JOHN LEETCH,

"*General Manager.*"

There is no evidence that any other officer of the company or any member of its board of directors advised or requested Mr. Leetch to send this letter or was cognizant of his intention in that regard. Mr. Leetch swore that the letter was written by him unaided, and that the letter from Brown was a personal letter, and he answered it as such.

After Leetch received the letter, and before he answered it, he had a conversation with Mr. Bailey, the secretary, in which he informed the secretary that he had received such a letter, and he then showed it to Bailey, who read it and returned it to Leetch. Bailey then said to Leetch that he (Bailey) had a paper in plaintiff's handwriting, where he stated "that the price of gas was so and so, and that the price of distribution was so and so," and he then gave Leetch the paper. Bailey said he did not know what Leetch wanted with it, and he thought nothing more about it; that Leetch took the paper and went off to his room, and Bailey never saw it again or heard of it until after Leetch's letter was written and sent. Bailey swore he knew nothing about Leetch's letter in answer to Brown until after it was sent, and that he gave no data to Leetch to reply to the letter, but simply told Leetch as matter of fact the plaintiff had said that gas could be made and sold at a profit at a dollar a thousand.

On the 14th of February, 1894, Mr. Brown wrote another letter, addressed to John Leetch, general manager, Washington Gas Light Company, Washington, D. C., in which he asked for more details in regard to the testimony of plaintiff before the committee of Congress. Receiving no reply, Mr. Brown, under date of February 19, again wrote Leetch, asking for the details as mentioned in his preceding letter of the 14th. This letter was answered as follows:

"E. C. Brown, Esq., Publisher Progressive Age,

"280 Broadway, N. Y.

"Dear Sir: I am in receipt of yours of the 14th and 19th instant. This delay in reply was my inability to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee.

"To-day I received a copy, which I herewith enclose for your use.

"Respectfully,

"John Leetch,

"*General Manager.*"

There is no evidence showing that this letter was either written by authority of any officer or director of the company, or that any such officer or director had any knowledge in regard to it.

It appeared in evidence that some time after Leetch answered the letters he placed them among papers of the company in the secretary's office, and they were so placed, because, as Mr. Leetch testified, it was a matter that had then assumed a position when it was necessary to save the letters, and he therefore placed them in the care and custody of the secretary.

Mr. Leetch further testified that none of the letters written by him were written in his capacity as general manager of the company; that they were written by him as a mere personal matter, altogether exclusive of any duty that he owed the gas company; that the gas company had no interest in the matter, and that he merely wrote them as an act of courtesy, stating the facts.

It also appeared that all the letters written by Mr. Leetch to Mr. Brown were copied by Leetch into the letter book of the company kept in the secretary's office, all the letters in which book were written either by the secretary, the assistant secretary or the general manager. Mr. Leetch did not know of any letters of personal or individual matters in that book prior to March 1, 1894, or that did not relate to the affairs of

the gas company, except those of the same nature as those letters above referred to.

The testimony also showed that Mr. Leetch, at the time he was made manager, was appointed generally to take care of the works and to do the best he could for the company; that he was a gas engineer, and took care of the works and took the place of what used to be the engineer, and after his appointment they had two engineers, one at each end, who were subordinate to Mr. Leetch.

As bearing upon the duties of Mr. Leetch, the record also contains evidence in the shape of a letter signed by the president by the authority of the board of directors of the gas company, dated Washington, March 1, 1865, and addressed to Mr. George A. McIlhenny, by which the latter was appointed superintendent of the gas works, and his duties were therein stated to be to take charge of every portion of said works pertaining to the manufacture, distribution and consumption of gas, and all persons employed in those departments; contracts for purchasing coal and selling tar were to be made by the president, but the superintendent was authorized to contract for other supplies to the works, the contracts to be submitted to the president for approval. The superintendent was to fix the price of coke, but all coke was to be purchased and paid for at the office. The superintendent was to have stated hours for being at the office in town and give attention to all complaints of leaky mains, etc. His special attention was directed to certain points regarding the standard for gas and increasing its product per pound of coal; increasing the coke sold; saving of refuse coke; reduction of men employed at the works; number of thousand feet of gas produced, and all other points which need correction; the letter closing with the statement: "The welfare of the company demands economy in its management, and that the gas produced shall be uniformly good." From that time until the year 1886 there is no evidence regarding the duties of superintendent or manager of the company.

In September, 1886, at a meeting of the board of directors, the president called the attention of the board to the necessity

of employing a competent man to fill the position of superintendent of the company, (said position being formerly designated engineer,) and Mr. McIlhenny (the president) was authorized to employ such person for the position. Pursuant to that authority the president wrote to Mr. Lansden (the plaintiff) stating: "Our board of directors has authorized me to employ a superintendent, and I have concluded to offer you the position at a salary of $5000 per annum, payable monthly, the condition being that you will give satisfaction, presuming that you are a first class gas works superintendent, otherwise this agreement may be revoked at any time." The plaintiff was at this time a gas engineer, who is, as plaintiff testified, a man who constructs and manufactures gas works and manufactures gas. His duties as superintendent would not enable him precisely to know the cost of the manufacture and distribution of gas.

Mr. McLean, president of the company, testified on this trial in regard to the position of Mr. Leetch; that he first had a recognized position with the company after Mr. Lansden (plaintiff) had left the service of the company; that he thought Leetch was on the pay roll of the company at that time; he was just generally employed there and familiarized himself with the company, but had no positive employment until after Mr. Lansden, the plaintiff, left; that Mr. Leetch was not put in exactly the position Mr. Lansden had occupied, but that in fact he was appointed generally "to take care of the works and to do the best he could do for the company; that he was a gas engineer and took care of the works."

This is all the evidence contained in the record bearing upon the duties of Mr. Leetch as general manager of the company and of his right to act for it in the above matter.

The question arises whether upon these facts and the legitimate inferences which may flow from them, the corporation defendant can be held liable for the publication of the libellous article in The Progressive Age.

That a corporation may be held responsible in an action for the publication of a libel is no longer open for discussion in this court. *Philadelphia, Wilmington & Baltimore Railroad*

v. *Quigley*, 21 How. 202, 210. In that case the company was held liable in damages to the plaintiff, Quigley, for the publication of a libel regarding the plaintiff's skill and capacity as a mechanic. Quigley brought his action against the company because the company published a letter addressed to it in the course of an investigation by its board of directors in regard to the conduct of some of its subordinates. The letter contained libellous matter in regard to the plaintiff, and with much other testimony was printed and published by the board of directors, and the court decided that the corporation could be held liable for the publication. In that case Mr. Justice Campbell, in delivering the opinion of the court, said: "That for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." The doctrine of this case has been approved and reaffirmed in many cases in this court since that time.

The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. *Salt Lake City* v. *Hollister*, 118 U. S. 256, 260; *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597, 609; *Lake Shore & Michigan Southern Railway* v. *Prentice*, 147 U. S. 101, 109, and cases cited at p. 110.

In this case no specific authority was pretended to have

been given the general manager, Leetch, to write the letters which he sent to Brown, or to authorize the publication of anything whatever in the periodical named. We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself. There is no evidence of an express authority, nor of any subsequent ratification of Leetch's conduct by the company. Can any authority be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence we find nothing upon which such an inference can be based; nothing to show that any correspondence whatever, upon the subject in hand, was within the scope of the manager's employment. Commencing with the time when a superintendent was employed in March, 1865, down to the employment of Leetch, no such power could be inferred from the evidence regarding the duties of a superintendent or manager. In March, 1865, the duties of such an officer were plainly stated. They were: "To take charge of every portion of said works pertaining to the manufacture, distribution and consumption of gas and all persons employed in those departments." Further details of his duties were mentioned in the writing making the appointment, but they all related to the carrying on of the business of the company. From all

that appears in the record the duties of superintendent of the gas works remained as stated in the communication as above mentioned, with possibly a change in the name from superintendent to engineer, until 1886, when, under authority of the board of directors, Mr. Lansden, the plaintiff, was employed as superintendent upon the presumption, as stated, that he was a first class gas works superintendent. There is nothing from which we could infer that the character or scope of the duties of superintendent was enlarged or changed at the time the plaintiff accepted the position from what those duties were stated to be in the letter appointing a superintendent in 1865.

From the evidence in the case, no presumption could be indulged that the duties of the general manager of the corporation in question included in their general scope or character the right to represent the corporation in any business such as is referred to in the letters of Brown or in the letters of Leetch in answer thereto. The letters of Mr. Brown had nothing whatever to do with the transaction of the business of the corporation or with anything relating thereto which the superintendent was authorized to perform. It was an inquiry relative to a past transaction regarding the testimony supposed to have been given before a committee of Congress, having, among other things, the subject of the price of gas in the city of Washington before it for consideration. From the evidence in this case, it is plain that it was no part of the duty of the general manager even to appear before that committee unless summoned so to do by the committee, or specially directed by the company to so appear. In no view of the evidence can we see the least basis for an inference that the manager had authority to represent the company in any matter connected with third parties and relating to the character of the evidence given by the plaintiff before the committee of Congress.

The manager did not himself regard the correspondence as one of an official nature, and he swears that he answered the letters as a mere personal matter, altogether exclusive of any duty that he owed to the gas company; that the gas

company had no interest in it, and he merely wrote the letters as an act of courtesy stating the facts, and that none of the officers of the company were informed as to the contents of the letters that he wrote, and they were ignorant regarding them.

The plaintiff, of course, would not be bound by the evidence of Mr. Leetch as to how he regarded the letters or in what capacity he thought that he was answering them, if there were other evidence in the case from which a contrary inference could properly be drawn — evidence from which it could be inferred that the manager was acting within the scope of his employment as manager; in such case it would be proper to refer the question of fact to the jury to ascertain whether the letters were written within the scope of his employment, notwithstanding his assertion that he wrote them in his personal capacity. But there is no such evidence.

The fact that the manager copied his letters to Brown into the official copy book kept in the office of the secretary is not material upon this question. It was the act of Mr. Leetch, unknown to the officers of the company, so far as the record shows, and the company cannot be held liable for the original act of Leetch by such evidence. It does not tend to show that his action was within the scope of his employment as manager.

If we set aside for a moment the testimony in regard to the duties to be performed by the superintendent, as stated in the communication of March, 1865, and look simply at the other facts in the case, we are still without any evidence from which it might be inferred that the act on the part of the manager was within the scope of his employment. The burden is upon the plaintiff to show this fact.

From the use of the term "general manager" we should not be authorized to infer any such authority, nor would it be permissible to allow the jury to make a mere guess that it existed. A general manager of a business corporation, such as this gas company is, would not be presumed to have this power. The term, in our judgment, when used in connection with such a corporation cannot, in the absence of any

evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, its distribution and the general ways and means of accomplishing the object of the corporation — all these in subordination to the board of directors and such superior officers as the board should provide.

We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it.

The next question arises in regard to the defendant Bailey.

The only evidence in regard to this defendant is that he was secretary of the company at the time in question; that after Mr. Lansden, the plaintiff, had made the memorandum in preparation for his being called as a witness before the Congressional committee in 1893, and in which memorandum he had stated the cost of gas, (although, as he says, he took that cost from the president, and did not pretend to state it as of his own knowledge,) he gave the memorandum to Mr. McLean, the president of the defendant company, who gave it to Mr. Bailey, the secretary, who had kept it in his possession from that time; that after Mr. Leetch received Mr. Brown's first letter relating to the plaintiff's testimony before the Congressional committee of 1894, Mr. Leetch showed him (Bailey) the letter, and that Mr. Bailey then read it, and stated: "I have a paper in Mr. Lansden's own handwriting, where he stated that the price of gas was so and so and the price of distribution was so and so;" and he then gave Leetch the paper; that he then knew that the items therein, so far as they regarded the cost of distribution, did not rest on plaintiff's personal knowledge, but that they came from the books; that he did not know what Leetch wanted with the paper; that he thought nothing about it; that Leetch had asked him

"Where is the paper?" and he then got it, and Leetch asked him to let him take it; and that Leetch did take it and went off to his room, and that Bailey never saw it again or heard of it until after the letter was written; that Bailey did not give Leetch any data to reply to the letter and he thought nothing about writing the letter, and that he simply said, as a matter of fact, that he (Lansden) had said that gas could be made and sold at a profit at a dollar. He never knew that the first letter of Brown had been answered until he saw it in The Progressive Age.

This is all the evidence connecting Mr. Bailey in any way with the publication of the libel, and we think it wholly insufficient for that purpose. We think there is nothing in this evidence from which the inference can reasonably and fairly be drawn that there was any intention on the part of Mr. Bailey to furnish Mr. Leetch with the figures in the memorandum so that he might answer the letter from Mr. Brown, and have the figures or any other matter published in his paper.

A finding by the jury, that Mr. Bailey furnished the information contained in this memorandum to Mr. Leetch for the purpose of having him communicate it to Mr. Brown, and for the purpose of having Mr. Brown publish the same, would not be supported by any evidence in this case. Such a finding would be a pure guess, unsupported by any evidence, and the jury should not be offered the opportunity to make it. The judgment should, therefore, be reversed as against Mr. Bailey.

The third question relates to the judgment against Leetch.

We are of opinion that the judgment ought also to be reversed and a new trial awarded as against him. We do not think it would constitute a defence in his case that there were other matters contained in the article published by Mr. Brown, not pertaining to and which were no part of the subject-matter upon which Mr. Leetch wrote his letters. For anything appearing in that publication which was outside and beyond the scope of the subject-matter of the letters of Mr. Leetch, he would not be responsible, because he could not be charged with authorizing the publication of such matter in any form, but if upon all the evidence on another trial the jury should be satis-

fied he furnished the publisher, Mr. Brown, with information of a libellous character regarding the plaintiff, for the purpose and with the intention of having the same published by Mr. Brown, we think that the defendant might be held liable for such publication on the ground that it was published by his aid and procurement and substantially by his agent. Of course, the evidence would have to be sufficient to justify a jury in finding the fact of such intention, and that the information was so furnished to Mr. Brown.

There are, however, two grounds upon which we think this judgment should be reversed, and no judgment entered upon the verdict even as against Mr. Leetch, one of which rests upon an exception to evidence, and the other is based upon the substantial injustice which we think might be the result if we were to permit judgment to be entered upon the verdict as against him alone.

When the plaintiff was on the stand, upon direct examination, he testified that the total capital stock of the company defendant was $2,000,000. He was then asked as to the dividends that had been paid upon the stock within his knowledge. This was objected to by counsel for defendants, who said it was perfectly well known that the gas company was able to pay the amount claimed in this libel case, and what dividends they pay is a matter private to the company.

Counsel for plaintiff said he was seeking to show only its earning capacity. To which counsel for defendants said they would admit that the company was able to pay this amount claimed. "The Court: Still they have the right to show the volume of the property of the company, and any evidence tending to show the volume of the property would be competent." To which ruling of the court counsel for the defendants excepted.

The witness then testified that the company had paid the last two regular dividends of ten per cent upon its capital stock.

The court then said to counsel: "That the admission of the fact that the company was able to respond in damages amounted to nothing; that the object of the evidence was

to furnish the jury a basis upon which they might calculate exemplary damages if they were entitled to exemplary damages, as was claimed. If the jury were going to give exemplary damages they might give much larger damages against a very wealthy person than they would against a person of ordinary circumstances." Counsel for the defendants said that their claim was only $50,000. To which the court responded: "If you admit that if they are entitled to a verdict at all they are entitled to $50,000, that does away with the necessity of the evidence; otherwise I think it would be admissible." And under the objection and exception of the defendants' counsel the witness then testified that he knew what dividends had been paid by the gas company since 1890, but did not know what had been earned; that every year they had paid 10 per cent; that in 1893, they had paid 15 per cent; that was an extra dividend; that in 1895 they had paid $400,000 — an extra dividend; that from 1890 down to the present time they had paid the regular 10 per cent dividend every year, and that in 1890 they had issued $600,000 of interest-bearing certificates to the stockholders, which would make it 40 per cent for that year, and in 1893 there was a special dividend paid of $3 per share in addition to the 10 per cent; that in 1894 he did not know of anything being paid but the regular dividend; that in 1895 they paid $4 a share, and that it takes $200,000 to make the regular dividend, and they paid $400,000 extra in, $600,000 altogether. The court did not directly instruct the jury that the evidence was only admissible for the purpose stated by him in his reply to the objection made by counsel for the defence. In his final charge to the jury and upon the request of the counsel for the defendants, the court instructed the jury that the plaintiff was not entitled to recover punitive damages against the defendant company or against either of the other defendants, but only such damages as the evidence proves that he has sustained on account of the action of the defendants, if any.

The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against

the company alone. All the defendants joined in a plea of not guilty, and the jury could not find a verdict of guilty against all, and apportion the damages among the several defendants by giving a certain amount as against the company and a certain other amount as against the individual defendants. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable. Cooley on Torts, 133, 135, 136; *Currier* v. *Swan*, 63 Maine, 323; *Berry* v. *Fletcher*, 1 Dill. 67; *Pardridge* v. *Brady*, 7 Ill. App. 639; *McCarthy* v. *De Armit*, 99 Penn. St. 63, 72.

The rule is different in South Carolina, where the jury can apportion the damages among the different defendants found guilty. It is acknowledged to be a departure from the rule at common law. *White* v. *McNeily and others*, 1 Bay, 10, 11.

As between themselves, there is no contribution among several tort feasors. *Merryweather* v. *Nixan*, 8 T. R. 186; *Farebrother* v. *Ansley*, 1 Camp. 343; *Wilson* v. *Milner*, 2 Camp. 452; Cooley on Torts, pp. 148, 149. A verdict might therefore be rendered against all defendants and collected out of one, and he would have no right of contribution. And the verdict, enhanced by the evidence of the wealth of one defendant, might be collected from the defendant the least able to respond and the least culpable of all, who would thus be mulcted in punitive damages, the amount of which might have been measured by the evidence of the wealth of another defendant.

In this case the jury was bound to give one entire sum against all the defendants found guilty, and that sum would be included in the judgment against each of them. The object of the evidence in relation to the capital stock of the corporation and the dividends declared by it was, as stated by the court to counsel, for the purpose of furnishing the jury the basis upon which they might calculate exemplary damages, yet it is not plainly limited to that purpose by any direction given to the jury by the court. If the evidence would be ad-

missible for the purpose stated by the court to counsel, in a case against the corporation alone, can it be that it would be admissible also in a case like this, where individual defendants are joined by the voluntary act of the plaintiff? We are of opinion that the evidence in regard to them would be inadmissible. It would form no basis for any verdict against the individual defendants. While a defendant who is least to blame is still liable for all the damages suffered by plaintiff, he is not liable to respond in punitive damages, the amount of which may be based upon particular evidence of the wealth of some other defendant.

Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined. What the true rule is in such case is not perhaps certain. 7 Ill. App. 639; 99 Penn. St. 63. But we have no doubt it prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages against all.

In many cases against several defendants it frequently happens that evidence is competent and is admitted as against one of the defendants only, and the court, on its own motion or on the request of the other defendants, would charge the jury that such evidence could not be taken into consideration as against the defendants to whom it did not apply. But here such a

power cannot be exercised. The court cannot say to the jury that the evidence of the wealth of the corporation is only received in regard to it and as furnishing a basis for a computation of exemplary damages against it. If received at all it must be received against all the defendants, as but one verdict can be given against all who are found guilty, when in truth in regard to all of them but the corporation it is evidence which is absolutely incompetent. Yet if the evidence is received on the assumption that it is material in relation to the corporation, the other defendants are affected by it the same as the corporation, and a verdict may very probably be enlarged against them because of the evidence as to the ability of the corporation defendant to pay. The jury is thus permitted to take into consideration the wealth of one defendant upon the question of the amount of the verdict against all of them.

Objection to the evidence was taken by counsel, and we think under the circumstances was well taken, and the exception is good in behalf of the individual defendants who were necessarily affected by its introduction.

But it is said that this error, if any, was cured by the ruling of the court in response to the request of defendants' counsel that punitive damages should not be granted. We are not certain as to that. As we have said, the court gave no instruction to the jury that it could only consider the evidence in connection with the question of punitive damages. The remark of the court as to the object of the evidence was made to counsel, and the court did not in any instructions given plainly limit the jury to its consideration for that purpose alone. The evidence was never withdrawn by the court, nor was the jury directed to take no notice of it. If the court admitted the evidence for one purpose only, and yet did not afterwards in terms withdraw it from the consideration of the jury, it was of such a nature that it still might affect the jury, even though the basis for its admission originally had disappeared. It is true the defendants did not in so many words ask the court to withdraw the evidence from the jury. It was, however, duly objected to when received, and it was

error to receive it. Under such circumstances, in order to cure the error, the court, when deciding that punitive damages could not be recovered, should have plainly and in distinct language withdrawn this particular evidence from the jury. We cannot be certain that its effect was removed by this action of the court. In a case of this character, where the line between compensatory and punitive damages is quite vague, and compensatory damages may be based upon the injury to the feelings and good name of a plaintiff, and where the amount even of such compensatory damages rests so largely in the discretion of a jury, we think it is utterly impossible to say that by merely charging the jury that punitive damages cannot be recovered, the effect of the incompetent evidence as to the wealth of one of the defendants was thereby removed or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case.

We are also of opinion that even upon the assumption that no error was committed upon the trial as against the defendant Leetch, which in itself would call for a reversal, yet the judgment should be wholly reversed and no judgment entered upon the verdict as to him, because the original verdict was against the three defendants, and it was given under such circumstances that we might well fear the amount was enlarged by the evidence as to the wealth of the corporation, and it is possible, if not probable, that if a verdict had been rendered against the individual defendant alone, it would have been for a materially less amount. At any rate, the jury has never been called upon to render a verdict against a sole defendant, and while it may be said that whether against one or against all the defendants, the plaintiff suffers the same damage and should be entitled to a verdict for the same sum, still the question arises whether a jury, in passing upon the several liability of the individual defendant, would give a verdict of the same amount as it would if both the other defendants remained. We cannot say it would, and as the jury has never rendered a verdict against Mr. Leetch individually and solely, and as the case is one where damages are so largely in the sole discretion of the jury, we think it unjust and improper to permit this

verdict to stand against Leetch alone while we set it aside as against the other defendants.

Where the judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, then we think the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment *in toto* and grant a new trial in regard to all the defendants.

The question is discussed with much fullness in *Albright* v. *McTighe and others*, 49 Fed. Rep. 817, and the same conclusion is arrived at.

The provisions contained in the judgment in *Pennsylvania Railroad* v. *Jones*, 155 U. S. 333, at 354, indicate the opinion of this court that it was right to reverse the entire judgment in that case for error in regard to one of several defendants, but the court held that as the error did not affect the others, the plaintiff should have liberty to become non-suit as to the one defendant and to then have judgment upon his verdict against the others. In that case there was a failure to prove a cause of action against the one defendant while no such failure existed as to the others, and there were no special reasons for a total reversal, but on the contrary, justice seemed to require that plaintiff should have the liberty of entering judgment upon his verdict against the other companies.

In regard to the defendants, McLean, the president, and Orme, the assistant secretary, the judge charged the jury that there was no prayer granted or asked by plaintiff's counsel directed specially to informing the jury whether it might or might not find against those defendants; that he did not understand that the plaintiff's counsel earnestly insisted upon a verdict against them personally; and he could only say that the evidence tending to show that they were personally liable was slight, and he submitted the case to the jury with that expression, leaving it to their discretion to find for or against them as they might think best. There was no finding by the jury against those defendants, and no judgment was entered against them and they have not brought error. In reversing

the judgment we do not intend to reverse what may be considered a finding of the jury in their favor.

For the reasons given, we reverse the judgment of the Court of Appeals of the District of Columbia, with directions to that court to reverse the judgment of the Supreme Court of the District of Columbia and to grant a new trial to the three defendants who are plaintiffs in the writ of error sued out from this court.

ORIENT INSURANCE COMPANY *v.* DAGGS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 81. Argued December 8, 1898. — Decided January 16, 1869.

The provision in section 5897 of c. 89, art. 4 of the Revised Statutes of Missouri, that "in all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured, the property may have sustained, between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial loss, the measure of damages shall be that portion of the value of the whole property insured, ascertained in the manner hereinafter described, which the part injured bears to the whole property insured;" and the provision in section 5898 "that no condition of any policy of insurance contrary to the provisions of this article shall be legal or valid," are not, when applied to a foreign insurance corporation insuring property within the State in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, forbidding a State to make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law; or to deny to any person within its jurisdiction, the equal protection of the laws.

A corporation is not a citizen within the meaning of that Amendment, and hence has not the privileges and immunities secured to citizens against state legislation.

Statement of the Case.

That which a State may do with corporations of its own creation it may do with foreign corporations admitted into it.
Hooper v. *California*, 155 U. S. 648, cited, approved and applied.

This was an action at law upon a policy of insurance, issued by the plaintiff in error, a corporation organized under the laws of the State of Connecticut. The policy was issued in June, 1893, insuring the defendant in error against loss or damage by fire to a certain barn situated in Scotland County, Missouri, in a sum not to exceed $800. The barn was, within less than three months after the issuing of the policy, entirely consumed by fire, and an action was brought upon the contract to compel the payment of the entire sum of $800.

The petition filed in the case avers the delivery of the policy of insurance to the defendant in error, and says that the company, by virtue of said policy, promised to pay the plaintiff the sum of $800 in case said barn should be destroyed by fire, and attaches a copy of the policy to the petition as the basis of the action.

The answer filed by the company stated that the "defendant is a corporation, organized and existing under and by virtue of the laws of the State of Connecticut, doing a general fire insurance business in the State of Missouri, and avers it has been doing such business continually since and prior to the first day of June, 1873, and that said defendant was and is fully authorized to do such business in the State of Missouri." The answer admitted the delivery of the policy and the total destruction of the barn by fire; that the plaintiff was the owner thereof, and that proofs of loss had been made.

The defendant further answering, stated that the contract of insurance sued on in the case was the contract between the parties, and that it provided that "said insurance company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and that the loss or damage shall be ascertained or estimated according to the actual cash value of the property at the time of the fire, and shall in no case exceed what it will cost to replace the same, deducting therefrom a suitable amount for any depreciation of said property from age, use or location, or otherwise."

Statement of the Case.

The answer further averred that at the time of the burning of the building in question it was not worth to exceed $100, which amount the plaintiff in error then offered to pay, with interest from the date of the fire, and to return the premium. The answer of the defendant further averred as follows:

"The defendant says that section 5897 of chapter 89, article 4, Revised Statutes of the State of Missouri, compiled in the year 1889, provides as follows: 'In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained, between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant.' . . . And that section 5898 of said chapter provides that no condition in any policy of insurance contrary to the provisions of this article, meaning thereby article 4, shall be legal or valid. The defendant says that said statute was enacted prior to the issuing of said policy and has not been repealed."

The defendant pleaded that said statute is contrary to the constitution of Missouri, and that the same is unconstitutional, null and void, and proceeded to aver as follows:

"The defendant further answering says that sections 5897 and 5898 of chapter 89, article 4, of the statutes of Missouri are contrary to and in contravention of the Constitution of the United States, which provides that no State shall pass any bill of attainder or *ex post facto* law, or laws impairing the obligation of contracts.

"Defendant further answering says that said sections, and each of them, are contrary to and in contravention of article 14 of the Constitution of the United States, commonly called the Fourteenth Amendment, and particularly of article 1 of said Amendment, which is as follows:

"'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"And that said sections 5897 and 5898 of chapter 89, article 4, of the Revised Statutes of Missouri are unconstitutional and contrary to the Constitution of the United States, and are null and void.

"That the defendant has the constitutional right to limit its liability by contract to actual damages caused by fire."

To this answer the plaintiff and assured filed a demurrer, which demurrer the court sustained, and the defendant, electing to stand upon the ruling upon said demurrer, judgment was entered in favor of the plaintiff, and in due course the cause was appealed to the Supreme Court of Missouri. At October term, 1896, the Supreme Court of Missouri rendered an opinion in said case, affirming the judgment of the court below. 136 Missouri, 282. The case then came to this court in due course upon petition in error.

There are twenty-three assignments of error which present the claim of plaintiff in error under the Constitution of the United States and the alleged error of the state court denying the claim.

Mr. Alfred H. McVey for plaintiff in error.

No appearance for defendant in error.

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

The statute of Missouri is alleged to violate the Fourteenth Amendment of the Constitution of the United States in the following particulars: (1) that it abridges the privileges or immunities of citizens of the United States; (2) denies to

persons within its jurisdiction the equal protection of the laws; and (3) deprives persons of property without due process of law.

(1) It is not clear that this ground is relied on. It is, however, not available to plaintiff in error. A corporation is not a citizen within the meaning of the provision, and hence has not "privileges and immunities" secured to "citizens" against state legislation. This was decided in *Paul* v. *Virginia*, 8 Wall. 168, against a corporation upon which were imposed conditions for doing business in the State of Virginia, and has been repeated in many cases since, including one at the present term, *Blake* v. *McClung*, *ante*, p. 239.

(2) It is not easy to make a succinct statement of the objections of plaintiff in error under this provision. Counsel says: "The business of insurance includes insurance against damages on account of death, accident, personal injury, liability for acts of employés, damages to plate glass, damages by hail, lightning, high wind, tornadoes, and against damages to personal property on account of fire or casualty by other elements, as well as insurance against loss or damage to buildings on account of fire. . . . No other business is subject to the discrimination, in case such business is involved in litigation, of having the damages assessed without due process of law. The statute singles out persons engaged in fire insurance as against all other kinds of insurance, and as against all other kinds of business, and imposes the onerous and unusual conditions provided in the statute, against such persons." And again: "The statute thus discriminates as to the subject-matter, as to the parties, as to the mode of trial of actions at law and equity, and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate its contracts, compel it to pay damages never sustained, and prevent it from having an investigation upon the trial by due process of law."

This mingles grounds of objection, and confounds the prohibitions of the provision we are considering with that of the next provision. Whether the statute of Missouri provides for "due process" we shall consider hereafter, and upon that con-

sideration determine how much of the complaint against it in that regard is true. Now we may confine ourselves to the more specific contention that it discriminates between fire insurance corporations or companies and those engaged in other kinds of insurance.

It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283. We said in that case that "the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion." And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured — differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify if not demand different legislative treatment. Of course it is not for us to debate the policy of any particular treatment, and the freedom of discretion which we have said the State has is exhibited by analogous if not exact examples to the Missouri statute in *Railway Company* v. *Mackey*, 127 U. S. 204, 208, and in *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26.

In *Railway Company* v. *Mackey*, 127 U. S. 204, a law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification, notwithstanding that it did not apply to other carriers, or even to other corporations using steam. The law was objected to, as the statute of Missouri is objected to, on the ground that it violated the provisions of the constitution which we are now considering.

To the first contention the court, by Mr. Justice Field, said: "The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State." And after further comment added: "That its passage was within the competency of the legislature, we have no doubt." To the second contention it was said: "It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from the fact." The legislation was justified by the character of the business of railroad companies, and it was declared to be a matter of legislative discretion whether the same liability should or should not be applied to other carriers, or to persons and corporations using steam in manufactures.

In *Minneapolis Railway Company* v. *Beckwith*, 129 U. S. 26, a law of Iowa making a class of railroad corporations for special legislation was sustained.

(3) "What it is for a State to deprive a person of life, liberty or property without due process of law" is not much nearer to precise definition to-day than it was said to be by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97.

The process "of judicial inclusion and exclusion" has proceeded, and yet this court, in *Holden* v. *Hardy*, 169 U. S. 366, 389, again declined specific definition. Mr. Justice Brown, speaking for the court, said: "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence." These principles were extended to the right

to acquire property and to enter into contracts with respect to property, but it was said "this right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers."

The legislation sustained was an act of the State of Utah making the employment of workingmen in all underground mines and workings and in smelters and all other institutions for the reduction and refining of ores or metals eight hours per day, except in cases of emergency, where life or property should be in imminent danger. The violation of the statute was made a misdemeanor. It was undoubtedly a limitation on the right of contract — that of the employer and that of the employed — enforced by a criminal prosecution and penalty on the former and on his agents and managers. It was held a valid exercise of the police powers of the State. These powers were not defined except by illustration, nor need we now define them. The case is a precedent to support the validity of the Missouri statute now under consideration.

The statute provides as follows: "In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; *and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured*, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant." . . . It is also provided that no condition in any policy of insurance contrary to such provision shall be legal or valid.

The specific objections which, it is claimed, bring the statute within the prohibition of the Constitution, in the last analysis, may be reduced to the following: That the statute takes away a fundamental right and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact.

Opinion of the Court.

The right claimed is to make contracts of insurance. The essence of these, it is said, is indemnity, and that the statute converts them into wager policies — into contracts (to quote counsel) having for their bases speculation and profit, "contrary to the course of the common law." The statement is broad, and counsel in making it ignores many things. The statute tends to assure, not to detract from the indemnity of the contracts, and if elements of chance or speculation intrude it will be on account of carelessness or fraud. It is admitted that the effect of the statute is to make valued policies of those issued; and the conclusive effect which has been ascribed to their valuation has never been condemned as making them wager policies or as introducing elements of speculation into them.

The statute then does not present the alternative of wager policies to indemnity policies. The change is from one kind of indemnity policy to another kind, from open policies to valued policies, both of which are sanctioned by the practice and law of insurance, and this change is the only compulsion of the law. It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done — estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions cannot be urged against fraud, and it permits the subsequent depreciation of the property to be shown.

We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property. Risk then can only come from the failure to observe care — that care which it might be supposed, without any prompting from the law, underwriters would observe, and which if observed would make their policies true contracts of assurance, not seemingly so, but really so; not only when premiums are paying, but when loss is to be paid. The State surely has the power to determine that this result is desirable, and to

accomplish it even by a limitation of the right of contract claimed by plaintiff in error.

It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non lædas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection. The Missouri statute comes within this rule.

The cases cited by plaintiff in error, which hold that the legislature may give the effect of *prima facie* proof to certain acts, but not conclusive proof, do not apply. They were not of contract nor gave effect to contracts. It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty.

The statute is not subject to the condemnation that it regulates contracts made or rights acquired prior to its enactment; and we may repeat the language of Mr. Justice Field, in *Missouri Railway Co.* v. *Mackey*, *supra*, that "it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State."

That which a State may do with corporations of its own creation it may do with foreign corporations admitted into the State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper* v. *California*, 155 U. S. 648, and need not be repeated.

Statement of the Case.

It is urged that the statute is not made a condition upon foreign corporations, but this view is not open to our acceptance. The Supreme Court of Missouri, exercising its function of interpretation, decides that it is. But we do not care to enter fully into the subject of conditions on corporations, foreign or domestic. The statute is sustained on the grounds that we have given.

The other contentions of plaintiff in error we do not consider it is necessary to review.

Judgment affirmed.

UNITED STATES *v.* HARSHA.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 127. Submitted January 11, 1899. — Decided January 23, 1899.

A judgment of a Circuit or District Court of the United States for the plaintiff in an action at law under the act of March 3, 1887, c. 359, 24 Stat. 505, is reviewable by the Circuit Court of Appeals upon writ of error.

The provision of the act of July 31, 1894, c. 174, § 2, 28 Stat. 162, 205, that "no person who holds an office, the salary or annual compensation of which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached," does not, *ex proprio vigore*, create a vacancy in the office of clerk of a Circuit Court of the United States, by reason of the fact that at the time of its taking effect the then lawful incumbent of that office is also holding the office of clerk of the United States Circuit Court of Appeals in the same circuit, having previously resigned the latter office, and his resignation not having been accepted by the judges.

On May 24, 1897, the Circuit Court of Appeals for the Sixth Circuit, upon a writ of error from that court to review a judgment rendered by the District Court of the United States for the Eastern District of Michigan in favor of Walter S. Harsha in an action brought by him against the United States, under the act of March 3, 1887, c. 359, to recover fees as clerk of the Circuit Court of the United States for that district, for services rendered during the first quarter of the

year 1895, certified to this court the following statement of facts and questions of law:

"Walter S. Harsha was duly appointed clerk of the Circuit Court of the United States for the Eastern District of Michigan, June 6, 1882, took the oath of office and filed his official bond in the sum of $20,000 on the same day, and is now and has from that time until the present been continuously, under said appointment by the judges of said court, and with their continued assent and approval, acting as clerk of said court under a *bona fide* claim of title to said office, no other person having at any time made any claim of title thereto, nor has his title been otherwise questioned than as hereafter stated.

"The said Harsha is now, and has been continuously since his appointment as clerk, a permanent resident of the city of Detroit, in the Eastern District of Michigan, where his official duties as such clerk are to be performed, and has during the whole of said time, from June 6, 1882, to the date hereof, given his actual personal attention to such duties, and has not at any time removed from said district.

"The accounts of Harsha as such clerk, for the first quarter of the calendar year 1895, amounting to $482.90, were made, presented, proved and allowed by the Circuit Court of the United States for the Eastern District of Michigan, as provided by law; said accounts were for services actually rendered, and were correct, and were duly forwarded to the Attorney General for examination under his supervision, as provided by statute.

"The said Harsha was duly appointed clerk of the United States Circuit Court of Appeals for the Sixth Circuit, June 16, 1891, took his oath of office and filed his official bond in the sum of $20,000 on the same day, and continued to perform the duties of the office of clerk of said court from June 16, 1891, aforesaid, to and including October 2, 1894, and received salary as such clerk at the rate of $3000 per annum for that time.

"On February 24, 1894, Harsha presented to the judges of said Court of Appeals his resignation as such clerk, which resignation was accepted by said judges October 2, 1894.

"Upon the presentation at the Treasury Department of the said accounts so forwarded to the Attorney General, the Comptroller of the Treasury, upon his construction of the act of Congress of July 31, 1894, decided that a vacancy occurred in the office of said clerk of the Circuit Court of the United States, beginning August 1, 1894, for the reason that after that date Harsha continued to hold the office of clerk of the United States Circuit Court of Appeals for the Sixth Circuit, the annual compensation of which office was $3000, and that such vacancy continued thereafter until the expiration of said first quarter of the calendar year 1895, and, upon the ground of such vacancy, disallowed the said accounts of petitioner as clerk of the United States Circuit Court for the Eastern District of Michigan for the said first quarter of the calendar year 1895.

"This action was brought by Harsha, to recover his fees earned as clerk of the Circuit Court, in the District Court of the United States for the Eastern District of Michigan, under the second section of the act of March 3, 1887, entitled 'An act to provide for the bringing of suits against the Government of the United States;' and after making a finding of facts and stating its conclusions of law, the District Court filed the same, and entered judgment for the petitioner Harsha in the sum of $482.90. The United States, by its attorney, then applied to the District Judge, holding the District Court, for the allowance of a writ of error from this court to the District Court. The writ was allowed, and was issued by the clerk of this court to the District Court.

"The instruction of the Supreme Court is respectfully requested on certain questions of law arising on the foregoing statement of facts as follows, to wit:

"First question. Can such a judgment rendered under the act of March 3, 1887, in the Circuit or District Court, be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal?

"Second question. Did the act of July 31, 1894, above re-

ferred to, *ex proprio vigore* create a vacancy in the office of clerk of the Circuit Court for the Eastern District of Michigan, by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the Circuit Court of Appeals of the Sixth Circuit?

"Third question. Does the general rule, that officers *de facto* may not recover by suit compensation for services rendered as such, apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power, under a *bona fide* claim of title to the office, when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formally to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification?"

Mr. Assistant Attorney General Pradt and *Mr. E. C. Brandenburg* for the United States.

Mr. Edwin F. Conely for Harsha.

Mr. Justice Gray delivered the opinion of the court.

This suit being an action at law under the act of March 3, 1887, c. 359, the judgment of the District Court therein was, as has been directly adjudged by this court, reviewable by the Circuit Court of Appeals upon writ of error. 24 Stat. 505; *Chase* v. *United States*, 155 U. S. 489; *United States* v. *King*, 164 U. S. 703. The first question certified must therefore be answered in the affirmative.

Mr. Harsha was appointed and qualified as clerk of the Circuit Court on June 6, 1882, and has ever since performed all his duties as such.

On June 16, 1891, he was appointed and qualified as clerk of the Circuit Court of Appeals. On February 24, 1894, he presented to the judges of that court his resignation of the

office of clerk thereof; and his resignation was accepted by them on October 2, 1894. From his appointment until the acceptance of his resignation he performed all the duties and received the salary of the clerk of that court.

In 1893, it was adjudged by the Circuit Court of Appeals, affirming a judgment of the Circuit Court, in an action brought by Mr. Harsha against the United States for services as clerk of the Circuit Court during the last half of 1891 and the first half of 1892, that his acceptance of the office and receipt of the salary as clerk of the Circuit Court of Appeals during that period did not vacate the office of clerk of the Circuit Court, or deprive him of the right to the compensation then sued for. *United States* v. *Harsha*, 16 U. S. App. 13.

The subject of the present suit is the right of Mr. Harsha to recover compensation for his services as clerk of the Circuit Court during the first quarter of the year 1895.

On July 31, 1894, Congress, by a provision inserted in the middle of a general appropriation act, and as an addition to a section relating to the pay of assistant messengers, firemen, watchmen, laborers and charwomen, enacted as follows: "No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached, unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army and Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate." Act of July 31, 1894, c. 174, § 2; 28 Stat. 162, 205.

The second question certified by the Circuit Court of Appeals to this court is whether this act, *ex proprio vigore*, created a vacancy in the office of clerk of the Circuit Court, "by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the Circuit Court of Appeals."

The provision of the act in question, so far as concerns the question now before this court, is simply this: "No per-

son who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation shall be attached." If the appointment to the other office were made after the passage of the act, it might well be held to be void, leaving the person in possession of the first office. But when, at the time of the passage of the act, a person is holding two offices, to each of which compensation is attached, and the compensation of either or both of which is by an annual salary, the act does not say which of the two offices he shall be deemed to have resigned, or which of the two he shall continue to hold. If the compensation of each office were a fixed salary of two thousand five hundred dollars or more, an election by the incumbent would be the only possible method of determining which office he should continue to hold. He must have the same right of election between the two offices, when one is paid by a fixed salary and the other by fees. The act, while it makes the two offices incompatible for the future, does not undertake to compel the defendant to give up the office which is paid by fees, when he prefers to hold that office and to give up the one which is paid by a salary.

At the time of the taking effect of the act, Mr. Harsha was actually holding under lawful appointments, and was performing the duties of, two offices, that of clerk of the Circuit Court, paid by fees, and that of clerk of the Circuit Court of Appeals, paid by a salary of three thousand dollars. He never showed any intention of resigning or abandoning the former office; and he had done all that he could to get rid of the latter office, by presenting his formal resignation thereof to the judges five months before the passage of the act, and never attempting to recall that resignation. Even if his resignation of this office could not take full effect until accepted, yet such resignation, coupled with his unequivocal intention to retain the other office, prevented the act of Congress from creating, of its own force, and independently of any action of his, a vacancy in that office. The fact that so long as his resignation of the one office had not been accepted, and while he

continued to perform the duties of both offices, he claimed the compensation attached to both — whether this was owing to his overlooking the provision in question, or to his own understanding of its effect — has no tendency to show that he elected to retain the office which he had resigned and to give up the other.

The second question certified must therefore be answered in the negative, and the third question becomes immaterial.

Ordered accordingly.

FIRST NATIONAL BANK OF GRAND FORKS *v.* ANDERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 223. Submitted January 3, 1899. — Decided January 23, 1899.

The motion in this case to dismiss or affirm was founded upon the allegation that the judgment of the Supreme Court of the State rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no Federal question. This court, while declining to sustain the motion to dismiss, holds that there was color for it, and takes jurisdiction of the motion to affirm.

A national bank which, being authorized by the owner of notes in its possession to sell them to a third party, purchases them itself and converts them to its own use, is liable to their owner for their value, as for a conversion, even though it was not within its power to sell them as the owner's agent.

This was a motion to dismiss or affirm. The case is stated in the opinion.

Mr. Henry W. Phelps for the motion.

Mr. Burke Corbet and *Mr. W. E. Dodge* opposing.

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

This was an action at law brought by Anderson against the First National Bank of Grand Forks, North Dakota, in

the District Court for the First Judicial District of North Dakota, to recover the balance of the value of certain notes belonging to Anderson, which he alleged the bank had converted.

The notes amounted to seven thousand dollars, secured by mortgage, and had been endorsed, and the mortgage assigned, to the bank as collateral security for a loan of two thousand dollars, and Anderson had authorized the bank to sell the notes to a third party, take up the loan, and remit the balance. But, instead of doing this, the bank, according to Anderson, had undertaken to purchase the notes itself, and had not accounted for their value.

The cause was tried four times, and four times carried to the Supreme Court of North Dakota. 4 Nor. Dakota, 182; 5 Nor. Dakota, 80, 451; 6 Nor. Dakota, 497. On the fourth appeal a judgment in favor of Anderson was affirmed by the Supreme Court, and this writ of error to revise it was allowed, which defendant in error now moves to dismiss, or, if that motion is not sustained, that the judgment be affirmed.

By exceptions to the admission of certain testimony, taken on trial, and by the assignment of errors in the Supreme Court, plaintiff in error raised the point that, under the statutes of the United States in respect of national banks, it was not within its power to become the agent of defendant in error to sell the notes in question to a third person; and not within the power of its cashier, who conducted the transaction, to bind the bank by such contract of agency.

On the third appeal, 5 Nor. Dakota, 451, the Supreme Court ruled that "when a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its conceded power to collect the claim out of such collateral notes." But further, that even though the act of agency were *ultra vires*, yet if the bank, instead of selling the notes to a third person, had, without the owner's knowledge, sold them to itself, it would be guilty of conversion, and could be held responsible therefor. As to the cashier, the court held that on the

pleadings and facts in the case, his act was the act of the bank.

The Supreme Court in its opinion on the fourth appeal, 6 Nor. Dakota, 497, 509, among other things, said: "The question of *ultra vires* has been already discussed in a previous opinion. See 5 Nor. Dakota, 451. We have nothing to add on that point. The recent decision of the Federal Supreme Court cited by counsel for appellant, *California Bank* v. *Kennedy*, 167 U. S. 362, does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the record now before us. In its answer and the brief of its counsel the defendant admits that the writing of the letters referred to was its act and not the act of an unauthorized agent. By its own pleading and admissions it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

The argument urged in support of the motion to dismiss is, principally, that the judgment of the state Supreme Court rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no Federal question.

This contention is so far justified as to give color to the motion, although, under our decision in *Logan County National Bank* v. *Townsend*, 139 U. S. 67, we must decline to sustain it, while, at the same time, that case affords sufficient authority, if authority were needed, for an affirmance of the judgment.

There, bonds had been sold and delivered to a national bank at a certain price, under an agreement that the bank would, on demand, replace them at that or a less price; and the bank had refused compliance. In an action against the bank, its defence was in part that by reason of want of authority to make the alleged agreement and purchase, it could not be held liable for the bonds on any ground whatever. It was decided, however, that the national banking act did not give

a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without legal authority to make, and that although the bank was not bound to surrender possession of them until reimbursed to the full amount due to it, and might hold them as security for the return of the consideration paid, yet that when such amount was returned, or tendered back to it, and the return of the bonds demanded, its authority to retain them no longer existed; and, from the time of such demand and its refusal to surrender the bonds to the vendor or owner, it became liable for their value on grounds of implied contract, apart from the original agreement under which it obtained them.

Here, the bank was found to have itself purchased notes, which the owner had authorized it to sell to a third party, and, on general principles of law, it was held liable for their value as for a conversion, even though it was not within its powers to sell them as the owner's agent.

We are of opinion that the Supreme Court of North Dakota committed no error in the disposition of any Federal question, and its judgment is

Affirmed.

UNITED STATES *v.* DUELL.

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

No. 444. Argued December 1, 2, 1898. — Decided January 23, 1899.

An appeal to the Court of Appeals of the District of Columbia from the decision of the Commissioner of Patents in an interference controversy presents all the features of a civil case, a plaintiff, a defendant and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final, so far as the particular action of the Patent Office is concerned; and such judgment is none the less a judgment because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

In deciding whether a patent shall issue or not, the Commissioner of Patents acts on evidence, finds the facts, applies the law and decides questions

Statement of the Case.

affecting not only public, but private interests; and likewise as to reissues, or extension, or on interference between contesting claimants; in all of which he exercises judicial functions.

Butterworth v. *Hoe*, 112 U. S. 50, held to be directly in point, and the language on page 59 held to be also in point in which the court, speaking of that clause in Article 1, Section 8 of the Constitution, which confers upon Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," says: "The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved — that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law necessary to be applied in the settlement of this class of public and private rights have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention and proceeding by fixed rules to systematic conclusions."

In an interference proceeding in the Patent Office between Bernardin and Northall, the Commissioner, Seymour, decided in favor of Bernardin, whereupon Northall prosecuted an appeal to the Court of Appeals of the District of Columbia. That court awarded Northall priority and reversed the Commissioner's decision. 7 App. D. C. 452. Bernardin, notwithstanding, applied to the Commissioner to issue the patent to him and tendered the final fee, but the Commissioner refused to do this in view of the decision of the Court of Appeals, which had been duly certified to him. Bernardin then applied to the Supreme Court of the District of Columbia for a mandamus to compel the Commissioner to issue the patent in accordance with his prior decision on the ground that the statute providing for an appeal was unconstitutional and the judgment of the Court of Appeals void for want of jurisdiction. The application was denied, and Bernardin appealed to

the Court of Appeals, which affirmed the judgment. 10 App. D. C. 294.

Seymour resigned as Commissioner and was succeeded by Butterworth, and Bernardin recommenced his proceeding, which again went to judgment in the Supreme Court, and the Court of Appeals. 11 App. D. C. 91. The case was brought to this court, but abated in consequence of the death of Butterworth. *United States* v. *Butterworth*, 169 U. S. 600. Bernardin thereupon brought his action against Duell, Butterworth's successor, and judgment against him was again rendered in the District Supreme Court, that judgment affirmed by the Court of Appeals, and the cause brought here on writ of error.

The following sections of the Revised Statutes were referred to on the argument:

"Sec. 4906. The clerk of any court of the United States, for any District or Territory wherein testimony is to be taken for use in any contested case pending in the Patent Office, shall, upon the application of any party thereto, or of his agent or attorney, issue a subpœna for any witness residing or being within such District or Territory, commanding him to appear and testify before any officer in such District or Territory authorized to take depositions and affidavits, at any time and place in the subpœna stated. But no witness shall be required to attend at any place more than forty miles from the place where the subpœna is served upon him.

"Sec. 4907. Every witness duly subpœnaed and in attendance shall be allowed the same fees as are allowed to witnesses attending the courts of the United States.

"Sec. 4908. Whenever any witness, after being duly served with such subpœna, neglects or refuses to appear, or after appearing refuses to testify, the judge of the court whose clerk issued the subpœna may, on proof of such neglect or refusal, enforce obedience to the process or punish the disobedience, as in other like cases. But no witness shall be deemed guilty of contempt for disobeying such subpœna, unless his fees and travelling expenses in going to, returning from and one day's attendance at the place of examination,

are paid or tendered him at the time of the service of the subpœna; nor for refusing to disclose any secret invention or discovery made or owned by himself.

"SEC. 4909. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners in chief; having once paid the fee for such appeal.

"SEC. 4910. If such party is dissatisfied with the decision of the examiners in chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person.

"SEC. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc.

"SEC. 4912. When an appeal is taken to the Supreme Court of the District of Columbia, the appellant shall give notice thereof to the Commissioner, and file in the Patent Office, within such time as the Commissioner shall appoint, his reasons of appeal, specifically set forth in writing.

"SEC. 4913. The court shall, before hearing such appeal, give notice to the Commissioner of the time and place of the hearing, and on receiving such notice the Commissioner shall give notice of such time and place in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the Commissioner shall furnish the court with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the Commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded.

"SEC. 4914. The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may

appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

"SEC. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

Section 780 of the Revised Statutes of the District of Columbia reads thus:

"SEC. 780. The Supreme Court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of sections forty-nine hundred and eleven to section forty-nine hundred and fifteen, inclusive, of chapter one, Title LX, of the Revised Statutes, 'Patents, Trade-marks, and Copyrights.'"

Section nine of the "act to establish a Court of Appeals for the District of Columbia, and for other purposes," approved February 9, 1893, c. 74, 27 Stat. 434, 436, is —

"SEC. 9. That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals."

Mr. Julian C. Dowell and *Mr. George C. Hazelton* for plaintiffs in error.

Mr. Solicitor General for defendant in error. *Mr. Jeremiah M. Wilson*, on behalf of Northall's assignee, filed a brief for same.

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

The Court of Appeals for the District of Columbia adjudged that Northall was entitled to the patent. By section 8 of the act establishing that court, 27 Stat. 434, c. 74, it is provided that any final judgment or decree thereof may be revised by this court on appeal or error in cases wherein the validity of a statute of the United States is drawn in question. The validity of the act of Congress allowing an appeal to the Court of Appeals in interference cases was necessarily determined when that court went to judgment, yet no attempt was made to bring the case directly to this court, but the relator applied to the District Supreme Court to compel the Commissioner to issue the patent in disregard of the judgment of the Court of Appeals to the contrary, and, the application having been denied, the Court of Appeals was called on to readjudicate the question of its own jurisdiction.

The ground of this unusual proceeding, by which the lower court was requested to compel action to be taken in defiance

of the court above, and the latter court was called on to rejudge its own judgment, was that the decree of the Court of Appeals was utterly void because of the unconstitutionality of the statute by which it was empowered to exercise jurisdiction.

Nothing is better settled than that the writ of mandamus will not ordinarily be granted if there is another legal remedy, nor unless the duty sought to be enforced is clear and indisputable; and we think that, under the circumstances, the remedy by appeal existed; and that it is not to be conceded that it was the duty of the Commissioner to disobey the decree because in his judgment the statute authorizing it was unconstitutional, or that it would have been consistent with the orderly and decorous administration of justice for the District Supreme Court to hold that the Court of Appeals was absolutely destitute of the jurisdiction which it had determined it possessed. Even if we were of opinion that the act of Congress was not in harmony with the Constitution, every presumption was in favor of its validity, and we cannot assent to the proposition that it would have been competent for the Commissioner to treat the original decree as absolutely void, and without force and effect as to all persons and for all purposes.

But as, in our opinion, the Court of Appeals had jurisdiction, we prefer to affirm the judgment on that ground.

The contention is that Congress had no power to authorize the Court of Appeals to review the action of the Commissioner in an interference case, on the theory that the Commissioner is an executive officer; that his action in determining which of two claimants is entitled to a patent is purely executive; and that, therefore, such action cannot be subjected to the revision of a judicial tribunal.

Doubtless, as was said in *Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, Congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination, but at the same time, as Mr. Justice Curtis, delivering the opinion of the court, further observed, "there are matters involving public

rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." The instances in which this has been done are numerous, and many of them are referred to in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714,715, 728.

Since, under the Constitution, Congress has power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and to make all laws which shall be necessary and proper for carrying that expressed power into execution, it follows that Congress may provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries as in its judgment will be best calculated to effect that object.

And by reference to the legislation on the subject, a comprehensive sketch of which was given by Mr. Justice Matthews in *Butterworth* v. *Hoe*, 112 U. S. 50, it will be seen that from 1790 Congress has selected such instrumentalities, varying them from time to time, and, since 1870, has asserted the power to avail itself of the courts of the District of Columbia in that connection.

The act of April 10, 1790, c. 7, 1 Stat. 109, authorized the issue of patents by the Secretary of State, the Secretary for the Department of War, and the Attorney General, or any two of them, "if they shall deem the invention or discovery sufficiently useful and important," and this was followed by the act of February 21, 1793, c. 11, 1 Stat. 318, authorizing them to be issued by the Secretary of State, upon the certificate of the Attorney General that they were conformable to the act. The ninth section of the statute provided for the case of interfering applications, which were to be submitted to the decision of three arbitrators, chosen one by each of the parties and the third appointed by the Secretary of State, whose decision or award, or that of two of them, should be final as respected the granting of the patent.

Then came the act of July 4, 1836, c. 357, 5 Stat. 117, cre-

ating in the Department of State the Patent Office, "the chief officer of which shall be called the Commissioner of Patents," and "whose duty it shall be, under the direction of the Secretary of State, to superintend, execute and perform, all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries, inventions and improvements, as are herein provided for, or shall hereafter be, by law, directed to be done and performed." . . . By that act it was declared to be the duty of the Commissioner to issue a patent if he "shall deem it to be sufficiently useful and important;" and, in case of his refusal, the applicant was (sec. 7) secured an appeal from his decision to a board of examiners, to be composed of three disinterested persons, appointed for that purpose by the Secretary of State, one of whom, at least, to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture or branch of science to which the alleged invention appertained. The decision of this board being certified to the Commissioner, it was declared that "he shall be governed thereby in the further proceedings to be had on such application." A like proceeding, by way of appeal, was provided in cases of interference. By section 16 of the act a remedy by bill in equity, still existing in sections 4915, 4918, Revised Statutes, was given as between interfering patents or whenever an application had been refused on an adverse decision of a board of examiners. By section 11 of the act of March 3, 1839, c. 88, 5 Stat. 353, 354, as modified by the act of August 30, 1852, c. 107, 10 Stat. 75, it was provided that in all cases where an appeal was thus allowed by law from the decision of the Commissioner of Patents to a board of examiners, the party, instead thereof, should have a right to appeal to the chief judge or to either of the assistant judges of the Circuit Court of the District of Columbia; and by section 10 the provisions of section 16 of the act of 1836 were extended to all cases where patents were refused for any reason whatever, either by the Commissioner or by the chief justice of the District of Columbia upon appeals from the decision of the Commissioner, as well as where the

same shall have been refused on account of or by reason of interference with a previously existing patent.

By the act of March 3, 1849, c. 108, 9 Stat. 395, the Patent Office was transferred to the Department of the Interior. The act of March 2, 1861, c. 88, 12 Stat. 246, created the office of examiners in chief, "for the purpose of securing greater uniformity of action in the grant and refusal of letters patent," "to be composed of persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the applicant for that purpose being filed, to revise and determine upon the validity of decisions made by examiners when adverse to the grant of letters patent; and also to revise and determine in like manner upon the validity of the decisions of examiners in interference cases, and when required by the Commissioner in applications for the extension of patents, and to perform such other duties as may be assigned to them by the Commissioner; that from their decisions appeals may be taken to the Commissioner of Patents in person, upon payment of the fee hereinafter prescribed; that the said examiners in chief shall be governed in their action by the rules to be prescribed by the Commissioner of Patents."

The act of July 8, 1870, c. 230, 16 Stat. 198, revised, consolidated and amended the statutes then in force on the subject, and by section 48, an appeal to the Supreme Court of the District of Columbia sitting in banc was provided for, whose decision was to govern the further proceedings in the case (sec. 50); and the provisions of the act material to the present inquiry were carried in substance into the existing revision.

By the act of February 9, 1893, c. 74, 27 Stat. 434, the determination of appeals from the Commissioner of Patents, which was formerly vested in the General Term of the Supreme Court of the District, was vested in the Court of Appeals, and, in addition, it was provided that "any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals."

As one of the instrumentalities designated by Congress in

execution of the power granted, the office of Commissioner of Patents was created, and though he is an executive officer, generally speaking, matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts.

Now, in deciding whether a patent shall issue or not, the Commissioner acts on evidence, finds the facts, applies the law and decides questions affecting not only public but private interests; and so as to reissue, or extension or on interference between contesting claimants; and in all this he exercises judicial functions.

In *Butterworth* v. *Hoe*, *supra*, Mr. Justice Matthews, referring to the constitutional provision, well said:

"The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved, that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions."

That case is directly in point and the *ratio decidendi* strictly applicable to that before us. The case was a suit in mandamus brought by the claimant of a patent in whose favor the Commissioner had found in an interference case, to compel the Commissioner to issue the patent to him. The Commissioner

had refused to do this on the ground that the defeated party had appealed to the Secretary of the Interior, who had reversed the Commissioner's action, and found in appellant's favor. This court held that while the Commissioner of Patents was an executive officer and subject in administrative or executive matters to the supervision of the head of the department, yet that his action in deciding patent cases was essentially judicial in its nature and not subject to review by the executive head, an appeal to the courts having been provided for. And among other things it was further said:

"It is evident that the appeal thus given to the Supreme Court of the District of Columbia from the decision of the Commissioner, is not the exercise of ordinary jurisdiction at law or in equity on the part of that court, but is one in the statutory proceeding under the patent laws whereby that tribunal is interposed in aid of the Patent Office, though not subject to it. Its adjudication, though not binding upon any who choose by litigation in courts of general jurisdiction to question the validity of any patent thus awarded, is, nevertheless, conclusive upon the Patent Office itself, for, as the statute declares, Rev. Stat. § 4914, it 'shall govern the further proceedings in the case.' The Commissioner cannot question it. He is bound to record and obey it. His failure or refusal to execute it by appropriate action would undoubtedly be corrected and supplied by suitable judicial process. The decree of the court is the final adjudication upon the question of right; everything after that dependent upon it is merely in execution of it; it is no longer matter of discretion, but has become imperative and enforceable. It binds the whole Department, the Secretary as well as the Commissioner, for it has settled the question of title, so that a demand for the signatures necessary to authenticate the formal instrument and evidence of grant may be enforced. It binds the Secretary by acting directly upon the Commissioner, for it makes the action of the latter final by requiring it to conform to the decree.

"Congress has thus provided four tribunals for hearing applications for patents, with three successive appeals, in which the Secretary of the Interior is not included, giving jurisdiction

in appeals from the Commissioner to a judicial body, independent of the Department, as though he were the highest authority on the subject within it. And to say that under the name of direction and superintendence, the Secretary may annul the decision of the Supreme Court of the District, sitting on appeal from the Commissioner, by directing the latter to disregard it, is to construe a statute so as to make one part repeal another, when it is evident both were intended to coexist without conflict."

* * * * *

"No reason can be assigned for allowing an appeal from the Commissioner to the Secretary in cases in which he is by law required to exercise his judgment on disputed questions of law and fact, and in which no appeal is allowed to the courts that would not equally extend it to those in which such appeals are provided, for all are equally embraced in the general authority of direction and superintendence. That includes all or does not extend to any. The true conclusion, therefore, is, that in matters of this description, in which the action of the Commissioner is quasi-judicial, the fact that no appeal is expressly given to the Secretary is conclusive that none is to be implied."

We perceive no ground for overruling that case or dissenting from the reasoning of the opinion; and as the proceeding in the Court of Appeals on an appeal in an interference controversy presents all the features of a civil case, a plaintiff, a defendant and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned, such judgment is none the less a judgment "because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution." *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

It will have been seen that in the gradual development of the policy of Congress in dealing with the subject of patents, the recognition of the judicial character of the questions involved became more and more pronounced.

Syllabus.

By the acts of 1839 and 1852 an appeal was given, not to the Circuit Court of the District of Columbia, but to the chief judge or one of the assistant judges thereof, who was thus called on to act as a special judicial tribunal. The competency of Congress to make use of such an instrumentality or to create such a tribunal in the attainment of the ends of the Patent Office seems never to have been questioned, and we think could not have been successfully. The nature of the thing to be done being judicial, Congress had power to provide for judicial interference through a special tribunal, *United States* v. *Coe*, 155 U. S. 76; and *a fortiori* existing courts of competent jurisdiction might be availed of.

We agree that it is of vital importance that the line of demarcation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers, but in the matter of this appeal we find no such encroachment of one department on the domain of another as to justify us in holding the act in question unconstitutional.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* MYERS.

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

No. 214. Argued October 21, 1898. — Decided January 23, 1899.

This bill was filed to enjoin the enforcement of a tax, imposed under the laws of Montana, upon lands granted by Congress by the act of July 2, 1864, c. 217, to the Northern Pacific Railroad Company, and acquired by the appellant on the reorganization of the company. There was a controversy as to the character of the lands taxed — whether mineral or non-mineral. The lands have never been patented or certified to the company; the company claimed that it had only a potential interest therein; and the relief sought was that the lands be adjudged not subject to such assessment and taxation until the issue of patents therefor by the United States. It was stipulated in the court below that the sole

Statement of the Case.

question desired to be submitted was, whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana. That court sustained the taxation. In this court the position of the company was stated by its counsel as follows: "The question for decision is not whether the railway company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable: whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the railway company in its grant. That interest becomes confessedly a vested interest upon construction of the road. It then becomes property and may well be held subject to some form of taxation. But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description: the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor, or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States." *Held*, that, although the question submitted by stipulation had been somewhat changed in form, the same result must be reached, and the judgment of the court below be affirmed.

This suit involves the validity of a tax levied under the laws of the State of Montana against certain lands lying within the grant to the Northern Pacific Railroad Company, made by the act of Congress, approved July 2, 1864, c. 217. 13 Stat. 365.

It was brought in the Circuit Court of the United States for the District of Montana by the receivers of the Northern Pacific Railroad Company, a Federal corporation, and the receivers were appointed by a decree of the Federal court.

The suit proceeded in the Circuit Court in the name of said receivers to a hearing on demurrer and to a submission of the case upon bill, answer and stipulated facts. On the twelfth of November, 1896, it was stipulated and represented to the court that the Northern Pacific *Railway* Company had purchased the property in question pending the litigation, and it was agreed and thereupon ordered by the court that the Northern Pacific *Railway* Company be substituted as plaintiff in place of the receivers. Thereupon a decree was passed on the sixteenth day of December in favor of the complainant, enjoining the enforcement and collection of the taxes. From this

decree the defendant William Myers, county treasurer, appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court. *Myers* v. *Northern Pacific Railway*, 48 U. S. App. 620. The plaintiff railway company takes this appeal.

It was agreed "that the sole question desired to be submitted upon the pleadings, and this stipulation, is whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana." This being the only question submitted, the allegations of the pleadings and statements of the stipulation not bearing on that question need not be stated; and it is sufficient to note that the bill and stipulation showed the incorporation of the Northern Pacific Railroad Company by the act of July 2, 1864; its power to construct a railroad from Lake Superior to Puget Sound; the grant of land to it by section 3, which is quoted hereafter; the performance by the railroad company of all the conditions of the grant, both provisional and final, including the construction of the road and its acceptance by the United States; and the freedom of the lands from preemption claims and rights.

Prior to the attempted assessments and tax levies assailed, the lands were surveyed by the United States or its authority, and were reported by the surveyors making such surveys to be agricultural lands, non-mineral in character; and the company prepared, in the manner prescribed by the Secretary of the Interior, lists of the lands claimed by it under the grant, including the lands in controversy, and filed them in the proper district land office, paying the fees thereon, and attached to each of said lists was an affidavit of the land commissioner of the railroad company, in which it was affirmed "that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Pacific Railroad Company as enuring to the said company" under its grant by the act of Congress of July 2, and a joint resolution approved May 31, 1870, and "that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the

grant, being within the limit of forty miles on each side of the line of route for a continuous distance of ——, being a portion of said lands for a section of —— miles of said railroad, commencing at —— and ending at ——."

The said lists were duly filed and their accuracy tested by the district land officers and so certified, and it was also certified that the filing was allowed; that they were surveyed public lands within the limits of the grant, "and that the same are not or is any part thereof returned and denominated as mineral land or lands." It was also certified that no claims were on file against the lands and that the fees were paid.

The lists were transmitted to the office of the Commissioner of the General Land Office.

The stipulation shows the manner of examination in the land office, and "that such lands are not patented or certified to the company until clear lists are approved by the Secretary." And the lists have not yet been examined or passed or patented to the company, and that the mineral or non-mineral character is under investigation under the provisions of the act of Congress of February 26, 1895, c. 131. 28 Stat. 683.

The company has such right, title, interest and property in the lands as was conferred upon it by the act of July, 1864, and the act and joint resolutions amendatory thereof, and acquired by a compliance with their terms.

One Thomas G. Miller, a citizen of Montana, transmitted to the Secretary of the Interior a letter signed by Thomas G. Miller as chairman citizens' executive committee, declaring that the selections of the railroad company embraced thousands of recorded mineral claims and extensive mining properties being prospected, developed and worked, "and in view of the irreparable injury which would be caused to the people and State of Montana by the premature or unlawful conveyance of title to such lands to the railroad company, I beg leave to formally file the following requests:

"That the Commissioner of the General Land Office be directed to suspend the patenting of lands in Montana to the Northern Pacific R. R. Company until the mineral or non-

mineral character of the lands selected by said company shall have been investigated and definitely ascertained and adjudicated by proper proceedings and until mineral claimants and the State of Montana shall have opportunity to be heard before the department on questions of law and fact.

"2. That the Commissioner be directed to cause to be noted on the lists of the company's selections the tracts and townships alleged to be mineral in character by affidavits now on file in the Department of the Interior.

"Very respectfully,

"THOMAS G. MILLER,

"*Chairman Citizens' Executive Committee.*"

November 4, 1889, the Secretary of the Interior referred said letter to the Commissioner of the General Land Office, with the following indorsement: "Referred to Commissioner of Gen'l Land Office, with approval of within requests and direction to comply thereunto. Please notify me when done. Nov. 4, '89. J. W. Noble, Sec'y."

This order was not revoked prior to 1895.

The company and its receivers have been diligent to prosecute the identification of the lands, and the defendant, conceding this, denies that they have not been or are not fully defined and identified as part of the grant to the company.

Three commissioners were appointed as provided in the act of February 26, 1895, and commenced the examination and classification of said lands during the year 1895, and have classified certain of the lands as mineral, a list of which is inserted, and that the remainder of the lands have not been examined and classified. And it was admitted that other lands, a list of which is given, are in contest in the Interior Department, and that a certain section of land was decided in 1894, but subsequent to the assessment, to be mineral, and excepted from the grant, and that there were other lands to which there were claims, but which were disputed by the company, and that some contests were decided in favor of the company.

In the year 1894 the assessor of Jefferson County, Montana,

proceeded to and did assess the lands described in the complaint herein, in the manner and form prescribed by law, and described and included said lands in the assessment book of said county of Jefferson for said year.

The receivers appeared before the board of equalization and objected to the assessment, and the board refused to strike the lands from the assessment roll, and the taxes were assessed and levied against the lands with the other lands of the county; that the tax proceedings were in manner and form in all respects as required by the laws of Montana; that the taxes amounted to $3000, and that the treasurer of the county was proceeding to collect the same by sale and would so collect the same if not enjoined and restrained by the order of the court.

As a ground of relief by injunction the bill alleges: "And your orators show that said tax levies cloud the title to said described lands and impair the value thereof as an asset in the hands of your orators; that said certificates and deeds when issued, as your orators believe and show they will be, will constitute further clouds upon the title thereto. That if said lands be sold a multiplicity of suits will be necessary to quiet the title thereto and to remove the clouds thereby created."

Among the things which were asked to be adjudged at the final hearing were:

"1. That the lands described in Schedule 'A' hereunto annexed, and each and all thereof, were not subject to assessment and taxation by said county of Jefferson or State of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor.

"2. That it may be ordered, adjudged and decreed that said pretended and attempted assessments and tax levies were and are null and void, and constitute a cloud upon the title to said described lands."

Section three of the act of July 2, 1864, is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and

telegraph line to the Pacific Coast, . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied, by homestead settlers, or preëmpted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . . Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation in this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided; and further provided, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

Section four provides for the issuing of patents on the completion and acceptance of each twenty-five consecutive miles of said railroad and telegraph line.

The assignment of errors is as follows:

"The said court held that the lands described in the bill of complaint in said action were subject to taxation, although it appears from the pleadings and stipulation in said cause:

"(*a.*) That said lands were at the time of the assessments and tax levies complained of unpatented, and were involved in contests pending before the Interior Department over questions of fact between said railway company and various settlers and the United States.

"(*b.*) Although it further appears from the pleadings and stipulation in said cause that said lands were not at the time of the assessment and tax levies complained of, identified and defined as lands passing under the act of Congress approved July 2, 1864, so as to be segregated from the public lands of the United States.

"(*c.*) Although it further appears from the pleadings and stipulations in said cause that the grantee, under the act of Congress approved July 2, 1864, 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,' was not entitled to patents for said lands at the time of the assessment and tax levies complained of.

"(*d.*) Although it appears from the pleadings and stipulation in said cause that the United States possessed at the time of the assessment and tax levies complained of an interest in said lands, and each and all thereof, and that the said lands were subject to exploration for minerals as public lands of the United States.

"The said court failed and refused to hold that the lands described in the complaint were not at the time of the assessment and tax levy complained of subject to assessment or taxation.

"The said court entered an order reversing the decree of the United States Circuit Court for the District of Montana, and remanded said cause with an order to the United States Circuit Court for the District of Montana to enter a decree in favor of the above-named appellant."

Mr. C. W. Bunn and *Mr. A. B. Browne* for appellant. *Mr. A. T. Britton* was on their brief.

Mr. C. B. Nolan, Attorney General of the State of Montana, for appellee.

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

The averments in the bill of complaint and the stipulation

of facts show a controversy between the railroad company and the Interior Department as to the character of the lands, whether mineral or non-mineral, taxed by the State of Montana, and the company avers "that at the time of said attempted assessments and tax levies said lands . . . had not been and are not now certified or patented to said railroad company, and the said lands were not ascertained or determined to be a part of the lands granted to said company, nor were they segregated from the public lands of the United States, and the said railroad company had and has but *a potential interest* therein." And part of the relief prayed for was "that the lands be adjudged not subject to assessment and taxation by said county of Jefferson or by the State of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor."

A similar claim was denied by the Circuit Court of Appeals for the Ninth Circuit in *Northern Pacific Railroad* v. *Wright*, 7 U. S. App. 502, and by this court in *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512. It is, however, now conceded that the railroad has a taxable interest, counsel for appellant saying:

"The question for decision is not whether the railway company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable; whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the railway company in its grant; that interest becomes confessedly a vested interest upon construction of the road. It then becomes property, and may well be held subject to some form of taxation.

"But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description; the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States."

The question which was submitted therefore by the stipulation, namely, "whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana," if not evaded by the concession of appellant, has changed its form; but even in the new form it seems to have the same foundation as the contention rejected in the *Nevada case*, *supra*, that because title may not attach to some of the lands it does not attach as to any. Whether it has such foundation we will consider.

In *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444, and *Northern Pacific Railroad Company* v. *Traill County*, 115 U. S. 600, it was decided that lands sold by the United States might be taxed before they had parted with the legal title by issuing a patent; but this principle, it was said, must be understood to be applicable only to cases where the right to the patent was complete, and the equitable title was fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right. In the first case the court said two acts remained to be done which might wholly defeat the right to the patent: (1) the payment of the cost of surveying; (2) a right of preëmption which would accrue if the company did not dispose of the lands within a certain time. The dependency of the right of taxation on the first condition was affirmed with the principle announced in *Railway Company* v. *McShane*. The dependency of the right of taxation on the second ground was expressly overruled.

Embarrassment to the title of the United States by a sale of the land for taxes seems to have been the concern and basis of those cases. This embarrassment was relieved, and Congress permitted taxation by the act of July 10, 1886, c. 764, 24 Stat. 143. By that act it is provided: "That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided*,

That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide, and to all liens of the United States, all mortgages of the United States and all rights of the United States in respect to such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become the preferred purchaser, and in such case the land sold shall be restored to the public domain and disposed of as provided by the laws relating thereto."

This act was interpreted in *Central Pacific Railroad Co.* v. *Nevada*, *supra*. The lands involved were classified in the opinion as follows: (1) those patented; (2) those unsurveyed; (3) those surveyed but unpatented, upon which the cost of surveying had been paid; and (4) like lands upon which the cost of survey had not been paid. Applying the statute, Mr. Justice Brown, speaking for the court, said: "The principal dispute is with regard to the fourth class. . . . In view of the statute, it is difficult to see how these lands, which are the very ones provided for by the statute, can escape taxation if the State chooses to tax them."

This case establishes that the State may tax the surveyed lands, mineral or agricultural, within the place limits of the grant, and there is nothing in the case nor its principle which limits the assessment to an interest less than the title; that distinguishes the lands from a claim to them. The statute of Nevada defined the term "real estate" to include "the ownership of, or claim to, or possession of, or right of possession to any lands;" and the Supreme Court of the State had decided that to constitute a possessory claim actual possession was necessary, and, on this account, distinguished in some way surveyed from unsurveyed lands. It was urged that the distinction was not justified, and that the necessity of actual possession applied alike to both kinds and exempted both kinds from taxation, and hence it was insisted there was nothing to

tax unless the title was taxed, and that this could not be done under the decisions of this court. To this contention the opinion replied that how the interest of the railroad should be defined was not a Federal question, nor did inaptitude of definition by the Supreme Court of the State or in the application of the definition raise a Federal question. "Taxation of the lands by the State," it was said, "rested upon some theory that the railroad had a taxable interest in them. What that interest was does not concern us so long as it appears that, so far as Congress is concerned, express authority was given to tax the lands."

If this case leaves us any concern it is only to inquire what assessable interest passed by the grant. It is not necessary to detail the cases in which this court has held that railroad land grants are *in præsenti* of land to be afterwards located. Their principle reached the fullest effect and application in *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 316, in which it was held that the legal title passed by such grants as distinguished from merely equitable interests, and an action of ejectment was sustained by a lessee of the Central Pacific Railroad Company before patent was issued. But in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, in a similar action recovery was denied to the Northern Pacific Railroad Company on the ground that mineral lands were not conveyed by the grant to it, but were "specifically reserved to the United States and excepted from the operations of the grant."

The accommodation of these cases is not difficult. In the *Barden case* there was a concession that the land was mineral, and there was an attempted recovery of valuable ores. In the *Deseret case* there was no such concession, and the primary effect of the grant prevailed. In the case at bar there is no such concession, and the primary effect of the grant must prevail. There is no presumption of law of what kind of lands the grant is composed. Upon its face, therefore, the relation of the railroad to every part of it is the same, and on the authority of *Deseret Salt Co.* v. *Tarpey*, ejectment may be brought for every part of it. The action, of course, may be

defeated, but it may prevail, and a title which may prevail for the company in ejectment surely may be attributed to it for taxation, to be defeated in the latter upon the same proof or concession by which it would be defeated in the former. An averment that there is a controversy about the character of lands not yielded to, an expression of doubt about it not acted on, is not sufficient. This view does not bring the railroad company to an unjust dilemma. The company has the title or nothing. In response to its obligations to the State, it must say which. If it have the title to any of the lands, this title cannot be diminished to a claim, or an interest because it has not or may not have title to others. If there is uncertainty, it must be resolved by the railroad. Suppose, to use the language of counsel, "Neither the assessor or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States." We nevertheless say again, as we said by the Chief Justice in *Northern Pacific Railroad* v. *Patterson*, 154 U. S. 130, 132, "If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why the plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

That the *Barden case* does not preclude state taxation of the lands is also manifest from its expression. Mr. Justice Field, who delivered the opinion of the court, in answer to the contention that its doctrine would have that effect, said: "So also it is said that the States and Territories through which the road passes would not be able to tax the property of the company unless they could tax the whole property, minerals as well as lands. We do not see why not. The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property, excluding the minerals, could be as well estimated as its value

including them. The property could be taxed for its value of the extent of the title which is of the land."

The averment of the answer is that this was done; that the lands were assessed and taxed for their value as agricultural lands without including the minerals in them. The replication put this in issue but the stipulation of facts does not explicitly notice it, but probably was intended to cover it by the agreement that the assessment was made in the manner and form required by the laws of Montana.

We are referred to the act of Congress of February 26, 1895, c. 131, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," 28 Stat. 683, as strengthening the contention of appellants. We do not think it does. It was passed after the time at which the validity of the assessment complained of must be determined. Besides, it does not purport to define the rights of the railway company in any particular with which we are now concerned. It furnishes the Secretary of the Interior with another instrumentality — not bringing the lands to a different judgment, but to an earlier judgment.

Discovering no error in the decree of the Circuit Court of Appeals, it is

Affirmed.

Mr. Justice Brewer, Mr. Justice Shiras, Mr. Justice White and Mr. Justice Peckham dissented.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* SPRATLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 183. Submitted January 3, 1899. — Decided January 30, 1899.

In a suit in a state court against a foreign corporation where no property of the corporation is within the State, and the judgment sought is a personal one, it is material to ascertain whether the corporation is doing

business within the State; and if so, the service of process must be upon some agent in the State so far representing it that he may properly be held in law its agent to receive such process in its behalf.

A foreign insurance company which has been doing business within a State through its agents does not cease to do business therein when it withdraws its agent and ceases to obtain or ask for new risks or obtain new policies, while, at the same time, its old policies continue in force, and the premiums thereon are paid by the policyholders to an agent residing in another State, who was once the agent in the State where the policyholders reside.

On the facts stated in the opinion of the court, it is held that the law implies, from the appointment and authority of the agent of the plaintiff in error, the power to receive in Tennessee service of process against the company.

If it appears that there is a law of the State in respect to the service of process upon foreign corporations, and that the character of an agency of a foreign corporation is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will, and ought to, draw such an inference and imply such authority, and service under such circumstances and upon an agent of that character is sufficient.

When the legislature of Tennessee, under the act of March 22, 1875, permitted the plaintiff in error, a foreign corporation, to do business within the State, on appointing an agent therein upon whom process might be served, and when, in pursuance of such provisions the company entered the State and appointed the agent, no contract was thereby created which would prevent the State from thereafter passing another statute in regard to service of process, and making such statute applicable to all foreign corporations, already doing business within the State.

THE case is stated in the opinion.

Mr. B. M. Estes, with whom was *Mr. Francis Fentress* on the brief, for plaintiff in error.

Mr. Thomas B. Turley and *Mr. Luke E. Wright* for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error filed its bill against the defendant in error in the chancery court of Shelby County, Tennessee, for the purpose of enjoining her from taking any proceedings under a judgment by default which she had obtained in the State of Tennessee, against the corporation, upon certain policies of insurance, and also for the purpose of obtaining a

decree pronouncing the judgment void and releasing the corporation therefrom.

The ground set forth in the bill, and upon which the complainant sought to have the judgment against it set aside, was that the complainant was a non-resident of the state of Tennessee, had no office or agent there at the time the process was served, and was doing no business in the State, and the person upon whom the process in the action had been served in behalf of the corporation was not its representative in the State, and no process served upon him was in any way effectual to give jurisdiction to the state court over the corporation. The bill also alleged that the judgment, if enforced, would result in taking complainant's property without due process of law, and would violate the Fifth and Fourteenth Amendments of the Constitution of the United States.

The defendant in error herein appeared and answered the bill, and alleged that the judgment she had obtained was a valid and proper judgment, and she denied the allegation in the bill that complainant was doing no business in the State at the time of the service of process, and alleged on the contrary that it was then doing business therein. She asked that the preliminary injunction theretofore granted should be dissolved.

The court of chancery upon the trial gave judgment in favor of the complainant, and decreed that the preliminary injunction granted in the cause should be made perpetual. The defendant appealed to the Supreme Court of the State, where the decree of the court of chancery was reversed, the injunction dissolved, and a judgment granted the defendant in error on the bond executed by the company in obtaining the injunction, for the amount of the original judgment, with interest from its date, together with the costs of the suit for the injunction. The complainant thereupon brought the case here by writ of error.

In addition to the objection that the person upon whom process was served was not such a representative of the company that service of process upon him was sufficient to give the court jurisdiction, the company alleges that under the act of 1875, which will be referred to hereafter, the company

appointed an agent pursuant to its provisions, and that any act subsequently passed relating to the service of process upon any other than the person so appointed could not affect the company, because such act would impair the contract which it alleges was created between the State and the company when it appointed an agent, by its power of attorney, pursuant to the provisions of such act of 1875.

The material facts are as follows: The corporation is a life insurance company, incorporated under the laws of, and having its principal office in, the State of Connecticut. It did a life insurance business in the State of Tennessee from February 1, 1870, until July 1, 1894. On March 22, 1875, the State of Tennessee passed an act to regulate the business of life insurance in that State and by section 12 of the act it was enacted that a company desiring to transact business by any agent or agents in the State should file with the insurance commissioner a power of attorney authorizing the secretary of state to acknowledge service of process for and in behalf of such company at any and all times after a company had first complied with the laws of Tennessee and been regularly admitted, even though such company may subsequently have retired from the State or been excluded; and it was made the duty of the secretary of state, within five days after such service of process by any claimant, to forward by mail an exact copy of such notice to the company. Pursuant to that statute the company duly filed a power of attorney as required, and appointed therein the secretary of state to receive service of process, and that power of attorney the company never in terms altered or revoked.

In 1887 the legislature of Tennessee passed an act, approved March 29, 1887, c. 226, entitled "An act to subject foreign corporations to suit in this State." The first section of this act provided that any foreign corporation found doing business in the State should be subject to suit there, to the same extent that said corporations were by the laws of the State liable to be sued, so far as related to any transaction had in whole or in part within the State, or to any cause of action arising therein, but not otherwise.

The second section provided that any corporation that had any transaction with persons or concerning any property situated in the State, through any agency whatever acting for it within the State, should be held to be doing business within the meaning of the act.

The third and fourth sections of the act are set forth in full in the margin.[1]

The company continued to do business in the State after the passage of this act, and on the 12th day of December, 1889, it insured the life of Benjamin R. Spratley, the husband of the defendant in error, for the term of his life, in the sum

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[1] SEC. 3. *Be it further enacted*, That process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of such an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process had been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees for which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty (30) days after the date of such mailing.

SEC. 4. *Be it further enacted*, That it shall be the duty of the plaintiff to lodge at the home office of the company, with any person found there, a written notice from him or his attorney, stating that such suit has been brought, accompanied by a copy of the process and the return of the officer thereon, of which fact affidavit shall be made by the person lodging the same, stating the facts and with whom the notice was lodged, or else the plaintiff or his attorney shall make an affidavit that he has been prevented from serving such notice by circumstances which should reasonably excuse giving it, which circumstances the affidavit of the plaintiff or his attorney shall particularly state; and no judgment shall be taken until one or the other of these affidavits shall be filed and the court be satisfied that the notice has been given the defendant, or that the excuse for not doing so be sufficient.

of $5000, for the benefit of his wife, the defendant in error, or, in case of her death before payment, to his children, etc. The company also insured the life of Mr. Spratley on the 25th day of February, 1893, in the sum of $3000, in favor of his wife and for her sole use and benefit, with other conditions not material here. These policies were issued through the solicitation and by the procurement of the agent of the company for the States of Tennessee and Kentucky, and who had headquarters at Louisville, Kentucky. He came to Memphis and solicited Mr. Spratley to take the policies, and the application for them was taken by such agent at Memphis. The defendant in error alleges in her answer that the premiums were paid thereon in Tennessee up to the death of Mr. Spratley in February, 1896, but that fact does not otherwise appear. It does appear that all premiums had been paid at the time of the death of Mr. Spratley.

On July 1, 1894, the company ceased issuing any new policies in the State of Tennessee, and withdrew its agents from the State, and on July 21, 1894, notified the state insurance commissioner to that effect. It had, however, a number of policies, other than those issued on the life of Mr. Spratley, outstanding in the State at the time it withdrew, (how many is not stated,) and it continued to receive the premiums on these policies through its former agent for that State, and to settle, by payment or otherwise, the claims upon policies in that State as they fell due.

The former agent resided in Louisville when he received payment of the premiums, and it does not appear that after July, 1894, he was in the State of Tennessee when any payment of premiums was made to him by Tennessee policyholders. He received these payments as agent of the company, and it recognized such payments as sufficient.

Mr. Spratley died in the city of Memphis, in the State of Tennessee, on the 28th of February, 1896, leaving his widow, the defendant in error, surviving him. The two policies were in force at the time of his death. The company, being notified of the death of Mr. Spratley, sent its agent to Memphis to act under its instructions in the investigation and adjust-

ment of the claim. Mr. Chaffee was the agent employed, and he had been employed in the service of the company since the first day of July, 1887. The writing under which he was employed stated that the company employed him "For special service in any matters which may be referred to you, with instructions, during the pleasure of the directors of the company and under the direction of the executive officers; to have your entire time and services, except upon leave of absence; to pay the necessary travelling and hotel expenses incurred in the line of your duty, and to pay you for your time and services at the rate of $2500 per annum; this agreement terminable on the part of the company at the pleasure of the directors and on your part by thirty days' written notice."

The company sent Mr. Chaffee specially to the State of Tennessee for the purpose of investigating into the circumstances of the death of Mr. Spratley and into the merits of the claim made by Mrs. Spratley, and while there he was authorized by the company to compromise the claim made by her upon terms stated in a telegram from the vice president of the company. While Mr. Chaffee was engaged in negotiations with Mrs. Spratley and her brother in relation to her claims, and after she had refused to accept the compromise offered by him in behalf of the company, and on April 15, 1896, he was served, in Memphis, with process against the corporation in an action upon the policies above mentioned.

The attorneys for the plaintiff also sent a notice addressed to the president and directors of the company, together with a copy of the process issued out of the Circuit Court of Shelby County, which notice and copy of process were sent to Mr. Dunham, an attorney at law in the city and county of Hartford, in the State of Connecticut, who, on May 8, 1896, at Hartford, served them upon the company by leaving them in the hands of its vice president, and an affidavit of that fact was made by Mr. Dunham, and filed at the time of the entry of judgment by default in the clerk's office at Memphis. A copy of the writ was also sent by registered letter by John A. Strehl, clerk of the court, addressed to the Connecticut Mutual Life

Insurance Company, Hartford, Connecticut, and an acknowledgment of the receipt of such registered letter, signed by William P. Green on behalf of the Connecticut Mutual Life Insurance Company, was also filed with the judgment.

On July 2, 1896, judgment by default was entered against the defendant, and the judgment recited the above facts in relation to the service of process on Mr. Chaffee, the sending of the registered letter from the clerk of the court, and the notice and copy of process to the attorney, Mr. Dunham, and his service thereof upon the vice president of the company at its office in Hartford, Connecticut. It recited also the fact that the defendant was doing business in Shelby County, Tennessee, but that it had no office or agency therein, and that it had wholly failed to make any appearance, and thereupon the default was entered and judgment went against the defendant for the sum of $8000, being the total amount due on the life insurance contracts or policies described in the declaration, and also for costs.

Upon these facts the question arises as to the validity of the judgment, to set aside which the company has filed this bill. Without considering, for the moment, the objection that there was a contract between the State and the company which could not be impaired, was the service of process upon Mr. Chaffee sufficient to give the court jurisdiction over the corporation?

When the process was served, the act of 1887, above mentioned, was in force.

The third and fourth sections of that act have already been set forth, and they provide that process may be served upon any agent of the corporation, found within the county where the suit is brought, no matter what character of agent such person may be. We are not called upon to decide upon the entire validity of this whole act. The Federal question with which we are now concerned is whether the court obtained jurisdiction to render judgment in the case against the company so that to enforce it would not be taking the property of the company without due process of law. Even though we might be unprepared to say that a service of process upon

"any agent," found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether upon the facts of this case the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. If it were, there was due process of law, whatever we might think of the other provisions of the act in relation to the service upon any agent of a corporation, no matter what character of agent the person might be. If the person upon whom process was served in this case was a proper agent of the company, it is immaterial whether the statute of the State also permits a service to be made on some other character of agent which we might not think sufficiently representative to give the court jurisdiction over the corporation. If the service be sufficient in this instance, the corporation could not herein raise the question whether it would be sufficient in some other and different case coming under the provision of the state statute.

In a suit where no property of a corporation is within the State, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the State; *Goldey* v. *Morning News*, 156 U. S. 519; *Merchants' Manufacturing Co.* v. *Grand Trunk Railway Co.*, 13 Fed. Rep. 358; and if so, the service of process must be upon some agent so far representing the corporation in the State that he may properly be held in law an agent to receive such process in behalf of the corporation. An express authority to receive process is not always necessary.

We think the evidence in this case shows that the company was doing business within the State at the time of this service of process. From 1870 until 1894, it had done an active business throughout the State by its agents therein, and had issued policies of insurance upon the lives of citizens of the State. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the State, was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and

a refusal to take any new risks or to issue any new policies within the State. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent.

The corporation alleged in its bill filed in this suit that the defendant herein was taking garnishee proceedings against its policyholders in the State for the purpose of collecting, as far as possible, the amount of the judgment she had obtained against the corporation, and it gave in its bill the names of some thirteen of such policyholders against whom proceedings had been taken by this defendant. It cannot be said with truth, as we think, that an insurance company does no business within a State unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the State through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another State, and who was once the agent in the State where the policyholders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis.

It is admitted that the person upon whom process was served was an agent of the company. Was he sufficiently representative in his character? He was sent into the State as such agent to investigate in regard to this very claim, and while there he was empowered to compromise it within certain stated terms, leaving him a certain discretion as to the amount. He was authorized to settle the claim for the amount of the reserve "or thereabouts." He did not leave his character as agent when he entered the State. On the contrary, it was as agent, and for the purpose of representing the company therein, that he entered the State, and as agent he was

seeking a compromise of the claim by the authority of the company, and therein representing it. Why was he not such an agent as it would be proper to serve process upon? He had been appointed an agent by the company; his whole time and services were given to the company under an appointment made years previously; he received a salary from the company not dependent upon any particular service at any particular time. The company having issued policies upon the life of an individual who had died, and a claim having been made for payment in accordance with the terms of those policies, the company clothed him with authority to go into the State and in its behalf investigate the facts surrounding the claim, and authority was given him to compromise it upon terms which left to him discretion to some extent as to the amount of payment. He was not a mere agent appointed for each particular case. He was employed generally, by the company, to act in its behalf in all cases of this kind and as directed by the company in each case. Entering the State with this authority, and acting in this capacity, the company itself doing business within the State, it seems to us that he sufficiently represented the company within the principle which calls for the service of process upon a person who is in reality sufficient of a representative to give the court jurisdiction over the company he represents. In view of all the facts, we think it a proper case in which the law would imply, from his appointment and authority, the power to receive service of process in the case which he was attending to.

Taken in connection with the further fact of sending (as provided for in the statute) a copy of the process and notice thereof by registered letter to the home office of the company, and also the personal service upon the company of a copy of the process and notice thereof at its home office, it must be admitted that one of the chief objects of all such kinds of service, namely, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service

on the agent in the State where suit was commenced, but we refer to it as a part of the facts in the case.

In *Lafayette Insurance Company* v. *French*, 18 How. 404, 407, it appeared that a statute of Ohio made provision for service of process on foreign insurance companies in suits founded upon contracts of insurance there made by them with citizens of that State. One of those provisions was that service of process on a resident agent of a foreign corporation should be as effectual as though the same was served upon the principal. In a suit commenced in Ohio against a foreign corporation by service upon its resident agent, the company objected to the validity of that service, and that question came before this court, and Mr. Justice Curtis, in delivering the opinion of the court, said:

"We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed. Nor do we think the means adopted to effect this object are open to the objection that it is an attempt improperly to extend the jurisdiction of the State beyond its own limits to a person in another State. Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent. Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such busi-

ness could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts; and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the corporation there in respect to such service; and notice to him was notice to the corporation which he there represented, and for whom he was empowered to take notice."

The act did not provide for an express consent to receive such service, on the part of the company. The consent was implied because of the company entering the State and doing business therein subject to the provisions of the act.

It is true that in the above case the person upon whom service of process was made is stated to have been a resident agent of the company; but the mere fact of residence is not material, (other things being sufficient,) provided he was in the State representing the company and clothed with power as an agent of the company to so represent it. His agency might be sufficient in such event, although he was not a resident of the State. It is also true that the agent in that case was an agent with power to make contracts of insurance in behalf of the corporation in that State, and from that fact in connection with the statute, the court inferred the further fact of an implied power to receive service of process in behalf of the corporation. The agent had not, so far as the case shows, received any express authority from the company to receive service of process. The court does not hold nor is it intimated that none but an agent who has authority to make contracts of insurance in behalf of the company could be held to represent it for the purpose of service of process upon it. It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and char-

acter of agent employed. And while the court held that an agent with power to contract was, in legal contemplation, clothed with power to receive notice for and on behalf of the corporation as effectually as if he were designated in the charter as the officer upon whom process was to be served, we think it is not an unnatural or an improper inference, from the facts in the case at bar, to infer a power on the part of this agent, thus sent into the State by the company, to receive notice on its behalf in the same manner and to the same extent that the agent in the case cited was assumed to have. In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.

This case is unlike that of *St. Clair* v. *Cox*, 106 U. S. 350. There the record of the judgment, which was held to have been properly excluded, did not (and there is no evidence which did) show that the corporation was doing business in the State at the time of the service of process on the person said to be its agent. Nor did it appear that the person upon whom the process was served bore such relations to the corporation as would justify the service upon him as its agent. In the course of the opinion in that case, Mr. Justice Field, speaking for the court, said:

"It is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ, or accompanying its service, or in the pleadings or in the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, and a certificate of service of process by the proper officer

on a person who is its agent there, would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

Here we have the essentials named in the above extract from the opinion of the court in *St. Clair* v. *Cox*. We have a foreign corporation doing business in the State of Tennessee. We have its agent present within the State, representing it by its authority in regard to the very claim in dispute, and with authority to compromise it within certain limits, and his general authority not limited to a particular transaction. On the contrary, as seen from his written appointment, his agency for the company was a continuous one, and had been such since 1887, although, of course, his agency was limited to a certain department of the business of the corporation.

The case does not hold that a foreign corporation cannot be sued in any State unless it be doing business there and has appointed an agent expressly that process might be served upon him for it. Speaking of the service of process upon an agent, the learned justice thus continued:

"In the State where a corporation is formed, it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed difficulties arise; it is not so easy to determine who represents the corporation there, and under what circumstances service on them will bind it."

This language does not confine the service to an agent who has been expressly authorized to receive service of process upon him in behalf of the foreign corporation. If that were true, it would be easy enough to determine whether the person represented the corporation, as unless he had been so

authorized he would not be its agent in that matter. In the absence of any express authority, the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them. If it appear that there is a law of the State in respect to the service of process on foreign corporations and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient.

It was held in *Pennoyer* v. *Neff*, 95 U. S. 714, that a service by publication in an action *in personam* against an individual, where the defendant was a non-resident and had no property within the State, and the suit was brought simply to determine his personal rights and obligations, was ineffectual for any purpose. The case has no bearing upon the question here presented.

In *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, it was held that the person upon whom process was served in the State of Texas was not a "local agent" within the meaning of that term as contained in the Texas statute. It was also held that the special appearance of the company for the purpose of objecting that the service of process was not good did not, in the Federal courts, confer jurisdiction as in case of a general appearance. There is nothing in the case affecting this question.

In *Maxwell* v. *Atchison, Texas &c. Railroad*, 34 Fed. Rep. 286, the opinion in which was delivered by Judge Brown, United States District Judge of Michigan, now one of the Justices of this court, the decision was placed upon the ground that the business which the defendant carried on in Michigan was not of such a character as to make it amenable to suits within that jurisdiction, especially where the cause of action in the case arose within the State of Kansas, and the court also held that the individual upon whom the process was served was not an officer or managing agent of the railroad company within the meaning of the act of the legislature, nor was

he even a ticket agent of the company; that he was a mere runner, and that service of process upon him for a cause of action arising in Kansas gave no jurisdiction to the court.

In *United States* v. *American Bell Telephone Co.*, 29 Fed. Rep. 17, Judge Jackson stated the three conditions necessary to give a court jurisdiction *in personam* over a foreign corporation: First, it must appear that the corporation was carrying on its business in the State where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such State; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the State.

In this case the company was doing business in the State. The agent was in the State under the authority and by the appointment of the company. He was authorized to inquire into and compromise the particular matters in dispute between the corporation and the policyholder, and he was no mere special employé engaged by the company for this particular purpose. And there was a local law, that of 1887, providing for service. It has been recently held in this court that as to a Circuit Court of the United States, where a corporation is doing business in a State other than the one of its incorporation, service may sometimes be made upon its regularly appointed agents there, even in the absence of a state statute conferring such authority. *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100.

Although the legislature, by the act of 1875, provided for service of process upon a particular person, (the secretary of state,) in behalf of a foreign corporation, and the company had, pursuant to the provisions of the act, duly appointed that officer its agent to receive process for it, nevertheless the legislature provided, by law in 1887, for service upon other agents, and the company continued thereafter to do business in the State. Continuing to do business, the company impliedly assented to the terms of that statute, at least to the extent of consenting to the service of process upon an

agent so far representative in character that the law would imply authority on his part to receive such service within the State. *Merchants' Manufacturing Co.* v. *Grand Trunk Railway*, 13 Fed. Rep. 358, 359. When the service of which plaintiff in error complains was made, the act of 1875 had been repealed by chapter 160 of the laws of 1895, and the company had never appointed an agent under chapter 166 of the laws of that year. There was, therefore, no one upon whom process could be served in behalf of the company, excepting under the act of 1887, unless the plaintiff in error be right in the claim that, by appointing the secretary of state its agent to receive process under the act of 1875, a contract was created, and the secretary of state remained such agent, notwithstanding subsequent statutes regulating the subject, or even repealing the act. We will refer to that claim hereafter. If by the statute of the State provision were made for the appointment of an agent by the company, upon whom process might be served, and the company had appointed such an agent, and there was no other statute authorizing service of process upon an agent of the company other than the one so appointed, we do not say that service upon any other agent of the company would be good. This is not such a case, and the question is not here open for discussion.

A vast mass of business is now done throughout the country by corporations which are chartered by States other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the State where the business was done, out of which the dispute arises.

It was well said in *Railroad Company* v. *Harris*, 12 Wall. 65, 83, by Mr. Justice Swayne, in speaking for the court, in regard to service on an agent, that "When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the

cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility." The court in view of these facts was of opinion that Congress intended no such result.

In holding the service of process upon this particular agent sufficient in this instance and so far as the character of the agent is concerned, we do not, as we have already intimated, hold that service upon any agent mentioned in the act of 1887 would be good. That question is not before us.

Upon the question relative to the alleged creation of a contract between the State and the company, by the appointment of the secretary of state as its agent under the act of 1875, to receive process for it, we have no doubt.

The act of 1875 stated the terms, upon compliance with which a foreign corporation should be permitted to do business within the State of Tennessee. There was however no contract that those conditions should never be altered, and when pursuant to the provisions of the act of 1875 this power of attorney was given by the corporation, the State did not thereby contract that during all of the period within which the company might do business within that State no alteration or modification should be made regarding the conditions as to the service of process upon the company. When therefore in 1887 the legislature passed another act and therein provided for the service of process, no contract between the State and the corporation was violated thereby, or any of its obligations in anywise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the State to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the State was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the State and the foreign corporation doing business within its borders under the former act.

Statutes of this kind reflect and execute the general policy of the State upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. *Douglas* v. *Kentucky*, 168 U. S. 488. The cases showing the right of a State to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hooper* v. *California*, 155 U. S. 648, 652.

Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category which permits the legislature of a State to legislate upon those subjects from time to time as the public interests may seem to it to require.

As these statutes involve public interests, legislation regarding them are necessarily public laws, and as stated in *Newton* v. *Commissioners*, 100 U. S. 548, 559; "Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

The same principle is found in the following cases: *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Butchers' Union Company* v. *Crescent City*, 111 U. S. 746; *Boyd* v. *Alabama*, 94 U. S. 645; *Douglas* v. *Kentucky*, 168 U. S. 488.

When the legislature of Tennessee therefore permitted the company to do business within its State on appointing an agent therein upon whom process might be served, and when in pursuance of such provisions the company entered the State and appointed the agent, no contract was thereby created which would prevent the State from thereafter passing another statute in regard to service of process, and making such statute applicable to a company already doing business in the State. In other words, no contract was created by the fact that the company availed itself of the permission to do business within the State under the provisions of the act of 1875.

Upon the case as presented in this record, we are of opinion that the service upon the person in question was a good service in behalf of the corporation. The judgment of the Supreme Court of Tennessee is therefore

Affirmed.

MR. JUSTICE HARLAN did not sit in and took no part in the decision of this case.

HOENINGHAUS *v.* UNITED STATES.

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

No. 341. Argued January 11, 1899. — Decided January 30, 1899.

Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, the merchandise in suit, being certain woven fabrics in the piece composed of silk and cotton, was subject to an ad valorem duty or to a duty based upon or regulated by the value thereof.

An additional duty of one per centum of the total appraised value of such merchandise for each one per centum that such appraised value exceeded

Statement of the Case.

the value declared in the entry, as applied to the particular article in such invoice so undervalued, accrued according to the provisions of section 7 of the act of June 10, 1890, as amended by the act of July 24, 1897.

On September 15, 1897, Frederich Hoeninghaus and Henry W. Curtiss imported, at the port of New York, certain woven fabrics in the piece, composed of silk and cotton. Such fabrics were provided for in paragraph 387, schedule *d* of the tariff act of July 24, 1897, which contains an elaborate scheme of specific duties for goods of this character, the rates varying from 50 cents to $4.50 per pound, depending upon the weight of the fabric, the percentage of silk contained in it, its color, its mode of manufacture, etc.; and concludes with a provision which reads as follows: "But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than 50 per centum ad valorem."

The appraiser returned the merchandise as manufactures of silk and cotton in the gum — silk under 20 per cent; and the collector assessed upon the merchandise a duty of 50 cents a pound, under the paragraph above mentioned. On the last item of the invoice the appraiser increased the valuation made in the invoice to make market value, thus making the appraised value exceed the value thereof declared in the entry. Thereupon the collector levied an additional duty of 1 per centum of the total appraised value for each 1 per centum that said appraised value exceeded the value declared on said item in the entry, under the provisions of section 32 of the act of July 24, 1897, which is in the following terms:

"That the owner, consignee or agent of any imported merchandise which has been actually purchased, may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition to the entry to the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the

invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; *and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry*, but the additional duties only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. *Such additional duties shall not be construed to be penal and shall not be remitted*, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: Provided, further, that all additional duties,

penalties or forfeitures, applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a *pro forma* invoice or statement in the form of an invoice, and no forfeiture or disability of any kind incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

Thereupon the importers filed a protest, claiming that said merchandise, having regard either to its invoice, entered or appraised value, was not subject to an ad valorem duty or to a duty based upon or in any manner regulated by the value thereof, but on the contrary was subject only to a specific duty.

The board of general appraisers, under the provisions of section 14 of the act of June 10, 1890, affirmed the decision of the collector, and held that such goods were properly subject to the additional duty imposed under section 7 of the act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897.

From this decision of the board of general appraisers the importers appealed to the Circuit Court of the United States for the Southern District of New York, and after, in pursuance of an order of said court, the board of general appraisers had made a return of the record and proceedings before them, that court affirmed the decision of the board of general appraisers. From the judgment of the Circuit Court an appeal was taken to the Circuit Court of Appeals for the Second Circuit; and that court thereupon certified to this court the following questions of law:

"First. Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, was the merchandise in suit subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof?

"Second. Did the additional duty of one per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in

the entry, as applied to the particular article in said invoice undervalued as aforesaid, accrue according to the provisions of section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897?"

Mr. W. Wickham Smith for Hoeninghaus. *Mr. Charles Curie* was on his brief.

Mr. Solicitor General for the United States.

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

The tariff legislation in question recognizes three classes of merchandise subject to duty. One is where the duties are purely specific, another where the duties are wholly based on valuation, and the third where the duties are "regulated in any manner by the value thereof."

All importations of merchandise must be accompanied with an invoice, stating the cost or market value. The third section of the act of June 10, 1890, c. 407, 26 Stat. 131, provides that all such invoices shall have endorsed thereon a declaration signed by the purchaser, manufacturer, owner or agent, setting forth that the invoice is in all respects correct and true, and was made at the place from which the merchandise is to be exported to the United States; that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, and the actual cost thereof, and, when obtained in any other manner than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from whence exported; that such market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise sold in the ordinary course of trade, in

the usual wholesale quantities; the actual quantity thereof; and that no different invoice of the merchandise mentioned has been or will be furnished to any one; that, if the merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is that which was actually paid for the merchandise by the purchaser.

The 7th section, as amended by section 32 of the act of July 24, 1897, provides that the importer, at the time he makes his entry, may make such addition to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise in the principal markets of the country from which imported; but no such addition shall be made to the invoiced value of any imported merchandise obtained otherwise than by actual purchase.

These and other provisions contained in the acts of June, 1890, and July, 1897, compel us to perceive the importance attached by Congress to the obligation put upon the importer to furnish the appraisers and the collector with a true valuation of the imported merchandise; and also the care taken to relieve the importer from a hasty or ill-considered valuation, contained in the invoice, by giving him an opportunity to raise such valuation by voluntarily making such addition thereto as to bring the same to the actual market value, and by providing for an appeal by the importer, if dissatisfied with the appraisement, to the board of general appraisers, and from the decision of the board to the courts.

The contention on behalf of the importers is, in effect, that there are only two classes of merchandise to be considered — one where the duties are purely specific, and where it is claimed no appraisement is required and none is made, and the other where the merchandise is subject to an ad valorem rate of duty; and that the merchandise in question in this case belongs to the former class.

Without deciding whether, even in the case of an importation of merchandise subject only to a specific duty it is lawful to dispense with an appraisement, our opinion is that, in find-

ing the duty properly assessable upon this merchandise, it was obligatory on the government officials to inquire into its value, and that therefore the duty was one regulated in some manner by the value thereof. The fact that it turned out, in the present case, that the goods did not pay a less rate of duty than fifty per centum ad valorem, did not relieve the appraiser from inquiring into and determining the value of the goods. And if it was the duty of the appraiser, in order to enable him to fix the duty, to inquire into the value of the imported merchandise, he was entitled to the aid afforded him in such an inquiry by the production of a true and correct invoice.

We cannot accept the contention of the importers that, where articles of merchandise are entered and appraised, the inquiry whether the appraised value exceeds the entered value is immaterial, unless, as a result of such inquiry, such articles have imposed upon them ad valorem duties.

The importers had no right to determine for themselves in advance whether a specific duty or an ad valorem duty should be levied. The duty was to be regulated by the value of the goods. A duty at least equivalent to an ad valorem duty of fifty per centum had to be levied, and to determine what duty was leviable it was necessary for the collector and appraisers to be truthfully advised of the value of the goods.

It is urged that, as specific duties were actually assessed in the present case, it therefore appears that the importers were not benefited by the undervaluation; that the revenue has not and could not suffer anything by the undervaluation; and that a mere difference of opinion between the importer and the appraisers, as to the value of the goods, should not subject the former to an additional duty.

But what might seem to be the hardship of such a case cannot justify the appraisers or the courts in dispensing with the requirements of the statutes. The meaning and policy of the tariff laws cannot be made to yield to the supposed hardship of isolated cases. Nor is it apparent that the enforcement of the statutory requirements can be justly termed a hardship to importers who take the risk of an undervaluation. The bur-

then of furnishing a true and correct invoice, in such a case, is no greater than that imposed on other importers where goods are confessedly within the category of goods subject to an ad valorem assessment.

The administration of such laws cannot be narrowed to a consideration of every case as if it stood alone, and as if the only question was whether there was an actual intention to defraud the government. Wide and long experience has resulted in the command that all importations of merchandise must be accompanied with a true and correct invoice, stating the cost or market value. Like other importers, the present appellants must comply with this command, and if they have failed to do so, they must be held to be subject to the additional duty imposed by the statute. If the statutory regulations are found to be too stringent, the remedy cannot be found either in the courts whose duty is to construe them, or in the executive officers appointed to carry them into effect, but in Congress.

We have been referred to no decision of this court directly applicable to the case in hand, but *Pings* v. *United States*, 38 U. S. App. 250, is cited. That was a case arising under the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, where gloves were imported into the port of New York and were dutiable at $1.75 per dozen, unless their value exceeded $3.50 per dozen, in which case they would be dutiable at fifty per centum ad valorem. The appraiser advanced their value in excess of ten per centum of the value declared in the entry, and the propriety of this advance was not questioned. The appraised value, however, was not in excess of $3.50 per dozen. The collector held the merchandise liable to the additional duty prescribed by section 7 of the Customs Administration Act of June 10, 1890. The importer's contention, that the additional duty should not be exacted because gloves of the kind imported pay a specific duty, and because the advance, although in excess of the ten per centum, was not sufficient to require him to pay the ad valorem duty exacted by the last proviso of paragraph 458 of the tariff act of October 1, 1890, was sustained by the board of general appraisers. But the Circuit

Syllabus.

Court held otherwise, and on appeal the Circuit Court of Appeals for the Second Circuit affirmed the decision of the Circuit Court. The Court of Appeals, reviewing the provisions of the act of June 10, 1890, held that where the value of the goods determines the question whether they are to pay specific or ad valorem duty, appraisement is essential, and that it is to be expected that the statute should require the importer himself to state the value of his goods faithfully and truthfully, and to enforce that requirement by appropriate penalties. The court said: "We see no reason for restricting the broad language of the statute, and concur with the Judge who heard the case in the Circuit Court, that the statutes require that all imports be entered at fair value, and that the provision for increasing duties for undervaluations of more than ten per centum makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not."

This case was under another statute, in somewhat different terms, but the reasoning upon which that decision went is that which we have pursued in the present case, and meets with our approval.

Our conclusion is that the questions certified to us by the Judges of the Circuit Court of Appeals should be answered in the affirmative, and it is so ordered.

Mr. Justice Peckham dissented.

MARSHALL *v.* BURTIS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 118. Submitted January 10, 1899. — Decided January 30, 1899.

As there was no finding of facts by the courts below, and no statement of facts in the nature of a special verdict, this court must assume that the judgment of the court below was justified by the evidence, and affirm the judgment of the Supreme Court.

Opinion of the Court.

THE case is stated in the opinion.

Mr. L. E. Payson for appellant.

Mr. A. H. Garland and *Mr. R. C. Garland* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a suit to quiet title to a lot in the city of Phœnix, Arizona, described as lot 8 in block 1 in Neahr's addition to said city. The appellee was plaintiff in the court below and the appellant was defendant, and we shall so designate them.

The plaintiff alleged that he was in possession as owner in fee, deriving it from one Friday Neahr, commonly known as Mary F. Neahr, an unmarried woman, over twenty-one years of age, by a deed dated October 14, 1892. That the defendant, contriving to defraud him (the plaintiff) and cloud his title to the property, induced said Friday Neahr, by false and fraudulent pretences, and without consideration, to sign and acknowledge an instrument in writing, the contents of which were unknown to her, which instrument was a conveyance to him from her of the property, and in which she was induced to fraudulently state that she was not of lawful age when she executed the deed to the plaintiff, and that said instrument was recorded in the office of the county recorder of Maricopa County, "all to the great injury of this plaintiff in the sum of five thousand dollars." Judgment was prayed that the instrument to Marshall be delivered up and cancelled, and that plaintiff have damages in the sum of five thousand dollars, and for general relief.

The answer admits that Friday M. Neahr was seized in fee of the property, and executed a deed therefor to the plaintiff, and that he entered into and was in possession thereof, and that he (the defendant) obtained a deed therefor on the 25th day of October, 1894.

The answer puts in issue all other averments, and alleges by way of cross complaint that when Friday M. Neahr executed the deed to plaintiff she was under twenty-one years, to

wit, nineteen years, which plaintiff knew. That Friday M. Neahr derived the property from her father by a deed of gift, in which it was expressly provided and limited that she should have no power of disposition of said premises until she arrived at the age of twenty-one years, which plaintiff knew. That she attained the age of twenty-one on the 7th of September, 1894, and on the 24th of October, 1894, she "executed, acknowledged and delivered to this defendant, for a valuable consideration, then and there paid to her by the defendant, a deed of conveyance in writing, with full covenants of seisin and warranty, conveying to this defendant the lands and premises described in the plaintiff's complaint herein, and therein and thereby said Friday M. Neahr expressly revoked and disaffirmed the aforesaid attempted conveyance of said premises to the plaintiff, and this defendant thereupon became, ever since has been, and now is the lawful owner of said premises and the whole thereof, and entitled to possession thereof; that said plaintiff has no right, title, claim or interest whatsoever in said premises, and the claim of the plaintiff to ownership thereof is without foundation and against the rights of this defendant, and is a cloud upon the title of this defendant to the said premises." Wherefore the defendant prayed that the deed to plaintiff be declared invalid and he be enjoined from setting up any claim to the property, and that defendant be adjudged the owner.

A trial was had on these issues before the court without a jury, and judgment was given for the plaintiff.

The judgment recited that —

"Evidence upon behalf of the respective parties was introduced and the cause was submitted to the court for its consideration and decision, and, after due deliberation, the court orders that plaintiff have judgment.

"Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff Peter T. Burtis is the owner of the following described real estate, situate in Maricopa County, Arizona Territory, to wit,

(Describing it);

and that said defendant Norton Marshall is not the owner of

said lot number eight (8), in block number one (1), of Neahr's addition or of any part thereof, and that the deed of said premises heretofore executed by Friday Mary Neahr to said Norton Marshall, of date October —, 1894, and recorded on the 29th day of October, 1894, in book 37 of deeds, page 55, in the office of the county recorder of said county of Maricopa, is invalid and of no effect, and the same is hereby annulled and cancelled, and the said defendant Norton Marshall has acquired no claim, title or right by virtue of said deed in or to the premises described therein, to wit, said lot number eight (8), in block number one (1), of said Neahr's addition to the city of Phœnix, and said defendant is hereby forever restrained and enjoined from asserting any claim or title to said premises or any part thereof by virtue of said deed.

"And it is further ordered, adjudged and decreed that said defendant Norton Marshall take nothing by his cross-complaint filed herein, and that said plaintiff Peter T. Burtis do have and recover of and from the said defendant Norton Marshall his costs and disbursements herein, taxed at $53.30."

A motion for a new trial was made and denied, and an appeal was then taken to the Supreme Court of the Territory, which affirmed the judgment of the district court. To review the judgment of the Supreme Court this appeal is prosecuted.

There are fourteen assignments of error, some of which attribute error to the judgment, some to the supposed finding of the court of the validity of the deed to plaintiff and invalidity of that to defendant, and assigning ownership of the property to the former and non-ownership to the latter. The second and third assignments of error are as follows:

"2. The said court erred in refusing to sustain the errors assigned on the appeal to it from the district court.

"3. The said court erred in refusing to reverse the said cause for the errors of the district court assigned."

Adverting to the errors assigned on appeal to the district court, those which were based on the action of the court other than the judgment were in refusing a new trial and "generally in admitting improper evidence offered by the

plaintiff, to which the defendant duly objected and took exception, as appears fully in the bill of exceptions."

There is no other specification of error in the admission of testimony and there is no specification in the briefs as required by rule 21. *Lucas* v. *Brooks*, 18 Wall. 436; *Benites* v. *Hampton*, 123 U. S. 519. Indeed, error on admitting testimony is not urged at all and probably was not intended to be. The statement of counsel is:

"The errors assigned reach every possible phase of the case, and need not be specifically referred to here.

"The judgment appealed from, being general, requires an analysis of the case.

"The only possible questions may be said to be —

"1. That Neahr was of full age when she made the deed to Burtis, October 14, 1892.

"2. If not, that she failed to disaffirm within a reasonable time after attaining her majority.

"3. That she ratified her deed to Burtis before deeding to Marshall and after attaining majority.

"4. That she was estopped to disaffirm, by her own act, in averring her majority in executing the Burtis deed.

"5. That she was bound to restore the consideration to Burtis before an effective disaffirmance.

"6. That Marshall, knowing the prior deed to Burtis, could not take title to himself in October, 1894.

"The first three propositions present purely questions of fact, and upon this record it is impossible that the court below could have based its judgment upon an affirmance of either of the three.

"The last three propositions present solely questions of law, and these it is confidently submitted are only to be resolved in favor of appellant."

We are not required, therefore, to review the rulings of the district court on admission or rejection of testimony. Does the record present anything else for our determination? In *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509, this court said, by Mr. Justice Gray, that "Congress has prescribed that the appellate jurisdiction of this court over

'judgments and decrees' of the territorial courts, 'in cases of trial by juries shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below,' and transmitted to this court with the transcript of the record. Act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28. The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite, 'We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' *Hecht* v. *Boughton*, 105 U. S. 235, 236." See also *Salina Stock Co.* v. *Salina Creek Irrigation Co.*, 163 U. S. 109; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303; *San Pedro & Cañon Del Agua Co.* v. *United States*, 146 U. S. 120; *Mammoth Mining Co.* v. *Salt Lake Foundry and Machine Co.*, 151 U. S. 447.

There was no finding of facts by the district court or by the Supreme Court, hence no "statement of facts in the nature of a special verdict," and we must assume that the judgment of the district court was justified by the evidence, and the judgment of the Supreme Court sustaining it is

Affirmed.

McQUADE *v.* TRENTON.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 125. Argued January 12, 1899. — Decided January 30, 1899.

A decision by a state court of a Federal question will not sustain the jurisdiction of this court if another question, not Federal, was also raised and decided against the plaintiff in error, and the decision thereof is sufficient, notwithstanding the Federal question, to sustain the judgment; and much more is this the case where no Federal question is shown to have been decided, and the case might have been, as this case probably was, disposed of upon non-Federal grounds.

THIS was a bill in equity filed in the Court of Chancery of the State of New Jersey by the inhabitants of the city of Trenton against John McQuade, to enjoin him from interfering with the relaying of a certain pavement, and the resetting of the curb and gutter in front of his premises, in the city of Trenton.

The bill averred, in substance, that a change of grade on the street in front of the premises of the defendant was made by a city ordinance, at the special request of the Pennsylvania Railroad Company, upon an agreement by the latter to make the changes, to carry off all the surface water diverted or changed by the alteration, and to indemnify the city; but that the defendant McQuade, who owned a lot upon the street in question, not only notified the workmen to desist from changing the grade, but forcibly interfered with their work by throwing hot and cold water on the men engaged in such work, and thus tried to prevent its being carried on; and that after the pavement had been relaid in front of his property, he tore it up and rendered it nearly impassable for pedestrians by digging a hole in the sidewalk in front of his premises and keeping the same filled with water.

In his answer, defendant denied that the railroad company had provided means to carry off the surface water, and alleged that the provisions made were utterly inadequate, and that his property had been damaged by the overflow of water

into his cellar. He further averred that the change of grade authorized by the city ordinance was not a proper change of grade, but that the alteration related to the construction of approaches to an elevated bridge, and was a matter over which the common council could not exercise any legal authority whatsoever; that by the attempted alteration of the grades, the surface water, instead of passing through the street, was caused to accumulate immediately in front of the defendant's property, and was likely to overflow the sidewalk and into the defendant's cellar; that if the sidewalk in front of defendant's property were raised to the grade mentioned in the ordinance, the cellar windows of his house would be practically closed up and his free access to the street greatly impaired; that the alteration of the grade was a work carried on at the expense of and for the sole benefit of the railroad company; that such company had no authority under the law to do the work and thereby damage defendant's property without first making compensation for the damage he would sustain by reason of such work, and that he had a right to prevent the completion of the work until he should have received full compensation for all damages he would sustain by such work, and hence that complainants were not entitled to the relief prayed for. Further answering, he insisted that under the constitution of the State he had a right to free access to the street from his property and to the free admission of light and air; and that no alteration in the grade of the street could be lawfully made until a proper method of procedure should have been prescribed by the legislature for the exercise of the power of eminent domain, "whereby this defendant may receive proper and adequate compensation for the damage that will result to him by said alteration of grades and exclusion of light and air."

The case was heard upon the pleadings and proofs, and a decree rendered that the defendant be perpetually enjoined from interfering with the completion of the sidewalk and curbing, and from removing or interfering with the pavement, sidewalk or curbing after the same shall have been completed.

Opinion of the Court.

In his opinion the Vice Chancellor put the case upon the grounds that the defendant had no right to take the law into his own hands and bid defiance to the city authorities; that the city being liable for damages sustained, because of the want of repaired streets, and having undertaken to repair them according to the grade which had been prescribed, the court was justified in enjoining defendant from any interference; that the only question at issue was one with respect to the damages to which McQuade was entitled; that he might have ascertained these before the city or railroad company took any steps, but that he allowed the company to go on and make all the changes necessary without taking direct proceedings to compel them to ascertain the damages and compensate him, and that he has still an ample remedy for a redress of his grievances without interfering with the right of the public to the use of the street in front of his dwelling.

From this decree McQuade appealed to the Court of Errors and Appeals upon the ground that under such decree the complainants were permitted to take and damage his property for public use without compensation, because no procedure for taking and injuring his property in the manner set forth had been prescribed by the legislature, and "because the decree is in sundry other respects contrary to the Constitution of the United States and to the law of the land." The petition of appeal was dismissed by the Court of Errors and Appeals and the case remanded for an execution of the decree. No written opinion was delivered.

Mr. David McClure for plaintiff in error.

No appearance for defendant in error.

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

The principal contention of the plaintiff in error (the defendant below) is that, as he had never been compensated in

damages for the injury to his property by altering the grade of the street in front of his lot, he had a right to abate the nuisance caused by the proposed changes, and that in the refusal of the state court to recognize this principle he had been deprived of his property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. But no such question was raised in the pleadings, unless the allegation of the answer that the plaintiffs had no right to make the alterations in question without first compensating defendant for his damages, be treated as equivalent to an allegation that his property had been taken without due process of law. The right of the defendant to damages was, however, assumed in the opinion of the Vice Chancellor, who disposed of the answer by saying that the defendant had mistaken his remedy, and must resort to another proceeding against the city for his damages. This was beyond all doubt a ruling broad enough to support the decree regardless of any Federal question that possibly might have been raised from the allegation of the answer. In his petition for an appeal defendant repeated his allegation that his property had been damaged without compensation, and averred generally that the decree was contrary to the Constitution of the United States, but made no specific allegation of any conflict therewith. As the Court of Errors and Appeals delivered no opinion, it is impossible to state definitely upon what ground the decree of the Vice Chancellor was affirmed. The presumption is that it was satisfied with the opinion of the court below, and affirmed the decree for reasons stated in the opinion of the Vice Chancellor; but however this may be, it is quite evident that a Federal question was not necessarily involved in the case, and hence that this court has no jurisdiction. *Kaukauna Water Power Co.* v. *Green Bay &c. Canal Co.*, 142 U. S. 254; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake &c. Canal Co.* v. *Yuba County*, 116 U. S. 410.

We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question not Federal were also raised and decided against the plaintiff in error, and the decision thereof

be sufficient, notwithstanding the Federal question, to sustain the judgment. Much more is this the case where no Federal question is shown to have been decided, and the case might have been, and probably was, disposed of upon non-Federal grounds. *Harrison* v. *Morton*, 171 U. S. 38; *Bacon* v. *Texas*, 163 U. S. 207, and cases cited.

The writ of error in this case must therefore be

Dismissed.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 157. FARMERS' BANK OF NORBORNE *v.* ROSELLE. Error to the Supreme Court of the State of Missouri. Motions to dismiss or affirm. Submitted November 1, 1898. Decided November 7, 1898. *Per Curiam.* Writ of error dismissed on the authority of *Meyer* v. *Cox*, 169 U. S. 735; *McLish* v. *Roff*, 141 U. S. 661; *Missouri* v. *Andriano*, 138 U. S. 496; *Dower* v. *Richards*, 151 U. S. 666; *Insurance Company* v. *Kirchoff*, 160 U. S. 374. *Mr. William B. King* and *Mr. William E. Harvey* for motions. *Mr. Morton Jourdan* opposing.

No. 400. Ross *v.* KING. Error to the Supreme Court of the State of Rhode Island. Motions to dismiss or affirm. Submitted October 31, 1898. Decided November 7, 1898. *Per Curiam.* Writ of error dismissed on the authority of *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Pim* v. *St. Louis*, 165 U. S. 373; *Zadig* v. *Baldwin*, 166 U. S. 485; *Kipley* v. *Illinois*, 170 U. S. 182. *Mr. John H. Glover* and *Mr. Stephen H. Olin* for motions. *Mr. Heber J. May* and *Mr. J. M. Wilson* opposing.

No. 304. CLIFFORD *v.* HELLER. Appeal from the Circuit Court of the United States for the District of New Jersey. Argued November 11, 1898. Decided November 14, 1898. Order affirmed with costs. *Mr. William D. Daly* for appellant. *Mr. James S. Erwin* for appellee.

No. 266. UNITED STATES AND COMANCHE INDIANS *v.* HOOD. Appeal from the Court of Claims. Argued October 24 and 25,

1898. Decided November 14, 1898. Judgment affirmed by a divided court. *Mr. Attorney General*, *Mr. Assistant Attorney General Thompson* and *Mr. Charles W. Russell* for appellants. *Mr. William B. King*, *Mr. Silas Hare* and *Mr. John W. Clark* for appellee.

Nos. 62 and 63. Sioux City, O'Neill and Western Railway Company *v.* Manhattan Trust Company. Certificate from the United States Circuit Court of Appeals for the Eighth Circuit. Argued November 11, 1898. Decided November 14, 1898. *Per Curiam.* Certificate dismissed on the authority of *United States* v. *Union Pacific Railway Company*, 168 U. S. 512, and cases cited; *Cross* v. *Evans*, 167 U. S. 60; *Warner* v. *New Orleans*, 167 U. S. 467; *Packer* v. *Nixon*, 10 Peters, 408; *Wiggins* v. *Gray*, 24 How. 303; *Enfield* v. *Jordan*, 119 U. S. 680. *Mr. John C. Coombs* and *Mr. Henry J. Taylor* for the Railway Company. *Mr. G. W. Wickersham*, *Mr. John L. Webster* and *Mr. John L. Cadwalader* for the Trust Company.

No. 56. United States *v.* Van Iderstine. Appeal from the Court of Claims. Argued and submitted November 8 and 9, 1898. Decided December 5, 1898. Judgment affirmed by a divided court. *Mr. Attorney General*, *Mr. Assistant Attorney General Pradt* and *Mr. George H. Gorman* for appellant. *Mr. Russell Duane* and *Mr. Harvey Spalding* for appellee.

No. 233. Holden *v.* Watson. Error to the Supreme Court of the State of Kansas. Motion to dismiss submitted November 30, 1898. Decided December 5, 1898. Dismissed with costs on motion of counsel for plaintiff in error. *Mr. Orrin L. Miller* and *Mr. O. H. Dean* for plaintiff in error. *Mr. Silas Porter* for defendant in error.

Decisions announced without Opinions.

No. 70. St. Louis and San Francisco Railway Company *v.* Barker. Error to the United States Circuit Court of Appeals for the Eighth Circuit. Argued for plaintiff in error December 7, 1898. Decided December 12, 1898. Judgment affirmed with costs and cause remanded to the United States Court in the Indian Territory, Central District. *Mr. L. F. Parker*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiff in error. No brief filed for defendant in error.

No. 77. Wheeler *v.* McBlair. Appeal from the Court of Appeals of the District of Columbia. Argued December 7, 1898. Decided December 12, 1898. Decree affirmed with costs. *Mr. Alfonso Hart* and *Mr. C. A. Keigwin* for appellant. *Mr. J. J. Darlington* for appellees.

No. 68. Chaplin *v.* United States. Appeal from the Court of Claims. Argued December 7 and 8, 1898. Decided December 12, 1898. *Per Curiam.* Judgment reversed and cause remanded with a direction to enter judgment for the claimant on the authority of *United States* v. *Elliott*, 164 U. S. 373. *Mr. James Lowndes* for appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Pradt* for appellee.

No. 69. Fuller *v.* United States. Appeal from the Court of Claims. Argued December 7 and 8, 1898. Decided December 12, 1898. *Per Curiam.* Judgment reversed and cause remanded with a direction to enter judgment for the claimants on the authority of *United States* v. *Elliott*, 164 U. S. 373. *Mr. James Lowndes* for appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Pradt* for appellee.

No. 78. United States *v.* Kidder. Appeal from the Court of Claims. Argued December 7 and 8, 1898. Decided December 12, 1898. *Per Curiam.* Judgment affirmed on the au-

thority of *United States* v. *Elliott*, 164 U. S. 373. *Mr. Attorney General* and *Mr. Assistant Attorney General Pradt* for appellant. *Mr. James Lowndes* for appellees.

No. 111. HARMON, RECEIVER, *v.* NATIONAL PARK BANK OF THE CITY OF NEW YORK. Error to the United States Circuit Court of Appeals for the Second Circuit. Argued January 6, 1899. Decided January 9, 1899. *Per Curiam.* Judgment affirmed with costs, on the authority of *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606, and cause remanded to the Circuit Court of the United States for the Southern District of New York with a direction to render judgment in accordance with the mandate of the United States Circuit Court of Appeals. *Mr. Frederic J. Swift* for plaintiff in error. *Mr. Louis F. Doyle* for defendant in error.

No. 104. KINNEAR *v.* BAUSMAN, RECEIVER. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted December 13, 1898. Decided January 9, 1899. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Union Mutual Life Insurance Company* v. *Kirchoff*, 160 U. S. 374, and cases cited. *Mr. George Turner* for appellant. *Mr. Frederick Bausman* for appellee.

No. 256. BLYTHE COMPANY *v.* BLYTHE. Appeal from the Circuit Court of the United States for the Northern District of California. Motions to dismiss or affirm. Submitted December 19, 1898. Decided January 9, 1899. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Smith* v. *McKay*, 161 U. S. 355; *Black* v. *Black*, 163 U. S. 678; *Tucker* v. *McKay*, 164 U. S. 701; *Carey* v. *Houston Railway*, 150 U. S. 170; *S. C.*, 161 U. S. 115; *Ex parte Railroad Company*, 95 U. S. 221; *Cross* v. *Del Valle*, 1 Wall. 1; *Rouse* v. *Letcher*, 156 U. S. 47. *Mr. F. D. McKenney*, *Mr.*

Wm. H. H. Hart, *Mr. John Garber* and *Mr. Robert Y. Hayne* for motions. *Mr. George W. Towle, Jr.*, *Mr. John F. Dillon* and *Mr. E. S. Pillsbury* opposing.

No. 100. Santa Fé, Prescott and Phœnix Railway Company *v.* Hurley. Error to the Supreme Court of the Territory of Arizona. Submitted January 3, 1899. Decided January 16, 1899. Judgment affirmed with costs and interest by a divided court. *Mr. George W. Kretzinger* for plaintiff in error. *Mr. William H. Barnes* for defendant in error.

Nos. 115, 116 and 117. McCook et al., Receivers, *v.* Wood, Administrator. Error to the United States Circuit Court of Appeals for the Eighth Circuit. Argued and submitted January 11, 1899. Decided January 16, 1899. Judgments affirmed with costs and causes remanded to the Circuit Court of the United States for the Western District of Arkansas. *Mr. L. F. Parker* for plaintiffs in error. *Mr. Oscar L. Miles* for defendant in error.

No. 126. United States *v.* Morgan. Appeal from the Court of Claims. Submitted January 11, 1899. Decided January 16, 1899. Judgment affirmed on the authority of *United States* v. *Jones*, 134 U. S. 483; *United States* v. *Barber*, 140 U. S. 164. *Mr. Attorney General* and *Mr. Assistant Attorney General Pradt* for appellant. *Mr. C. C. Lancaster* for appellee.

No. 110. King *v.* Williamson. On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. Submitted January 5, 1899. Decided January 23, 1899. Decree affirmed with costs, and cause remanded to the Circuit Court of the United States for the District of West Virginia. *Mr. Maynard F. Stiles* for King. No appearance for Williamson.

Decisions announced without Opinions.

No. 605. ROESEL *v.* KIRK, SHERIFF. Appeal from the Circuit Court of the United States for the District of New Jersey. Submitted January 9, 1899. Decided January 23, 1899. *Per Curiam.* Final order affirmed, with costs, on the authority of *Kohl* v. *Lehlback*, 160 U. S. 293; *Bergemann* v. *Backer*, 157 U. S. 655; *Lambert* v. *Barrett*, 157 U. S. 697; *Lambert* v. *Barrett*, 159 U. S. 661, *Andrews* v. *Swartz*, 156 U. S. 272. *Mr. Frank Bergen* for appellant. *Mr. Nicholas C. J. English* for appellee.

Decisions on Petitions for Writs of Certiorari.

No. 448. SPURR *v.* UNITED STATES. Sixth Circuit. Granted November 7, 1898. *Mr. B. P. Waggener*, *Mr. A. H. Horton* and *Mr. John A. Pitts* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

No. 463. MORRIS *v.* STEWART. Seventh Circuit. Denied November 7, 1898. *Mr. Charles H. Aldrich* for petitioner. *Mr. Samuel P. McConnell*, *Mr. Horace K. Tenney* and *Mr. H. M. Pollard* opposing.

No. 352. KUMLER *v.* HALE. Sixth Circuit. Denied November 14, 1898. *Mr. O. S. Brumback* for petitioner. *Mr. Barton Smith*, *Mr. Rufus H. Baker* and *Mr. John P. Wilson* opposing.

No. 434. ATLAS STEAMSHIP COMPANY *v.* STEAMSHIP "LA BOURGOGNE." Second Circuit. Denied November 14, 1898. *Mr. Everett P. Wheeler* for petitioner. *Mr. Edward K. Jones* opposing.

No. 603. WHEELER *v.* STEAMSHIP "LA BOURGOGNE." Second Circuit. Denied November 14, 1898. *Mr. Everett P. Wheeler* for petitioner. *Mr. Edward K. Jones* opposing.

Decisions announced without Opinions.

No. 597. MICHIGAN STOVE COMPANY *v.* FULLER WARREN COMPANY. Seventh Circuit. Denied November 28, 1898. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for petitioner. *Mr. Edward P. Vilas* and *Mr. Elias H. Bottum* opposing.

No. 468. DEAN LINSEED OIL COMPANY *v.* UNITED STATES. Second Circuit. Denied December 5, 1898. *Mr. Elihu Root* and *Mr. S. B. Clarke* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

No. 595. LAKE STREET ELEVATED RAILROAD COMPANY *v.* ZIEGLER. Seventh Circuit. Denied December 5, 1898. *Mr. Charles H. Aldrich* for petitioner. *Mr. John J. Herrick* opposing.

No. 622. CITIZENS' BANK OF TINA *v.* ADAMS. Seventh Circuit. Denied December 12, 1898. *Mr. Francis A. Riddle* for petitioner. *Mr. Mason B. Loomis* opposing.

No. 630. UNITED STATES *v.* HARRIS ET AL., RECEIVERS. Third Circuit. Granted December 19, 1898. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner.

No. 631. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* MCNEILL, RECEIVER. Ninth Circuit. Denied December 19, 1898. *Mr. William Allen Butler* and *Mr. John Notman* for petitioner. *Mr. L. B. Cox* opposing.

No. 626. TAYLOR, GOVERNOR, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. Sixth Circuit. Denied December 19, 1898. *Per Curiam.* This is an application for a writ of

certiorari to review a decree of the Circuit Court of Appeals for the Sixth Circuit on appeal from an interlocutory order, and is denied on the authority of *Chicago and Northwestern Railway Company* v. *Osborne*, 146 U. S. 354; *Forsyth* v. *Hammond*, 166 U. S. 506. *Mr. George W. Pickle*, *Mr. William L. Granbery*, and *Mr. Albert D. Marks* for petitioner. *Mr. J. M. Dickinson* opposing.

No. 638. International Bank of St. Louis *v.* Faber. Second Circuit. Denied January 9, 1899. *Mr. Robert D. Murray* for petitioner. *Mr. Francis Forbes* opposing.

No. 655. Donnell *v.* Boston Towboat Company. First Circuit. Denied January 9, 1899. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* for petitioner. *Mr. Lewis S. Dabney* and *Mr. Frederic Cunningham* opposing.

No. 640. City of New Orleans *v.* Warner. Fifth Circuit. Granted January 16, 1899. *Mr. Samuel L. Gilmore* and *Mr. Branch K. Miller* for petitioner. *Mr. Richard De Gray*, *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. Wheeler H. Peckham* opposing.

No. 663. Delafield *v.* Hospital of the Protestant Episcopal Church in Philadelphia. Third Circuit. Denied January 16, 1899. *Mr. D. T. Watson* and *Mr. A. P. Burgwin* for petitioner.

No. 665. Brown *v.* Cranberry Iron and Coal Company. Fourth Circuit. Denied January 16, 1899. *Mr. Theodore F. Davidson* and *Mr. Charles A. Moore* for petitioner.

No. 667. Cadwalader, late Collector, *v.* Meyer and Dickenson. Third Circuit. Granted January 16, 1899. *Mr. At-*

torney General and *Mr. Solicitor General* for petitioner. *Mr. Frank P. Prichard* opposing.

No. 668. WILLS *v.* JONES. Court of Appeals of the District of Columbia. Denied January 23, 1899. *Mr. D. W. Baker* for petitioner. *Mr. Chapin Brown* opposing.

No. 662. SAYERS *v.* BURKHARDT. Fourth Circuit. Denied January 23, 1899. *Mr. Holmes Conrad* for petitioner. *Mr. J. R. Sypher* opposing.

No. 672. SCOTT *v.* LATIMER, RECEIVER. Eighth Circuit. Denied January 23, 1899. *Mr. H. F. Stevens* for petitioner.

No. 675. CROSSMAN *v.* BURRILL. Second Circuit. Granted January 23, 1899. *Mr. Everett P. Wheeler* for petitioner. *Mr. Laurence Kneeland* opposing.

No. 677. ROEHM *v.* HORST. Third Circuit. Granted January 23, 1899. *Mr. R. C. Dale* and *Mr. Samuel Dickson* for petitioner. *Mr. Frank P. Prichard* opposing.

No. 681. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* ST. JOSEPH UNION DEPOT COMPANY. Eighth Circuit. Denied January 30, 1899. *Mr. L. C. Krauthoff* for petitioner. *Mr. C. A. Mosman* and *Mr. O. M. Spencer* opposing.

No. 687. SAVILLE, CLAIMANT, *v.* AMERICAN SUGAR REFINING COMPANY. Second Circuit. Denied January 30, 1899. *Mr.*

J. Parker Kirlin for petitioner. *Mr. Harrington Putnam* opposing.

No. 689. Li Sing *v.* United States. Second Circuit. Granted January 30, 1899. *Mr. Wm. C. Beecher* for petitioner. *Mr. Attorney General*, *Mr. Solicitor General* and *Mr. H. L. Burnett* opposing.

No. 691. American National Bank of Denver *v.* Northwestern Mutual Life Insurance Company. Eighth Circuit. Denied January 30, 1899. *Mr. T. J O'Donnell* and *Mr. Milton Smith* for petitioner. *Mr. John H. Denison* opposing.

In Memoriam.

AUGUSTUS HILL GARLAND.

BORN JUNE 11, 1832. DIED JANUARY 26, 1899.

SUPREME COURT OF THE UNITED STATES.

Thursday, January 26, 1899.

The Honorable John W. Griggs, Attorney General of the United States, addressed the court as follows:

"May it please the court: It is my sad duty to announce to the court the sudden death of an ex-Attorney General of the United States — Augustus Hill Garland.

"The sudden and unexpected death of this distinguished man comes with a shock of surprise to those of us who have heard of it, as undoubtedly it came to those of this court who witnessed his seizure. He was a man so distinguished in his profession, so distinguished as a statesman in political life, and so connected officially and professionally with this court, to the last moment of his life, that I deem it proper to suggest to the court that out of respect to his memory they should take a recess until to-morrow, and I make that motion."

The Chief Justice responded:

"The court receives the information of the death of Mr. Garland with sincere sorrow, and fully concurs in the suggestion that has been made. As a mark of respect to the memory of this distinguished member of the bar and eminent public servant, an adjournment will be taken until to-morrow, at the usual hour."

While making the closing argument in *Towson* v. *Moore*, 173 U. S. 17, on the 26th of January, Mr. Garland was stricken with apoplexy. He was at once removed to the Clerk's office, where he died soon after.

APPENDIX.

GENERAL ORDERS AND FORMS IN BANKRUPTCY.

ADOPTED AND ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES NOVEMBER 28, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's

certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in

the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removeable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee

to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is

unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge,

or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus*

to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in

a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United

States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

[N.B. — Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

[Form No. 1.]

Debtor's Petition.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the —— District of ———:

The petition of ——— ———, of ———, in the county of ———, and district and State of ———, ——— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicil] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———.

——— ———, *Attorney.*

United States of America, District of ———, ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———, *Petitioner.*

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

——— ———,

——— ———.

(*Official character.*)

SCHEDULE A. — STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						$	c.
(1) Taxes and debts due and owing to the United States.							
(2) Taxes due and owing to the State of ——, or to any county, district, or municipality thereof.							
(3) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4) Other debts having priority by law.							
					Total		

——— ———, *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N.B. — Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	c.
				Total . . .				

——— ———, *Petitioner.*

Schedule A. (3)

Creditors whose claims are unsecured.

[N.B. — When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person: and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———, *Petitioner.*

Schedule A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N.B. — The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as endorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———, *Petitioner.*

Schedule A. (5)

Accommodation paper.

[N.B. — The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	*c.*
					Total		

——— ———, *Petitioner.*

Oath to Schedule A.

United States of America, District of ——— ss:

On this —— day of ———, A.D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

———— ————,

[*Official character.*]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c.
		Total		

———— ————, *Petitioner.*

SCHEDULE B. (2)

Personal property.

	$	c.
a. — Cash on hand		
b. — Bills of exchange, promissory notes, or securities of any description (each to be set out separately)		
c. — Stock in trade, in — business of ——— ———, at ———, of the value of ———		
d. — Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.		
e. — Books, prints and pictures, viz.		
f. — Horses, cows, sheep, and other animals (with number of each), viz. .		
g. — Carriages and other vehicles, viz.		
h. — Farming stock and implements of husbandry, viz.		
i. — Shipping, and shares in vessels, viz.		
k. — Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.		
l. — Patents, copyrights, and trade-marks, viz.		
m. — Goods or personal property of any other description, with the place where each is situated, viz.		
Total		

——— ———, *Petitioner.*

SCHEDULE B. (3)

Choses in action.

		Dollars.	Cents.
a. — Debts due petitioner on open account			
b. — Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds			
c. — Policies of insurance			
d. — Unliquidated claims of every nature, with their estimated value			
e. — Deposits of money in banking institutions and elsewhere			
	Total		

———— ————, *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N.B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
		$	c.
Interest in land			
Personal property			
Property in money, stock, shares, bonds, annuities, etc. . .			
Rights and powers, legacies and bequests	Total . . .		

Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
		$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor			
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy	Total . . .		

——— ———, *Petitioner.*

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

		Valuation.	
		$	c.
Military uniform, arms and equipments			
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption			
	Total . . .		

——— ———, *Petitioner.*

Schedule B. (6)

BOOKS, PAPERS, DEEDS AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

———— ————, *Petitioner.*

Oath to Schedule B.

United States of America, District of ————, ss:

On this —— day of ————, A.D. 18—, before me personally came ———— ————, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

————— ————,

————— ————,

[*Official character.*]

Summary of Debts and Assets.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A	1 (1)	Taxes and debts due United States			
" "	1 (2)	Taxes due States, counties, districts, and municipalities.			
" "	1 (3)	Wages			
" "	1 (4)	Other debts preferred by law			
Schedule A	2	Secured claims			
Schedule A	3	Unsecured claims			
Schedule A	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A	5	Accommodation paper			
		Schedule A, total			
Schedule B	1	Real estate			
Schedule B	2-a	Cash on hand			
" "	2-b	Bills, promissory notes, and securities			
" "	2-c	Stock in trade			
" "	2-d	Household goods, etc.			
" "	2-e	Books, prints, and pictures			
" "	2-f	Horses, cows, and other animals			
" "	2-g	Carriages and other vehicles			
" "	2-h	Farming stock and implements			
" "	2-i	Shipping and shares in vessels			
" "	2-k	Machinery, tools, etc.			
" "	2-l	Patents, copyrights, and trade-marks			
" "	2-m	Other personal property			
Schedule B	3-a	Debts due on open accounts			
" "	3-b	Stocks, negotiable bonds, etc.			
" "	3-c	Policies of insurance			
" "	3-d	Unliquidated claims			
" "	3-e	Deposits of money in banks and elsewhere			
Schedule B	4	Property in reversion, remainder, trust, etc.			
Schedule B	5	Property claimed to be excepted			
Schedule B	6	Books, deeds, and papers			
		Schedule B, total			

[Form No. 2.]

Partnership Petition.

To the Honorable ——— ———,

Judge of the District Court of the United States for the —— District of ———:

The petition of ——— ——— respectfully represents:

That your petitioners and ——— ——— have been partners under the firm name of ——— ———, having their principal place of business at ———, in the county of ———, and district and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath , contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath , contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further

statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

——— ———,
——— ———,
——— ———,

——— ———, *Attorney.* *Petitioners.*

——— ———, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

——— ———,
——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]
——— ———.

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[Form No. 3.]

Creditors' Petition.

To the Honorable ——— ———, judge of the District Court of the United States for the —— district of ———:

The petition of ——— ———, of ———, and ——— ———, of ———, and ——— ———, of ———, respectfully shows:

That ——— ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or* resided, *or* had his domicil] at ———, in the county of ——— and State and district aforesaid, and owes debts to the amount of $1000.

That your petitioners are creditors of said ——— ———, having provable claims amounting in the aggregate, in excess of securities

held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows: _____

_____

_____

And your petitioners further represent that said ——— ——— is insolvent, and that within four months next preceding the date of this petition the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of ———

_____

_____

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——— ———, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

United States of America, District of ———, ss:

——— ———, ——— ———, ——— ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ——— ———, this —— day of ———, 189—.

——— ———,

——— ———.

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[Form No. 4.]

Order to Show Cause upon Creditors' Petition.

In the District Court of the United States for the —— District of ———.

In the matter of
_____
_____
In Bankruptcy.

Upon consideration of the petition of ——— ——— that ——— ——— be declared a bankrupt, it is ordered that the said ——— ——— do appear at this court, as a court of bankruptcy, to be holden at ———, in the district aforesaid, on the —— day of ———, at — o'clock in the —— noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——— ———, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A.D. 18—.

{ Seal of the court. } ——— ———,
Clerk.

[Form No. 5.]

Subpœna to Alleged Bankrupt.

United States of America, ——— District of ———.

To ——— ———, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ———, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ———, in said district, on the —— day of ———, A.D. 189—, ——— ——— to answer to a petition filed by ——— ——— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this —— day of ———, A.D. 189—.

{ Seal of the court. } ——— ———,
Clerk.

[Form No. 6.]

Denial of Bankruptcy.

In the District Court of the United States for the ——— District of ———.

In the matter of ————	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—.

And now the said ——— ——— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or* he demands that the same may be inquired of by a jury].

——— ———.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

——— ———,

[*Official character.*]

[Form No. 7.]

Order for Jury Trial.

In the District Court of the United States for the ——— District of ———.

In the matter of ————	In Bankruptcy.

At ———, in said district, on the —— day of ———, 18—.

Upon the demand in writing filed by ——— ———, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

{ Seal of } { the court. }

——— ———,

Clerk.

[Form No. 8.]

Special Warrant to Marshal.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —— day of ———, A.D. 18—, filed against ——— ———, of the county of ——— and State of ———, in said district, and said petition is still pending; and whereas it satisfactorily appears that said ——— has committed an act of bankruptcy [*or* has neglected *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——— ———, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— of ———, A.D. 189—.

(Seal of the court.)

——— ———,

Clerk.

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ——— ———, and of all his deeds, books of account, and papers which have come to my knowledge.

——— ———,

Marshal [or *Deputy Marshal*].

Fees and expenses.

1. Service of warrant		
2. Necessary travel, at the rate of six cents a mile each way		
3. Actual expenses in custody of property and other services as follows [Here state the particulars.]		

——— ———,

Marshal [or *Deputy Marshal*].

District of ———, A.D. 18—.

Personally appeared before me the said ——— ———, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

——— ———,

Referee in Bankruptcy.

[FORM No. 9.]

BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A.D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the ——— district of ——— against the said ———, and the said ——— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ——— ———, subject to the further orders of said District court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ——— ——— shall indemnify the said ——— ——— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
presence of — ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]

Approved this —— day of ———, A.D. 189—.

——— ———,

District Judge.

[FORM No. 10.]

BOND TO MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound

unto ——— ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A.D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ——— ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——— ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ——— ———, and the said ——— ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of —

——— ——— [SEAL.]

——— ——— [SEAL.]

——— ——— [SEAL.]

——— ———

——— ———

Approved this —— day of ———, A.D. 189—.

——— ———,

District Judge.

[FORM NO. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

At ———, in said district, on —— day of ———, A.D. 18—, before the Honorable ——— ———, judge of the ——— district of ———.

This cause came on to be heard at ———, in said court, upon the petition of ——— that ——— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had*].

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said ——— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the —— day of ———, A.D. 18—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 12.]

Adjudication of Bankruptcy.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—, before the Honorable ——— ———, judge of said court in bankruptcy, the petition of ——— ——— that ——— ——— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ——— ——— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the —— day of ———, A.D. 18—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 13.]

Appointment, Oath and Report of Appraisers.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt.*	In Bankruptcy.

It is ordered that ——— ———, of ———, ——— ——— of ———, and ——— ———, of ———, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ———, A.D. 18—.

———— ————,
Referee in Bankruptcy.

—— District of ———, ss:

Personally appeared the within-named ——— ——— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

———— ————.
———— ————.
———— ————.

Subscribed and sworn to before me this —— day of ———, A.D. 189—.

———— ————,
[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ———, this —— day of ———, A.D. 18—.

——— ———.
——— ———.
——— ———.

[FORM No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Whereas ——— ———, of ———, in the county of ——— and district aforesaid, on the —— day of ———, A.D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or* against] him on the —— day of ———, A.D. 189—, according to the provisions of the acts of Congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ——— at ———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A.D. 18—.

{ Seal of the court. }

——— ———,
Clerk.

[FORM No. 15.]

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— ——— ———	In Bankruptcy.

Whereas on the —— day of ———, A.D. 18—, a petition was filed to have ——— ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions

of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy,* on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ———, A.D. 189—, at ———.

Witness my hand and the seal of the said court, at ———, in said district, on the —— day of ———, A.D. 189—.

Seal of the court.

——— ———,
Clerk.

[FORM NO. 16.]

REFEREE'S OATH OF OFFICE.

I, ——— ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

——— ———.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

——— ———,
District Judge.

[FORM NO. 17.]

BOND OF REFEREE.

Know all men by these presents: That we ——— ——— of ——— ——— as principal, and ——— ——— of ——— ——— and ——— ——— of ——— ———, as sureties are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A.D. 189—.

The condition of this obligation is such that whereas the said ——— ———, has been on the —— day of ———, A.D. 18—,

appointed by the Honorable ——— ———, judge of the District Court of the United States for the ——— district of ———, a referee in bankruptcy, in and for the county of ———, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

——— ———, [L. S.]
——— ———, [L. S.]
——— ———, [L. S.]

Approved this —— day of ——— A.D. 189—.

——— ———,
District Judge.

[FORM NO. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the ——— District of ———. In Bankruptcy.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the creditors of ——— ———, of ———, in the county of ———, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of ———, A.D. 18—, the said ——— ——— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——— in ———, on the —— day of ———, A.D. 18—, at — o'clock in the —— noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

——— ———,
Referee in Bankruptcy.

——— ——, 18—.

[FORM NO. 19.]

LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—, before ——— ———, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

——— ———,
Referee in Bankruptcy.

[Form No. 20.]

General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To ——— ———:

——— ———.

I, ——— ———, of ———, in the county of ——— and State of ———, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said

bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A.D. 189—.

———. [L. S.]

Signed, sealed and delivered in the presence of —

———.

Acknowledged before me this —— day of ———, A.D. 189—.

———,

[*Official character.*]

[FORM NO. 21.]

SPECIAL LETTER OF ATTORNEY IN FACT.

In the matter of
Bankrupt.
} In Bankruptcy.

To ———,

———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the —— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

———, [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A.D. 189—.

Signed, sealed, and delivered in presence of —

———.

Acknowledged before me this —— day of ———, A.D. 18—.

———,

[*Official character.*]

[Form No. 22.]

Appointment of Trustee by Creditors.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, to be the trustee— of the said bankrupt's estate and effects.

Signature of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby, approved.

———,
Referee in Bankruptcy.

[Form No. 23.]

Appointment of Trustee by Referee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice

has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, as trustee of the same.

——— ———,
Referee in Bankruptcy.

[Form No. 24.]

Notice to Trustee of his Appointment.

In the District Court of the United States for the ——— District of ———.

In the matter of ———, *Bankrupt.*	In Bankruptcy.

To ——— ———, of ———, in the county of ———, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of ———, A.D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at ——— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——— the —— day of ———, A.D. 18—.

——— ———,
Referee in Bankruptcy.

[Form No. 25.]

Bond of Trustee.

Know all men by these presents: That we, ——— ———, of ———, as principal, and ——— ———, of ———, and ——— ———, of ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind

ourselves and our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A.D. 189—.

The condition of this obligation is such, that whereas the above-named ——— ——— was, on the —— day of ———, A.D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein ——— ——— is the bankrupt, and he, the said ——— ———, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ——— ———, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of —

——— ——— ——— ———, [SEAL.]
——— ——— ——— ———, [SEAL.]
——— ———, [SEAL.]

[FORM NO. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the ——— District of ———, at ———, ———, this —— day of ———, 189—.

Before ——— ———, referee in bankruptcy, in the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

It appearing to the court ——— ———, of ———, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of ——— dollars, it is ordered that the said bond be, and the same is hereby, approved.

——— ———,
Referee in Bankruptcy.

[Form No. 27.]

Order that no Trustee be Appointed.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

——— ———,
Referee in Bankruptcy.

[Form No. 28.]

Order for Examination of Bankrupt.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A.D. 18—.

Upon the application of ——— ———, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before ——— ———, one of the referees in bankruptcy of this court, at ——— on the —— day of ———, at — o'clock in the —— noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——— ———, *Referee in Bankruptcy.*

[Form No. 29.]

Examination of Bankrupt or Witness.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—, before ——— ———, one of the referees in bankruptcy of said court.

——— ———, of ———, in the county of ———, and State of ———, being duly sworn and examined at the time and place above mentioned, upon his oath says [*here insert substance of examination of party*].

——— ———, *Referee in Bankruptcy.*

[Form No. 30.]

Summons to Witness.

To ——— ———:

Whereas ——— ———, of ———, in the county of ———, and State of ———, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the ——— District of ———,

These are to require you, to whom this summons is directed, personally to be and appear before ——— ———, one of the referees in bankruptcy of the said court, at ———, on the —— day of ———, at — o'clock in the —— noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ———, Judge of said court, and the seal thereof at ———, this —— day of ———, A.D. 189—.

——— ———, *Clerk.*

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A.D. 18—, before me came ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he did, on ———, the —— day of ———, A.D. 189—, personally serve ——— ———, of ———, in the county of ——— and State of ———, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

——— ———.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

———— ————.

[Form No. 31.]

Proof of Unsecured Debt.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A.D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____

_____

that no part of said debt has been paid [except _____

_____];

that there are no set-offs or counterclaims to the same [except _____

_____];

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

———— ————,

Creditor.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

———— ————,

[*Official character.*]

[Form No. 32.]

Proof of Secured Debt.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A.D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of ——— dollars; that the consideration of said debt is as follows _____; that no part of said debt has been paid [except _____]; that there are no set-offs or counterclaims to the same [except _____]; and that the only securities held by this deponent for said debt are the following: _____

_____

_____

——— ———,
Creditor.

Subscribed and sworn to before me this —— day of ———, A.D. —.

——— ———,
[*Official character.*]

[Form No. 33.]

Proof of Debt Due Corporation.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A.D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, and made oath and says that he is ——— of the ———, a corporation incorporated by and under the laws of the State of ———, and carrying on business at ———, in the county of ——— and State of ———, and that he is duly authorized to make this proof, and says that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bank-

ruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____

_____;

that no part of said debt has been paid [except _____

_____]; that there are no set-offs or counterclaims to the same [except _____

_____]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

——— ———,

——— *of said Corporation.*

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

——— ———,

[*Official character.*]

[Form No. 34.]

Proof of Debt by Partnership.

In the District Court of the United States for the ——— District of ———.

In the matter of _____ *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A.D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that he is one of the firm of ——— ———, consisting of himself and ——— ———, of ———, in the county of ———, and State of ———; that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of ——— dollars; that the consideration of said debt is as follows: _____;

that no part of said debt has been paid [except_____];

that there are no set-offs or counterclaims to the same [except _____]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

_____ _____,
Creditor.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

_____ _____,
[*Official character.*]

[Form No. 35.]

Proof of Debt by Agent or Attorney.

In the District Court of the United States for the ——— District of ———.

In the matter of _____ *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A.D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ———, in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____;

that no part of said debt has been paid [except _____

_____];

and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because _____

_____,

and that he is duly authorized by his principal to make this affi-

davit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

_____.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

_____,
[*Official character.*]

[Form No. 36.]

Proof of Secured Debt by Agent.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A.D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ——— in the sum of ——— dollars; that the consideration of said debt is as follows: ———
_____;
that no part of said debt has been paid [except _____
_____];
that there are no set-offs or counterclaims to the same [except _____];
and that the only securities held by said ——— for said debt are the following: _____
_____;
and this deponent further says that this deposition cannot be made by the claimant in person because _____
_____,
and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

_____.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

———— ————,
[*Official character.*]

[FORM NO. 37.]

AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A.D. 18—, at ———, came ——— ———, of ———, in the county of ———, and State of ———, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ———————

———————

———————

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ——— ———, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

———— ————.

Subscribed and sworn to before me this —— day of ———, A.D. 18—.

———— ————,
[*Official Character.*]

[FORM NO. 38.]

ORDER REDUCING CLAIM.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—.

Upon the evidence submitted to this court upon the claim of ——— against said estate [and, *if the fact be so,* upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ———, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ———, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest,* with interest thereon from the —— day of ———, A.D. 18—].

———— ————,
Referee in Bankruptcy.

[FORM No. 39.]

ORDER EXPUNGING CLAIM.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—.

Upon the evidence submitted to the court upon the claim of ——— against said estate [and, *if the fact be so,* upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

———— ————,
Referee in Bankruptcy.

[FORM No. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—.

A list of debts proved and claimed under the bankruptcy of —— ——, with —— dividend at the rate of —— per cent this day declared thereon by —— ——, a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

———— ————,
Referee in Bankruptcy.

[Form No. 41.]

Notice of Dividend.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A.D. 18—.

To ——— ———,

Creditor of ——— ———, bankrupt:

I hereby inform you that you may, on application at my office, ———, on the —— day of ———, or on any day thereafter, between the hours of ——, receive a warrant for the ——— dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter. ——— ———, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To ——— ———,

Trustee in bankruptcy of the estate of ——— ———, bankrupt:

Please deliver to ——— ——— the warrant for dividend payable out of the said estate to me.

——— ———, *Creditor.*

[FORM No. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit [*here describe it and its estimated value*], should be sold by auction, in lots or parcels, and upon terms and conditions, as follows:——

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ———, A.D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A.D. 189—.

——— ———,

Referee in Bankruptcy.

[Form No. 43.]

Petition and Order for Redemption of Property from Lien.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*], is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property,* has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ———, A.D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ———, A.D. 189—.

———,

Referee in Bankruptcy.

[Form No. 44.]

Petition and Order for Sale Subject to Lien.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*], is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ———, A.D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or* at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A.D. 189—.

———,

Referee in Bankruptcy.

[FORM NO. 45.]

PETITION AND ORDER FOR PRIVATE SALE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, _____

_____

_____

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit, _____

_____

_____

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ———, A.D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A.D. 189—.

———— ————,
Referee in Bankruptcy.

[Form No. 46.]

Petition and Order for Sale of Perishable Property.

In the District Court of the United States for the ——— District of ———.

In the matter of _____ *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, the said bankrupt, [*or* a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate],

That a part of the said estate, to wit, _____

_____

_____

now in ———, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ———, A.D. 189—.

———— ————.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ———, A.D. 189—.

———— ————,

Referee in Bankruptcy.

[FORM NO. 47.]

TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms and equipments			
Property exempted by state laws.			

———— ————,

Trustee.

[Form No. 48.]

Trustee's Return of No Assets.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A.D. 18—.

On the day aforesaid, before me comes ——— ———, of ———, in the county of ———, and State of ———, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt , neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ———, this —— day of ———, A.D. 18—.

———,

Referee in Bankruptcy.

[Form No. 49.]

Account of Trustee.

Dr. *The estate of* ——— ———, *bankrupt* , *in account with* ——— ———, *trustee.* Cr.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[Form No. 50.]

Oath to Final Account of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A.D. 18—, before me comes ——— ———, of ———, in the county of ———, and State of ———, and makes oath, and says that he was, on the —— day of ———, A.D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing —— sheets of paper, the first sheet whereof is marked with the letter —— [*reference may here also be made to any prior account filed by said trustee*] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt , and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

———, *Trustee.*

Subscribed and sworn to before me at ———, in said ——— District of ———, this —— day of ———, A.D. 18—.

———,

[*Official character.*]

[Form No. 51.]

Order Allowing Account and Discharging Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

———,

Referee in Bankruptcy.

[Form No. 52.]

Petition for Removal of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———,

Judge of the District Court for the ——— District of ———:

The petition of ——— ———, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ———, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore ——— ——— pray that notice may be served upon said ———, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

——— ———.

[Form No. 53.]

Notice of Petition for Removal of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A.D. 18—.

To ——— ———,

Trustee of the estate of ——— ———, bankrupt:

You are hereby notified to appear before this court, at ———, on the —— day of ———, A.D. 18—, at — o'clock —. M., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——— ———, one of the creditors of said bankrupt, filed in this court on the —— day of ———, A.D. 18—, in which it is alleged [*here insert the allegation of the petition*].

——— ———, *Clerk.*

[Form No. 54.]

Order for Removal of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Whereas ——— ———, of ———, did, on the —— day of ———, A.D. 18—, present his petition to this court, praying that for the reasons therein set forth, ——— ———, the trustee of the estate of said ——— ———, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ——— ——— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said ——— ——— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ——— ———, trustee [*or* out of the estate of the said ——— ———, subject to prior charges].

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A.D. 18—.

{ Seal of } { the court. }

——— ———,
Clerk.

[Form No. 55.]

Order for Choice of New Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A.D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of ——— ———, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ———, in ———, in said district, on the —— day of ———, A.D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

——— ———,
Referee in Bankruptcy.

[Form No. 56.]

Certificate by Referee to Judge.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

I, ——— ———, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ———, the —— day of ———, A.D. 18—.

——— ———,
Referee in Bankruptcy.

[Form No. 57.]

Bankrupt's Petition for Discharge.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the District of ———.

——— ———, of ———, in the county of ———, and State of ———, in said district, respectfully represents that on the —— day of ———, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have

a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ———, A.D. 189—.

——— ———, *Bankrupt.*

ORDER OF NOTICE THEREON.

District of ———, ss:

On this —— day of ———, A.D. 189—, on reading the foregoing petition, it is —

Ordered by the court, that a hearing be had upon the same on the —— day of ———, A.D. 189—, before said court, at ———, in said district, at — o'clock in the —— noon; and that notice thereof be published in ——— ———, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A.D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

—— hereby depose, on oath, that the foregoing order was published in the ——— ——— on the following ——— days, viz.:

On the —— day of ——— and on the —— day of ———, in the year 189—.

———— ————.

District of ———.

———— ————, 189—.

Personally appeared ——— ———, and made oath that the foregoing statement by him subscribed is true.

Before me,

———— ————,

[*Official character.*]

I hereby certify that I have on this —— day of ———, A.D. 189—, sent by mail copies of the above order, as therein directed.

———— ————,

Clerk.

[Form No. 58.]

Specification of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

——— ———, of ———, in the county of ———, and State of ———, a party interested in the estate of said ——— ———, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

——— ——, *Creditor.*

[Form No. 59.]

Discharge of Bankrupt.

District Court of the United States,

——— District of ———.

Whereas, ——— ——— of ——— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said ——— ——— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ———, A.D. 189—, on which day the petition for adjudication was filed ——— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——— ———, judge of said district court, and the seal thereof this —— day of ———, A.D. 189—.

——— ———,

(Seal of the court)

Clerk.

[Form No. 60.]

Petition for Meeting to Consider Composition.

District Court of the United States for the ——— District of ———.

——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

The above-named bankrupt respectfully represent that a composition of ——— per cent upon all unsecured debts, not entitled to a priority ——— ——— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of ——— creditors whose claims are allowed.

Wherefore, he pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

——— ———,
Bankrupt.

[Form No. 61.]

Application for Confirmation of Composition.

In the District Court of the United States, for the —— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———.

At ———, in said district, on the —— day of ———, A.D. 189—, now comes ——— ———, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ——— dollars, has been deposited, subject to the order of the judge, in the ——— National Bank, of ———, a designated depository of money in bankruptcy cases.

Wherefore the said ——— ——— respectfully asks that the said composition may be confirmed by the court.

——— ———, *Bankrupt.*

[Form No. 62.]

Order Confirming Composition.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A.D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

[Form No. 63.]

Order of Distribution on Composition.

United States of America:

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to

pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A.D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

INDEX TO GENERAL ORDERS.

TABLE OF FORMS.

INDEX.

ADMIRALTY.

1. Where the stipulated compensation in a salvage contract is dependent upon success it may be made for a larger compensation than a *quantum meruit* and much more so when such success is to be achieved within a limited time; and such contract, after execution, will not be set aside simply because the compensation is excessive, unless shown to have been corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of important facts, in immediate danger to the ship, or under other circumstances amounting to compulsion, or when its enforcement would be contrary to equity and good conscience. *The Elfrida*, 186.
2. Many leading cases in this country and some in England, where salvage contracts have been set aside, and compensation awarded in proportion to the merits of the services, examined, and shown to establish (1) That the courts of both countries are in entire accord in holding that a contract of salvage, which the master has been corruptly or recklessly induced to sign, will be wholly disregarded; (2) that some of the American courts have also laid down the rule that all salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable, to which this court is unable to give its assent; (3) that while in England there has been some slight fluctuation of opinion, by the great weight of authority, and particularly of the more recent cases, it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside. *Ib.*
3. Where no circumstances exist which amount to a moral compulsion, such a contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth. *Ib.*
4. On the continent of Europe the courts appear to exercise a wider discretion, and to treat such contracts as of no effect if made when the vessel is in danger, but this court cannot accept this as expressing the true rule on the subject. *Ib.*

CONFLICT OF LAW.

CONSTITUTIONAL LAW.

A. CONSTITUTION OF THE UNITED STATES.

2. Under the legislation and contracts set forth in the opinion of the court in this case, the water power incidentally created by the erection and maintenance of the dam and canal for the purpose of navigation in Fox River is subject to control and appropriation by the United States, and the plaintiff in error is possessed of whatever rights to the use of this incidental water power could be granted by the United States. *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 58.
3. At what points in the dams and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. *Ib.*
4. The plaintiff's declaration, in a case pending in a *nisi prius* court in Virginia, set forth that he was the owner in fee of a lot of land fronting on Eighth street between Cary and Canal streets, in Richmond, on which were located two brick buildings, the first floor of which was used for store purposes and the second story as dwellings; that said property, previous to the obstruction of Eighth street, as hereinafter described, was very profitable as an investment, being continuously rented to good tenants, who promptly paid remunerative rents for the same; that on the 25th day of June, 1886, the city council of Richmond, by ordinance, authorized the Richmond and Alleghany Railway Company to obstruct for the distance of sixty feet (commencing at Canal street in the direction of Cary street) Eighth street, and by virtue of which said railway company wholly obstructed and occupied said street for said distance with its tracks, sheds, fences, etc., except to pedestrians, for whom said company was required to provide by overhead bridge and stairway approaches thereto. It further was averred that by means of this obstruction, so made by said company by authority of said city, travel along said street was arrested and the property rights of the petitioner, as an abutter upon said street, were not only substantially injured, but practically destroyed; that the city had no right under the Constitution and laws of the land to authorize the said railroad company to close said street or place obstructions therein without proper legal proceedings for that purpose and the making of just compensation to such abutting owners as might be injured by said action; that this unconstitutional and illegal action rendered said defendants liable to the petitioner, as trespassers on his property, for all damages that he had sustained not common to the public; that the obstructions were in themselves nuisances which the city was charged with the duty of abating and moving, and that every day's continuation of the same was a new offence. A general demurrer being entered, judgment was given for defendants. The plaintiff moved to set aside said judgment, solely on the ground that the act of the general assembly of Virginia, approved May 24, 1870, providing a charter for the city of Richmond, so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance,

CORPORATION.

COURT AND JURY.

CRIMINAL LAW.

CUSTOMS DUTIES.

See SMUGGLING.

DECOY LETTER.

See EVIDENCE, 2.

DISTRICT OF COLUMBIA.

1. In the provision in the 16th section of the act of May 20, 1870, c. 108, "to incorporate the Washington Market Company," that "the city government of Washington shall have the right to hold and use, under such rules and regulations as the said corporation may prescribe, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets as a market," etc., the words "the said corporation" refer to the city government of Washington, and not to the Market Company. *Washington Market Co.* v. *District of Columbia*, 361.
2. The correspondence between the Market Company and the city government respecting the use and improvement of this tract which is printed as a note to the statement of the case, creates no easement in the tract in favor of the Market Company; and the company recognized the fact that Congress might lawfully dispossess it from the use and occupancy of it. *Ib.*

EASEMENT.

See DISTRICT OF COLUMBIA, 2.

EQUITY.

See CONSTITUTIONAL LAW, A, 1;
JURISDICTION, A, 2;
TAX AND TAXATION, 1, 2, 3.

EVIDENCE.

1. The plaintiff in error, defendant below, a letter carrier, upon his trial charged with purloining a letter containing money, offered himself as a witness on his own behalf, denying that he had purloined the money. On cross-examination he said that he had enemies in the office, and named two persons. The Government called both as witnesses, and both denied that they bore ill will to him. Their evidence was objected to on the ground that the defendant's evidence on this point was collateral, brought out by cross-examination, and that the Government was bound by the answer. *Held*, that the evidence was admissible. *Scott* v. *United States*, 343.
2. A decoy letter, containing money, addressed to a fictitious person, mailed for the purpose of discovering the frauds of a letter carrier, is to be treated as a real letter, intended to be conveyed by the mail, within the meaning of the statutes on that subject. *Ib.*

FOX RIVER WATER POWER.

See CONSTITUTIONAL LAW, A, 2, 3.

FRAUD.

See COURT AND JURY.

HABEAS CORPUS.

INTERSTATE COMMERCE.

See USURY, 3.

JURISDICTION.

A. GENERALLY.

1. Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: (1) When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of *habeas corpus*. (2) When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Harkrader* v. *Wadley*, 148.
2. A court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused. *Ib.*

B. JURISDICTION OF THE SUPREME COURT.

1. No particular form of words or phrases in which a claim of Federal rights must be asserted in a state court has ever been declared necessary by this court; but it is sufficient, if it appears from the record that such rights were specially set up or claimed there in such way as to bring the subject to the attention of the state court. *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 58.
2. The facts in the record show that there is no merit in the several objections to the jurisdiction of this court taken by the appellee in this case. *Harkrader* v. *Wadley*, 148.
3. An answer by the defendant in an action in a state court brought to enforce a lien created by a reassessment of taxes upon its real estate, which sets up that the notice of the reassessment was insufficient, and that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the Fourteenth Amendment to the Constitution, raises a Federal question of which this court has jurisdiction. *Bellingham Bay &c. Railroad Co.* v. *New Whatcom*, 314.
4. As the laws of Kansas permit an amendment of the plaintiffs' plead-

all the real estate to his children and grandchildren. He died in 1860, and in 1872 his creditors took proceedings to set aside the conveyance and to subject his interest in the property to the payment of his debts. Their contention was sustained by this court in *Johnson* v. *Waters*, 111 U. S. 640. Then a receiver was appointed to take charge of both interests in all the property. The portion to which this suit relates was in the possession of Buckner, claiming under the conveyance made by Morgan in 1858. The receiver threatening to eject him, Buckner, in order to remain in possession, took a lease of the whole plantation from the receiver. In 1891 it was decided in *Mellen* v. *Buckner*, 139 U. S. 388, that one undivided half of the plantation belonged to Buckner, and that only the remaining half was subject to the debts of Morgan, and that if the heirs should not desire a severance of their portions, the whole should be sold and the proceeds divided in accordance with the decree. The sale was made two years later. Buckner paid the receiver rent for the whole plantation from 1884 to 1891, but paid nothing thereafter. This action was commenced by the receiver in a state court of Louisiana to recover from Buckner rent for one-half of the estate for 1891 and 1892, and one half of the taxes thereon for those years. Buckner in reply claimed the right to offset against the receiver's demand one half of the rent which he had paid to him between 1884 and 1891, and asked for judgment against the receiver for the surplus. The Supreme Court of Louisiana sustained the offset and reserved to Buckner the right to recover the surplus. *Held:* (1) That Buckner was entitled to set off against the rent unquestionably due for the undivided half of the plantation for 1891 and 1892 one half the amount paid by him for rent between 1884 and 1891; (2) that he was not precluded from obtaining the benefit of this right in the state courts by the fact that the receiver was an officer of the Federal court, or by any proceedings had in that court, as the receiver voluntarily went into the state court; (3) that the jurisdiction of the state court was clear, and its judgment is affirmed. *Grant* v. *Buckner*, 232.

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW, A, 1, 11, 12, 13.

NATIONAL BANK.

A national bank which, being authorized by the owner of notes in its possession to sell them to a third party, purchases them itself and converts them to its own use, is liable to their owner for their value, as for a conversion, even though it was not within its power to sell them as the owner's agent. *First National Bank of Grand Forks* v. *Anderson*, 573.

PATENT FOR INVENTION.

1. An appeal to the Court of Appeals of the District of Columbia from the decision of the Commissioner of Patents in an interference controversy presents all the features of a civil case, a plaintiff, a defendant and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final, so far as the particular action of the Patent Office is concerned; and such judgment is none the less a judgment because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution. *United States* v. *Duell*, 576.
2. In deciding whether a patent shall issue or not, the Commissioner of Patents acts on evidence, finds the facts, applies the law and decides questions affecting not only public, but private interests; and likewise as to reissues, or extension, or on interference between contesting claimants; in all of which he exercises judicial functions. *Ib.*
3. *Butterworth* v. *Hoe*, 112 U. S. 50, held to be directly in point, and the language on page 59 held to be also in point in which the court, speaking of that clause in Article 1, Section 8 of the Constitution, which confers upon Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," says: "The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved — that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law necessary to be applied in the settlement of this class of public and private rights have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions." *Ib.*

PRACTICE.

As there was no finding of facts by the court below, and no statement of facts in the nature of a special verdict, this court must assume that the judgment of the court below was justified by the evidence, and affirm the judgment of the Supreme Court. *Marshall* v. *Burtis*, 630.

PUBLIC LAND.

RAILROAD.

SMUGGLING.

STATUTE.

A. Construction of Statutes.

See Usury, 1, 2.

B. Statutes of the United States.

See Circuit Courts of Appeal, 1, 2;
Claims against the United States;
Constitutional Law, 2, 16;
Criminal Law;
Customs Duties, 1, 3, 7, 8, 9;
District of Columbia, 1;
Jurisdiction, B, 5, 16;
Limitation, Statutes of;
Public Land, 1, 2;
Smuggling, 1, 2, 3, 5, 7;
Tax and Taxation, 4, 5, 9.

C. Statutes of States and Territories.

Alabama. *See* Constitutional Law, A, 15.
Kansas. *See* Jurisdiction, B, 4.
Missouri. *See* Constitutional Law, A, 16.
Ohio. *See* Constitutional Law, A, 13.
South Carolina. *See* Lease.
Tennessee. *See* Constitutional Law, 6, 10; Corporation, 9.
Virginia. *See* Constitutional Law, A, 4, 5.
Washington Territory. *See* Constitutional Law, A, 1.
West Virginia. *See* Tax and Taxation, 3.
Wisconsin. *See* Constitutional Law, A, 2.

TAX AND TAXATION.

TERRITORY.

TORT.

See CORPORATION;
EVIDENCE, 3, 4, 5, 6.

TROVER.

See PUBLIC LAND, 1.

USURY.

1. Usury is a statutory offence, and Federal courts, in dealing with such a question, must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts. *Missouri, Kansas and Texas Trust Co.* v. *Krumseig*, 351.
2. When a State thinks that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, as in this case, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity, or at law; and the local law, consisting of the applicable statutes, as construed by the Supreme Court of the State, furnishes the rule of decision. *Ib.*
3. These views are not applicable to cases arising out of interstate commerce where the policy to be enforced is Federal. *Ib.*
4. Whether the contract between the parties in this case was, as a contract of life insurance, void because the defendant had not complied with the statutes of Minnesota, has not been considered by the court. *Ib.*

WILL.

Mrs. Ruth died on the 16th of June, 1892, having on the first day of the same month and year executed both a will and a codicil. After revoking all previous wills and codicils and directing the payment of debts and funeral expenses, the will bequeathed all the real, personal or mixed property to the American Security and Trust Company for the benefit of a granddaughter, Sophia Yuengling Huston, during her natural life. On the death of the granddaughter the will provided that the trust should end, and that it should be the duty of the trustee to pay over to the Hospital of the University of Pennsylvania the sum of five thousand dollars for purposes stated, and to deliver all the "residue and remainder of the estate of whatever kind" to the Home for Incurables, to which corporation such residue was bestowed for a stated object. The codicil was as follows: I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament — I hereby revoke and annul the bequest therein made by me to the Home