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UNITED STATES REPORTS

VOLUME 177

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER, TERM 1899

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J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.

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

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PROPERTY OF UNITED STATES SENATE LIBRARY

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1899.

JELLENIK *v.* HURON COPPER MINING COMPANY.

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

No. 100. Argued and Submitted January 16, 1900.—Decided March 12, 1900.

A suit was brought in the Circuit Court of the United States for the Western District of Michigan by parties citizens of other States than Michigan against a Michigan mining corporation and certain individual defendants holding shares of stock in that corporation and being citizens residing in Massachusetts. The plaintiffs claimed that they were the real owners of certain shares of stock of the corporation the certificates of which were held by the Massachusetts defendants, and sought a decree removing the cloud upon their title to such shares and adjudging that they were entitled to them. *Held*,

1. That the defendants, citizens of Massachusetts, were necessary parties to the suit.
2. That they could be proceeded against in respect of the stock in question in the mode and for the limited purposes indicated in the eighth section of the act of Congress of March 3, 1875, 18 Stat. 470, c. 137, which authorized proceedings by publication against absent defendants in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought.

Statement of the Case.

3. That for the purposes of that act the stock held by the citizens of Massachusetts was to be deemed personal property "within the district" where the suit was brought. The certificates of stock were only evidence of the ownership of the shares, and the interest represented by the shares was held by the Company for the benefit of the true owner. As the habitation or domicil of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Michigan dismissing the bill of the plaintiffs, appellants here, for want of jurisdiction over some of the defendants who were held to be indispensable parties to the suit.

The case made by the bill is as follows: The plaintiffs are stockholders of the Huron Copper Mining Company and citizens of other States than Michigan. The Company is a Michigan corporation, the mines operated by it, all its other property, and its principal offices for business being at Houghton, Michigan, with a branch office at Boston, Massachusetts.

During the transactions complained of in the bill, the Board of Directors of the Company, whose members are the other defendants in this suit, were J. C. Watson, D. L. Demmon, Samuel L. Smith, H. J. Stevens and Johnson Vivian. Watson, Demmon and Stevens (the last-named having since died) were residents of Boston, Watson being President and Demmon Secretary and Treasurer of the Company. They had charge and control of the branch office in Boston. Smith resided at Detroit, Michigan, but was frequently in Boston. Vivian resided at Houghton, Michigan, and was for many years the general manager of the mining operations and the business of the Company at its mining location in Houghton County. Smith and Vivian disclaimed any connection with the alleged fraudulent transactions set forth in the bill, but were put upon their proof by the plaintiffs as to the matters stated therein.

In June, 1890, the Board of Directors made an assessment upon the capital stock of the Company of five dollars per share

payable on July 7th of that year. Notice of the assessment was given to the stockholders, accompanied by the statement that it would be sufficient to pay off all the indebtedness of the Company and leave a cash balance in its treasury of over thirty thousand dollars in addition to the unsold copper and other personal property of the Company.

It was alleged that upon receiving the amount of the assessment, two hundred thousand dollars, the Board of Directors, for the purpose of defrauding the plaintiffs and other stockholders, applied a portion of it to the payment of spurious debts of the Company, and wasted and misapplied another large portion, diverting it from the Treasury of the Company and from the purpose for which it was made, and applying it to the personal uses of the Directors and officers of the Company and their confederates.

On October 25, 1891, the Board of Directors made another assessment upon the stock of the Company of three dollars per share which aggregated one hundred and twenty thousand dollars. This assessment was made without the knowledge of the stockholders and at a time when, as appeared from the statement of the Board, there were sufficient assets of the Company exclusive of its mines and mining property to pay all its legal debts.

The bill charged that the Board of Directors or their representatives had disposed of the stock held by them before the making of the above assessments, and were the holders of none or at least a very small portion, except as they held stock purchased at a sale to be presently referred to as trustees for the plaintiffs and other stockholders, so that they had but a nominal, if any, interest in the Company; that they had so manipulated the assessments as to enable them to speculate in the stock of the Company to the detriment of the stockholders; that they had contracted fraudulent debts by means of false and illegal salaries, allowances and commissions to themselves, by making fraudulent contracts for the Company at extravagant prices, and by borrowing large sums of money for the Company at usurious interest, in which contracts and usurious loans the Directors and their confederates were interested as

contracting parties with the Company; that while acting as Directors and trustees for the stockholders they had betrayed their trust and mismanaged the affairs of the Company for their own profit and advantage; and that for many years they had continued the mining of copper at an apparent loss by reason of such fraudulent practices and mismanagement, and by false statements concealed the same from the stockholders.

On November 1, 1891, the plaintiff Jellenik, acting for himself and as attorney for several of the plaintiff stockholders, applied to Watson and Demmon for leave to examine the books of the Company for the purpose of determining the true state and condition of its affairs, but the demand was refused and for that reason Jellenik refused and advised his clients to refuse to pay the three dollar assessment.

On February 9, 1892, the assessment of three dollars not having been paid, a sale of the stock was made by order of the Directors at the office of the Company in Boston. The sale took place in the private office of the defendant Demmon, the Secretary and Treasurer of the Company. No one was present but the plaintiff Edwards and three other persons, besides the officers and Directors of the Company and their clerks. The Directors or their clerks did all the bidding on the stock, except the bids made for twenty shares, ten of which were purchased for each of the plaintiffs Dickey and Kennedy, trustees. One of the clerks in the office of the Company bid in 2725 shares, and Watson, the President of the Company, took 38,315 shares. The total number of shares sold was 41,060, or 1060 more than the Company possessed, its capital stock being 40,000 shares.

Notwithstanding the assessment of five dollars and the second assessment of three dollars, which were made upon notice to the plaintiffs and other stockholders that they would not only be ample to pay all the indebtedness of the Company but would leave its property free and clear with a large balance in the treasury, and notwithstanding the defendants Watson and Demmon in making the sale of the stock under the three dollar assessment required Dickey and Kennedy, trustees, and other stockholders not in conspiracy with the defendants, to pay the

full amount of the assessment on such sale, Watson and Demmon, the bill charged, either fraudulently sold the stock upon that sale to themselves individually or to their fellow conspirators for a mere pittance, without realizing the assessment thereon, or they realized the money and squandered it and allowed the indebtedness of the Company to be put in judgment in Houghton County, Michigan, with the fraudulent intent through and by that means to buy in and absorb the property and render valueless the stock of the plaintiffs.

In carrying out this scheme, it was alleged that the Directors permitted judgments to be taken against the Company for $180,230.08, of which amount $106,251.84 was a judgment by the defendant Demmon to himself, growing out of illegal transactions with himself as a Director and officer. All the judgments were obtained on the same day, December 30, 1891, by consent between the attorneys appearing for the Company and those for the judgment creditors, Demmon's judgment having been fraudulently procured by using his power and influence to prevent any investigation as to the honesty and legality of his claim.

All of the judgments, except the one procured by Demmon, were assigned to J. B. Sturgis, trustee, of Houghton, Michigan, and on May 7, 1892, the mining property of the Company was sold under the judgments so assigned to Sturgis and a certificate of sale given him by the sheriff of Houghton County. On August 21, 1893, the sheriff of that county, in pursuance of the certificate of sale, executed a sheriff's deed of the property to Sturgis. This deed was duly recorded August 24, 1893, and so far as the records showed, no transfer of title to the property had since been made by Sturgis.

It was alleged that the purpose of making the fraudulent assessment and pretended sale of stock was to exclude the plaintiffs and other stockholders from any right of inquiry into the affairs of the Company; that the purpose of the Directors and officers in causing the property of the Company to be seized and sold by legal process for spurious and fraudulent debts was to extinguish the title of the corporation and of its stockholders to the mining property and to vest the same in

the Directors and their confederates; and that the pretended sale of stock was made in defiance of the protest of the plaintiffs and other stockholders of the Company and upon notice given to the Directors, at the time and place of the sale of the stock, of the fraudulent character of the assessment and of the proposed sale, like notice being given to all purchasers before the making of the sale.

It was stated in the bill that on September 15, 1892, the plaintiffs filed in the court below a bill similar to the one herein. A plea and demurrer were interposed by Watson and upon a hearing had thereon by consent the court held that the bill was defective in its jurisdictional allegations, and declined to proceed further until one was filed having proper allegations and giving it jurisdiction to act.

The present bill contained this paragraph:

"Your orators allege that the shares of stock in the said defendant Company are personal property, and its location is where the Company is incorporated and nowhere else, and that the *locus in quo* of the stock of the defendant Company has been since its incorporation at Houghton County, Michigan, that being its principal office for business and place of incorporation, and this bill is filed to remove any incumbrances, lien or cloud upon the title of your orators in said personal property thus located caused by the fraudulent acts of the defendants, as herein alleged, and for such other and further relief as the nature of the case shall require."

The plaintiffs also averred that they filed their bill in their own behalf because the Company, acting fraudulently through its Board of Directors and controlled particularly by the defendants Watson and Demmon, refused them any information with regard to its affairs or to allow them to see the books or to procure a statement therefrom, and because there was no other mode of relief, as there were no agents of the Company authorized to act for the relief of stockholders except the defendants thus fraudulently conspiring to break down and ruin its stock.

The relief asked was that a receiver be appointed to take possession of all the property and assets of the Company, wind

up its business and make sale of its property; that the Directors and officers, their agents, servants, attorneys and representatives, be restrained and enjoined from in any manner intermeddling with the property and business of the Company, from levying upon, attaching, seizing by execution or selling, or causing to be levied upon, attached, seized by execution or sold, any of the property of the Company, and from prosecuting by any mesne or final process any claim or claims whatever against the Company, and also from cancelling any of the stock of the plaintiffs as set forth and described in the bill, and issuing new stock therefor to the pretended purchaser thereof under the pretended sales for delinquent assessment, and if such cancellation had been attempted by the defendants or any of them and new certificates issued therefor to the defendants or any of them or their confederates, that they be restrained from further transferring the same upon the books of the Company until the final order of the court; that an account might be taken under the direction of the court of the loss occasioned to the Company and its stockholders by means of the covin, breach of trust, mismanagement and neglect of duty and embezzlement of the Directors and their confederates, and of the profits made by the Directors and officers or any of them, and of their confederates or any of them, by means of such covin, deceit, fraud, unlawful confederacy, conspiracy and misappropriation of assets, and that the Directors and officers and every of them be ordered and decreed to pay over to such receiver or the court the entire sum or sums so ascertained; that the court might adjudge and decree that the pretended sale made on the 9th day of February, 1892, was a nullity and passed no title to any of the stock, that Watson and Demmon and their co-Directors and confederates be adjudged to hold the stock which they pretended to acquire at such sale in trust for the plaintiffs and other stockholders of the Company, and that the latter then held respectively in the Company the respective shares of stock which they held prior to the date of the sale, and that by the decree of the court any cloud upon the title of such stock of the plaintiffs might be removed therefrom; and that such other and further relief be granted as the

exigencies of the case might require and to the court should seem meet in the premises.

Such was the case made by the averments in the bill.

Mr. F. O. Clark for appellants.

Mr. T. L. Chadbourne for appellees.

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

Process was served upon the Huron Copper Mining Company and the other defendants residing in Michigan. Watson, Demmon and Smith, being non-residents, were proceeded against by publication, but they failed to appear. The Company appeared and pleaded to the jurisdiction of the court: 1. That Watson, Demmon and Smith were indispensable parties to the suit, but not inhabitants of the Western District of Michigan, and that no subpœna or process of any kind had been served upon them in the district, nor had they voluntarily appeared and submitted themselves to the jurisdiction of the court. 2. That the stock of the Huron Copper Mining Company belonging to the complainants was not personal property within the district.

The plea was sustained and the bill was dismissed without prejudice to the bringing of such further suit by the complainants as they might be advised.

The Circuit Court correctly held that the defendants Watson, Demmon and Smith were necessary parties to the controversy made by the bill. 82 Fed. Rep. 778. But could they not have been brought before the court in the mode and for the limited purposes indicated in the eighth section of the act of March 3, 1875, entitled "An act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of cause from State courts and for other purposes," which section provides:

"§ 8. That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable

lien upon or claim to, or *to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded

with to final judgment according to law." 18 Stat. 470, 472, c. 137.

That section was expressly saved from repeal by the fifth section of the act of March 3, 1887, 24 Stat. 552, 555, c. 373, as corrected by section 5 of the act of August 13, 1888, 25 Stat. 433, 436, c. 866, and is in full force. *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352.

Prior to the passage of the above act of March 3, 1875, the authority of a Circuit Court of the United States to make an order directing a defendant—who was not an inhabitant of nor found within the district and who did not voluntarily appear—to appear, plead, answer or demur, was restricted to suits in equity brought to enforce legal or equitable liens or claims against real or personal property within the district. Rev. Stat. § 738. But that act extended the authority of the court to a suit brought "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought."

One of the objects of the present suit was to remove an incumbrance or cloud upon the title to certain shares of the stock of a Michigan corporation. No question is made as to the jurisdiction of the court so far as it rests upon the diverse citizenship of the parties. The plaintiffs alleged that they were the equitable owners of that stock, although the legal title was in certain of the defendants. The relief asked was a decree establishing their rightful title and ownership; and in order that such a decree might be obtained the defendants referred to were ordered to appear, plead, answer or demur; but as they refused to do so, the Circuit Court decided that it could not proceed further. That court was of opinion that "the shares of stock in question are not personal property within the district within the purview of the statute of the United States authorizing the bringing in by publication of notice to non-resident defendants who assert some right or claim to the property which is the subject of suit." 82 Fed. Rep. 778, 779. The proper forum, the court said, for the litigation of the question involved would be in the State of which the defendants were citizens.

Opinion of the Court.

The question to be determined on this appeal is, whether the stock in question is personal property within the district in which the suit was brought. If it is, then the case is embraced by the act of 1875, c. 137, and the Circuit Court erred in dismissing the bill.

By the statutes of Michigan providing for the incorporation of companies for mining, smelting and manufacturing iron, copper, silver, coal and other ores or minerals, it is provided: "The stock of every such corporation shall be deemed personal property, and shall be transferred only on the books of the company in such form as the by-laws direct or as the directors shall prescribe; and such corporation shall at all times have a lien upon the stock of its members for all the debts due from them to such corporation." By the same statutes it is provided: "It shall be lawful for any corporation formed under the provisions of this act to conduct its mining and manufacturing business in whole or in part at any place or places in the United States (or any foreign country); and any such corporation shall be subject to the laws of this State in regard to corporations, so far as the same shall be applicable to corporations formed under this act." "It shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this State, and to hold any meeting of the stockholders or board of directors of such company at such office so provided for; but every such Company having its business office out of this State shall have an office for the transaction of business within this State, to be also designated in such articles of association." c. 266. "Any share or interest of a stockholder in any bank, insurance company, or any other joint stock company that is or may be incorporated under the authority of, or authorized to be created by any law of this State, may be taken in execution and sold in the following manner: The officer shall leave a copy of the execution certified by him with the clerk, treasurer or cashier of the company, if there be any such officer, and if not, then with any officer or person who has, at the time, the custody of the books and papers of the corporation; and the property shall be considered seized on execution when such copy is left."

"If the shares or interest of the judgment debtor shall have been attached in the suit in which the execution issued, the purchaser shall be entitled to all the dividends which shall have accrued after the levying of the attachment." c. 275. "In attaching real estate or any right or interest in land, it shall not be necessary that the officer should enter upon the land or be within view of it; and in attaching shares of stock, or the interest of a stockholder in any corporation organized under the laws of this State, the levy shall be made in the manner provided by law for the seizure of such property on execution." 1 and 2 Howells' Anno. Stat. Michigan, (1882) §§ 4094, 4097, 4105, 7697, 7698, 7701, 7993; 2 Compiled Laws, Mich. 1897, pp. 2197, 2200; 3 Ib. 3131–2, 3187.

These provisions make it clear that by the law of Michigan the shares of stock in the defendant Company are to be deemed personal property, transferable on the books of the Company; and that the share or interest of a stockholder may be taken in execution or reached by attachment, a copy of the execution or attachment being left by the officer with the clerk, treasurer or cashier of the Company. The authority of the State to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted. We need not discuss, in the light of the authorities, whether the shares of stock in the defendant Company may not be accurately described as chattels or choses in action, or property in the nature of choses in action. Chief Justice Shaw, in *Hutchins* v. *State Bank*, 12 Met. 421, 426, said: "If a share in a bank is not a *chose in action*, it is in the nature of a *chose in action*, and what is more to the purpose, it is personal property." The Court of Appeals of New York, speaking by Judge Comstock, held certificates of stock to be simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member. *Mechanics Bank* v. *New York & New Haven Railroad*, 3 Kernan, 627; Angell & Ames on Corp. § 560. It is sufficient for this case to say that the State under whose laws the Company came into existence has declared, as it lawfully might, that such stock is to be deemed personal prop-

erty. That is a rule which the Circuit Court of the United States sitting in Michigan should enforce as part of the law of the State in respect of corporations created by it. The stock held by the defendants residing outside of Michigan who refused to submit themselves to the jurisdiction of the Circuit Court being regarded as personal property, the act of 1875 must be held to embrace the present case, if the stock in question is "within the district" in which the suit was brought. Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the Company — such shareholders being made parties to the suit — to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicil of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another State, at which a book showing the transfers of stock may be kept.

It is suggested that the requirement in the act of 1875 that a copy of the order of publication "shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be," is inapplicable here, because no one in Michigan is alleged in the bill to have *possession* of the shares in question. But the bill does show that the property represented by the certificates of shares is held by a Michigan corporation which being subject personally to the jurisdiction of the court may be required by a final decree in a suit brought under the act of March 3, 1875 to cancel such

certificates held by persons outside of the State and regard the plaintiffs as the real owners of the property interest represented by them.

It is also contended that the words in the act of 1875, "when a part of said property shall be within another district but within the same State, said suit may be brought in either district in said State," indicate that the act had reference only to tangible personal property capable of being located in more than one district. This would be too narrow an interpretation of the statute. No reason can be suggested why suits involving the title to shares of the stock of a corporation or company should have been excluded from the operation of the statute. On the contrary, the statute contemplated that there might be cases involving the title to personal property not in the actual manual possession of some person; for the direction is that the order of the court be served upon the person or persons in possession or charge of the property, "if any there be." The corporation being brought into court by personal service of process in Michigan, and a copy of the order of court being served upon the defendants charged with wrongfully holding certificates of the stock in question, every interest involved in the issue as to the real ownership of the stock will be represented before the court. We think the Circuit Court may rightfully proceed under the act of 1875, for the purpose of determining such ownership, and that in dismissing the bill error was committed.

The decree is reversed and the cause is remanded with directions for such further proceedings as are consistent with this opinion and with law.

Mr. Justice Brown and Mr. Justice Shiras did not participate in the decision of this case.

THORP *v.* BONNIFIELD.

TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 153. Argued March 1, 1900. — Decided March 19, 1900.

When a defendant has, by his own action, reduced the judgment against him by a voluntary settlement and payment below the amount which is necessary in order to give this court jurisdiction to review it, the real matter in dispute is only the balance still remaining due on the judgment, and the right of review in this court is taken away.

The court, being satisfied that the amount in dispute in this case is less than the amount required by statute to give it jurisdiction, orders the writ dismissed for want of jurisdiction.

THE statement of the case will be found in the opinion of the court.

Mr. J. T. Ronald for plaintiff in error.

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

MR. JUSTICE PECKHAM delivered the opinion of the court.

This case has been transferred from the United States Circuit Court of Appeals for the Ninth Circuit, under and by virtue of an act of Congress, (30 St. 728,) providing for such transfer. The act is set forth in the margin.[1]

[1] That all cases, civil and criminal, filed on appeal from the District Court of the United States for the District of Alaska, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and pending on appeal therein, on and prior to the thirtieth day of December, 1897, of which the Supreme Court of the United States would have had jurisdiction under the then existing law, if a proper appeal had been taken thereto at the time said cases were filed on appeal in said Circuit Court of Appeals, be, and the same are, deemed and treated as regularly filed on appeal in the Supreme Court of the United States as of the date when filed in said Cir-

By the terms of this act it is to operate only upon those cases of which this court would have had jurisdiction under the law existing at the time the case was taken to the Circuit Court of Appeals, if a proper appeal had been taken to this court at the time the case was filed in the Circuit Court of Appeals. If this act be valid therefore, we must inquire whether the case was one over which this court would have had jurisdiction if a proper appeal had been taken.

The case was commenced in the United States District Court for the District of Alaska in April, 1895, for the purpose of recovering moneys alleged to be due under the terms of a contract for the leasing of certain mining properties, situated in that district. The plaintiffs (defendants in error) demanded judgment for $7231.25, besides costs of the action. The defendant (plaintiff in error) demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and leave given to answer, which the defendant failed to do within the time granted, and judgment was entered by default for the amount claimed in the complaint, with costs.

The defendant then moved to vacate and set aside the judgment, and that motion was denied, and he sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit. The defendants in error moved to dismiss the writ on the ground that the Circuit Court of Appeals had no jurisdiction.

The Circuit Court of Appeals certified the question to this court for the purpose of receiving its instruction upon the question of jurisdiction. This court answered the question in the negative, denying the jurisdiction of the Circuit Court of Ap-

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cuit Court of Appeals. The clerk of said Circuit Court of Appeals is directed to transmit to the Supreme Court of the United States, as soon as practicable, the records of such cases, and the clerk of said Supreme Court is directed to receive and file the same for hearing and determination in the Supreme Court of the United States when regularly reached on the docket, subject to any rules made or to be made by said court which may be applicable.

Approved July 8, 1898.

peals. 168 U. S. 703. The mandate from this court was duly issued, and the Circuit Court of Appeals in conformity therewith dismissed the writ of error, and on January 4, 1898, it issued its mandate to that effect, directed to the District Court of the United States for the District of Alaska, which was filed in the office of the clerk of that court on February 3, 1898, and in obedience to that mandate the writ of error was duly dismissed by the District Court.

On March 29, 1898, an execution upon the original judgment was issued from the District Court, directed to the United States marshal of the district, under which certain property of the defendant was sold and a return made by the marshal to the court, and on June 14, 1898, the sale was duly confirmed by the District Court.

It thus appears that nearly a month before the passage of the act of July 8, 1898, (*supra*,) the judgment of the District Court of Alaska had been carried into effect, an execution issued, the property sold, a report made of the sale to the court, and that sale confirmed.

The defendants in error made a motion in this court to dismiss the writ for want of jurisdiction. That motion was postponed by the court until the hearing of the case upon its merits, and upon the argument thereof the motion to dismiss was renewed upon the ground (among others) that the act of Congress, if applicable to cases such as this, was unconstitutional and void.

A further ground for dismissal was set up because, as alleged, it appeared from the record that the amount in dispute between the parties was less than the sum necessary to give jurisdiction to this court. This ground necessitates the statement of a few additional facts, and if it be well founded, it relieves us from a discussion of the constitutional question.

After the demurrer of the defendant to the plaintiffs' complaint had been overruled and leave given to answer, and the defendant made default, judgment was entered for the amount of the plaintiffs' claim. This was on January 25, 1896. By the complaint it appears that under the lease of the mine by the plaintiffs to the defendant Thorp, the latter agreed to mine, work and operate the premises, and after making certain payments,

etc., he was to retain for himself seven-sixteenths of the profits or net proceeds arising from the operation of the mine, and was to pay to the plaintiffs the remaining nine-sixteenths in the proportion of seven-sixteenths to the plaintiff Bonnifield and two-sixteenths to the plaintiff Heid.

Immediately after the entry of the judgment it appears by the affidavits in the case, presented for the purpose of setting the judgment aside, that the defendant and the plaintiff Bonnifield entered into negotiations in regard to the judgment, and Bonnifield became satisfied that it had been entered for more than was equitably due from the defendant, and accordingly upon the payment of a certain sum to him (much less than by the face of the judgment appeared to be due him) Bonnifield "made a complete settlement of all his matters and differences with the defendant, and received a full and complete settlement and satisfaction for his interest in the judgment obtained in the case," and Bonnifield thereupon "executed a satisfaction of all his right, title and claim in and to said judgment, to wit, seven-eights thereof." This satisfaction was given the defendant on the 28th of January, who filed the same in the clerk's office on the 10th day of February, 1896. After he had filed the satisfaction, and on the same day, the defendant filed his petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

The judgment in the case continued to stand on the face of the record at its original sum, $7231.25 recovery, and $33.55 costs. By the defendant's voluntary settlement with and payment to Bonnifield, one of the plaintiffs, the balance remaining unpaid was less than the amount necessary to give this court jurisdiction.

The plaintiff in error cites various cases to maintain the proposition that when the defendant in the case below brings it here for review the amount of the judgment or decree against him governs our jurisdiction, and, as in this case, the judgment is for more than seven thousand dollars, he maintains that this court has jurisdiction notwithstanding the payment and settlement above mentioned.

But those cases have no application when the defendant by his

own action has reduced the judgment by a voluntary settlement and payment below the amount which is necessary in order to give this court jurisdiction to review it. The real matter in dispute is in such case the balance still remaining due on the judgment. Otherwise he might voluntarily settle the controversy and pay the whole judgment, and then seek to review it. In this case it appears there was a "full, final and complete settlement of all matters and differences" between the defendant and plaintiff Bonnifield, and the latter then executed "a full and complete satisfaction of all his rights, title and claim in and to said judgment." And this was procured by the defendant's own voluntary act. Clearly there was no matter in dispute relative to that judgment after such voluntary settlement and payment beyond the sum remaining due thereon. Thus an event has intervened subsequently to the entry of the judgment, and one which owes its existence to the act of the defendant himself, which has taken away his right of review in this court. It is a compromise or settlement, *pro tanto*, between the parties; or it is like a case where, pending a suit concerning the validity of the assessment of a tax, the tax is paid; or the amount of the tax has been tendered and deposited in a bank which by statute had the same effect as actual payment and receipt of the money. *Dakota County* v. *Glidden*, 113 U. S. 222; *Little* v. *Bowers*, 134 U. S. 547; *California* v. *Railroad Company*, 149 U. S. 308. In such cases the writs of error will be dismissed.

The facts as to the settlement and payment appear here in the record, although they may be shown by other evidence, as the above cases hold.

It is urged that the plaintiff Bonnifield had no right under the circumstances to make the settlement and to satisfy the judgment to the extent which he did. But this does not answer the objection. As matter of fact he and the defendant had a full settlement, and he did satisfy the judgment at the request of the latter, and both defendants in error now join in a motion to dismiss, predicated upon that settlement and payment, and they both thus ratify the same and acknowledge its sufficiency. The plaintiff in error is in no position to deny the validity of the settlement and payment made at his own re-

quest and by himself, when its sufficiency is acknowledged by the other parties.

Being satisfied that the amount in dispute in this case is less than the amount required by statute to give us jurisdiction, and without expressing any opinion upon the other ground for the motion,

The writ must be dismissed for the want of jurisdiction, and it is so ordered.

QUACKENBUSH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 145. Argued February 1, 1900.—Decided March 19, 1900.

The act of February 16, 1897, c. 235, for the relief of Commander Quackenbush enacted "that the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy as of the date of August first, eighteen hundred and eighty-three, and to place him on the retired list of the Navy, as of the date of June first, eighteen hundred and ninety-five: *Provided*, That he shall receive no pay or emoluments except from the date of such reappointment." *Held*,

(1) That its only apparent office was to forbid the allowance of pay or emoluments from August 1, 1883, by limiting such allowance to the date of the reappointment, which, in that view, must be regarded as the date of appointment under the act;

(2) That it was remedial in its character, and should be construed as ratifying prior payments which the Government in its counter-claim was seeking to recover back.

THIS was an appeal from a judgment of the Court of Claims dismissing the petition of claimant and the counter-claim of defendants in the above entitled cause. 33 C. Cl. 355. The peti-

tion was filed December 11, 1897, and sought recovery for amounts alleged to be due from the Government "from the 1st day of August, 1883, until the first day of June, 1895, at the rate of $2300 per annum, being the leave or waiting orders pay as prescribed by law for the grade or rank of commander, and from the 1st day of June, 1895, to the 26th day of May, 1897, at the rate of $2625 per annum, being three-quarters of the sea pay as prescribed by law for the grade or rank of commander." The counter-claim averred that claimant was indebted to defendants "by reason of payments illegally made to him during the period from June 9, 1874, up to and including March 31, 1881, when the claimant was not in the naval service of the United States."

The facts were in substance as follows: Claimant was duly and legally commissioned a commander in the Navy of the United States by and with the advice and consent of the Senate on the 2d day of January, 1872, to take rank from the 25th day of May, 1871. Thereafter in the month of February, 1874, certain charges were filed against claimant before the Navy Department, and a court martial was duly organized to try the same, by which, after hearing, and in that month, claimant was sentenced to be dismissed from the naval service of the United States. This sentence was approved by the President, and the Secretary of the Navy, June 9, 1874, addressed a letter to the claimant at Boston, Massachusetts, informing him of the sentence, its approval, and that from that day claimant would "cease to be an officer of the Navy." On June 12, the Secretary of the Navy addressed a letter to "Commander John N. Quackenbush, U. S. Navy," requesting him to "return to the Department the order dismissing you from the Navy." Both these letters were delivered to claimant on one and the same day, to wit, on or about June 15, 1874. In obedience to the order of June 12, claimant returned the letter of dismissal.

December 8, 1874, the Secretary of the Navy officially addressed a letter to claimant, in which, after setting forth the finding of the court martial and the sentence, the Secretary said: "This sentence was, on the 9th day of June, 1874, mitigated to suspension from rank and duty on furlough pay for six

years, the suspension to date from that day." December 13, 1877, the Secretary of the Navy transmitted to the Attorney General of the United States a statement of the facts in the case, embodying the correspondence, and requested his advice thereon. In answer, the Attorney General, March 16, 1878, 15 Op. Atty. Gen. 463, advised the Secretary that the claimant remained an officer in the Navy.

In that correspondence the date of the President's approval of the sentence was given as June 5, 1874, but the Attorney General held that the letter of the Secretary of December 8, 1874, was satisfactory proof of the mitigation of the sentence by the President on June 9, and that it was competent for him to grant commutation on that day.

Section 1363 of the Revised Statutes provided that "there shall be allowed on the active list of the line officers of the Navy . . . ninety commanders . . . ;" which number was, by the act of August 5, 1882, 22 Stat. 284, 286, c. 391, reduced to eighty-five.

June 10, 1874, the President sent to the Senate the name of W. S. Schley to be commander in the Navy, "vice Quackenbush, dismissed," and the nomination was duly confirmed June 12, 1874. The records of the Navy Department show that there were ninety commanders borne on the active list of the Navy from the date of the appointment of W. S. Schley to August 5, 1882, when the number was reduced by law, except during the early part of the year 1879, when the list was temporarily increased to ninety-one by Congress.

After Schley's appointment, as Quackenbush was still on the Register, the Secretary of the Navy, when his attention was called to the matter, directed that no nomination should be made to the next succeeding vacancy, and this recommendation was complied with, no appointment being made to the position subsequently becoming vacant by the retirement of Commodore Morris.

The Court of Claims found that pursuant to the commuted sentence and by virtue thereof, claimant was placed under suspension, on furlough pay, and was borne upon the official printed Navy Register as a commander in the Navy "under suspension,"

from the year 1874 up to and including the year 1880, when the sentence expired, and from and after the date of such expiration he was borne on said Register as a commander of the Navy on waiting orders until the publication of the Register for 1883, when his name was omitted and dropped from the same. "During the whole of said period he retained his proper and legal place on the official list of commanders in the Navy, and was advanced in numbers from year to year, as promotions of his seniors in said grade occurred, in the same manner and in all respects in the regular course, as other officers in his said grade and rank were advanced."

He was paid as on furlough for six years, and thereafter, from June 9, 1880, to March 31, 1881, was taken, by direction, on the rolls of the paymaster at the Navy Yard at Boston, Massachusetts, and paid as on "waiting orders."

On the thirtieth of March, 1881, the judgment of this court was announced in *Blake* v. *United States*, 103 U. S. 227. It was there ruled that the President has the power to supersede and remove an officer of the Army or the Navy by the appointment, by and with the advice and consent of the Senate, of his successor. What direction, if any, was given at the time, in view of this decision, did not appear; but, at all events, from March 31, 1881, until May 26, 1897, claimant received no pay, allowances or emoluments of any kind.

In April, 1882, the views of the Secretary of the Navy were requested by the chairman of the Committee on Naval Affairs in the House of Representatives in respect of the propriety of the passage of a pending bill "to confirm the status of John N. Quackenbush, a commander in the United States Navy," and the Secretary responded that it appeared to have been the intention of the President in exercising clemency in the case of Commander Quackenbush that he should be retained in the service, and that it seemed just, in view of all the circumstances, that he should be entitled to the benefit of that clemency.

The following entry appears opposite claimant's name on one of the records of the Navy Department: "208. John N. Quackenbush left off the register published 1st August, 1883, by direction of the Secretary of the Navy; his action being based upon a decision of the Supreme Court."

December 6, 1883, the Secretary of the Navy designated to the President, D. W. Mullan, to be a commander in the Navy "vice John N. Quackenbush, no longer in the service;" and in that month the President sent to the Senate the nomination of said Mullan to be a commander in the Navy from the 3d day of July, 1882, "vice John N. Quackenbush, no longer in the service." The nomination was duly confirmed and Mullan commissioned.

Claimant filed a petition April 15, 1895, to the Secretary of the Navy asking that he be restored to his proper position on the list of naval officers, but the Secretary declined to grant any relief, holding that the matter of his rights was *res judicata* under the action taken by his predecessor. In May, 1895, claimant exhibited a petition in the Supreme Court of the District of Columbia praying that a writ of mandamus issue to the Secretary of the Navy requiring him to put claimant's name back on the list of naval officers, which was dismissed February 11, 1896.

Bills for the relief of Commander Quackenbush were introduced in Congress from 1882 to 1897, and many reports made thereon.

February 16, 1897, an act entitled "An act for the relief of John N. Quackenbush, late a commander in the United States Navy," became a law without the approval of the President. 29 Stat. 803, c. 235. This act read as follows:

"That the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy as of the date of August first, eighteen hundred and eighty-three, and to place him on the retired list of the Navy, as of the date of June first, eighteen hundred and ninety-five:

Provided, That he shall receive no pay or emoluments except from the date of such reappointment."

In May, 1897, in accordance with the terms of the act, the President nominated claimant to the Senate to be a commander on the retired list of the Navy, and the nomination was confirmed. The claimant took the prescribed oath on May 26, 1897, since which last mentioned date he has been paid three-quarters of the sea pay of a commander in the Navy on the active list. Claimant reached the age of sixty-two on May 31, 1895.

Mr. John Paul Jones and *Mr. Richard R. Beall* for appellant.

Mr. Assistant Attorney Walker for the United States. *Mr. Assistant Attorney General Pradt* was on his brief.

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

In *Blake* v. *United States*, 103 U. S. 227, it was held that the President has power, by and with the advice and consent of the Senate, to displace an officer in the army or navy by the appointment of another person in his place, and that when that has been done he cannot again become an officer except upon a new appointment with like advice and consent. The ruling has been repeatedly affirmed and followed. *Keyes* v. *United States*, 109 U. S. 336; *Mullan* v. *United States*, 140 U. S. 240. And see *Parsons* v. *United States*, 167 U. S. 324.

When through mistake, or misapprehension, or for any other reason, injustice has been done, Congress has the power to accord relief, but the courts cannot of their own motion revise the grounds of action taken in the constitutional exercise of executive power.

Claimant is a commander in the United States Navy on the retired list by virtue of his appointment and retirement under the act of February 16, 1897. This suit was brought to recover pay as on leave or waiting orders from August 1, 1883, to June 1,

1895, when claimant reached the age of sixty-two years, and pay as a retired officer from June 1, 1895, to May 26, 1897, when he took the prescribed oath on his appointment; and if he is entitled to the amount sued for, it is by reason of the act and not otherwise.

The act described claimant in title and context as "late a commander in the United States Navy;" suspended as to him "the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States Naval service;" and authorized the President to appoint him to the same grade and rank as of the date of August 1, 1883, and to place him on the retired list as of the date of June 1, 1895.

Congress thereby declared that claimant had been prior to August 1, 1883, but was not then, a commander, and that, in order to enable him to be appointed to that grade and rank, it was necessary to suspend the act of August 5, 1882, which limited the number of commanders on the active list, and also forbade promotion or increase of pay in the retired list. 22 Stat. 284, c. 391.

If the act had contained nothing more, the effect of the appointment would have been, in addition to fixing claimant's status as to grade and rank as of August 1, 1883, to entitle him to pay from that date, but not to pay prior thereto, as by the terms of the act he was not a commander until appointed thereunder. The act did not stop there, however, but a proviso was added which read: "*Provided*, That he shall receive no pay or emoluments except from the date of such reappointment."

Provisos are commonly used to limit, restrain or otherwise modify the language of the enacting clause, and that was the manifest purpose of this proviso. But it was not needed to limit the effect of the act prior to August 1, 1883, or to enlarge its effect after that date. Its only apparent office was to forbid the allowance of pay or emoluments from August 1, 1883, by limiting such allowance to "the date of such reappointment," which in that view must be regarded as the date of appointment under the act.

This result is in harmony with the language used. Claimant

had been a commander and had ceased to be such. He was again appointed, and that second appointment was a reappointment. The date of that reappointment was certainly when it was actually made, and to substitute the date to which the appointment related for the actual date would defeat the obvious object of the proviso, which was to narrow the effect of giving the reappointment a retroactive operation. It was allowed that effect as to grade and rank, but not as to current pay or emoluments between August 1, 1883, and the date of the reappointment. This fixed his relative position with reference to other officers in matters of privilege and precedence, and of command if detailed to active service in time of war. At the same time by referring the appointment to the prior date the retired pay was sensibly affected. If claimant had been appointed without any such reference and had been immediately retired, he would have been entitled to only one-half the sea pay of a commander under section 1588 of the Revised Statutes, for he would not have reached the age of sixty-two years while in the service; but as he was appointed as of August 1, 1883, he was put constructively in the service from that date and so, on being retired, became entitled to three-quarters of such sea pay; and this he is receiving.

Something was said in argument in respect of the commission, which is not set out in the findings, but whatever its terms, the conclusion remains unaffected. The appointment and the commission are distinct acts, and the terms of the commission cannot change the effect of the appointment as defined by the statute.

Assuming claimant to have been lawfully out of the service June, 1874, the Government preferred a counter-claim for the pay received by him from then to March 31, 1881. But the act of February 16, 1897, was remedial in its character, and although we cannot for that reason give to its terms any other than their obvious meaning, we think it should be construed as ratifying these prior payments.

Congress had all the facts before it and intended to award some measure of relief in view of the circumstances. It went so far and no farther, but it went far enough to enable us to

hold that it would be inconsistent with the object of the act to sustain any recovery back.

In short we agree with the Court of Claims in its conclusions on both branches of the case.

Judgment affirmed.

WATERS-PIERCE OIL COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 97. Argued January 8, 9, 1900. — Decided March 19, 1900.

It is well settled that a State has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it.

The statute of Texas of March 30, 1890, prohibiting foreign corporations, which violated the provisions of that act, from doing any business within the State imposed conditions which it was within the power of the State to impose; and this statute was not repealed by the act of April 30, 1895, c. 83.

THE Waters-Pierce Oil Company is a private corporation incorporated under the laws of Missouri, and its principal offices are situated in St. Louis.

It was incorporated to deal in naval stores, and to deal in and compound petroleum and other oils and their products, and to buy and sell the same in Missouri and other States. Its capital stock was originally one hundred thousand dollars, but was subsequently increased to four hundred thousand dollars.

On the 6th day of July, 1889, it filed in the office of the secretary of state of Texas, in accordance with the requirements of law, a certified copy of its articles of incorporation, and secured a permit to transact business in the State for the term of ten years.

By virtue of the permit the company engaged in business in the State, and while so engaged, it is claimed, violated the statutes of the State against illegal combinations in restraint of

competition in trade, (copies of the statutes are inserted in the margin,)[1] and thereby incurred a forfeiture of its permit to do business in the State.

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[1] SEC. 1. Be it enacted by the Legislature of the State of Texas, That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them for either, any or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State. Fifth—To make or enter into, or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or *quo warranto* proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis County, in the name of the State of Texas.

This suit is brought to enforce such forfeiture, and was tried in the district court of Travis County, Texas, before the court

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SEC. 5. That the provisions of chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by *quo warranto*, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders thereunder, or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

SEC. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions whether within or without the State.

SEC. 10. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis County, and it shall be the duty of the attorney general or the district or the county attorney to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

and a jury. A verdict was rendered against the company, upon which a judgment was duly entered. The judgment was affirmed by the Court of Civil Appeals, (19 Texas Civ. App. Rep. 1,) and this writ of error was sued out in due course.

SEC. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

SEC. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

Approved March 30, 1889. Acts of 1889, p. 141, c. 177.

The Act of 1895.

Chapter 83.—[H. B. No. 404.] An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act.

SEC. 1. Be it enacted by the Legislature of the State of Texas, That an act entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889, be so amended as to hereafter read as follows:

SEC. 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade, (or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.)

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article

The pleadings are very voluminous, alleging the grounds of action and the grounds of defence, with much elaboration and many repetitions.

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or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or *quo warranto* proceedings in Travis County, at Austin, or at the county seat of any county in the State where such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis County, in the name of the State of Texas.

SEC. 5. That the provisions of chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by *quo warranto*, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. If any person shall be or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

The basis of the action is an agreement which is set out in full in the complaint, made on the second day of January, 1882,

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5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations, shall be punished by fine of not less than fifty nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

SEC. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State.

SEC. 10. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or

between a great many firms and partnerships, individuals and corporations, owning and controlling a large amount of the money and capital invested in the production of petroleum and its products, and in their shipment and sale.

The parties to the agreement embraced three classes: (1) certain partnerships and corporations, of the number of eleven; (2) certain individuals, of the number of forty-four, who are enumerated; and (3) a portion of the stockholders and members of other corporations and limited partnerships, twenty-five being enumerated, one of which was the Waters-Pierce Oil Company. Other individuals, partnerships and corporations could after-

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where either of the offenders reside, or in Travis County, and it shall be the duty of the attorney general or the district or county attorney to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

SEC. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State; provided, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

SEC. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the State to recover penalties, or to affect the right of the State to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this State, or affect the right of the State to maintain prosecutions for violations thereof, under any law of this State relating to trusts, for acts heretofore done.

SEC. 14. Any court, officer or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury, may subpœna persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections about which he may testify fully and without reservation.

SEC. 15. All laws or parts of laws in conflict with this act are hereby repealed.

SEC. 16. Whereas, the people of this State are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule which requires that all bills shall be read on three several days, be suspended, and it is so enacted.

Approved, April 30, 1895.

wards join upon the request of the trustees provided for by the agreement.

It was mutually agreed that a corporation should be formed in Ohio, New York, Pennsylvania and New Jersey, or any existing corporation could be used, to mine, manufacture, refine and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto.

To the several corporations thus organized all the business, rights and stock of the parties to the agreement were to be transferred, and trust certificates issued in consideration thereof.

It is averred that the object of the parties in entering into said agreement and trust was to control and monopolize the petroleum industry in the United States and the several States thereof, and the business of manufacturing, refining, selling and transporting petroleum and its products, refined, illuminating and lubricating oils, and that they intended to and did create, make and effect a combination of their capital, skill and acts for such purposes and for the following purposes, to wit:

"1st. To create and carry out restrictions in trade in petroleum and its products, refined, illuminating and lubricating oil, in the United States, and in the domestic trade of the States thereof.

"2d. To increase the price of petroleum and its products, same being commercial commodities and of prime necessity to the people.

"3d. To prevent competition in the manufacture, sale and purchase of petroleum and its products.

"4th. To fix at a standard figure the price of petroleum and its products, whereby the price of the same to the public shall be controlled and established, petroleum and its products being commodities of merchandise, intended for use and sale in the State of Texas as well as other States.

"5th. For the purpose of agreeing, obligating and binding themselves not to sell, dispose of or transport petroleum and its said products below a common standard figure, and to keep the price of petroleum and its products at a fixed or graded figure, and establish and settle the price of petroleum and its products

between themselves and others, and to preclude a free and unrestricted competition among themselves and others in the sale of petroleum and its products, and for the purpose of pooling, combining and uniting any interest they should and did have in connection with the sale of petroleum and its products, that the prices of same might be affected."

That the trustees provided for in said agreement proceeded to execute it, and are still executing it, and for such purpose have divided the markets of the United States in various subdivisions, and one of them is composed of Southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory and a part of Louisiana.

That the means employed to effect the purpose of the agreement is to reduce prices below what is reasonable in order to destroy competition, and when it is destroyed raise them again above the market price. A member of the trust is indemnified against loss by the combined power and wealth of all of its parties.

That the Waters-Pierce Oil Company has become a party to said agreement through the control that the trustees acquired by a transfer of stock of the oil company to them, and that the company has taken no corporate action against the transfer of such stock or such control, but has acquiesced in both, and, "through its directors, officers and agents conforms its corporate action to the policy fixed by said nine trustees, . . . and pursues . . . and executes the purposes and objects of said trust agreement above set out in this State."

That in pursuance of the policy of said agreement it confines its business in the subdivision aforesaid, does not invade or transact business in any other; that no other party to the agreement transacts business in the territory allotted to and accepted by the Waters-Pierce Oil Company, and the latter adopts and pursues the methods of driving out and overcoming competition in the sale of oils that are adopted and pursued by the other members in the territory allotted to them; that in the market of Texas there is no competition between the Waters-Pierce Oil Company and such other parties; and that by reason of the facts stated the Waters-Pierce Oil Company has monopolized and still

monopolizes the trade in petroleum and its products in Texas, and performs the unlawful purpose of said trust agreements "in reference to the trade in said commodities which are of prime importance and necessity to the people of the State."

That since the 6th day of July, 1889, the oil company has made contracts, sometimes in writing and sometimes verbally, with merchants and others through its agents in this State, in consideration of a small rebate on the oil purchased, or for other considerations unknown to the plaintiff, whereby the said merchants have contracted not to buy any oil from any other person or corporation, but will "deal with and buy and sell oils obtained from said defendant company exclusively," and in some instances agreed with said company not to sell the oils so bought to any one buying from or dealing with any other person or corporation dealing in oils in competition with the defendant.

The names of some of the persons and merchants are given.

That about the year 1890 the defendant company entered into contracts with certain jobbers and merchants of the city of Brownsville, whereby they respectively agreed to buy all the oil needed in their respective businesses of the defendant company for various rebates on the box or gallon, and they were respectively to sell such oil to retail dealers at the invoice price fixed by the company, and various penalties were agreed to be paid to the company if oil should be purchased from any one else, and that business was done under said contracts until certain dates in the latter part of December, 1896.

That the company is seeking to renew all of said contracts, and is seeking to carry on its business in said city under the same.

That the Eagle Refining Company is a corporation legally incorporated in Ohio for the purpose of manufacturing, refining, compounding and dealing in all kinds of oils, greases and petroleum and its various products, and duly obtained a permit to do such business in the State of Texas on the 6th day of November, 1891, and began to transact such business in the State "in honest and sharp competition with the Waters-

Pierce Oil Company," and continued to do so up to the 13th day of October, 1894, when the two companies "entered into a certain combination and trust," the exact terms of which are unknown to petitioner, whereby the oil company secured the control of all the property, business and franchises of the Eagle Company, and the latter agreed to withdraw from doing any business in the State in competition with the oil company for fifteen years.

That since said date the oil company has been doing business in the name of the Eagle Company in apparent, but not real, competition with itself, and that said contract has affected the production of petroleum and has affected also the sale of its products.

It is also averred that prior to the year 1890 one C. W. Robinson was engaged in the oil business in competition with the oil company, and that some day in that year the company entered into an agreement with him by the terms of which the company secured the control and management of his business, although it is conducted in his name; that by the terms of the agreement he is to buy and sell exclusively the oils of the company, and the agreement is still in force.

That the contracts and agreements with the merchants aforesaid and with the Eagle Refining Company and said Robinson were for the purposes hereinbefore enumerated, and resulted in effecting such purposes.

That the oil company, since its permit to do business in the State, has abused its franchises and privileges; has monopolized the oil trade in the State; has unlawfully entered into the contracts mentioned above, and is engaged in making similar ones; has lowered the price of its oils against competing oils below a reasonable and fair market price; either has refused to sell or would sell only at an exorbitant figure to any person who dealt in competing oils; has pursued and carried out a system of threats and intimidations and bribery to prevent parties from buying or selling competing oils; has threatened those dealing in such oils with a ruinous reduction of price, has given rebates to buyers from it as an inducement not to patronize a competitor, has offered money or the pay-

ment of expenses incident thereto, to get and induce parties ordering competing oils to countermand the orders, and refuse to take the same after contracting therefor. That this is the general course of dealing pursued by the oil company, and when competitive oils are driven out of the market thereby it raises the price of oil far above the true and reasonable market value of the same.

That such course of dealing has resulted in the complete monopolization by the oil company with the oil trade of the State, and is still stifling and threatening legitimate competition to the great injury of the people of the State.

That by reason of the acts detailed the oil company has forfeited its right and permit to do business in the State.

To the petition of the State the oil company demurred and answered. In its demurrer it urged the repugnancy of the statutes of the 1889 and 1895 to the Fourteenth Amendment of the Constitution of the United States, and the insufficiency of the allegations of the petition as a ground of forfeiture of its permit to do business in the State. In its answer it denied generally and specifically those allegations, claimed the permit as a contract, and invoked the Constitution of the United States against its impairment by a subsequent law of the State; claimed to be engaged in interstate commerce, and denied the jurisdiction of the State to regulate it.

There was evidence submitted on the issues, but the court instructed the jury that the evidence was not sufficient to show that the oil company became a member of or entered into the Standard Oil Trust agreement. Also that the contracts with the Eagle Refining Company and with C. W. Robinson were not in violation of the laws of the State, and confined their consideration to their bearing upon the course of dealing of the company in the State.

The court also withdrew transactions of interstate commerce from the consideration of the jury, and submitted only those of local business.

Applying the facts of the case to the definitions of the statutes, the court instructed the jury as follows:

"Now, if you find from the evidence that the defendant com-

pany, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying and selling oils, as named and set out in plaintiff's petition, since July 6, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively for a specified time and from no other source, in consideration of rebates allowed them by defendant company, or for any other valuable consideration, or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all the oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, or if said defendant company, so acting since said date, made and entered into and carried out in this State a contract with any of the parties as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty, and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that said contracts had been made, consented to and ratified or carried out the same after they were made, then you are instructed that the defendant would be guilty of violating the laws against trusts of this State, and if you so find the facts to be as above stated you will return a verdict for the plaintiff against the defendant Waters-Pierce Oil Company."

Counsel for Parties.

The jury rendered a verdict against the defendant company, but in favor of the individual defendants, upon which the following judgment was entered against the company:

"It is therefore ordered, adjudged and decreed by the court that the defendant, the Waters-Pierce Oil Company, be, and is hereby, denied the right and prohibited from doing any business within this State, and that its permit to do business within this State, heretofore issued July 6, 1889, by the secretary of state of this State, be, and the same is hereby, cancelled and held for naught, and that said defendant, the Waters-Pierce Oil Company, its managers, superintendents, agents, servants and attorneys, be, and are hereby, perpetually enjoined and restrained from doing business within this State.

"Nothing herein shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State."

On appeal to the Court of Civil Appeals the judgment was affirmed, the court holding that the statutes were valid exercises of the police power of the State. It also held that the statute of 1889 was a condition of the permit of the Waters-Pierce Oil Company to do business in the State. A rehearing was denied. A writ of error to the Supreme Court of the State was denied, and the case was then brought here.

The assignments of error express in various ways the alleged discriminations of the statutes between persons and classes of persons, and the alleged deprivation of many persons of the right and liberty of contract, while permitting such right and liberty to others; the denial to foreign corporations of the right to do any business in the State, interstate or otherwise; the assumption by the State of the power to punish acts done out of the State, and authorizing a conviction of what are claimed to be criminal offences by a preponderance of proof.

Mr. George Clark and *Mr. John D. Johnson* for plaintiff in error. *Mr. D. C. Bolinger* was on their brief. *Mr. S. C. T. Dodd* filed a brief for same.

Mr. T. S. Smith for defendant in error. *Mr. M. M. Crane* and *Mr. T. A. Fuller* filed a brief for same.

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

Transactions of interstate commerce were withdrawn from the consideration of the jury and were also excepted from the judgment. The transactions of local commerce which were held by the state courts, trial and appellate, to be violations of the statutes consisted in contracts with certain merchants by which the plaintiff in error required them to buy oils exclusively from it, "and from no other source;" or buy oils exclusively from it and not to sell to any person handling competing oils; or to buy exclusively from it and to sell at a price fixed by it.

The statutes must be considered in reference to these contracts. In any other aspect they are not subject to our review on this record, except the power of the state court to restrict their regulation to local commerce, upon which a contention is raised. It is based on the following provision:

"Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the district court of Travis County in the name of the State of Texas."

The claim is, if we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82; *United States* v. *Harris*, 106 U. S. 629; *Baldwin* v. *Franks*, 120 U. S. 678, and some other cases are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and the court finding the meaning of the statutes plain, decided that it could not be changed by construction even to save the statutes from unconstitutionality. This was but an exercise of judicial interpretation.

The courts of Texas have like power of interpretation of the

statutes of Texas. What they say the statutes of that State mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348; *St. Louis, Iron Mountain, &c., Railroad* v. *Paul*, 173 U. S. 404.

We may return therefore to the propositions which were submitted to the jury.

They have been broadly discussed, and considerations have been presented which transcend them, and relate to grievances which do not affect plaintiff in error. We are confined to its grievance. *Clark* v. *Kansas City*, 176 U. S. 114; *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348.

What is it? It is said that the statutes of Texas limit its right to make contracts and take away the property or liberty assured by the Fourteenth Amendment of the Constitution of the United States. Besides, it is asserted that the statutes make many discriminations, between persons and classes of persons, and able arguments are built upon their alleged injustice and oppression. We are not called upon to answer those arguments or to condemn or vindicate the statutes on this record.

The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court.

A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.

Bank of Augusta v. *Earle*, 13 Pet. 519, involved the power of the Bank of Augusta, chartered by the State of Georgia, and invested by its charter with a function of dealing in bills of

exchange, to exercise that function in the State of Alabama. In passing on the question certain principles were declared which have never since been disturbed.

A contract of the corporation, it was declared, is the contract of the legal entity, and not of its individual members. Its rights are those given to it in that character, and not the rights which belong to its constituent citizens.

Its charter confers its powers and the means of executing them, and such powers and means can only be exercised in other States by the permission of the latter.

Chief Justice Taney said, delivering the opinion of the court, p. 587:

"The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court. In the case of *Head* v. *Providence Insurance Company*, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said: 'Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record.' In the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 636, the same principle was again decided by the court. 'A corporation,' said the court, 'is an artificial being, invisible, intangible and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the character of its creation confers upon it, either expressly or as incidental to its very existence.' And in the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, where the question in relation to the powers of corporations and their mode of action were very carefully considered, the court said: 'But whatever may be the implied powers of aggregate corporations,

by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute, must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself.' "

The power of the bank to deal in bills of exchange in the State of Alabama was sustained, but it was put upon the ground that neither the policy of the State nor its laws forbade it, and that the law of international comity which prevailed there sustained it.

In *Paul* v. *Virginia*, 8 Wall. 168, 181, the dependent and derivative rights of corporations were again declared. *Bank of Augusta* v. *Earle* was quoted from, and it was again decided that a corporation is the mere creation of local law, and can have no legal existence beyond the limits of the sovereignty where created, and the recognition of its existence in other States and the enforcement of its contracts made therein depend purely upon the comity of those States.

"Having no absolute right of recognition in other States, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And it was also decided that a corporation did not have the rights of its personal members, and could not invoke that provision of section 2, article 4, of the Constitution of the United States, which gave to the citizens of each State the privileges and immunities of citizens of the several States. See also *Pembina Mining Co.* v. *Penn*, 125 U. S. 181; *Ducat* v. *Chicago*, 10 Wall. 410. And it has since been held in *Blake* v. *McClung*, 172 U. S. 239, and in *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, that the prohibitive words of the Fourteenth Amendment have no broader application in that respect.

In *Blake* v. *McClung*, a Virginia corporation was denied the

right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of a British corporation in the hands of a Tennessee court.

In *Orient Insurance Co.* v. *Daggs*, the right of the company, a Connecticut corporation, to limit by contract its liability to the actual damages caused by fire, notwithstanding a provision in a statute of Missouri making the measure of damages in case of total loss the value of the property stated in the policy, was denied.

See also *Pembina Mining Co.* v. *Penn*, 125 U. S. 181.

In *Hooper* v. *California*, 155 U. S. 648, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the State. All preceding cases were cited, and it was assumed as settled "that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State." And the exception to the rule was stated to be "only cases where a corporation created by one State rests its right to enter another and engage in business therein upon the Federal nature of its business."

This exception was recognized in the case at bar and the business of the plaintiff in error of a Federal nature excluded from the operation of the judgment.

The pending case might be rested on *Hooper* v. *California*, simply as authority, and we have entered upon the reasoning upon which it was based, because its application to the contentions of the plaintiff in error is not properly estimated in the arguments of counsel.

Nor can the plaintiff in error claim an exemption from the principle on the ground that the permit of the company was a contract inviolable against subsequent legislation by the State. That contention was presented to the Court of Civil Appeals, and the court properly replied: "After the act of 1889 went into effect the State granted to appellant [plaintiff in error here] authority to engage in its business within the State for a

period of ten years. The act of 1889, as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. . . . The act in force when the appellant entered the State informed it that for a violation of its terms the permit to do business here would be forfeited. This provision of the law was as much a part of the obligation, and as binding upon the appellant, as if it had been expressly made part of the permit."

The statute of 1889, therefore, was a condition upon the plaintiff in error within the power of the State to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.

The statute was not repealed by the act of 1895. The only substantial addition made by the latter was to exclude from its provisions organizations of laborers, for the purpose of maintaining a standard of wages. The Court of Civil Appeals said of it, p. 18:

"If the clause in the act of 1895 which exempts from its operation labor organizations for the purpose of maintaining their wages would render that statute obnoxious to the Fourteenth Amendment to the Constitution, which we do not think the case, the entire act would be void, and could not operate as a repeal of the former law of 1889; and so that if it should be determined that this latter act was unconstitutional, the former act would be in force, and would not be subject to the objections urged against it, for the reasons stated by us in passing upon these objections, and therefore the State could maintain a case under this act."

In other words, as to that act the situation is this: It is either constitutional or unconstitutional. If it is constitutional, the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not affect the act of 1889, and that, as we have seen, imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the State to forfeiture.

Judgment affirmed.

Mr. Justice Harlan dissented.

IN RE GROSSMAYER, PETITIONER.

ORIGINAL.

No. 4. Submitted Febuary 26, 1900. — Decided March 26, 1900.

If the Circuit Court of the United States, after sufficient service on a defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute.

Under articles 1223 and 1224 of the Revised Statutes of Texas of 1895, an action cannot be maintained against a partnership, consisting of citizens of other States, by service upon an agent within the State.

THE statement of the case will be found in the opinion of the court.

Mr. Thomas Harvey Clark for Grossmayer.

Mr. William W. MacFarland opposing.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a petition for a writ of mandamus to the District Judge of the United States for the Eastern District of Texas, holding the Circuit Court of the United States for that district, to enter judgment by default for the petitioner in an action brought by him in that court.

The proceedings in that action, as appearing by the petition for mandamus, and by the judge's return to a rule heretofore issued by this court, were as follows: The petitioner, a citizen of the State of Texas, and a resident of Galveston in the Eastern District of Texas, brought an action in that court to recover damages in the sum of $50,000, against Robert G. Dun, a citizen of the State of New York, and Robert D. Douglas, a citizen of the State of New Jersey, alleging that the defendants carried on business in that district, and throughout the United States, as an association under the name of R. G. Dun and Company,

and praying for a summons to said R. G. Dun and Company, to be served upon John Fowler, alleged to be a resident of Galveston and the local agent of said R. G. Dun and Company. A summons was issued accordingly, and the marshal returned that he had served it upon Fowler as such local agent. The defendants having filed no plea, answer or demurrer in the action, the plaintiff moved for a judgment by default. The defendants then, appearing specially for the purpose, filed a plea to the jurisdiction of the court, because the defendants were not and never had been a corporation, but were private individuals, citizens of the States of New York and New Jersey respectively and not of the State of Texas; and in support of this plea filed an affidavit of Fowler to the truth of the facts therein stated. And the court thereupon entered the following order: "On this day came the plaintiff, by his attorney, and moved the court that judgment by default be entered against the defendant herein for the want of an appearance or answer, as required by law; and the said motion having been heard and argued before the court, and the court being sufficiently advised, it is considered and ordered by the court that the said motion be denied."

Two objections are made to the issue of a writ of mandamus: 1st. That, if the decision of the Circuit Court was erroneous, the remedy was by writ of error, and not by mandamus. 2d. That the Circuit Court had no jurisdiction of the action, for want of due service upon the defendants.

The objection to the form of remedy cannot be sustained. A writ of mandamus, indeed, cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. A final judgment of the Circuit Court of the United States for the defendant upon a plea to the jurisdiction cannot therefore be reviewed by writ of mandamus. But if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute. *Ex parte Schollenberger*, 96 U. S. 369; *Pennsylvania Co., petitioner*, 137 U. S. 451–453; *American Construction Co.* v. *Jacksonville &c.*,

Railway, 148 U. S. 372, 379; *Hohorst, petitioner*, 150 U. S. 653, 664. In *Goldey* v. *Morning News*, 156 U. S. 518, cited for the respondent, which was brought to this court by writ of error, the Circuit Court had entered a final judgment in favor of the defendant, setting aside the summons, and relieving the defendant from appearing to answer the complaint. But in the case now before us that court has done no more than to decline to enter a judgment in favor of the plaintiff. The plaintiff could not sue out a writ of error before a final judgment had been entered against him; and he could not compel the Circuit Court to proceed to final judgment, otherwise than by a writ of mandamus.

But the Circuit Court rightly held that it had no jurisdiction to enter judgment against the defendants, because there had been no lawful service of the summons upon them. It appears by the record, and is not now denied by the petitioner, that the defendants were a partnership. In the absence of local statute, no valid judgment can be rendered against the members of a partnership without service upon them. *D'Arcy* v. *Ketchum*, 11 How. 165. The Revised Statutes of Texas of 1895 contain the following provisions:

"Art. 1223. In any suit against a foreign private or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association or acting corporation or association.

"Art. 1224. In suits against partners, the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

It is argued, in behalf of the petitioner, that the defendants in this case were an "association," within the meaning of article 1223 of these statutes, and therefore service on their local agent within the State was sufficient. But upon reading that article in connection with article 1224, which immediately follows it, it is manifest that the words in the former section, "cor-

poration, joint stock company or association, or acting corporation or association," were not intended to include partnerships; and that the mode of service in actions against partnerships was regulated by the latter section, which requires service in such actions to be made upon one of the firm. As no such service had been made in the case before us, the Circuit Court had no jurisdiction to entertain the action, or to render judgment against the defendants.

Writ of mandamus denied.

FARMERS' LOAN AND TRUST COMPANY *v.* LAKE STREET ELEVATED RAILROAD CO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 108. Argued January 19, 1900. — Decided March 26, 1900.

A suit in equity is commenced by filing a bill of complaint; and this general rule prevails also by statute in Illinois.

As between the immediate parties in a proceeding *in rem* jurisdiction attaches when the bill is filed and the process has issued, and when that process is duly served, in accordance with the rules of practice of the court.

The possession of the *res* in case of conflict of jurisdiction vests the court which has first acquired jurisdiction with power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of coördinate jurisdiction from exercising a like power.

This rule is not restricted, in its application, to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, liquidate insolvent estates, and in suits of a similar nature, and it is applicable to the present case.

The Lake Street Elevated Railroad Company was incorporated under the laws of the State of Illinois in the month of August, 1892, with a capital stock of five million dollars, which was increased in the month of April, 1893, to ten millions of dol-

lars, consisting of one hundred thousand shares of the par value of one hundred dollars each.

On April 7, 1893, the company made and delivered a certain mortgage or trust deed to the American Trust and Savings Bank, a corporation of the State of Illinois, and to the Farmers' Loan and Trust Company, a corporation of the State of New York, as trustees, to secure the payment of bonds in the aggregate amount of six million five hundred thousand dollars. The said trust companies duly accepted said trust, and the mortgage was afterwards, on May 6, 1893, recorded in the recorder's office of Cook County, Illinois. The amount and number of said bonds was afterwards, in pursuance of provisions contained in the mortgage, increased to 7574 bonds of the par value of $1000 each, making the total mortgage indebtedness $7,574,000. The mortgage contained the usual provisions authorizing the trustees, in case of default in payment of the interest coupons for a period of six months, to declare the entire principal debt to have become due and payable, and to proceed by foreclosure or otherwise to enforce the terms of the mortgage.

On January 30, 1896, at ten o'clock and thirty-five minutes A.M., the Farmers' Loan and Trust Company, as a corporation of the State of New York, filed in the Circuit Court of the United States for the Northern District of Illinois a bill of complaint against the Lake Street Elevated Railroad Company, the Union Elevated Railroad Company, the Northwestern Elevated Railroad Company, the West Chicago Street Railroad Company and the American Trust and Savings Bank, all corporations organized under the laws of the State of Illinois.

The bill alleged that default had been made by the Lake Street Elevated Company in the payment of all interest coupons payable on the 1st day of July, 1895, and on the 1st day of January, 1896; that the Lake Street Elevated Railroad Company had become insolvent, and was unable to pay its debts and obligations; that a foreclosure suit was necessary, and pending the proceeding that it was expedient and necessary to have a receiver appointed. The bill further alleged

that the Union Elevated Railroad Company, the West Chicago Street Railroad Company and the Northwestern Elevated Railroad Company claimed to have acquired some interest, by lease or otherwise, in the mortgaged property, and that the American Trust and Savings Bank, named as co-trustee in the mortgage, had been requested to join with it as complainant in the bill of foreclosure, but had declined and refused so to do or to take any action in the premises, and was therefore made a party defendant. A subpœna was thereupon issued directed to the several defendants, commanding them to appear and answer on the first Monday of March next thereafter.

On the same day, January 30, 1896, shortly after the said bill had been filed and process had issued, the Lake Street Elevated Railroad Company filed in the Superior Court of Cook County, State of Illinois, a bill of complaint against the Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company.

The bill, after setting forth the facts attending the issue of the mortgage, alleged that at the time said mortgage was executed and delivered the Farmers' Loan and Trust Company, being a corporation under the laws of the State of New York, had not, and had not since, complied with the laws of the State of Illinois, which required a deposit with the auditor of public accounts for the benefit of the creditors of said company of the sum of two hundred thousand dollars in stocks of the United States or municipal bonds of the State of Illinois, or in mortgages on improved and productive real estate of such State, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon; that, at the time of the execution and delivery and acceptance of said trust under said mortgage, the Lake Street Company, the complainant, did not know that the Farmers' Loan and Trust Company had not complied with the laws of the State of Illinois; and that since the acceptance of said trust the Farmers' Loan and Trust Company had been doing business in the State of Illinois, and had appointed one William Burry as its agent to enforce compliance by the Lake Street Elevated Company with the trusts reposed

in the Farmers' Loan and Trust Company, under said mortgage or deed of trust, and that said Burry, as such agent, had acted and still was acting by virtue of the authority claimed to be vested in the Farmers' Loan and Trust Company under said mortgage.

This bill further alleged that the Lake Street Elevated Railroad Company had been unable to earn sufficient money in operating its railroad to pay the interest upon the bonded indebtedness secured by the said mortgage or deed of trust; that, notwithstanding such fact, one William Ziegler, of New York city, conspiring and confederating with various persons, and altogether representing 610 bonds of the total issue of 7574 bonds, made a demand upon the Farmers' Loan and Trust Company and the American Trust and Savings Bank that they proceed to foreclose said mortgage, and take possession under and by virtue of the powers contained in said mortgage and the authority vested in said trustees, or to file a bill to foreclose such mortgage; that the complainant, the Lake Street Elevated Railroad Company, filed on December 30, 1895, a bill in the Circuit Court of Cook County, Illinois, against said William Ziegler and others, seeking to enjoin them, and each of them, and the Farmers' Loan and Trust Company and the American Trust and Savings Bank, from instituting any proceedings to foreclose said mortgage, and, for reasons set forth, an injunction immediately and without notice was prayed for.

It appears that such an injunction was issued, but that subsequently said cause was, on petition of Ziegler and other bondholders, removed into the Circuit Court of the United States for the Northern District of Illinois.

The bill in the present case proceeded to allege that no other persons than Ziegler and those associated with him as holders of the 610 bonds were asking or demanding of the Farmers' Loan and Trust Company any action or proceeding, but notwithstanding it proposed and would file a bill to foreclose the said mortgage for failure to pay the interest upon the bonded indebtedness; that the holders of 6574 bonds, issued under said mortgage, had requested the trustees to take no action whatsoever under said mortgage or trust deed with reference to the

failure of said company to provide for or pay the interest due July 1, 1895, and January 1, 1896; that the American Trust and Savings Bank, in compliance with said request, declined and refused on January 28, 1896, to join with the Farmers' Loan and Trust Company in any proceedings whatsoever to enforce the provisions or conditions of said mortgage on account of the failure of the company to pay said interest.

The bill further alleged that it was the wish of the holders of over 6500 of said bonds that the Farmers' Loan and Trust Company should be removed from its position as trustee under said mortgage, first, for failure to comply with the laws of the State of Illinois, and, second, for assuming to act or take proceedings under said mortgage, contrary to the request of the holders of a majority of the bonds issued under said mortgage. Thereupon the bill proceeded to pray that a new trustee should be appointed by the court to act, under and by virtue of said mortgage, in place and stead of the Farmers' Loan and Trust Company; that an injunction *pendente lite* should be issued, restraining and enjoining said the Farmers' Loan and Trust Company from taking any proceedings or bringing or prosecuting any suit or suits, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, and that, upon final hearing, said injunction should be made perpetual; and for other and further relief. A writ of injunction was forthwith issued and served.

On January 31, 1896, the Farmers' Loan and Trust Company filed, in the Superior Court of Cook County, its petition to remove said cause into the Circuit Court of the United States. The petition alleged that the Farmers' Loan and Trust Company was a corporation organized under the laws of the State of New York, and a citizen thereof; that the Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company were corporations organized under the laws of the State of Illinois, and citizens thereof; that in said cause there were controversies between citizens of different States, which controversies could be fully determined as between them, and that said controversies were between the petitioner on the one part, and the Lake Street Elevated Railroad Company on the other, and were as follows:

1. A controversy concerning the right of the petitioner to act as trustee under the mortgage. 2. A controversy concerning the removal of the petitioner as trustee under said mortgage. 3. A controversy concerning the enjoining of the petitioner from taking any proceedings or bringing or prosecuting any suits, or acting under and by virtue of the terms, provisions and conditions of the mortgage.

The petition further alleged that if the controversy in the cause was one and inseparable, then such controversy was wholly between citizens of different States, and could be fully determined between them, and that said controversy was between the petitioner on the one part and the Lake Street Elevated Railroad Company on the other part, and that said other defendants, the American Trust and Savings Bank and the Northern Trust Company, were not proper or necessary parties in the cause.

The petition further alleged that on January 30, 1896, it had exhibited in the Circuit Court of the United States for the Northern District of Illinois its bill in chancery for a foreclosure of said mortgage, and in doing so was acting under and by virtue of the terms, provisions and conditions of said mortgage; that its said bill of complaint was filed prior to the commencement of this suit or of any notice thereof to the petitioner, or of any notice to the petitioner of the temporary injunction issued in this cause, and that the suit so commenced by the petitioner is still pending and undetermined; that the bringing of this suit and the issuing of said injunction tends to obstruct and impede the administration and jurisdiction of the said Circuit Court of the United States in the suit so commenced by the petitioner in said Circuit Court of the United States, and interferes with the property thereby brought into said Circuit Court, and that there is therefore involved in this suit a controversy arising under and by virtue of the laws of the United States, which controversy affects the jurisdiction of said Circuit Court of the United States in said cause so commenced therein by the petitioner.

The petition made profert of a bond in the penal sum of five hundred dollars, conditional for the entering in the Cir-

cuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that might be awarded if said Circuit Court of the United States should hold that this suit was wrongfully or improperly removed thereto.

The petitioner thereupon prayed the court to proceed no further in the cause, except to make an order of removal, as required by law, and to accept said surety and bond, and to cause the record therein to be removed to said Circuit Court of the United States, according to the statute in such case made and provided.

The Superior Court of Cook County having denied the removal, thereafter, on February 4, 1896, the Farmers' Loan and Trust Company procured an order from the Circuit Court of the United States giving leave to file a transcript of the record of this suit in the United States court, whereupon, on that day, such transcript of record was filed and the cause was docketed.

Thereafter motions were severally made by the Lake Street Elevated Railroad Company, the Northern Trust Company and the American Trust and Savings Bank, in the Circuit Court of the United States, for an order remanding the cause to the Superior Court of Cook County. These motions were accompanied by statements denying, among other things, that the suit involved controversies between citizens of different States, and alleging that the bond filed by the petitioner was insufficient in that said bond was not signed by the petitioning company, but by sureties only.

On March 16, 1896, after argument, the Circuit Court of the United States overruled and denied the motions to remand.

In February, 1896, the American Trust and Savings Bank, and on April 24, 1896, the Lake Street Elevated Railroad Company, filed, in the Circuit Court of the United States demurrers to the bill of foreclosure. On April 21, 1896, the Circuit Court, on motion and after argument, set aside the *ex parte* injunction that had been entered by the state court, after the bill of foreclosure had been filed in the Federal court; and thereupon an appeal was taken from this order, setting aside the injunction, to the Circuit Court of Appeals of the Seventh Circuit, which appeal

was, on January 9, 1897, overruled and dismissed. 77 Fed. Rep. 769.

On March 18, 1896, a motion was made in the state court to attach for contempt the attorney of the Farmers' Loan and Trust Company in disobeying the *ex parte* injunctional order. Thereupon the Farmers' Loan and Trust Company entered a special appearance in the state court, and moved to quash the service in the case; and on the same day, on a motion by the counsel of the Lake Street Elevated Company, the court entered an order finding that it had jurisdiction of the parties and the subject-matter, and ordering that the special appearance and motion by the Farmers' Loan and Trust Company should be stricken from the files as having been improperly and improvidently filed. The Farmers' Loan and Trust Company then applied for leave to enter a general appearance and for time to answer. Leave so to do was granted by the court, on condition that the answer be on or before March 25, 1896. Upon the coming in of the answer on that day the court appointed May 8, 1896, for a final hearing. The Farmers' Loan and Trust Company had leave to file an amended answer, in which, besides denying the several charges made against it in the bill, it was alleged that the state court did not have jurisdiction; that the case had been removed to the Circuit Court of the United States, and that, by reason of the action of that court in refusing, on motion by the Lake Street Elevated Railroad Company, to remand, the state court should not proceed with the case.

On May 28, 1896, the state court made its findings in favor of the Lake Street Elevated Railroad Company, the complainant, and on June 4, 1896, entered a final decree in the case.

By this decree it was decreed that the Farmers' Loan and Trust Company should be and was removed from its position as trustee, and it was further ordered that "the said defendant, the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they hereby are perpetually enjoined and restrained from taking any proceedings, or bringing or prosecuting any suit or suits, to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings

Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or trust deed."

It was further ordered that the American Trust and Savings Bank should, by an instrument in writing, appoint a trustee in place of the Farmers' Loan and Trust Company, and that the Farmers' Loan and Trust Company should execute an instrument of transfer to vest in such new trustee "all the property, privileges and rights" of the said Farmers' Loan and Trust Company under said trust deed.

In October, 1896, an appeal from this decree was taken to the Appellate Court for the First District of Illinois, and on February 9, 1897, that court affirmed the decree of the trial court. 68 Ill. App. 666.

On appeal to the Supreme Court of the State the decree of the Appellate Court was affirmed on June 7, 1898. 173 Ill. 439.

It was held by the state courts that the case was not properly removed to the Circuit Court of the United States for the reason that the bond filed with the petition for removal was not signed by the Farmers' Loan and Trust Company, the petitioner, but only by the sureties. Those courts likewise held that the Farmers' Loan and Trust Company was properly removed as trustee because of its non-compliance with the provision of the state statute, requiring foreign trust companies to make a deposit of securities with the state auditor.

On July 7, 1898, a writ of error from this court to the Supreme Court of Illinois was allowed.

Mr. John J. Herrick and *Mr. William Burry* for plaintiff in error. *Mr. Herbert B. Turner* was on their brief.

Mr. Clarence A. Knight and *Mr. T. A. Moran* for defendant in error. *Mr. Levy Mayer* was on their brief.

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

Whether the state courts erred in refusing to accept the peti-

tion and bond filed by the plaintiff in error, the Farmers' Loan and Trust Company, for removal of the cause to the Circuit Court of the United States, and whether the Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company, by appearing in the Circuit Court, by moving to remand, by demurring to the bill, after such motion had been overruled, and by appealing to the Circuit Court of Appeals, were estopped from proceeding in the state court, are questions which have been argued at length before us, but which, for reasons presently to be stated, we have not found it necessary to decide.

Apart from those questions, the principal matters in dispute are the legal competency of the Farmers' Loan and Trust Company to act as trustee under the mortgage, and whether, in view of the controversy between the two sets of bondholders in regard to the right and expediency of a foreclosure proceeding, the Farmers' Loan and Trust Company can proceed to enforce the provisions of the mortgage. And these are matters which are necessarily involved, and can be properly raised and determined in the Circuit Court of the United States whose jurisdiction had attached by the filing of the bill of foreclosure before the commencement of the suit in the state court.

The contention that the jurisdiction of the state court first attached because, although the suit therein was not commenced till after the commencement of the suit in the Federal court, the summons issued by the state court was served before the service of the writ of subpœna issued by the Federal court, is not well founded.

A suit in equity is commenced by filing a bill of complaint. Story's Equity Pleading, sec. 7, fourth edition.

Such is also the rule by statute in Illinois. Rev. Stats. Illinois, 1874, c. 22; *Hodgen* v. *Guttery*, 58 Illinois, 431.

It is true that in applying the doctrine of *lis pendens* to the case of a third person who is a *bona fide* purchaser, notice is held to begin from the date of service of the subpœna and not from the filing of the bill. *Miller* v. *Sherry*, 2 Wall. 237, 250; 2 Maddock's Ch. Pr. 325; *Haughwout* v. *Murphy*, 22 N. J. Eq. 536, 545; *Grant* v. *Bennett*, 96 Illinois, 513.

Opinion of the Court.

But here no question is presented relating to rights acquired by any third person after the commencement of the suit and before the service of process on the defendants. As between the immediate parties, in a proceeding *in rem*, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served, in accordance with the rules of practice of the court.

The defendants could not defeat jurisdiction thus acquired, and supplant the case, by bringing suit in another court and procuring an *ex parte* injunction seeking to restrain the service of process already issued.

As, then, the bill of foreclosure had been filed in the Circuit Court of the United States, and the jurisdiction of that court had thus attached before the commencement of the suit in the state court, it follows upon principle and authority that it was not competent for the State court to interfere by injunction or otherwise with the proceedings in the Federal court.

The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coördinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. *Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 How. 450; *Moran* v. *Sturges*, 154 U. S. 256; *Central Bank* v. *Stevens*, 169 U. S. 432; *Harkrader* v. *Wadley*, 172 U. S. 148.

We think that this salutary rule is applicable to the present case. The bill filed in the Federal court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding necessarily involves the right of the complainant trustee to act as such, and the determination of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings. These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court whose jurisdiction was first legally invoked to determine them.

Our conclusion is that the Superior Court of Cook County erred in its decree perpetually enjoining and restraining the Farmers' Loan and Trust Company, the plaintiff in error, from proceeding with or prosecuting the said foreclosure suit in the Circuit Court of the United States, and from acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of the said mortgage; that the Appellate Court of the First District of Illinois erred in affirming said decree, and that the Supreme Court of Illinois erred in affirming the judgment of the said Appellate Court.

Accordingly, the judgment of the Supreme Court of Illinois is reversed, and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

CARMICHAEL *v.* EBERLE.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 166. Submitted March 5, 1900. — Decided March 26, 1900.

In the light of the various orders of the court below, this court holds that a rehearing was not granted in this case, but that the motion for rehearing was permitted to be argued, and as that was heard before four of the judges of the court, and there was an equal division, it was denied; and, as the judgment of reversal was not a final judgment, the appeal must be dismissed.

THE statement of the case is in the opinion of the court.

Mr. William B. Childers for plaintiffs in error and appellants.

Mr. T. B. Catron for defendant in error and appellee.

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

This was an action in ejectment brought in the district court for the county of Socorro, in the Territory of New Mexico, which resulted in judgment against one of the defendants and in favor of the other defendants, whereupon Eberle, plaintiff below, carried the case on writ of error to the Supreme Court of the Territory.

At the July term, 1895, of that court, and on October 16, the following judgment was entered: "This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justice Laughlin dissenting, reversing the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by

the court that the judgment in this cause of the district court in and for the county of Socorro, whence this cause came into this court, be, and the same hereby is, reversed, and that this cause be, and the same hereby is, remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged by the court that the said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in this court expended, to be taxed, and that execution issue therefor."

December 17, 1895, defendants in error filed a motion for rehearing, pending which the court adjourned to court in course. At July term, 1896, and on August 11, this order was entered: "This cause coming on for hearing upon the motion of said defendants in error, heretofore filed herein, for a rehearing of said cause, the same is argued by H. L. Pickett, Esq., attorney for said defendants in error, and by T. B. Catron, Esq., attorney for said plaintiff in error, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement."

December 18, 1896, judgment was rendered as follows: "This cause having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, upon the motion of the said defendants in error for a rehearing of said cause granted herein at a former term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justices Laughlin and Bantz dissenting, reversing the judgment of the court below, and remanding said cause for a new trial for reasons stated in the opinion of the court on file herein. It is therefore considered and adjudged by the court that the judgment of the district court in this cause in and for the county of Socorro, whence this cause came into this court, be and the same is hereby reversed, and that this cause be and the same is hereby remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged that said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in

this court expended, to be taxed, and that execution issue therefor."

On the first day of February, 1897, the following motion was filed: "Now come the defendants in error in the above entitled cause and move the court to set aside the entry heretofore made in said cause on the 11th day of August, 1896, as the same appears upon page 388 of the records of said court in Record B, page 388, and to enter *nunc pro tunc* in place of said entry an order granting to the appellees in said cause a rehearing, and also that the court set aside the judgment of reversal in said cause on the 18th day of December, 1896, as the same appears upon page 464 of Record B of the minutes and records of said court, and enter in lieu thereof an order affirming the judgment of the court below, and for grounds of said motion the said appellees show to the court that a rehearing was granted in said cause, and said cause re-argued and taken under advisement by the court and afterwards decided by a divided court, two of the members sitting in said cause being in favor of reversal and two in favor of affirmation, which entry in legal effect results in the affirmation of the judgment of the court below."

This motion was overruled March 1, 1897, in these terms: "This cause having been submitted on motion to amend the record and make an entry *nunc pro tunc* granting the defendants in error a rehearing on a former day of this term, the court announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion. It is therefore considered and adjudged by the court that the motion to amend the record and to make an entry *nunc pro tunc* be, and the same hereby is, denied." Thereupon the case was brought to this court on writ of error and also on appeal.

The contention of plaintiff in error is that a rehearing was granted, and that, as the court was equally divided on such alleged rehearing, the judgment of the district court was affirmed. We are of opinion, however, that, in the light of the various orders of the Supreme Court, although that of December 18 was somewhat obscurely worded, a rehearing was not granted, but that the motion for rehearing was permitted to be argued, and as that was heard before four of the

judges of the court and there was an equal division, it was denied. Had this been otherwise, the court would not have unanimously overruled the motion to amend the record so as to make it appear that a rehearing had actually been granted.

Moreover counsel agree that under the rules of the court a rehearing could not be granted unless one of the justices who concurred in the judgment so desired, and a majority of the court so determined, and that this was also true of permission to argue such application. It is evident that oral argument was allowed, and it also appears that no justice who concurred in the judgment desired a rehearing, and that a majority of the court did not determine to grant it.

The judgment of reversal therefore stood, and

As it was not a final judgment, the writ of error and the appeal must be dismissed, and it is so ordered.

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 81. Argued December 13, 14, 15, 1899.—Decided March 26, 1900.

The Federal character of a suit must appear in the plaintiff's own statement of his claim, and where a defence has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action.

The treasury warrants in question in this case cannot be said upon the evidence to have violated the Constitution of the United States, or of the State of Texas.

A warrant, drawn by the authorities of a State in payment of an appropriation made by the legislature, payable upon presentation if there be funds in the treasury, and issued to an individual in payment of a debt of the State to him, cannot be properly called a bill of credit, or a treasury warrant intended to circulate as money.

A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists, and to which the members have sworn obedience, is not to be lightly indulged; and it cannot prop-

erly be held that the receipt of the warrants issued in pursuance of legislative authority in Texas, and in payment of an indebtedness due the State from the individual paying them, is an illegal transaction, and amounts in law to no payment whatever.

When a municipality contracts for a municipal improvement, which it is within its power to agree for, and engages to pay for the same in bonds which it is beyond its power to issue, and the work so contracted for is done, the municipality is responsible for it in money as it cannot pay in bonds.

Where the validity of a contract is attacked on the ground of its illegal purpose, that purpose must clearly appear, and it will not be inferred simply because the performance of the contract might result in an aid to an illegal transaction.

On the principles laid down in *Baldy* v. *Hunter*, 171 U. S. 388, the contract in this case cannot be held to be unlawful.

When the officers of the State, pursuant to its statutes, received warrants as payment, they acted for the State in carrying out an offer on its part which the State had legal capacity to make and to carry out; and the contract having been fully executed by the company and the State, neither party having chosen to refuse to perform its terms, neither party, as between themselves can thereafter act as if the contract had not been performed.

This proceeding was commenced by the State of Texas against the defendant, the Houston and Texas Central Railroad Company, (hereafter called the company,) to recover the amount due on certain bonds issued to the State, and to foreclose the lien which existed upon its property as security for the payment of such bonds. The company is the legal successor of the two companies which received the loans and gave their bonds, and no question of liability arises on that ground. Judgment was given in the trial court for the amount found due, and a lien was declared and a sale of the property of the company ordered. From this judgment the company appealed to the Court of Civil Appeals for the State, where it was modified, and then affirmed. The company brings the case here on writ of error.

The petition of the State by which the proceeding was commenced showed that the predecessors of the plaintiff in error borrowed money from the school fund of the State and gave their bonds therefor. These bonds were not paid according to their tenor and effect, and the legislature therefore, on August 13, 1870, passed a general act for the relief of railroad

companies indebted to the State, by which it was provided that if any company should on the first day of November, 1870, pay six months' interest on the aggregate amount of the loan, which, on the first day of May, 1870, was due from it to the State, and one per centum of the principal, and thereafter should make similar semi-annual payments, the State would not exact any other payments.

(What was the aggregate amount of the loans due on the first of May, 1870, from the two companies of which the present company is the successor, is the question in controversy, and its answer depends upon the validity of certain payments made by the companies to the State in treasury warrants during the war. Part of the discussion rests upon the meaning and effect of this act, and it is, therefore, given in full in the margin.)[1]

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[1] An act for the relief of railroad companies indebted to the State for loans from the Special School Fund.

Whereas, the political disturbances since the year 1860, by unsettling the business of the country, have largely contributed to prevent compliance on the part of railroad companies indebted to the State for loans from the special school fund, with their engagements respecting the payment of the principal and interest of said loans; and,

Whereas, it is desired to relieve said companies from the liability of their railroads to sale consequent upon their non-compliance as aforesaid: Therefore,

SEC. 1. Be it enacted by the Legislature of the State of Texas, That any railroad company indebted to the State for loans from the special school fund may avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State, on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment, in addition, on said first day of November of one per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest, and one per cent. on account of said sinking fund semi-annually thereafter, to wit, on the first day of May and November in each year.

SEC. 2. That if any railroad company shall fail to pay any amount required to be paid in section one of this act at the time designated thereby, or within ten days thereafter, then the whole debt of such company, principal and interest, shall become due, and the governor shall proceed without delay to cause the railroad of said company and its franchises and property, so

Statement of the Case.

Subsequently, semi-annual payments of interest and sinking fund were made by or on account of the Washington County Railroad Company, (one of the predecessors of the plaintiff in error,) up to and including the first of May, 1879, but no payment was made on November 1, 1879, or at any time thereafter. Similar payments were made by or on account of the Houston and Texas Central Railway Company (the other of such predecessors) up to and including the first day of May, 1893, but a portion only of the semi-annual interest claimed to be due in November, 1893, was paid, and nothing has been paid since November, 1, 1893. Judgment was prayed for the sums of money stated to be due with interest, for the foreclosure of the lien and for a sale of the property under execution, the proceeds to be applied to the payment of the sum due with interest, and for such other relief as might be necessary.

To this petition the defendant filed an answer, and therein among other things alleged that after the commencement of the civil war the various railroad companies were unable to fulfil their obligations to the State, and therefore the legislature of Texas, on the eleventh day of January, 1862, passed an act for their relief, extending the time of payment of interest and sinking fund amounts until the first of January, 1864.

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far as the lien or mortgage of the State covers the same, to be sold, the sale to be in all respects (when not in conflict with this act) conducted according to the provisions of the statute of August 13, A. D. 1856: *Provided, however*, That in case the governor should (for the protection of the school fund) deem it necessary, he may buy in any road to be sold under this act, in the name of the State: *Provided, further*, That if the whole principal and interest which may become due as aforesaid, and all costs attending the advertisements and proposed sale, shall be paid before the day of sale, then the proceedings for sale shall be stopped.

SEC. 3. That the State of Texas will not exact of any railroad company not hereafter in default in respect to any of the payments required in this act the payment of the principal of the debt of said company, excepting said payments on account of the sinking fund as aforesaid, but that any company may pay the same in full at any time on thirty days' notice to the governor, and that said lien or mortgage of the State shall not attach to any extension of its existing road hereafter constructed by any of said companies.

SEC. 4. That this act shall take effect from and after its passage.

Approved, August 13, 1870, p. 85, c. 63.

The state legislature, on December 16, 1863, passed the first act in relation to receiving treasury warrants from railroad companies, c. 57, which reads as follows:

"SEC. 1. Be it enacted by the Legislature of the State of Texas, That the comptroller of the State be, and he is hereby, authorized to receive from the railroad companies in this State who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due, provided the same is tendered in state bonds or in state treasury warrants, previous to the meeting of the next regular session of the state legislature.

"SEC. 2. That for all sums so paid in, the comptroller and treasurer shall issue to the special school fund the bonds of the State bearing 6 per cent. interest."

The legislature also passed another act on May 28, 1864, c. 16, which reads as follows:

"SEC. 1. Be it enacted by the Legislature of the State of Texas, That the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive state bonds or state treasury warrants at par for freight or passage at the prices or rates established by law.

"SEC. 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the State that any railroad company has failed or refused to receive the state bonds or state treasury warrants at par for freight or passage at the rates established by law, he is required to refuse to receive the state bonds or treasury warrants for the interest due by said railroad upon its bond.

"SEC. 3. That the president of any railroad in this State be, and is hereby, required to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act, under a penalty of $100, to be recovered for the benefit of the State by suit before any court of competent jurisdiction, upon information of any party."

On November 15, 1864, still another act was passed by the legislature, c. 16, which reads as follows:

"Be it enacted by the Legislature of the State of Texas, That the railroad companies of this State that are indebted

to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner) provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel.

"That all treasury warrants and bonds and coupons of the State, so received into the state treasury, shall be cancelled; and the comptroller shall issue the bonds of the State, bearing six per cent. interest to the special school fund for the amount so paid in; and this act take effect from its passage."

Upon the passage of these various acts and in reliance upon the agreement and obligation of the State, as evidenced thereby, the two companies acquired treasury warrants upon good consideration, and after the passage of the act of May, 1864, they received treasury warrants at par in payment of freight and passenger services rendered by them to the various people who demanded the same, and they subsequently paid treasury warrants to the comptroller of the State in payment of interest due on their indebtedness, (the amounts of such payments are set forth in the answer,) and upon such payment and receipt of the warrants by the comptroller and treasurer they were cancelled as authorized and required by the above mentioned act, and thereupon the comptroller and treasurer issued the bonds of the State bearing six per centum interest to the special school fund for the amount so paid by the railroad companies in treasury warrants. By reason of all which it was alleged that a valid and binding contract between the State and the railroad companies was made, that the payments in treasury warrants should be valid payments, at their par value, upon the various loans made by the State to the companies; and it was further alleged that the payments by treasury warrants had been received by the authorities of the State and cancelled, and a credit for the amount thereof as payment given to the companies on the books of the State, and that the transaction thereby became fully executed, and

the State could not thereafter dispute or question the validity of such payments or the right of the company to the credits given it by the State.

It was also alleged that after the passage of the act of August 13, 1870, and about the first of November, 1870, the comptroller of the State, with the concurrence and approval of the governor, wrongfully and without authority of law, recharged each of the railroad companies respectively upon the books of the comptroller's office with the several amounts theretofore paid by them respectively in treasury warrants, and there was demanded from the respective companies on the first day of November, 1870, six months' interest and one per centum for the sinking fund on the aggregate amount of the loan, as made up by the comptroller, after striking out the payments made by the company with the treasury warrants. These amounts were paid under protest, as being illegally demanded and resulting in a violation of the contract existing between the companies and the State. Payments on the same basis were continued semi-annually from that time, accompanied by a protest similar to the one first mentioned, until, as the company contends, the full amount due by it to the State had been paid, provided the payments in treasury warrants were credited as valid payments. Since that time the company has refused to make further payments. It claimed that the act of August 13, 1870, as construed by the state authorities, impaired the obligation of the contract existing between the State and itself, and thereupon it prayed for judgment.

To this pleading the plaintiff filed its first supplemental petition, and therein specially set up that the three several acts of the legislature of the State, mentioned in the defendant's answer as the authority for the payment upon the bonds of the company in treasury warrants, were unconstitutional and void, because (1) the warrants in which payments were authorized to be made were issued for the purpose of being circulated as money and were in violation of the state constitution; (2) also because they were bills of credit emitted by the State, and therefore in violation of section 10 of article 1 of the Constitution of the United States; and (3) because the acts under which the

warrants were authorized to be paid, together with other acts passed at or about the same time, plainly indicated that the treasury warrants and other obligations in which payments were authorized to be made, and which were made by the defendant, were issued in aid of the rebellion against the United States of America, and were, therefore, void.

Upon these pleadings a motion was made by the company to remove the case to the United States Circuit Court, on the ground that by the filing of the plaintiff's last above mentioned pleading it became apparent for the first time, from plaintiff's statement of its own claim, that the case was one arising under the Constitution or laws of the United States, and defendant was therefore entitled to a removal. The motion was denied, and although further pleadings were thereafter served on each side, they are not material to the matters discussed in the opinion.

The case was tried without a jury, there being no dispute as to the facts. The trial court held that the payments in treasury warrants were illegal because they were issued to circulate as money, in violation of the constitution of the State. It also held that they were issued, or at least some of them were issued, in direct aid of the rebellion and were therefore void; that the burden rested with the defendant to show, if it could, which, if any, of the warrants were valid. Judgment was given in favor of the State.

The company then appealed to the Court of Civil Appeals for the Third Supreme Judicial District of the State, where the judgment was modified so as to render no personal judgment against the company, and to foreclose the lien of the State only upon that part of the road which the findings showed was in existence on August 13, 1870, and as thus modified it was affirmed, solely on the ground that the warrants were issued in violation of the state constitution, as paper intended to circulate as money. A writ of error was applied for to the Supreme Court of Texas, and by that court refused. The company then brought the case here by writ of error to the Court of Civil Appeals. The defendant in error has made a motion to dismiss the writ on the ground that this court has no jurisdiction, for reasons stated in the opinion.

Mr. John G. Carlisle and *Mr. R. S. Lovett* for plaintiffs in error. *Mr. J. P. Blair* and *Mr. Maxwell Evarts* were on their brief.

Mr. Charles A. Culberson for defendants in error. *Mr. T. S. Smith* and *Mr. M. M. Crane* were on the briefs.

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

The motion to dismiss the writ of error must be denied. The case involves a Federal question under the contract clause of the Constitution.

The claim on the part of the defendant in error, the plaintiff below, is that the state court decided the case under the provisions of the state constitution only, and without reference to the act of 1870, which the plaintiff in error (the railroad company) alleges to be an impairment of the contract set up by it in the pleadings. Although the state court held that the payments in dispute were made by means of state treasury warrants issued to circulate as money, which were therefore void as in violation of the constitution of the State, and that the delivery of the warrants by the company amounted to no payment whatever, the question still remains whether by that decision any effect was given to the act of 1870. We think the judgment of the state court did give effect to that act.

It will be seen that the third section provides that the State will not exact of any railroad company, not thereafter in default, the payment of the principal of the debt, excepting as paid by the payments due the sinking fund under the provisions of the act; it also provides in the second section that if a railroad company failed to pay the amount required to be paid in section one, at the times designated thereby or within ten days thereafter, then the whole debt of such company, principal and interest, should become due, and the governor was directed to proceed as therein stated.

The first thing to be done in order to be able to carry out the provisions of the act was to ascertain what the aggregate amount

of the loan was, as that amount stood on the first day of May, 1870, because it was upon that amount that interest semi-annually was to be paid, and also one per centum of principal to the sinking fund. The authorities of the State determined what the aggregate amount was as it stood on the first day of May, 1870, and they arrived at that amount by refusing to recognize as valid any payment which the company had made in treasury warrants, and in that way they made the aggregate amount larger by those sums than that made by the company, which claimed to be credited with the amount of its payments in those warrants. Upon the aggregate amount, as determined by the authorities of the State, payment of the interest and for the sinking fund was demanded under the act. This demand was complied with by the company under protest, and accompanied by a claim on its part that the aggregate amount due on the loan was less than that stated by the authorities of the State by just the amount of the payments which the company had made in these treasury warrants. The protest was overruled and the claim denied, and thereafter the same protest and the same claim were made and the same action taken upon the part of the state authorities on each semi-annual occasion when payments were due and made. This lasted until the payments made by the company in cash and in the treasury warrants, upon the basis of the legality of the payments in such warrants, paid the indebtedness due from the company to the State, and from that time it has refused to make further payments. The State did not acknowledge that full payment had been made of that indebtedness, and thereupon commenced the present proceeding to recover the amount it claimed to be due and to foreclose its lien against the company. This it could not do under the statute of 1870 unless the company had defaulted in respect to the payments required under that act.

It is admitted that the company had not so defaulted, provided the payments in treasury warrants were duly credited to it, nor is it denied on the other hand that if those payments were not valid payments and ought not to be credited to the company, then it had defaulted in respect to the payments required by the act before the commencement of these proceed-

ings. When the state court, therefore, decided that these warrants were issued in violation of the constitution of the State, and that payments in them were in fact and in law no payments, and gave judgment accordingly, the effect of that decision was necessarily to hold that the company had defaulted in respect to the payments required under the act, and that the proceedings of the State to collect the sum due were permitted by the act, and effect was thus given to such act, although not one word was spoken in regard to it in the opinion delivered in the state court.

If the railroad company had not failed to pay any amount required to be paid in section one of the act, then the proceeding herein could not have been taken, by reason of the provision contained in the third section, and it is only after a failure to pay for ten days that the second section permits the proceedings to be taken to collect the amount. In giving judgment for the plaintiff, therefore, the court has in effect determined that the plaintiff was proceeding rightly under the act of 1870, and effect was thus given to its provisions.

The judgment of the Court of Civil Appeals gives an additional effect to the act, because by its judgment there is struck out the provision in the judgment of the trial court in regard to the lien of the State, and it has limited that lien in accordance with the third section of the act, so that it should not attach to any extension of the railroad which had been constructed since its passage. Although that modification may be a favor to the company, it nevertheless gives effect to the act. The company has not accepted that act so that it cannot draw in question its validity as construed by the state court, and hence no reason is shown for the granting of the motion to dismiss on that ground. The only acceptance consists in the payments made by the company to the State after its passage. The very first payment made by the company, under the act, namely, on the first day of November, 1870, was however made while asserting the claim that payments in treasury warrants were valid and should be acknowledged and credited to the company, and upon the refusal of the state authorities to admit those payments the company paid the interest and percentage on the larger sum de-

manded by the State, under protest, that such demand was illegal and improper, and every subsequent payment was made under the same protest by the company. Payments so made show no such acceptance of the act as to prevent the company from thereafter drawing in question its validity as construed by the state authorities.

Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below. *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116; *University* v. *People*, 99 U. S. 309; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *New Orleans Water Works Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *Central Land Company* v. *Laidley*, 159 U. S. 103, 109; *Bacon* v. *Texas*, 163 U. S. 207, 216; *McCullough* v. *Virginia*, 172 U. S. 102.

In this case we think we have shown that the judgment did give effect to subsequent legislation which, as construed by the state court, the company claims has impaired the obligation of the contract between itself and the State. The writ of error was therefore well brought.

The motion for the removal of this case to the United States Circuit Court was properly denied. The statement of the cause of action as contained in plaintiff's first petition did not show that the suit was one arising under the Constitution, laws or treaties of the United States.

The suit, as it appears upon the face of the petition of plaintiff, was upon the bonds given by the company for the loan of a portion of the school fund, and to foreclose the lien of the State upon the property of the company, and in the petition reference was made to the act of 1870 for the purpose of stating the amount due on the bonds for principal and interest. Nothing upon the face of this petition showed any fact upon which Federal jurisdiction could be based. The company answered by alleging certain payments in treasury warrants, which, if properly credited, would show that with the other payments that had been made there was nothing due the plaintiff on the bonds. As an answer to this defence the plaintiff set up the invalidity of the laws providing for payments in treasury warrants; that the warrants were issued by the State in violation of both the state and Federal Constitutions, and that the payments were therefore illegal and void. This was no part of the plaintiff's cause of action upon which suit was brought, and that cause of action did not in any way involve a question arising under the Constitution or laws of the United States. The defendant, therefore, made out no case for a removal to the United States Circuit Court. *Oregon &c. Railway Company* v. *Skottowe*, 162 U. S. 490, 494; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Galveston, Harrisburg &c. Railway* v. *Texas*, 170 U. S. 226, 235.

The result of the authorities is that the Federal character of the suit must appear in the plaintiff's own statement of his claim, and that where a defence has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action, but are merely a reply to the defence set up by the defendant. The review of the Federal question by this court is not thereby precluded, for it having been properly raised in the state court and decided against the contention of the party setting it up, this court may review it on error to the highest court of the State.

This brings us to the question what, if any, contract existed between the State and the company consequent upon the payments by the company to the comptroller of the State in the treasury warrants heretofore mentioned.

Opinion of the Court.

The company contends that by the passage of the acts of December 16, 1863, May 28, 1864, and November 16, 1864, and by its compliance with such acts and its payment of treasury warrants to the comptroller and their receipt by him and his cancellation thereof, there was an executed transaction, and an implied contract thereupon arose that such payments should remain and be regarded as valid and effectual, and that this implied contract was entitled to the protection of the Constitution of the United States, and its obligation could not be impaired by any subsequent act of the legislature of the State.

These acts have been already set forth. The company alleges that it fully complied with all of them, and that relying upon the offers thus made it paid to the State the warrants mentioned, which were received by the comptroller and cancelled, and bonds of the State for a like amount, bearing six per cent interest, were issued by him to the school fund.

The provision in the state constitution, which it is alleged was violated by the issuing of these warrants, is contained in the eighth section of article seven of the constitution of 1845, in which, among other things, it was provided, " . . . and in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money." The same provision is found in the constitution of Texas adopted in 1861.

It is contended on the part of the State that these warrants were issued in violation of that section of the constitution, inasmuch as they were treasury warrants intended to circulate as money.

It is stated in the opinion, delivered in the Court of Civil Appeals, "that the warrants of the State, issued during the period of the war after January 1, 1862, were intended to be used and circulated as money, and in this connection it is well to say that we are of the opinion, from all that it is shown by the record, together with various acts of the legislatures during that time, that the payments made in warrants by the railway companies upon the obligations sued upon were in warrants issued after the time we have declared they were intended to circulate as money."

The question whether the legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. Whether an act provides for the issuing of warrants that were intended to circulate as money is in reality a question of law arising upon the construction of the legislative act, and a finding by the court that warrants issued under and by virtue of certain acts of the legislature were issued with such intention is in the nature of a legal conclusion and not a finding of fact, and therefore it can be reviewed by this court.

To prove that these warrants were so issued, reference is made to various acts of the legislature, (in addition to those above mentioned under which the payments were made by the company,) among which are the following:

The act approved February 14, 1860, which provided that when an account was presented for payment for which an appropriation had been made it was the duty of the comptroller to audit it if legal and to issue his warrant for the amount, and if there were any money in the treasury to pay the demand the comptroller was directed to issue his warrant upon the treasurer for the amount with ten per centum per annum interest, and those warrants were to be signed by the governor and indorsed by the treasurer. The act further provided that these warrants should not circulate as money, but might be assigned.

It is said that the warrants issued under this act were few, and they are not classed among the warrants in which any payments were made to the school fund. It is, of course, not contended that these warrants were intended to circulate as money, but the act was repealed in 1862, and the repealing act, while containing other provisions, omitted the provision that the warrants to be issued should not circulate as money, and that omission is regarded by counsel as suggestive of the intention of the legislature that the warrants issued under the act of 1862 should so circulate.

By the second section of that act it was provided that the comptroller on presentation of any warrant bearing interest, as well as on presentation of any other legal claim for which an

appropriation had been made, should draw a warrant on the treasury for the amount, and payment was to be made if there were any money in the treasury; but, if not, the comptroller was authorized to issue one or more warrants for the amount that might be due and payable to the party entitled to payment, or bearer, "and said warrants shall be of such proportions of the claim as may be expressly required by the holder; provided, that not more than one tenth of the whole amount may be issued in warrants of one dollar each and the balance of five dollars or more each, and said warrants shall be indorsed by the treasurer, and every interest-bearing warrant that is superseded shall be cancelled by the comptroller."

The third section of the act provided that when the warrants were presented at the treasury and paid they should be cancelled, and should not be reissued.

By the act of January 11, 1862, it was provided that treasury warrants, not bearing interest, in addition to the other provisions made for their reception in payment for lands, (including certificates therefor,) should be receivable as money in the payment of office fees, including fees for patents and land dues payable in the general land office, taxes and all other dues to be collected for the State or in its name, with exceptions therein stated.

By another act passed on the same day, January 11, 1862, (General Laws, Texas, 1862, page 38,) the treasurer and every other officer of the State and of counties who had received as public money, among other things, the treasury warrants of the State, were directed to disburse or transfer the same as money, at par, if the person or persons entitled to have a disbursement or transfer would receive such warrants as money, and officers who were authorized to receive public money were authorized and directed to receive these warrants as money, except when expressly prohibited by some other law. Treasury warrants of the State received by the treasurer thereof were not to be reissued.

Also on December 16, 1863, another act was passed, c. 60, section 2 of which reads as follows:

"A tax of one half of one per cent. shall be levied and col-

lected in kind on all specie, treasury notes of the Confederate States of America, treasury warrants of the State of Texas, and bank notes, held or owned within this State, and all foreign bills of exchange and certificates of deposit, and other evidences of money upon deposit or secured beyond the limits of the State, owned by persons residing therein, shall be known as specie, and thereon shall be levied and collected a tax of one half of one per cent. in specie."

The court below has construed these various acts, in connection "with well-known matters of history relating thereto," and considering also the character of legislation during the period of the war, as establishing the intention of the legislature that the warrants should circulate as money. It is stated in the opinion that the legislation, providing the purpose for which they could be used and the small amounts for which they could be issued, and also the size, shape and color of the warrants, together with the history of the times and the well-known depleted condition of the treasury during that period, and the scarcity of existing, reliable and available circulating medium, as money, all showed that the purpose of the various acts of the legislature was to give to the warrants issued during that time as much as possible a standing and character as money. The court therefore held that the warrants were void, as issued in violation of the constitution of the State; the payment made in them was in law no payment; that no contract arose between the State and the company by reason of the use made of the warrants in surrendering them to the comptroller, and that, therefore, no defence to plaintiff's cause of action was established.

These warrants were issued pursuant to appropriations made by the legislature and in payment of debts existing at the time in favor of the individuals to whom they were delivered. They were payable at once, and if there had been funds of the State in the treasury they would have been immediately paid and cancelled. It was only because there was no money in the treasury that they were not paid. The State therefore provided that they might be received in payment of taxes or dues to the State, and that its officers might disburse them in pay-

ment of its debts to any person who would consent to receive them, but that when presented to the treasurer of the State and received by him they should be cancelled.

We have been referred to no act making provision for the size, shape or color of the paper to be used for the warrants, and such size, etc., cannot be regarded as evidence of any weight as to the intent on the part of the legislature that they should circulate as money, nor does the depleted condition of the treasury or the scarcity of a circulating medium necessarily or properly induce to that conclusion. That the size of the warrant, both as to amount and shape, might somewhat facilitate a holder, upon occasion, to discharge a debt, and in that way use it as money, is not at all sufficient or indeed any proper evidence of an unlawful intent on the part of the legislature. The act of December 16, 1863, is not the slightest evidence on the subject. It simply provided for taxing specie, treasury notes of the Confederate States, treasury warrants of the State, and bank notes held or owned in the State. It also provided a tax upon foreign bills of exchange and other evidences of money on deposit or secured beyond the limits of the State and owned by persons residing therein, and provided that they should be known as specie. The fact that treasury warrants were mixed up in such an act for the purpose of taxation with specie, bills of exchange, certificates of deposit, etc., has not the slightest tendency to prove the intent that the warrants should circulate as money.

It does not seem to us that this legislation shows that the warrants were thus issued within the meaning either of the state or the Federal Constitution. The only provision looking towards a treatment of the warrants in any manner as money is the direction to the State's own officers to receive them as payment for taxes and dues to the State, and to pay them as money to such persons as would receive them in payment of the indebtedness of the State to them.

The fact that a creditor of the State, willing to receive payment in these warrants, might demand that they should be issued to him in small sums, and not in one single warrant, does not bear with great force upon the intent of the legislature that the warrants should thereafter circulate as money. It does not

show that those warrants were intended to so circulate between individuals for the ordinary purposes of society and in the general transactions of business between citizens. For the State to say that the warrants should be transferred or disbursed by its own officers, as money, if the person entitled to a transfer or disbursement from the State would receive them as money, simply amounts to a declaration that the warrants should be issued to all such persons as would accept them in payment of the debts due them from the State. To encourage such willingness the provision was made that these warrants should be receivable as money, that is, as payment for certain debts due the State, as for taxes, etc. This use of the words "as money" has, in our judgment, no further significance, and has no force for the purpose of showing the intention of the legislature to have the warrants circulate generally as money and to form a circulating medium of that kind of paper.

It must not only be that they are capable of sometimes being used instead of money, but they must have a fitness for general circulation in the community as a representative and substitute for money in the common transactions of business. This is what is meant by the expression "intended to circulate as money." These warrants were payable to the individual to whom the State was indebted, or to bearer, and were issued to a creditor of the State. That the legislature may have desired to facilitate the use of the warrants by these provisions is perhaps true. But the members of the legislature knew that to issue the warrants to circulate as money would be to condemn them from the start. That the promise should be made to receive them in payment of debts due the State would add to their usefulness and to the willingness of people to take them in payment of debts due them from the State, and that while in their hands others might receive them in payment of debts was a possibility or probability depending upon whether the person taking them had opportunity to use them to pay some of his own debts to the State. That he might on some occasion be able to so use the warrant as to enable him to thereby discharge an obligation from himself to a third person who was willing to accept it does not bring the warrant so used within

the ordinary meaning of the term money. It is not money in that sense.

The provision in the state is substantially the same as that in the Federal Constitution, in that the legislature is prohibited from issuing treasury warrants, treasury notes or paper of any description intended to circulate as money, while in the Federal Constitution the prohibition is against a State's emitting bills of credit, and the necessity exists in both that the paper shall be issued to circulate as money, in order to be in violation of either instrument. It has been held that the bills of credit prohibited by the Federal Constitution are those which were intended to circulate as money, and hence the authorities as to the meaning of that expression, when so used, are applicable here.

In *Craig* v. *State of Missouri*, 4 Pet. 410, Chief Justice Marshall, in referring to the meaning of the clause in the Constitution prohibiting a State from emitting bills of credit, said (page 432):

"The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

It is true the court in the *Craig* case held that the certificates authorized by the State of Missouri were void, because they were in effect bills of credit. They were issued on account of loans made from time to time to the State, and were held to have been issued to circulate as money. The court then consisted of seven members, and Mr. Justice Johnson, Mr. Justice Thompson and Mr. Justice McLean did not concur in the judgment. Mr. Justice Johnson thought that the term did not extend to certificates that bore interest and the value of which varied with each passing day; that they approximated to bills

drawn upon a fund, not to be withdrawn by any law of the State; that the promise was also to receive in payment of debts and taxes due the State, and the certificates did not depend for value upon the faith of the State only, and hence they were not bills of credit.

Mr. Justice Thompson thought they were not bills of credit for the reason, among others, that the act did not profess to make them a circulating medium or a substitute for money; it made them only receivable for taxes, etc., due the State, and those were special and limited objects not sufficient to enable the certificates to answer the purpose of a circulating medium to any considerable extent.

Mr. Justice McLean thought that to constitute a bill of credit it must be issued by a State, and its circulation as money enforced by statutory provisions. At page 454 he said: "Where a warrant is issued for the amount due to a claimant, which is to be paid on presentation to the treasurer, can it be denominated a bill of credit?" He thought not.

In the subsequent case of *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, the same question as to the meaning of the term bills of credit arose, and Mr. Justice McLean delivered the opinion of the court.

The question was whether bank notes issued by the Bank of the Commonwealth of Kentucky, declared by the state act of incorporation to be exclusively the property of the Commonwealth, were bills of credit. In the course of the opinion the judge stated, page 312: "The terms bills of credit in their mercantile sense comprehend a great variety of evidences of debt, which circulate in a commercial country. . . . But the inhibition of the Constitution applies to bills of credit in a more limited sense. It would be difficult to classify the bills of credit which were issued in the early history of this country. *They were all designed to circulate as money*, being issued under the laws of the respective colonies."

Reference is made in the course of the opinion to *Craig* v. *Missouri* (*supra*), and to the views of the two dissenting judges (besides himself) as to the meaning of the expression, and he ends the discussion of that part of the question by referring to

what Chief Justice Marshall had said, and adding: "The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money."

It was held that the bank notes in question did not fill that definition. In *Woodruff* v. *Trapnall*, 10 How. 190, 205, the question was again referred to by Mr. Justice McLean in delivering the opinion of the court, and he said that the notes of the banks therein mentioned were not bills of credit, upon the authority of the *Briscoe* case. To the same effect is *Darrington* v. *Bank of Alabama*, 13 How. 12, the opinion being also delivered by Mr. Justice McLean. The State creating the bank in that case was the only stockholder, and its credit was pledged for the ultimate redemption of the notes of the bank.

The court said it was impossible to hold that bills issued by the bank came within the definition of bills of credit. *Briscoe* v. *The Bank* (*supra*) was again referred to and the definition approved, that the paper must be issued by a State, upon its faith, designed to circulate as money, and to be received and used as such in the ordinary business of life.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 283, the coupons in question were in the ordinary form, and one of them was set out in the opinion of the court, and is as follows:

"Receivable at and after maturity for all taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1884, on bond No. 2731.

"Coupon No. 20. GEO. RYE, *Treasurer.*"

It was contended that this coupon was a bill of credit in the sense of the Constitution, because receivable in payment of debts due the State, and negotiable by delivery merely and intended to pass from hand to hand and to circulate as money.

It was in consequence of unrestrained issues of paper money by the colonial and state governments, based alone upon credit, said the court, that this clause in the Constitution prohibiting the emission of bills of credit by the States was adopted, and

the proper definition of the term was not founded on the abstract meaning of the words so as to include everything in the nature of an obligation to pay money, reposing on the public faith and subject to future redemption, but was limited to those particular forms or evidences of debt that had been so abused to the detriment of both private and public interests.

Speaking of these particular coupons the court said:

"They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law, which authorizes their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that in fact they were so used."

The fact that the coupons were receivable in payment of taxes, and other dues to the State, and hence might circulate from hand to hand as money, was held to fall far short of showing their fitness for general circulation in the community as the representative and substitute for money in the common transactions of business, which the court held was necessary to bring them within the constitutional prohibition against bills of credit. This reasoning applies with equal force to treasury warrants. Both classes of paper must be intended to circulate as money, and the same conditions regarding such intention and the same evidence to prove it would be necessary in each case.

In the light of these authorities, it seems to us that it cannot be properly said that the treasury warrants violated the Constitution, either of the State or of the United States, because there is no evidence that they were intended to circulate as money within the meaning of that term as already given. The record does not show that the legislature intended that these warrants should or that they could be so used as to circulate

among the people as money, to be used by them as a paper currency or a circulating medium in their dealings with each other. Small denominations of the warrants would certainly facilitate their retirement through their use for payment of taxes and other debts due the State, and would increase their convenience for paying freight or passenger fare to the companies, which would then have an opportunity to present them to the State, in payment of interest, and as the laws did not provide for their circulation as money, but only to be received or paid by the officers of the State between the State and its debtors and creditors and to the railroad companies, as stated, it cannot be supposed from such evidence that it was the intention of the legislature that these warrants should be circulated as money, and should thus violate the provisions of the Constitution.

A warrant drawn by the state authorities in payment of an appropriation made by the legislature, where the warrant is payable upon presentation, if there be funds in the treasury, and which has been issued to an individual in payment of the debt of the State to him, cannot, as it seems to us, be properly called a bill of credit or a treasury warrant intended to circulate as money. Although the State directed its officers to receive the warrants as money, in payment of certain dues to the State, and to deliver them to those who would receive them as money in payment of dues from the State to such persons, yet, as we have already remarked, this direction was only another mode of expressing the idea that, as between the State and the individual, the delivery of the warrant should operate as a payment of the debt for which the delivery was made. When the warrants once came back to the treasurer of the State, they were not to be reissued. The decisions of this court have shown great reluctance, under this provision as to bills of credit, to interfere with or reduce the very important and necessary power of the States to pay their debts by delivering to their creditors their written promises to pay them on demand, and in the meantime to receive the paper as payment of debts due the State for taxes and other like matters.

If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the

part of the legislature that the paper should circulate as money. There must, in other words, be an intention to violate the constitution.

A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists and to which the members have sworn obedience, is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil from the very acts themselves which are under discussion, and if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction rather than one which invalidates them, because they were enacted with a direct purpose to violate the state constitution.

But if for the purpose of this argument it should be assumed that the warrants, although issued to those who were the creditors of the State and in payment of the debts due from the State to those creditors, were nevertheless issued to circulate as money, and therefore in violation of the constitution, it cannot be properly held, in our opinion, that the receipt of such warrants pursuant to legislative authority and in payment of an indebtedness due the State from the individual paying them is an illegal transaction and amounts in law to no payment whatever.

The State was debtor to the individuals to whom the warrants were first issued in payment of that indebtedness, and all that can be said is that it violated the law by giving this particular form to the instrument by which it assumed to pay its debt. Surely if for that reason the delivery of the warrants constituted no payment, the State would have the right to make such payment in some other way. If, by reason of the violation of the constitution, its direction to the treasurer to pay the warrant was void, and no action could be maintained upon the warrant, by reason of its invalidity, (aside from the fact that the State would not be suable,) there is certainly nothing to prevent the State from recognizing the debt it actually owed, and which it assumed to pay by issuing these warrants. That recognition may be contained in the very law which authorizes their issue or in some other law. When, therefore, it passed the statutes providing that the warrants should

be received in payment of taxes and other dues to it, and also by the comptroller in payment of the interest and sinking fund due from the railroad companies to the State, and when by virtue of such authority the state officers actually did receive the warrants for such payments, we see no illegality in the payments, and it seems to us that credit therefor should be given accordingly.

Suppose that the State, intending to issue these warrants to circulate as money, had paid them through its officers to its creditors, and had then become convinced that the warrants were a violation of the constitution of the State and ought not to have been issued. Could not the State say to the creditors to whom these warrants had been paid, if you will give them back we will pay you in a form that is not a violation of the constitution? Would anybody suspect that surrendering these warrants to the State and receiving other warrants in their stead, in a form which did not violate the constitution, would be an illegal act on the part of the State? The original warrants having been issued to various creditors of the State, and they very likely having transferred them to others, wherein would consist the illegality if the State offered to and did receive those warrants from such others and paid their amount in valid obligations? Instead of paying their amounts in valid obligations, where is the invalidity if the State offers to receive them and to cancel obligations which the party owes to it to an amount equal to their face value? All this is but another way of paying the indebtedness which the State originally owed to the individuals to whom it issued these warrants, and when it cancels obligations due to it of an amount which equals the face value of the warrants, and receives the warrants in return, the legal effect is the same as if the warrants had never been transferred by the persons to whom they were originally issued, and they had brought them back to the State, and the State had given in exchange for them some valid evidence of indebtedness.

It seems to us that the same principle is involved as was enforced in *Hitchcock* v. *Galveston*, 96 U. S. 341, 350, where a city had contracted with the plaintiffs for the improvement of its sidewalks, and agreed to pay for the same in bonds which it

was beyond the power of the city to issue. It was held that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the performance of the contract. The court said: "If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payments need not be made at all."

Suppose in that case the bonds had been issued by the city in violation of its charter? Could not the city thereafter, upon discovering its inability to make such a contract, receive the bonds back and make payment in some other way? Or could it not have received the bonds as a payment to that extent of an indebtedness due from their holder to the city?

Unless such transactions be legal, then it follows that the State could obtain the property or labor of the individual and pay therefor in an obligation which it had no right to issue, and which it could on that account subsequently repudiate and then deny all liability to pay at all. The character of the transaction is not altered by the transfer of these warrants from the original holder to other parties, and the State has full power to recognize in favor of the bearer of the warrants, the validity of the debt which they originally represented, and to pay the same by allowing a credit to their bearers up to the value of the warrants. We see nothing in morals or in law which should prevent the State from recognizing and liquidating the indebtedness which was due from it and which was represented by the warrants.

The other theory would prevent the State from ever redeeming warrants in form invalid, but which had been issued in payment of debts due from the State to persons receiving them.

If payments such as were made in this case were not valid, but absolute nullities, then any person who used the warrants to pay his taxes with, although they were received by the collector and an acquittance given, was nevertheless liable to pay those taxes again. Such consequences ought not to follow from the fact that the form of the warrant in which the payment was made rendered the warrant itself illegal as issued in violation of the Constitution.

Their receipt by the state officers from the railroad company as directed by the legislature is also justified, as appears by the case of *Little Rock* v. *National Bank*, 98 U. S. 308. This court held that even if the bonds mentioned therein were issued in violation of law, yet when the city accepted their surrender and redeemed them by giving other bonds in lieu of a portion and a credit on the books of the city for another portion of them so surrendered, such transaction was valid, and the holder of the bonds so given in lieu of the illegal ones, could recover on them, and also upon the credit given on the books of the city. We perceive no reason why the State could not, if it chose, receive these warrants in discharge of the debt *pro tanto* due it from the company.

The next question is whether the payments made are void because the warrants were issued, as alleged, in aid of the rebellion.

If by reason of any fact existing at the time these transactions occurred, and which appears in this record, the payments in question were not valid, and no valid contract grew out of the same, then the judgment should be affirmed, notwithstanding we differ with the court below in regard to the effect of the payment on the ground taken by that court. Until we are able to say there was a valid contract subsisting by reason of these transactions, by which payments were received as payment *pro tanto* of interest and sinking fund, we cannot be called upon to discuss the question whether any legislation subsequent to the making of the alleged contract has impaired its obligation. We must, therefore, pursue the inquiry in order to determine the existence and validity of the contract.

It is alleged that at least some of these warrants were issued in aid of the rebellion and were therefore void, and no attempted payments made in them could be recognized as legal or binding. Various acts of the legislature have been referred to which provided for the issuing of bonds in return for loans to the State for military purposes. The findings of the trial court upon the subject were as follows:

"I find that it has not been proved whether the warrants actually used in making the payments were warrants issued for

indebtedness incurred prior to the civil war or warrants issued for the State indebtedness incurred after the war began, or if of the latter class whether they were warrants issued for military purposes or for civil indebtedness, but from the circumstantial evidence I conclude that neither the railroad company nor the State discriminated as to the class of warrants the railroads received for carrying services or paid on their indebtedness, and that some of all kinds were used in making the payments.

* * * * * * * *

"In reaching the foregoing conclusions of fact I have excluded from my consideration the statements made in official reports and governors' messages to the legislature, having concluded that defendant's objections that the statements contained in these papers were not admissible as evidence proving or tending to prove the facts therein stated, were good. I have also eliminated from consideration certain other evidence, as shown by explanations attached to defendant's bills of exception."

Taking these findings, it seems that some of the warrants had been originally issued for military purposes, while others had been issued for civil indebtedness. It is also to be inferred from the record that the warrants were in the hands of various people, residents in the State, from whom they had been purchased by the company for a fair and adequate consideration, or had been received by it at par in payment of freight or passenger services over its lines of road. Assuming that the warrants were invalid as having been issued in payment for services rendered, or stores received for use in aid of the rebellion, yet this contract between the State and the company had no connection with the purpose for which they were issued, nor was the consideration of the contract based in the remotest degree with reference to that purpose. The warrants were issued to other persons having not the slightest relation to the company, and in payment of an indebtedness for purposes to which the company was an entire stranger. The purpose of the company was undoubtedly, pursuant to the offers of the State made in the acts mentioned, to use the warrants in payment of what might be due for principal or interest on the bonds of the company held by the State.

There is no proof that the company received the warrants for any other purpose. No inference could properly, as we think, be drawn from the evidence that there was any intent, design or wish on its part to aid the rebellion by the acquisition of these warrants and so far as can be seen, it was a transaction in the way of the business of the company, entered into for the simple purpose of paying an indebtedness which it owed the State, and which, by these acts, the State permitted to be paid in this way. Even though portions of the warrants had been procured at less than par, of which fact there is no affirmative evidence, still the transaction on the part of the company did not thereby become one in aid of the rebellion, and upon this point we do not see that the prices which may have been paid for the warrants were material in the inquiry. The contract between the State and the company did not in any way aid the former in issuing them, nor did it aid the purpose for which the State may have desired to issue them.

Where the validity of a contract is attacked on the ground of its illegal purpose, that purpose must clearly appear, and it will not be inferred simply because the performance of the contract might possibly result in a remote, incidental and unintentional aid to an illegal transaction.

It is somewhat difficult to see how the offer to receive these warrants and their reception pursuant to the offer can be said to be illegal as based upon a consideration which looked to aiding the rebellion by its performance.

It has been held that a contract between parties resident within the lines of insurrectionary States stipulating for payment in Confederate notes, issued in furtherance of a scheme to overturn the authority of the United States within the territory dominated by the Confederate States, was not to be regarded for that reason only as invalid. Contracts thus made, not designed to aid an insurrectionary government, it was held, could not therefore, without manifest injustice to the parties, be treated as invalid. *Thorington* v. *Smith*, 8 Wall. 1; *Delmas* v. *Insurance Co.*, 14 Wall. 661.

The receipt of these warrants, like the contract to receive payment in Confederate notes, was not for that reason only

unlawful, although the State was the party that received them. The company was not an agent of the State in putting them in circulation, nor is there any proof that in fact it circulated any of them. The company did not take them for the purpose of giving currency to them, but in order to consummate a transaction which, when consummated, was simply a business one on the part of the company, and if by any possibility it could "indirectly or remotely promote the ends of the *de facto* government organized to effect a dissolution of the Union, it was without blame, except when proved to have been entered into *with actual intent* to further invasion or insurrection." *Thorington* v. *Smith*, 8 Wall. 1, 12; *Baldy* v. *Hunter*, 171 U. S. 388, 394.

A specimen of the contract condemned under the rule is to be found in *Sprott* v. *United States*, 20 Wall. 459, where the plaintiff sought to recover from the defendant the value of certain cotton which he had purchased from and paid the price in money to the Confederate government and which the Union forces took from its possession in the last days of the existence of that government. The court held that in the transaction the plaintiff gave aid and assistance to the rebellion in the most efficient manner he possibly could; that he could not have aided that cause more acceptably if he had entered its service and become a blockade runner, or under the guise of a privateer had preyed upon the unoffending commerce of his country. The plaintiff asked the court to in effect carry out his void contract with the Confederate government. That is very different from holding that these warrants were so far void that they could not form the basis of payment of debts by their holders, who had not received them from the State but had taken them in the course of business from other parties and who then offered them in payment of their debts due the State.

This whole subject has recently been gone over in *Baldy* v. *Hunter*, 171 U. S. 388, where many other cases are commented upon, and the principle of that and the other decisions of this court therein referred to would seem to hold this contract not unlawful.

But suppose these warrants were issued in aid of the rebel-

lion and were therefore void, and that the subsequent offer of the State to receive them in payment of the debt of the company, under the provisions of the legislative acts already referred to, was, while unexecuted, also void on that ground, still their actual receipt and the acquittance given were not, for that reason, void as between these parties.

A contract in aid of the rebellion has been held illegal because it belonged to that class of contracts which are *mala in se*, whose consideration is immoral and founded upon a criminal purpose. If a State were a party to such a contract it would not be void on the technical ground that it was *ultra vires* as beyond the contract making power of the State, but because of the illegal nature of its consideration. The contract would be void for the same reason that it would be void as between individuals, not because they had no capacity to make it, but because, being founded upon an illegal consideration, no court would recognize its validity or enforce its provisions. A State as a sovereignty has power generally to make contracts, unless there be some constitutional inhibition as to certain classes of contracts, and if the consideration of a particular contract is bad or immoral, the contract is illegal because of the character of its consideration, and not because the contract would be beyond the general scope and power of the State. Hence, as between the parties to it, the State might, if it chose, perform all its requirements, and if the acts of its officers were performed in obedience to legislative authority, their performance in executing the contract would be the act of the State. If, on the other hand, the constitution of the State had prohibited its officers from ever receiving anything but gold in payment of this debt of the company, a delivery of something else in assumed payment of the debt, though received as such by its officers under the authority of the legislature, would be no payment. That would be a case where the payment would be absolutely void because beyond the capacity of the State to authorize and equally beyond its capacity to ratify. It would be *ultra vires* in the strict sense of the term. In such event, it would be true that the act of the officer would be his individual act, and in no sense would he represent or bind the State by his action. Such

an attempted payment might, therefore, be regarded by any subsequent officer of the State as wholly void and ineffectual for any purpose.

The distinction between the two cases is obvious. In the one the contract is void because of the illegality of the consideration, not because of the legal incapacity of either party to make the contract, while in the other there is an entire lack of power to make it under any circumstances. When, therefore, the officers of the State pursuant to its statutes received the warrants as payment, they acted for the State in carrying out an offer upon its part which the State had the legal capacity to make and to carry out, and which it in this manner did carry out. The State in such case had the same power to carry out its contract (so far as the parties to it are concerned) as individuals would have had to carry out the same kind of a contract, and when the warrants were received by the officers acting for the State in payment of the interest, and the bonds of the State were issued to the school fund and acquittance given to the company, the transaction was finished and completed, in the case of the State, just as it would have been in like circumstances in the case of the individual, and by such action (as between the parties) the State is bound; the acts of its officers are its own acts, and it must be judged in the same way as an individual would be judged. In other words, the contract having been fully executed by the company and the State, neither party having chosen to refuse to perform its terms, neither party as between themselves can thereafter act as if the contract had not been performed, nor can the State pass any act which shall impair the obligation which springs from its performance. After the complete execution of the transaction it must be that each party thereupon and at once became possessed of certain legal rights arising from its performance. Neither party could undo what had been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so, or, in other words, the law implies a contract that the payments made shall not be thereafter repudiated or denied. Any subsequent statute of the State which repudiated or permitted the repudia-

tion of the payments would impair the obligation of the contract which the law raises from the transaction itself.

That a contract will be implied under such circumstances is stated in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500. There the court said: "Some of the authorities show that, though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, *express or implied*, and the court will not unravel the transaction to discover its origin."

So in this case. The illegal object was fully executed and accomplished, and upon its accomplishment and by reason of the whole transaction there arose an implied contract that the settlement should be conclusive upon all parties to it. This principle calls for no aid from the court in the enforcement of a void contract. The parties have already fully complied with all its terms, and by reason thereof the implied contract has arisen.

The State cannot now be permitted to repudiate or set aside the acts of its former officers, done in pursuance of the direction of the legislature of the State, and effectually and forever closed long before the present proceeding was commenced. As between the parties to those transactions, this cannot be done.

The action of the present officers of the State in bringing this proceeding has been undoubtedly prompted by the best motives and from a desire to promote the true interests of their State, but we nevertheless are unable to see how the proceeding can be successful without overturning those principles of law which must guide and control our judgment.

We are then brought to the question whether the subsequent legislation of the State has in any manner impaired the obligation of the contracts made by the State at the times when these various payments were made.

We have shown in the treatment of the motion to dismiss how the judgment of the court below gave effect to the subse-

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quent act of 1870. In giving such effect was the obligation of the contract between the parties impaired thereby?

If the State had passed no act, the question of contract could not have been raised in this court, the payments might have been repudiated, and the court have held them illegal, and we would have no jurisdiction to review its judgment. But the State has passed a statute, and said that if the company would pay interest and a certain proportion semi-annually upon the aggregate amount of the loan as it stood May 1, 1870, no further exaction would be made. The court has construed this to mean that if the company will pay such proportion semi-annually on the amount of the loan, to be ascertained by striking out the payments in warrants, then no default will be incurred, but if not, then it will have made default, and the act of 1870 provides in such case for proceedings to collect the amount due. We say the court below has so construed the act, and we say so notwithstanding it has not mentioned it in any such connection. It has said so, however, by implication necessarily arising from the judgment it has given when taken in connection with the provision of the act which permits proceedings only to be taken on a default, which does not exist in this case if the company be credited with these warrants as payments. By permitting the proceedings the court has necessarily construed the act as meaning that there is a default when payments are not made on the basis of the invalidity of the payments in warrants. The obligation of the contract which we hold existed between the State and the company growing out of the transactions mentioned has therefore by this construction of the act by the state court been materially impaired.

It is alleged on the part of the State that the acceptance of the treasury warrants in payment of money loaned from the school fund was a violation of the constitution of the State of Texas, as being an illegal diversion of that fund. Upon that point we agree with the court below, (which held that there was no such diversion,) for the reasons given by that court.

We have examined the various objections of the defendant in error which it has made because of the alleged failure of the

plaintiffs in error to properly bring the Federal question before the court, but we think they are not well taken.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed and the case remanded to that court with directions to remand the case to the District Court, with directions to reverse its judgment and for further proceedings not inconsistent with the opinion of this court, and is so ordered.

Mr. Justice Brown concurring:

I concur in the conclusion of the court, but from so much of the opinion as holds that the treasury warrants in question were not bills of credit within the meaning of the Constitution of the United States, I am constrained to dissent.

It is admitted that these warrants fulfill all the conditions of bills of credit, except, as it is said, they were not intended to circulate as money. I am unable to concur in this view of the intent of the legislature. By the act of February 14, 1860, authorizing interest bearing warrants on the treasury, it was expressly provided that these warrants should not circulate as money, but might be assigned. This act was repealed, however, in 1862, by another act providing that warrants should be drawn for legal claims against the State, and payment made, if there were money in the treasury; but if not, the comptroller was authorized to issue warrants payable to the party entitled to payment, or bearer, which warrants should be of such proportions of the claim as were required by the holder, one-tenth of the whole amount of which might be issued in warrants of one dollar each, and the residue in warrants of five dollars or more each. There was an omission in this act, which appears to me extremely significant, of the proviso of the former act that such warrants should not circulate as money. By another act, approved the following day, it was provided that treasury warrants of the State, not bearing interest, should be receivable "as money" in the payment of taxes, office fees (including fees for patents) and land dues payable in the general land office of Texas, and all other dues to be collected for the State, with

certain specified exceptions. By another act of December 16, 1863, the comptroller was authorized to receive from the railroad companies indebted to the special school fund all interest on their bonds that might be or might thereafter become due in state treasury warrants. This act was amended May 28, 1864, by providing that the act of 1863 should not apply to railroad companies which refused to receive these bonds or treasury warrants at par for freight or passage, at the prices or rates established by law.

The railway companies were thus compelled to receive these warrants as money from their patrons in order to be able to avail themselves of them in payment of interest upon their bonds. In addition to this, the warrants were in the form of bank notes, printed upon peculiar paper, such as is ordinarily used by banks for their circulating notes, and contained a brief and unconditional promise of the State to pay the amount to a party named, or bearer, and were declared on their face to be receivable for public dues.

If these facts be not decisive of an intention that these warrants should circulate as money, it is difficult to say what additional facts were needed to manifest that intent. Indeed, the opinion of the court seems to me to practically eliminate from the Constitution the provision that the States shall not emit bills of credit, as well as to overrule the opinion of this court in *Craig* v. *Missouri*, 4 Pet. 410. In that case, the legislature of the State of Missouri authorized the officers of the state treasury to issue certificates, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan offices in the State of Missouri, in discharge of taxes or debts due to the State, for the sum of ——— dollars, with interest for the same, at the rate of two per cent per annum from this date." These certificates were receivable at the treasury in payment of taxes, or moneys due to the State, or to any municipality, and by all officers, civil and military, in the discharge of salaries and fees of office. If simple certificates of the State, containing no promise to pay, are bills of credit, much more, it seems to me, should these obligations of the State of

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Texas issued in denominations of one dollar and upwards, in the size, shape and color of bank notes, and receivable in discharge of all taxes and debts due the State, to which a forced circulation was given as between railways and their patrons, be held to be obnoxious to the same provision of the Constitution. As was said by Chief Justice Marshall in that case: "The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees would give them currency. They were to be put into circulation; that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed 'bills of credit' instead of 'certificates' nothing would have been wanting to bring them within the prohibitory words of the Constitution."

But I fully concur with the court upon the second point, that the State, having issued these warrants for a valuable consideration, having put them in circulation, having expressly authorized the railroad companies to pay them in discharge of their interest upon their bonds, and having received them without objection at the time, it is too late now to claim that they did not operate as payment. Though the warrants may have been issued without authority, it was competent for the State to recognize them, and to refuse now to admit them as payment upon these bonds appears to me a plain violation of the public faith. Upon the theory of the Court of Civil Appeals, I see nothing to prevent the State, unless there be a statute of limitations operative against it, from bringing suit against everybody who paid these warrants to the State for taxes or for dues, and recovering the amount a second time.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY CO. *v.* TEXAS. Error to the Court of Civil Appeals for the Third Supreme Judicial

District of the State of Texas. No. 82. Argued with No. 81. Decided March 26, 1900.

This involves precisely the same questions that have just been determined in the foregoing case, and the same judgment will, therefore, be entered. Same counsel as in No. 81.

UNITED STATES *v.* ELDER.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 35. Argued October 13, 16, 1899.—Decided March 26, 1900.

United States v. *Ortiz*, 176 U. S. 422, affirmed and followed, to the point that, in order to justify the confirmation of a claim under an alleged Mexican grant, under the act of March 3, 1891, c. 539, 26 Stat. 854, it is essential that the claimants establish, by a preponderance of proof, the validity of their asserted title.

The mere approval, by the governor, endorsed on a petition presented to him for a grant, before a reference to ascertain the existence of the prerequisites to a grant, is not the equivalent of a grant.

In order to vest an applicant under the regulations of 1828, with title in fee to public land, it was necessary that the grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record in some form was required to be made of the grant; and the action of the legislative body could not lawfully be invoked for approval of a grant, unless the expediente evidenced action by the governor, unambiguous in terms as well as regular in character.

The mere indorsement by a Mexican governor of action on the petition, before any of the prerequisite steps mentioned in the regulations of 1828 had been taken to determine whether, as to the land and the applicants, the power to grant might be exercised, was a mere reference by the governor to ascertain the preliminary facts required to justify an approval of an application, and had no force and effect as an actual grant of title to the land petitioned for.

Although the documents in question in this case, executed by the prefect and the justice of the peace, fairly import that those officials assumed authority to grant something as respected the land in question, they did not, in 1845, possess power to grant a title to public lands.

THE alleged Mexican grant which forms the subject of this controversy relates to a tract of land situate in the county of

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Taos, New Mexico, embraced in what is designated as the Cebolla grant. The asserted grant was presented in 1872 for confirmation to the surveyor general of New Mexico, under the act of July 2, 1854, by John T. Graham and William Blackmore, who averred that they possessed a perfect title to the land covered by the grant, by reason of mesne conveyances from the original grantees. This claim so presented was favorably reported to Congress, but it does not appear that any action was taken thereon. Upon a survey made by the direction of the General Land Office in November, 1877, the area embraced in the alleged grant was declared to consist of 17,159.57 acres. The controversy now here for review was commenced by proceedings instituted in the Court of Private Land Claims to obtain a confirmation of this alleged grant. The petition to that end was filed on February 18, 1893, on behalf of the present appellees, who asserted that they were the owners of the Cebolla tract by purchase from the heirs and assigns of the original grantees. The alleged grant was asserted to have been made on December 31, 1845, by Manuel Armvjo, governor of New Mexico, and the papers claimed to evidence such grant, as translated, are reproduced in the margin.[1]

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[1] Seal Fourth. [SEAL] Two reales.
Years one thousand eight hundred and forty-two and one thousand eight hundred and forty-three.
Habilitated for the years one thousand eight hundred and forty-four and one thousand eight hundred and forty-five.
Administrator AGUSTIN DURAN. Governor MANUEL ARMIJO.
To his excellency Manuel Armijo, Governor of this Department of New Mexico:

I, Carlos Santistevan, for myself and in the name of five other associates, all residents of the town of Dolores, in the district of Taos, before your excellency in due legal form, represent and state that finding without any land with title in fee to cultivate for the support of ourselves and our needy families, and having found a vacant tract very suitable tract for cultivation, irrigable from certain water, said to be from the Lama, quite sufficient for its irrigation, at the place called by that name up to another place, the Cebolla, which places are between the settlements of the Rio Colorado and San Cristoval, pertaining to the said district of Dolores de Taos, I ask and pray, from the well known and distinguished liberality of your excellency, that in the name of the high powers of our Mexican Republic, you be pleased to

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It was averred in the petition with respect to the survey above referred to, that it was not made in accordance with the boun-

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make us a grant of the said tract; for the same is of very convenient size, and has ample water to be cultivated, and to afford sufficient support for the petitioners and their families, and would not injure any third party with respect to property or pasturage, or in any other way, but would rather result in the great welfare and increase of population and of agriculture; and, besides relieving the necessity of the petitioners, it will also strengthen that locality or frontier which guards the said population of the Rio Colorado, from which the said tract is distant but about one league, and from the settlement of San Cristoval somewhat more.

Therefore I earnestly pray that your excellency be pleased to accede to this our petition. I declare and protest, etc.

City of Santa Fé, December 31, 1845. At the disposition of your excellency.

CARLOS SANTISTEVAN.

SANTA FÉ, *December* 31, 1845.

To the prefect of the district, that he ascertain whether the land applied for has an owner, and cause the corresponding justice to deliver the land referred to by the petitioner. ARMIJO.

JUAN BAUTISTA VIGIL Y ALARID, *Secretary.*

RIO ARRIBA, *January* 3, 1846.

The justice of the peace to whom it corresponds to do so will investigate whether the tract the petitioners apply for is vacant, and whether any injury to a third party would result from the granting thereof; and, none resulting, he will proceed to grant them of the land an abundance of what each can cultivate, under the condition that they inclose the same with a regular fence, in order to prevent damages, and that they do not obstruct the roads, pastures and watering places, and with notice that they shall keep arms sufficient for their defense.

D. LUCERO.

In this, the third precinct, Dolores, of the district of Taos, on the twentieth day of the month of March, one thousand eight hundred and forty-six, I, Juan Lorenzo Martines, justice of the peace, by authority of law, for the said precinct, in pursuance of a decree of January 3, eighteen hundred and forty-six, by his honor Diego Lucero, prefect of the second district of the north, issued to me as the proper justice, that I investigate whether the land applied for by the five petitioners is vacant, and I, meeting no impediment, proceeded to the tract and, finding the same uncultivated and unoccupied, took the petitioners by the hand, and leading them very slowly and in full legal form, in virtue of holding competent authority, I placed them in possession of the land they pray for for cultivation, they being without land in fee, doing so in the name of God and of the

daries set forth in the grant, but was "of a different portion of land, a part or all of which is included in the said grant." The

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high authority of our wise Mexican laws, which are sufficient to grant the public domain, to the end that idleness be banished and agriculture be encouraged. Wherefore they, at the instant they received their liberal donation and were favored in this manner, shouted with joy, saying huzza for the renowned sovereignty of the Mexican nation. And in this joy they plucked up grass and cast stones, as being lawful proprietors of the land which they wished to irrigate with the water of the valley of the Lama, as relying upon that small water source they had applied for the donation; and I therefore designate to them for limits: On the north, the boundaries of the Rio Colorado grant; on the south, to where the dividing line of San Cristoval is reached; on the east, the mountain, and on the west, the edge of the bluff of the Rio Del Norte, leaving the pastures, roads, and watering places free, eastwardly, from where they cannot irrigate; they not to prevent pasturing in virtue of being the possessors; and they are also obligated to inclose with a regular fence, so that they may not have to claim damages, and shall keep arms sufficient for their protection.

And to the end that this grant may in all time subsist, I authenticate the same under the authority conferred upon me, with my attending witnesses, for the lack of a notary public, there being none in this department; and it is done on this common paper, there being none of the proper stamp, the new settlers binding themselves to supply the same of the proper stamp whenever they can opportunely procure it; to all of which I certify.

J. Lorenzo Martines.

Attending: Juan José Cordova.
Attending: José Concepcion Medina.

Note.—The persons placed in possession, with their full names, are those following in this list of names, made that they, for the sake of peace and good neighborhood, may in proportion to the tract divide among themselves the land I delivered them without measuring, owing to the very inclement day and the much thicket which impeded the cord; and they are in this list: Juan Carlos Santistevan, José Manuel Garcia, Julian Santistevan, Carlos Ortivis, Tomas Ortivis.

Valid. [rubric.]

Attending: Juan José Cordova.
Attending: José Concepcion Medina.

Tomas Ortivis being of those placed in possession in this grant, at the foot of which this note is appended, he transfers to his brother Carlos Ortivis, all his rights in this grant; and he signed this before me, Lorenzo Martin, alcalde, and the said Tomas signed this with me this 7th April, 1850.

Lor'o Martin, *Alcalde.*

Attending: Rafael Sisneros. Tomas Ortivis. X
Attending: Mateo Romeo. X

Court of Private Land Claims entered a decree, (Murray, J., dissenting,) defining the boundaries of the tract covered by the claim as allowed, and confirming title thereto in "the heirs and assigns of said five original grantees and to their heirs and assigns." The United States thereupon appealed to this court.

Mr. Matthew G. Reynolds for the United States. *Mr. Solicitor General* and *Mr. William H. Pope* were on his brief.

Mr. T. B. Catron for Elder.

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

It is contended that the court below erred in confirming the alleged grant—

1. Because the documents relied upon, assuming them to be genuine, do not show that a grant was made, for the reason that on their face they do not purport to be a grant by the governor of New Mexico;

2. Even if the papers can, on their face, be construed as importing a grant by the governor, the claimants were not entitled to confirmation, because there was no archive evidence of the alleged grant and no inscription of the same in the records of the former government;

3. That the governor of New Mexico was without authority to make a grant of public lands at the time the papers relied upon purport to have been executed; and—

4. That even if it be conceded that the governor, at the time in question, had power to make a grant, and that the papers are held to be a manifestation of his purpose to do so, yet, be-

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Carlos Ortivis being of those placed in possession under this grant, at the foot of which this note is appended, he transfers to the citizen José Gonzales his rights in the grant; and he signed this before two witnesses present; and he transferred his rights for the price of two dry cows, one cow with a calf and one yoke of oxen; which he signed with the witnesses this 29th of September, 1850. Carlos Ortivis. X

Witness: José Miguel Pacheco.

Witness: José Bitor Vales. X

cause of a failure to show compliance with essential conditions exacted by the Mexican law, the claimants have not established such a case as entitles them to a decree of confirmation.

The matters embraced in the two last propositions involve legal questions of serious moment, which have been elaborately discussed at bar, but are unnecessary to be considered, if at all, until the subjects covered by the first two contentions are disposed of.

Before approaching a consideration of the two first questions, which logically come under one head, we premise by stating that in order to justify the confirmation of a claim, under the act of March 3, 1891, c. 539, 26 Stat. 854, it is essential that the claimants establish, by a preponderance of the proof, the validity of their asserted title. *United States* v. *Ortiz*, 176 U. S. 422.

To ascertain whether the papers relied upon constitute a grant of title to land, and to determine whether the existence of archive evidence of a grant is an essential prerequisite to the confirmation of the alleged title, it is necessary to briefly recapitulate the provisions of the Mexican colonization law of 1824 and the regulations of 1828 thereunder, and to review previous adjudications on the subject of the form required by Mexican law to manifest that the power to grant had been exercised. It is necessary to do this, since it is undoubted that although it be conceded that the governor of the Territory of New Mexico possessed power in 1845 and 1846 to make a grant of public lands situated within that territory, nevertheless the right to exercise such power as well as the documents by which it was essential to manifest the calling into play of the power, was derived from and was dependent upon the colonization law and the regulations thereunder just mentioned.

The law of 1824 was enacted to provide for the colonization of vacant public lands, and the regulations were adopted for the purpose of executing the powers which the law conferred. Certain articles or sections of the regulations of 1828, to which we shall hereafter have occasion to refer, are printed in the margin.[1]

[1] Excerpts from the Regulations of November 21, 1828 (Reynolds' Span. & Mex. Land Laws, pp. 141, *et seq.*):

In brief, the regulations of 1828, adopted to carry into effect the law of 1824, required every applicant for a grant of land to present a petition to the executive head of the territory, alleg-

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"1. The political chiefs of the territories are authorized, under the law of the General Congress of the 18th of August, 1824, and under the conditions that will hereafter be stated, to grant the public lands of their respective territories to the contractors, families or private persons, Mexicans or foreigners, who may apply for them for the purpose of cultivating them or living upon them.

"2. Every applicant for land, whether contractor, head of family or private person, shall apply to the political chief of the respective territory with an application in which is given his name, country, profession, the number, nature, religion and other circumstances of the families or persons whom he desires to colonize, and shall also mark as distinctly as possible and describe on a map the land he applies for.

"3. The political chief shall proceed immediately to obtain the necessary information as to whether or not the conditions required by said law of the 18th of August are found in the application, both as regards the land and the applicant, either that this latter be attended to simply or that he be preferred, and shall at the same time hear the respective municipal authority as to whether any objection or not is found to the grant.

"4. In view of all of which the political chief shall grant or not said application in strict conformity with the law applicable to the matter, especially with that of the 18th of August, 1824, already cited.

"5. The grants made to private persons or families shall not be held to be definitely valid without the previous consent of the territorial deputation, for which purpose the respective proceedings shall be forwarded to it.

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"8. The grant asked for being definitely made, a document signed by the political chief shall be issued to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provisions of the laws, in virtue of which the possession shall be given.

"9. The corresponding entries of all the applications presented and grants made shall be made in a book intended for the purpose, with the maps of the lands that shall be granted, and a detailed report shall be forwarded to the supreme government every quarter.

"10. No stipulation shall be admitted for a new settlement, unless the contractor obligates himself to furnish at least twelve families as settlers.

"11. The political chief shall set a reasonable time for the settler, within which he must necessarily cultivate or occupy the land in the terms and with the number of families which he has stipulated, in the intelligence that if he does not do so the grant of the land should be void, but the political chief may, nevertheless, revalidate it in proportion to the part in which the party in interest had complied.

ing the existence of certain facts. That official was directed to obtain information as to whether or not the necessary conditions authorizing the making of a grant existed; and upon the receipt of such information the application was to be granted or rejected in strict conformity to law. As respected grants to heads of families or private persons, the "proceedings" culminating in a grant were required to be forwarded to the legislative body of the territory for its approval, until which approval grants were not to be definitively valid, while grants to contractors for the colonization of many families required the approval of the supreme government, to whom the proceedings were to be sent for its action.

Concerning the fourth article or section of the regulations this court said, in *Arguello* v. *United States*, 18 How. 539, 543:

"By the fourth section the governor, being thus informed, may 'accede or not' to the prayer of the petition. This was done in two ways; sometimes he expressed his consent by merely writing the word 'concedo' at the bottom of the expediente; at other times it was expressed with more formality, as in the present case. But it seldom specified the boundaries, extent or conditions of the grant. It is intended merely to show that the governor has 'acceded' to the request of the applicant, and as an order for a patent or definitive title in due form to be drawn out for execution. It is not itself such a document as is required by the eighth section, which directs 'that the definitive grant asked for being made, a document signed by the governor shall be given to serve as a title to the parties interested.'"

That the mere approval by the governor endorsed on a petition presented to him for a grant, before a reference to ascertain the existence of the prerequisites to a grant, or indeed the action of the governor antecedent to the actual execution by him of a formal grant which was required by law, was not the equivalent

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"12. Every new settler, after he has cultivated or occupied the land under his stipulation, shall be careful to so show to the municipal authority, in order to consolidate and secure his right to the property to enable him to freely dispose thereof, after the proper record has been made."

of the grant, was clearly decided. The court, referring to a mere approval of a claim for land, said:

"The document of the 26th has none of the characteristics of a definitive grant. It shows that only the governor assents that the petitioner shall have a grant of land called 'Las Pulgas.' It describes no boundary, and ascertains no quantity. It contemplates a 'corresponding patent,' and does not purport itself to be such a document."

In *Hornsby* v. *United States*, 10 Wall. 224, the court considered the requirement of article 5 of the regulations. It was declared to have been the duty of the governor, and not of the grantee, to submit to the legislative body of a territory of the Republic of Mexico, for its approbation, grants issued by the governor; that by a grant, regular in form and of which archive evidence existed, a title of some kind passed to the applicant, and that, as respected such a grant, under the powers conferred on the court by the California act, a failure to obtain juridical possession or the approval of the departmental assembly, prior to the treaty of cession, did not operate to forfeit the title of the grantee or prevent a confirmation of a claim based on such grant. Whether this rule applies under the act of March 3, 1891, is one of the questions embraced in the propositions which we have postponed considering and as to which therefore we presently intimate no opinion whatever.

The "proceedings" which by article 5 of the regulations were to be forwarded to the legislative body were termed an expediente. What was embraced in the expediente is thus stated in *United States* v. *Knight's Adm'r*, 1 Black, 227, 245:

"When complete an expediente usually consists of the petition, with the diseño annexed; a marginal decree, approving the petition; the order of reference to the proper officer for information; the report of that officer in conformity to the order, the decree of concession and the copy or a duplicate of the grant. These several papers—that is, the petition with the diseño annexed, the order of reference, the informé, the decree of concession and the copy of the grant, appended together in the order mentioned—constitute a complete expediente within the meaning of the Mexican law."

And in *United States* v. *Larkin*, 18 How. 557, 561, this court, speaking of the final order or decree by a governor exhibiting favorable action upon an application, it was expressly declared that a "concession and direction constitute a part of the evidence of the title, or, according to the Mexican vocabulary, a part of the 'expediente.'"

In *Fuentes* v. *United States*, 22 How. 443, the nature and importance of an expediente was commented upon. In that case confirmation was sought of a purported grant without the production of an expediente. The court said (p. 453):

"The case, then, stands altogether disconnected from the archives, and exclusively upon the paper in the possession of Fuentes. It has no connection with the preliminary steps required by the act of Mexico of the 18th of August, 1824, or with the regulations of November 28, 1828. It is deficient in every particular—unlike every other case which has been brought to this court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer, for a report upon the case; no transmission of the grant—supposing it to be such—to the departmental assembly or territorial legislature, for its acquiescence; nor was an expediente on file in relation to it, according to the usage in such cases.

"All of the foregoing were customary requirements for granting lands. Where they had not been complied with, the title was not deemed to be complete for registration in the archives, nor in a condition to be sent to the departmental assembly for its action upon the grant. The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed, particularly in a case where the archives do not show any record of such a grant."

That the proceedings evidenced by the expediente may be examined in passing upon the claim of a grant in fee was expressly adjudicated in *De Haro* v. *United States*, 5 Wall. 599.

Speaking of the execution of a grant in duplicate, it was said in *United States* v. *Osio*, 23 How. 273, 279:

"Grants under the colonization laws were usually issued in duplicates, one copy being designed for the party to whom it was made, and the other to remain in the archives to be transmitted with the expediente to the departmental assembly for its approval. They were in all respects the same, except that the copy left in the office, sometimes called the duplicate copy, was not always signed by the governor and secretary, and did not usually contain the order directing a note of the grant to be entered in the office where land adjudications were required to be recorded."

As shown in the excerpt of article 9 of the regulations of 1828, it was required that a record should be made of the applications presented and grants made. Concerning this provision, this court in the case last cited said (p. 279):

"Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the department of California, when a short entry was made in a book kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued."

Again, referring to article 9, in *United States* v. *Bolton*, 23 How. 341, this court said (p. 350):

"Sec. 11" (9?) "directs that a proper record shall be kept of all the petitions presented and grants made, with maps of the lands granted.

"This record is the evidence of the grant. It being made, the governor (sec. 8) shall sign a document and give it to the party interested to serve as a title, wherein it must be stated that said grant (to wit, *the record*) is made in exact conformity with the provisions of the laws. In virtue of this document issued to the party, possession of the lands shall be given. But the document is not sufficient of itself to prove that the governor has officially parted with a portion of the public domain and vested the land in an individual owner. This must be established before the board of commissioners by record evidence,

as found in the archives, or which had been there and has been lost."

As instructive upon the point now under consideration we quote from the opinion delivered in *Pico* v *United States*, 2 Wall. 279, 281:

"The regulations of 1828, which were adopted to carry into effect the colonization law of 1824, prescribed with great particularity the manner in which portions of the public domain of Mexico might be granted to private parties for the purposes of residence and cultivation. It is unnecessary to state the several proceedings designated, as they have been the subjects of frequent consideration in previous opinions of this court. All of them, from the petition of the colonist or settler to the concession of the governor, were required to be in writing, and when the concession was made, to be forwarded to the departmental assembly for its consideration. The action of that body was entered with other proceedings upon its journals, and these records, together with the documents transmitted to it, were preserved among the archives of the government in the custody of the secretary of state of the department. The approval of the assembly was essential to the definitive validity of the concession, and when obtained a formal grant was issued by the governor to the petitioner. The regulations contemplated an approval to precede the issue of the formal grant; so when the grantee received this document the concession should be considered final. For a long time after the adoption of the regulations this course of proceeding was followed; but afterwards, and for some years previous to the conquest, a different practice prevailed, and the formal title papers were issued without waiting for the action of the assembly, a clause being inserted to the effect that the grant was subject to the approval of that body. Of the petitions presented and grants issued, whether before or after the approval of the assembly, a record was required to be kept in suitable books provided for that purpose.

"As will be perceived from this statement, it was an essential part of the system of Mexico to preserve full record evidence of all grants of the public domain, and of the various

proceedings by which they were obtained. When, therefore, a claim to land in California is asserted under an alleged grant from the Mexican government, reference must, in the first instance, be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises."

In *Peralta* v. *United States*, 3 Wall. 434, there was considered the validity of an alleged grant claimed to have been made in the early part of 1846. The grant was attempted to be established by the introduction in evidence, from private hands, of an expediente, embracing documents exhibiting the proceedings had preliminary to the making of the alleged grant, including an order of the governor, based upon the report of a prefect, that a title issue, and parol proof of the execution of a formal grant. In the course of the opinion affirming the decree of the district court rejecting the grant, the court reiterated former declarations, saying (p. 440):

"The colonization regulations of 1828 constitute the 'laws and usages' by which the validity of a Mexican title is to be determined. It is not important to restate the nature and extent of those regulations, for they have been so often commented on that they are familiar to the profession. The Mexican nation attached a great deal of form to the disposition of its lands, and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is, that a *record* was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the government to ascertain with accuracy what portions of the public lands had been alienated. *The record was the grant*, and without it the title was not divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession; but this 'titulo' did not divest the title, unless record was made in conformity with law."

Opinion of the Court.

The solemnity of juridical possession as connected with the investiture of a private person with a complete and perfect title to public lands of Mexico has been commented upon in various decisions of this court. *Malarin* v. *United States*, 1 Wall. 282; *Graham* v. *United States*, 4 Wall. 259; *Van Reynegan* v. *Bolton*, 95 U. S. 33; *United States* v. *Pico*, 5 Wall. 536, and *More* v. *Steinbach*, 127 U. S. 70.

In *Malarin* v. *United States*, discussing the claim of the execution of an alleged grant of public lands in the territory of California in 1840, the court said (p. 289):

"When the grant to Pacheco was issued there still remained another proceeding to be taken for the investiture of the title. Under the civil, as at the common law, a formal tradition or livery of siesin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurements and segregation in such cases, therefore, preceded the final delivery of possession. By the Mexican law various regulations were prescribed for the guidance, in these matters, of the magistrates of the vicinage. The conditions annexed to the grant in the case at bar required the grantee to solicit juridical possession from the proper judge. In compliance with this requirement, within four months after the issuance of the grant, he presented the instrument to the judge of the district, and requested him to designate a day for delivering the possession. The judge designated a day, and directed that the adjoining proprietors be cited, and that measures and counters be appointed. On the day designated the proprietors appeared, and two measurers and two counters were appointed and sworn for the faithful discharge of their duties. A line provided for the measurement was produced, and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to the center of the land, and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact 'by pulling up grass and making demonstrations as owner of the land.' Of the various steps thus taken, from the

appointment of the day to the final act of delivery, a complete record was kept by the judge, and by him transmitted to the grantee after being properly entered upon the 'book of possessions.'"

It appears from the adjudications of this court that the formal grants made to land in the territory of California enumerated conditions attached to the grant, in seeming compliance with the spirit if not the letter of the Mexican colonization law, and with the exactions of the regulations adopted to execute the same. It certainly cannot be questioned that, under Spanish dominion, the public lands were not granted in the first instance, in fee, to settlers or colonists, freed from conditions. As said by this court in *Chaves* v. *United States*, 168 U. S. 177, 188, speaking of the Spanish law in force in 1788:

"Lots and lands were distributed to those who were intending to settle, and it was provided that 'when said settlers shall have labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same and freely to dispose of them at their will as their own property.' But confirmation by the audiencia, or the governor if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title."

The constituents of the preliminary papers leading up to a grant and of the grant itself, and the distinction between them, to which attention had been so often directed by this court, was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Ainsa* v. *United States*, 161 U. S. 208, 219, as follows:

"An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of [or?] final title paper [s] is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant and property granted."

It is manifest from the foregoing review of the decisions under the California act, that it was held, that in order to vest an

applicant under the regulations of 1828, with title in fee, either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential, it was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record, in some form, was required to be made of such grant.

As a corollary from the foregoing, it of course follows that the action of the legislative body could not lawfully be invoked for the approval of a grant, unless the expediente evidenced action by the governor, unambiguous in terms as well as regular in character.

Although it be assumed that there was a settled practice in New Mexico prior to the treaty of cession, to evidence a grant of land by a decree of the governor entered upon the reports made to him, without the execution of an independent and formal grant, such assumption would not avail in this case. For, undoubtedly, it would be essential in a paper of the character referred to that it should indicate the land to which the grant referred and the persons to whom it was made, and, further, that there should be a record thereof. It is patent that the regulations contemplated that the original "proceedings" or expediente which were to be forwarded to the departmental assembly, if evidencing the fact that a grant had actually been made, should remain in the custody of the public officials, and that such "proceedings" to be complete should exhibit the action taken by the governor after the ascertainment of the prerequisites required by law.

Inspecting, then, the alleged granting papers on the assumption of their genuineness, we proceed to determine whether or not they justify the contention that thereby a valid grant of any kind was made. In doing so let us consider, first, the form of the alleged granting papers, and, second, their substance.

The only ground for contending that there was a grant by the governor must rest on the inference that the indorsement by the official named, on the petition of Santistevan, manifested the purpose of the governor to grant an absolute title to land, and operated to constitute a formal deed of grant. The indorsement thus referred to is as follows:

"SANTA FÉ, *December* 31, 1845.

"To the prefect of the district, that he ascertain whether the land applied for has an owner, and cause the corresponding justice to deliver the land referred to by the petitioner. ARMIJO.

"JUAN BAUTISTA VIGIL Y ALARID, *Secretary.*"

But, under all the authorities to which we have referred the mere endorsement by a Mexican governor of action on the petition, before any of the prerequisite steps mentioned in the regulations of 1828 had been taken to determine whether as to the land and the applicants the power to grant might be exercised, was treated as a mere reference by the governor to ascertain the preliminary facts required to justify an approval of an application, and not as having force and effect as an actual grant of title to the land petitioned for. Under the decisions referred to, it cannot be doubted that the regular practice was deemed to be the execution of a formal deed of grant, following a decree acceding to the application, after reports made as to the results of the investigation directed to be had as required by law.

Whilst, as we have said, it may have been the practice in New Mexico for the governor not to make an independent, formal grant, but, after the receipt of reports from subordinate officials, to indorse a decree of concession or grant upon the papers evidencing the "proceedings" in the matter, such practice would not justify the conclusion that the mere approval indorsed on a petition, amounting but to a direction to take the necessary steps for the ascertainment of needed information, should be treated as dispensing with any manifestation by the governor of his intention to grant a title to land after the requisite information had been communicated to him. It is manifest that the prefect to whom the indorsement by the governor on the petition was addressed did not consider it as a grant of title to the tract of land in question, since he directed the justice of the peace, if the land was vacant and third parties would not be injured thereby, to "proceed to grant them of the land an abundance of *what each can cultivate*, under the condition that they inclose the same with a regular fence, in order to prevent damage, and that they do not obstruct the road, pastures and water-

ing places, and with notice that they should keep arms sufficient for their defense."

Now, it is undoubted that the documents executed by the prefect and the justice of the peace fairly import that those officials assumed authority to grant something as respected the land in question, either title or a right of possession for purposes of cultivation, but it is beyond controversy that the officials referred to did not, in 1845, possess power to grant the title to public lands. *Hays* v. *United States*, 175 U. S. 248; *Crespin* v. *United States*, 168 U. S. 208; *United States* v. *Bergere*, 168 U. S. 66. If, however, the subordinate officials referred to presumed to act on behalf of the governor in making a grant of title, the failure of the latter to subsequently ratify their action rendered their acts nugatory. *United States* v. *Bergere*, *supra*.

As a grant of title by the governor was a prerequisite to the conferring of juridical possession, of necessity the delivery thereof must have conformed to such precedent grant, and the mere act of possession cannot in any view have the force and effect of a grant. The document evidencing possession certainly formed no part of the "proceedings" or expediente which was required to be transmitted to the legislative body for its decision, approving or disapproving action taken by the governor antecedent to the giving of possession.

Passing, however, from the mere question of form and considering the substance of things, can the papers relied upon be treated as constituting a grant of title to the land in question? Certainly, the adjudications of this court upon the regulations of 1828, from the beginning, have established the doctrine that a grant of Mexican land could not be confirmed unless there had been at least a reasonable compliance with the requirements of those regulations. Now, the Mexican law under which, if at all, a grant of this land could have been made, required the governor to be informed both as to the capacity of the individual under the law to receive the grant, and as to whether the land petitioned for was in a condition for grant. And whilst exacting that the governor should thus have the means of information in order to enable him to form a judgment, the law pointed out the officials to whom he should refer the petition for examination and report on these subjects.

Now, in the case before us, that the governor at the inception of the proceedings was not sufficiently informed, either as to the land or the applicants, to take final action upon the petition, is patent on the face of the documents. Thus, the petition does not designate who were the "five" associates of Santistevan, and the governor in his indorsement requires the prefect to ascertain the condition of the land. Further, though the prefect was not informed, either by the petition or the indorsement of the governor, as to who were the petitioners to whom delivery of the land was to be made, he remained ignorant on the subject, and directed the justice of the peace to ascertain the condition of the land, and to grant to the "petitioners" (asserted in the petition of Santistevan to be *six* in number) an abundance of what each could cultivate of the land, under certain prescribed conditions. We find, however, the justice of the peace assuming to grant to "*five* petitioners" jointly, either a title to or the right of possession of, all the land within described boundaries.

Regarded as a grant of title, the documents relied upon import, contrary to the letter and spirit of the regulations, that it was a matter of no consequence to what particular individuals a grant was to be made, and that Santistevan might designate, at his pleasure, the persons to be placed with himself in possession. But, by article 3 of the regulations, the determination whether the conditions required by the colonization law existed, "both as regards the land and the applicant," was imposed upon the executive head of the territory. And as already shown, the grant could not have been created by the mere conferring of juridical possession, since the authority to give possession was necessarily derived from and must have conformed to a precedent grant.

It is manifest that the indorsement of Governor Armijo, considered by itself or in conjunction with the petition, failed to identify the petitioners, and did not, in terms, purport to grant title to land. As Santistevan petitioned that the grant be made by the governor "in the name of the high powers of our Mexican Republic," it is not permissible to infer that the governor intended to delegate to subordinate officials the power to decide whether an absolute or any title to the land petitioned for should

be granted, or to determine what portion thereof should be granted. The reasonable interpretation of the act of the governor would appear to be that he intended either to license the occupation of land within the prescribed limits for cultivation, or that he desired an examination and report to be made, with a delivery of temporary possession, pending further action on his part.

When it is borne in mind that the application of Santistevan purports to have been made at a time when hostilities were impending between Mexico and the United States, and the territory of New Mexico was undoubtedly in a disturbed condition, its citizens in all probability preoccupied with preparations for an impending clash of arms, the inference from the documents we have been considering is not unwarranted that but a mere temporary possession or license was intended by the prefect and justice of the peace to be conferred upon the applicants. Such an hypothesis would account for the long delay following the direction of the prefect to the justice of the peace, bearing date January 3, 1846, and the delivery of possession on the 20th of March following. And it is to be remarked that such a possession as could have been had of the land in question under then existing circumstances, during the short time intervening the asserted delivery of possession and the conquest of the country by the American forces, would have been insufficient to have constituted even an equity in favor of the alleged grantees, which this court could recognize were it clothed with the broad powers conferred by the California act. *Peralta* v. *United States*, 3 Wall. 434, 441. It may be added that the record fails to satisfactorily establish any occupancy or cultivation prior to the conquest, and but trifling cultivation thereafter, and the latter by a portion only of the alleged grantees.

To summarize. In the documents presented as establishing title in the alleged original grantees, there is an entire disregard of the requirements of the regulations of 1828, and the proceedings do not warrant the finding that the acts of the prefect and of the justice of the peace were ever reported to or received the approval of the governor, or that the latter official ever made a grant of title. The major portion of the documents claimed

to constitute title, if regular, properly constituted part and parcel of an expediente belonging to the archives. They, however, bear no indorsement to indicate that they had ever been among public archives prior to their production in 1872 from private custody for filing in the office of the surveyor general of New Mexico. So, also, no evidence was introduced tending to show that any sort of official record had ever been made of a grant of title to the land in controversy, while the tenor of the act of possession forbids the inference that any formal grant was ever executed by the governor. The case is therefore without the principle of various decisions of this court where, with repect to a formal grant, introduced in evidence, *complying with the requirements of the regulations*, but whose authenticity was disputed, the case was remanded to the lower court to permit the introduction of evidence, if such could be produced, to establish that archive evidence of the grant once existed. One of the prerequisites for the introduction of secondary evidence of title is proof that a "grant was obtained and made in the manner the law required." *United States* v. *Castro*, 24 How. 346, 350.

Unless it be assumed that the Mexican Government was indifferent as to the disposition of its lands, and that anybody and everybody possessed power to convey them, as a matter of course, to whoever chose to ask for them, proceedings such as those we have reviewed cannot be treated as having had the effect of divesting the Republic of Mexico of title to a portion of its public lands.

Sustaining, as we do, the first two contentions urged by the Government, it becomes unnecessary to consider or pass upon the others which were pressed upon our attention. As a consequence of the foregoing reasons, it results that the claim should have been rejected by the Court of Private Land Claims, and that because it erroneously confirmed the alleged grant, the decree made below should be

Reversed and the cause remanded with instructions to reject the claim and dismiss the petition, and it is so ordered.

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

Mr. Justice Shiras and Mr. Justice McKenna dissented.

JAMESTOWN AND NORTHERN RAILROAD COMPANY *v.* JONES.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 142. Argued February 1, 1900.—Decided March 26, 1900.

Under the act of March 3, 1875, c. 152, "granting to the railroads the right of way through the public lands of the United States," such grant to the plaintiff in error took effect upon the construction of its road.

THIS suit was brought by plaintiff in error to have itself adjudged the owner of a right of way over the northwest quarter of section eight, in township one hundred and forty-one, of range 64, in the county of Stutsman, State of North Dakota.

Its title rests upon the act of Congress of March 3, 1875, c. 152, 18 Stat. 482, entitled, "An act granting to railroads the right of way through the public lands of the United States."

The plaintiff was organized September 17, 1881, under the laws of the Territory of Dakota. After its organization it surveyed a line of route for its railroad from a point near Jamestown in a northwesterly direction through the county of Stutsman and over the land in controversy. The survey was finished the 30th of October, 1881. A map representing the survey was made by a resolution of the board of directors, and was adopted as the definite route of the railroad.

In 1882 the road was constructed upon the line surveyed, and since that time trains have been continuously run over it by the plaintiff.

On the 26th of January, 1883, the plaintiff filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same. On the 13th of March, 1883, plaintiff's map of definite location was filed and approved by the Secretary of the Interior. There was some uncertainty in the evidence whether such map was ever filed in the office of the register of the local land office, but it probably was.

Statement of the Case.

On the 12th of February, 1881, the land then being public land of the United States, duly surveyed, one Sherman Jones filed a declaratory statement upon it, alleging settlement the 8th of February, 1881. On the 13th of March, 1883, it had not been cancelled or vacated.

On the 26th of May, 1882, one William S. King filed a declaratory statement on the land, which on the 13th of March, 1883, had not been cancelled.

In addition to the above the trial court found the following facts:

"On the 7th day of March, A. D. 1883, one Ella Sharp filed in said land office an application to be allowed to enter said tract under the homestead law, together with the affidavit required by law. Said application was received and entered at said land office and continued in force until, on the 21st day of November, 1892, it was cancelled at said land office by relinquishment.

"On the 23d day of February, A. D. 1883, the defendant, T. J. Jones, was a citizen of the United States and over the age of twenty-one years. On that day, intending to purchase said tract under the preëmption laws, he built a house thereon; on the 3d day of March of said year he commenced living in said house, and from that day continuously to the present has resided on said land and has cultivated and improved the same. On June 5, 1883, he filed in said land office at Fargo a declaratory statement under the preëmption law, alleging settlement on said land on March 3, 1883. He afterward applied to said land office to be allowed to make proof under his declaratory statement, but owing to the existence of said prior homestead entry of Ella Sharp said application was refused. In November, 1892, he secured from said Ella Sharp a relinquishment of her homestead entry, and on the 21st day of November, 1892, the same date said entry was canceled by relinquishment, he made application to said land office to be allowed to change his preemption entry upon said tract into a homestead entry. Said application was received at said land office, the entry allowed and numbered 20,234, and a receiver's receipt bearing the same number issued to said defendant. Afterward, on the 21st day

of January, A. D. 1893, he made final proof for said land under the homestead law, and on February 18, 1893, a final receiver's receipt, numbered 7233, was issued to him by said land office at Fargo. On the 26th day of May, 1893, a patent in due form, whereby the United States conveyed and granted said land to said defendant, was issued to and received by him. There was not in said receiver's receipt or final certificate, or in said patent for said tract, a reservation of any vested or accrued right, claim or interest to said land on the part of the plaintiff or of any person or corporation under the act of Congress of March 3, 1875. At the time defendant settled upon said land plaintiff was and ever since has been engaged in operating a line of railroad thereover.

"The plaintiff has not at any time instituted proceedings or resorted to any process whatever under state or Federal laws to condemn a right of way across said land or to divest defendant of his title or any possessory right that he might have to said land.

"Plaintiff has taken for its use as a right of way upon said land a strip one hundred feet wide, being fifty feet on each side of the central line of its railroad tract, and extending diagonally across said land from a point about the middle of its south boundary to a point near its northwest corner. Said strip includes about six acres of said land. The land not taken is divided into two unequal parts and its value for farming purposes decreased. Trains of cars are drawn by plaintiff over and across said land every day, and the crop on defendant's land is injured by smoke from said railroad, and his buildings and crops subjected to increased hazard of destruction by fire. By the taking of said strip for a right of way and the construction and operation of a railroad thereon the said land is depreciated in value in the sum of three hundred dollars.

"Defendant has not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage inflicted thereby."

As conclusions of law the court found that no right of way accrued until March 13, 1883, the date of the filing of the pro-

file map of the road; that prior to that time the land had ceased to be public land by reason of the preëmption and homestead entries which had been filed upon it; that the defendant, T. J. Jones, was the owner in fee of said land without reservation of any kind, and that his title related back to February 23, 1883, the date of his settlement thereon.

Judgment was entered dismissing plaintiff's cause of action, awarding the defendant three hundred dollars, and costs taxed at $24.65, and that "upon the payment to the defendant of the sum of three hundred dollars and the costs of this action there shall vest in the plaintiff, Jamestown and Northern Railroad Company, and its successors and assigns, the full legal title to that portion of the northeast quarter of section 8, township 141, range 64, used by it as a right of way, to wit, fifty feet on each side of the center line of said railroad, as the same has been heretofore constructed and is now located and operated through said land by said plaintiff."

Upon appeal to the Supreme Court of the State the judgment was affirmed (7 N. D. 619) and this writ of error was then sued out.

Mr. A. B. Browne for plaintiff in error.

No appearance for defendant in error.

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

In the summer of 1882 the plaintiff in error constructed its railroad across the land in controversy, and the finding of the court is that "at the time defendant settled upon said land plaintiff was and ever since has been engaged in operating a line of railroad thereover."

The defendant nevertheless was awarded three hundred dollars damages, and the plaintiff adjudged to have acquired no rights whatever by the construction of its road.

The act of 1875, upon which plaintiff relies, is as follows:

"That the right of way through the public lands of the

United States is hereby granted to any railway company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road;

"Also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad;

"Also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

* * * * * * * *

"SEC. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes, approved July 1, 1862,' approved July 1, 1864.

"SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location

of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

"SEC. 5. That this act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved for sale. . . ."

There is some uncertainty in the act. Its first section is expressed in words of present grant, but there is no definite grantee. We said in *Hill* v. *Russell*, 101 U. S. 503, 509: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee." And it was further said that in all cases where a grant was given a present effect, a State or some other corporation having all of the qualifications specified in the act had been designated as a grantee. In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named. In *Noble* v. *Railroad Co.*, 147 U. S. 165, we said: "The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory,' etc. The uniform rule of this court has been that such an act was a grant *in præsenti* of lands to be thereafter identified. *Railway Co.* v. *Alling*, 99 U. S. 463."

This case establishes that a railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization under the same with the Secretary of the Interior. It was also so held by Mr. Secretary Vilas in *Dakota Central Railroad Co.* v. *Downey*, 8 Land Decisions, 115.

But what constitutes a definite location of the right of way? Upon the answer to that question the present controversy hinges. The State courts decided, as we have seen, that the right of way only became definitely located by the filing of a profile map of the road. The contention of the plaintiff in error is that the right of way may be definitely located by the actual construction of the road. And this was the ruling of the Interior Department in *Dakota* v. *Downey*, *supra*, and the ruling has been subsequently adhered to. *St. Paul, Minneap-*

olis & Manitoba Ry. Co. v. *Maloney et al.*, 24 Land Decisions, 460; *Montana Central Rd. Co.*, 25 Land Decisions, 250; *St. Paul & Minneapolis Ry. Co.*, 26 Land Decisions, 83.

The ruling gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction of its road, or in advance of construction by filing a map as provided in section four. Actual construction of the road is certainly unmistakable evidence and notice of appropriation.

Secretary Vilas said in *Dakota Central R. R. Co.* v. *Downey:*

"As to the roadway the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. . . . This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with. The fact that the railroad company may locate and construct its road upon unsurveyed lands is clearly recognized in the fourth section of the act; and the regulations of the department have been made to apply to such cases, and authorize such construction.

"It seems to me that the fourth section of the act was written for another purpose and for another case. It relates to a case of a railroad company which desires to secure the present grant, and give to it fixity of location, *before* its road shall be constructed; and it is designed to provide a similar privilege in respect to rights of way which acts granting lands to aid in the construction of railroads have provided — namely, the privilege of giving fixity of location to the subject of the grant *before* construction of the road.

* * * * * * * *

"It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to file a map of definite location in order to entitle it to the benefits of the right of way.

"The fourth section is designed to provide a mode by which fixity of location can be secured to a grantee, *in anticipation*

of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to the 'central line of said road,' which only means — without the fourth section — a *constructed* road."

This decision and the subsequent decisions of the Interior Department were concerned with cases of construction on unsurveyed land, but we think the power applies also to surveyed lands. The only difference which the act of Congress makes between surveyed and unsurveyed land is the provision in section four for filing the profile of the road.

It follows from these views that the grant to plaintiff in error by the act of 1875 became definitely fixed by the actual construction of its road, and that the entry of the defendant in error was subject thereto.

This conclusion does not conflict with the doctrine announced in *Van Wyck* v. *Knevals*, 106 U. S. 360, and in *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629, that the title to lands passing under railroad land grants is considered as established at the date of the filing of the map of definite location. The same question is not here presented. Different considerations apply to the grant of lands than to the grant of the right of way.

The judgment of the Supreme Court of North Dakota is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

BRISTOL v. WASHINGTON COUNTY.

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

No. 109. Argued January 22, 1900. — Decided April 9, 1900.

The personal property of a citizen of and resident in one State, invested in bonds and mortgages in another State, is subject to taxation in the latter State; and the amount of the tax is a claim against the property of the person taxed which is a debt that may, in case of death of the person taxed, be proved against his estate in the State where the mortgages and loans are contracted subject to the statutes of limitations of the State.

This is an appeal from a judgment of the Circuit Court for the District of Minnesota, allowing a claim in favor of Washington County, Minnesota, against the estate of Sophia M. Bristol, deceased.

Sophia M. Bristol died testate, naming James Bristol as her executor, and her will was duly admitted to probate in Wyoming County, State of New York, where said James and Sophia M. resided. Thereafter Mr. Bristol applied to the Probate Court of the County of Ramsay, State of Minnesota, for the admission of the will to probate there and the issue of letters testamentary to him. This was done, and subsequently the County of Washington exhibited its claim against said estate, whereupon Bristol filed his petition in the Probate Court for the removal of the action instituted by the filing of the claim into the Circuit Court of the United States, and it was removed accordingly. A repleader was awarded by stipulation, and a formal complaint and answer filed. The matter was heard by the Circuit Court, a jury being waived according to law, and the court made the following findings:

"I. That Cyrus Jefferson was the father of said Sophia M. Bristol, deceased, and died in November, 1883. For fourteen years just prior to his death he was a citizen and resident of the State of New York, and during said time loaned and in-

vested large sums of money to various persons residing in Minnesota, upon their notes, payable to his order at said Stillwater, secured by mortgages on real estate in said Washington and adjoining counties in the State of Minnesota; all said loans and investments were made and the notes and mortgages taken by and through William M. McCluer, the agent of said Cyrus Jefferson, who resided at the city of Stillwater, in said Washington County, during all the time hereinafter mentioned, and who, with full authority from said Cyrus Jefferson, made all such loans and took and retained all notes and securities and collected and reloaned both the principal and interest of said loans at said city of Stillwater, in Washington County, Minnesota, and kept the same permanently invested in that way, as nearly as practicable, save as to such moneys as said Jefferson drew from time to time to pay his debts and living expenses.

"II. Prior to May 1, 1883, said William M. McCluer, at said Stillwater, by the direction of said Jefferson, but otherwise with the same power and under the same authority and in the same manner, loaned of said moneys of said Cyrus Jefferson to persons in Washington County sums aggregating eighteen thousand dollars ($18,000), taking notes and mortgages therefor in the name of and payable to said Sophia M. Bristol at said Stillwater, and retained the same as her agent, and handled and collected and reinvested the same in the same manner as he had those of Cyrus Jefferson.

"III. After the death of said Cyrus Jefferson and on December 18, 1883, all the other notes and mortgages held by said McCluer as agent for said Cyrus Jefferson were transferred, assigned, and passed to said Sophia M. Bristol as her share of the estate of her said father. She thereupon employed said William M. McCluer and Charles M. McCluer, both of whom then at all times herein mentioned resided at said Stillwater, as her agents at said city of Stillwater in and about said loaning business. She gave to them all the authority before that time exercised by said William M. McCluer for her father, Cyrus Jefferson, as aforesaid, and also gave to them a written power of attorney empowering them or either of them

to satisfy and discharge or to sell and assign any and all mortgages then or thereafter in her name in the States of Minnesota or Wisconsin; all of said notes and mortgages of said Sophia M. Bristol, including those received by her as her share of her father's estate, as well as those taken in her name by said William M. McCluer prior to the death of her father, as aforesaid, were still left by her in the hands of her agents in Stillwater, Minnesota, and said agents continued as before to make collections of both principal and interest due on said notes and mortgages, to satisfy and discharge mortgages, and to make new loans and investments upon like securities with the moneys so collected by them for said Sophia M. Bristol, and kept all of her moneys received or collected by them prior to transmittal or reinvestment of the same, and while in their hands, deposited in bank in said Stillwater as their money, and having all notes and mortgages received by them for such loans made payable at their own office in said city of Stillwater, said mortgages being upon lands in Washington and adjoining counties in Minnesota.

"IV. In March, 1885, all of such notes then in the hands of said agents were delivered to said Sophia M. Bristol, and thereafter all new notes as taken by said agents in said business were sent to Sophia M. Bristol and kept by her at her home in New York, but were payable as before at the office of said agents in Stillwater, Minnesota; all mortgages securing such notes were retained by said agents, and said notes were returned to said agents at Stillwater by said Sophia M. Bristol from time to time whenever required by them for the purpose of renewal, payment, collection, or foreclosure of securities; that the said William M. McCluer and Charles M. McCluer continued as agents for said Sophia M. Bristol, collecting money becoming due upon said notes and making loans in her name, sometimes under the direction of James Bristol, her husband, but generally upon their own judgment; that they remitted money to Sophia M. Bristol when she called for the same, and what was not received by her was invested in new loans, as aforesaid.

"That said Sophia M. Bristol did receive from the proceeds

of said collections at various times large sums of money through said agents, and all moneys collected were always subject to be sent to her or paid out in any way she should order.

"V. In the month of August, 1890, said William M. McCluer died, and thereafter said Charles M. McCluer continued to act as sole agent for said Sophia M. Bristol at said city of Stillwater, Minnesota, with the same power as before exercised by him and said William M. McCluer, except that in November, 1890, Sophia M. Bristol revoked said power of attorney which authorized said agent to satisfy mortgages of record, and thereafter executed satisfactions of mortgages herself.

"VI. Said loaning business was so carried on by said Sophia M. Bristol by and through her said agents at the city of Stillwater, Minnesota, in the manner aforesaid until her death, in the month of August, 1894.

"VII. Said Sophia M. Bristol had no taxable property in said Washington County during any of the years hereinbefore or hereinafter mentioned other than the loans and indebtedness mentioned, which were secured by mortgages upon lands in Minnesota, and which were under the charge and management of her said agents, who, during all said years and during all the time within which the taxes hereinafter mentioned were assessed and levied, resided and had their office and transacted said loaning business at the said city of Stillwater, in said county and State.

"VIII. That the moneys originally sent by said Jefferson to said William M. McCluer and invested and reinvested by said McCluer, and afterwards by said Sophia M. Bristol kept and retained in the hands of said William M. McCluer and Charles M. McCluer as her agents, were so sent, retained and kept in the hands of said agents in the city of Stillwater, Washington County, Minnesota, in and during each of the years when the taxes hereinafter mentioned were assessed and levied against said Sophia M. Bristol, as hereinafter specifically set forth, as and for a permanent investment and business under the full control of said agents, and said property and said loans acquired and had a situs in said city of Stillwater, Washington County, Minnesota, for the purpose of taxation.

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"IX. That the claimant herein, Washington County, is and for more than thirty years last past has been a municipal corporation, to wit, an organized county created and existing under and pursuant to the laws of the State of Minnesota.

"X. That in and during each of the years from 1883 to 1894, inclusive, certain personal property taxes were duly assessed and levied against said Sophia M. Bristol by the proper taxing officers of said city of Stillwater and said Washington County on the personal property of said Sophia M. Bristol, deceased, consisting of the 'credits other than that of bank, banker, broker or stock jobber,' and that said assessments were each in fact based upon credits due said Sophia M. Bristol on promissory notes of various persons residing in Washington County and other counties in Minnesota, payable to her order, secured by mortgages on real estate situate in Washington County and other counties in the State of Minnesota.

"Said notes were all made payable at the office of William M. McCluer or Charles M. McCluer, at the city of Stillwater. The assessed valuation of said personal property upon which said taxes were so assessed and levied for each of said years, the rate of the tax assessed upon property in the said city of Stillwater, in said county, that being the district where said property was assessed, in the number of mills levied on each dollar of property at the assessed valuation for each of said years, and the amount of said taxes so assessed and levied against said Sophia M. Bristol, deceased, for each of said years, are as set forth in the following schedule thereof, to wit: [Here followed schedule as described. The valuations ran from $17,900 in 1883 to $184,900 in 1884; $196,672 in 1888; $181,292 in 1889, and $179,900 in 1890, 1, 2, 3 and 4.]

"That the said Sophia M. Bristol failed and neglected to pay said taxes on the first day of March in each of the years following that in which said taxes were respectively levied, as hereinbefore set forth, or at any time thereafter, and that by reason of such failure said Sophia M. Bristol became and was and is liable to pay a penalty amounting to five per cent. on the amount of said taxes for the years 1883 to 1894, and ten per cent. on the amount of said taxes for each year thereafter, and that the

amount of said penalty for each of said years is as follows — that is to say: [Here the penalties claimed for each year were set forth.]

"XI. Said Sophia M. Bristol never resided in Washington County nor in the State of Minnesota at any time, nor was she within the State of Minnesota from March 1, 1883, until her death, in August, 1894, except temporarily, and that the whole period of time she spent in the State of Minnesota from March 1, 1883, until her death did not exceed one year.

"XII. On or about the nineteenth day of October, 1894, the will of said Sophia M. Bristol was duly admitted to probate in and by the probate court of Ramsey County, in the State of Minnesota, and such proceedings were had in the matter of said estate that James Bristol, the executor named in said will, was duly appointed by said court as the executor of said last will and testament and of said estate, and the said James Bristol thereupon duly qualified as such executor and entered upon the discharge of his duties as such, and thereafter and on the eighteenth day of April, 1895, and within the time required by the order duly made by said probate court for filing claims against the estate of said Sophia M. Bristol, deceased, said claimant, Washington County, duly made and filed its verified claim in due form for all of the said taxes and the said penalties, together with interest upon the amount of said taxes and penalties for each year from and after the first day of March, in the year after the year in which said taxes were levied, as aforesaid.

"XIII. That the said Sophia M. Bristol was and for more than fifteen years next prior to her death has been a resident and citizen of the State of New York, and said James Bristol, the executor above named, is now and for more than fifteen years last past always has been a resident and citizen of the State of New York.

"XIV. The court further finds that all of the taxes hereinbefore mentioned were fairly and equally assessed on a fair valuation of the personal property of said Sophia M. Bristol, deceased, for each of the years hereinbefore mentioned, and that no part of said taxes has ever been paid."

As conclusions of law the court found that Washington County

was entitled to judgment for the amount of the taxes and penalties, together with costs and disbursements, and that "said claim of said amount is a just and valid claim against the estate of Sophia M. Bristol, deceased," and entered judgment as follows: "It is therefore considered, ordered and adjudged — That the County of Washington, the claimant in this case, do have and recover of and from the estate of Sophia M. Bristol, deceased, the sum of sixty-four thousand six hundred eighty-four dollars and seventy-eight cents ($64,684.78), so found to be due by the court, and that said sum of sixty-four thousand six hundred eighty-four dollars and seventy-eight cents ($64,684.78) is a just and valid claim against the estate of Sophia M. Bristol, deceased, in favor of said Washington County, besides the costs and disbursements herein to be taxed."

Mr. C. W. Bunn and *Mr. Emerson Hadley* for plaintiff in error.

Mr. Moses E. Clapp and *Mr. George H. Sullivan* for defendant in error. *Mr. N. H. Clapp* and *Mr. L. L. Manwaring* were on their brief.

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

The judgment amounted in effect to the allowance of the claim payable in due course of administration out of assets of the estate within the jurisdiction of the probate court. This was so notwithstanding the domicil of the testatrix and of her executor was in the State of New York; that that was the place of principal administration; and that the person charged therewith was the same. *Aspden* v. *Nixon*, 4 How. 467; *Johnson* v. *Powers*, 139 U. S. 156, 159.

Our jurisdiction by direct appeal is invoked on the ground that the application of the Constitution of the United States was involved, and that a law of the State was "claimed to be in contravention of the Constitution of the United States."

The objections of the executor to the allowance of the claim

and his answer put forward the deprivation of property without due process of law; the abridgment of privileges and immunities of citizens of the United States; and the denial of the equal protection of the laws, as the violations of constitutional safeguards relied on. Of these the first only is pressed upon our attention and needs to be considered, and that raises the question whether the laws of the State of Minnesota, as expounded by the Supreme Court of that State, in authorizing this judgment, amounted to the taking of property without due process of law.

In the course of the administration of the estate of Cyrus Jefferson, deceased, in the probate court of the County of Washington, Minnesota, a claim was presented in March, 1884, against the estate for unpaid taxes for the years 1882 and 1883, on credits secured by mortgages, amounting to about $122,000, and the claim was allowed. The executors appealed to the district court where the order of the probate court was affirmed. The case was then carried by the executors to the Supreme Court of Minnesota, which, on May 26, 1886, affirmed the judgment. *In re Jefferson*, 35 Minnesota, 215. It was objected "that taxes are not debts which can be proved against the estate of deceased persons;" but the court overruled the objection, saying: "It is not material whether a personal tax is a debt, in the sense that an action against the person may be maintained to recover it. It is at least a claim against the property which survives the death of the person against whom it is levied, and remains a claim against his estate. The statute regards it as a debt to be paid out of the estate. In prescribing the order of preference in which debts shall be paid, where the estate is not sufficient to pay all, it provides (Gen. St., 1878, c. 53, § 38) that, after paying the necessary expenses of the funeral, last sickness and administration, the executor or administrator shall 'pay the debts against the estate in the following order. . . . *Second*, public rates and taxes.' This, we think, is conclusive that, for the purpose of proof and payment out of the estate, a personal tax is a debt." The court further held that a tax list or tax duplicate, duly certified by the county auditor, as required by statute, was *prima facie* evidence of the

due levy of the taxes in it. The main question in the case was whether credits due to a resident of another State, from residents within Minnesota, for moneys loaned and invested by, and which credits were managed and controlled by, an agent of the creditor, resident within Minnesota, could be taxed in Minnesota under existing statutes, and the court held that they could. The court, after referring to the provisions of the statute that all personal property in the State was subject to taxation, and that all moneys and credits should be listed by the owner or his agent, where one or the other resided, said: "It is to be taken, therefore, as the intent of the statute, that credits, to whomsoever owing, are taxable here if they can be regarded as personal property *in this State;* that is, situated in this State. To justify the imposition of tax by any State, it must have jurisdiction over the person taxed, or over the property taxed. As Jefferson was not a resident of this State, there was no jurisdiction over him. But if the property on account of which these taxes were unpaid was within this State, the State had jurisdiction to impose them as it might impose a tax upon tangible personal property permanently situated here, and to enforce the taxes against the property. The authorities which we cite in support of the proposition that the credits taxed had a *situs* here, fully sustain this.

"For many purposes the domicil of the owner is deemed the *situs* of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned,—at the domicil of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." After citing *Catlin* v. *Hall*, 21 Vermont, 152; *People* v. *Smith*, 88 N. Y. 576; *Wilcox* v.

Ellis, 14 Kansas, 588; *Board of Supervisors* v. *Davenport*, 40 Illinois, 197, and many other cases, the opinion continued thus: "The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this State, not for a mere temporary purpose, but as permanently as though the owner resided here. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever have an actual *situs* other than the domicil of the owner, can ever be regarded as property within any other State, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

It was thus ruled that the tax list of personal property was *prima facie* evidence of the due levy of the taxes; that such taxes could be proven against decedents' estates; and that credits secured by mortgages, the result of the business of investing and reinvesting moneys in the State, were subject to taxation as having their *situs* there.

Admonished as to the law of the State in these particulars, Mrs. Bristol, Mr. Jefferson's daughter, continued the business of investing and reinvesting in the same way and through the same agency until her own death in August, 1894. The state statute required every person being a resident of the State to list his personal property, including moneys, credits, etc., for taxation and "moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney or on account of any other person or persons;" and in cases of failure to obtain a statement of personal property from any cause, it was made the duty of the assessor to ascertain its amount and value and assess the same at such amount as he believed to be the true value thereof. Stat. 1894, c. 11, §§ 1515, 1546; Stat. 1878, c. 11, §§ 7, 38. No question arises here in respect of the

regular listing of these investments for taxation from 1883 until and including 1894, nor in respect of the valuation thereof.

Mrs. Bristol had invested some $18,000 of her own money, belonging to her prior to her father's death, in the same way and by the same agency, and invested and reinvested in the same manner that money and moneys derived from notes and mortgages held by the agent for Mr. Jefferson, which passed to her on his death. And these investments were taxable and were taxed year by year during all this period according to the statutes of the State and the decision of the Supreme Court from which we have quoted.

It is insisted, however, that this is not so, because in 1885, which was after the presentation of the claim against the father's estate in the probate court, though before the decision by the Supreme Court, the notes then in the hands of the agents were delivered to Mrs. Bristol, and thereafter all new notes taken in the business were sent to her and kept by her in her home in New York. But these notes were payable as before at the office of the agents in Minnesota; the mortgages securing the notes were retained by the agents, and the notes were returned to the agents from time to time, whenever required by them, for the purpose of renewal, collection or foreclosure of securities; the agents continued to collect the money due on the notes, and to make loans in the name of Mrs. Bristol, sometimes under her husband's direction, but generally on their own judgment; and they remitted money to Mrs. Bristol whenever she called for the same, while what was not received by her was invested in new loans. It also appeared that Mrs. Bristol had given the agents a power of attorney empowering them to satisfy or discharge, or to sell and assign, any and all mortgages in her name in the States of Minnesota and Wisconsin, but that she revoked this instrument after the death of one of the agents, and about November, 1890, thereafter executing satisfactions of mortgages herself.

Nevertheless the business of loaning money through the agency in Minnesota was continued during all these years just as it had been carried on before, and we agree with the Circuit Court that the fact that the notes were sent to Mrs. Bristol in New

York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes as expounded in the decision to which we have referred. And we are unable to perceive that any rights secured by the Federal Constitution were infringed by the statutes as thus interpreted so far as the *situs* of these loans and mortgages was concerned.

In *New Orleans* v. *Stempel*, 175 U. S. 309, certain taxes were levied on money on deposit, and also on money loaned on interest, credits and bills receivable, and it was held by this court that the statutes of Louisiana, as interpreted by the courts of that State, in authorizing such assessment, did not violate the Constitution of the United States. There the money, notes and evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

Persons are not permitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design.

In *New Orleans* v. *Stempel* it was remarked: "With reference to the decisions of this court it may be said that there has never been any denial of the power of a State to tax securities situated as these are, while there have been frequent recognitions of its power to separate for purposes of taxation the *situs* of personal property from the domicil of the owner. . . . In *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, the ruling was that although shares of stock in national banks were in a certain sense intangible and incorporeal personal property, the law might separate them from the persons of their owners for purposes of taxation, and give them a *situs* of their own. See also *Pullman's Car Company* v. *Pennsylvania*, 141 U. S. 18, 22, where the question of the separation of personal property from the person of the owner for purposes of taxation was discussed at length. As also the case of *Savings Society* v. *Multnomah*

County, 169 U. S. 421, 427, in which a statute of Oregon taxing the interest of a mortgagee in real estate was adjudged valid, although the owner of the mortgage was a non-resident." In the latter case the subject was much considered, and Mr. Justice Gray, delivering the opinion of the court, said: "The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. Personal property, as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax. *Tappan* v. *Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607; *Coe* v. *Errol*, 116 U. S. 517, 524; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22, 27."

Accepting the views of the state court in relation to the state statutes and proceedings thereunder, and concluding that the Constitution of the United States did not operate to prohibit the exercise of the power to tax these investments, it follows that the Circuit Court did not err in sustaining the validity of the taxation. But it is further contended that, as Mrs. Bristol was a non-resident, the power to tax could be exercised only as against the very property taxed; that these assessments did not constitute judgments *in personam;* and that judgment against her estate could not, therefore, be rendered upon them. The state statute provided that claims for taxes should be preferred to ordinary debts, (Stat. 1894, c. 45, § 4529,) and, as has been seen, the Supreme Court has decided that, "for the purpose of proof and payment out of the estate, a personal tax is a debt." The court, for that purpose, so treated taxes, but not as being debts in the usual acceptation of the term. The obligation to contribute to the support of government in return for the protection and advantages afforded by government is not dependent on contract, but on the exercise of the public will as demanded by the public welfare.

By the laws of Minnesota, moneys, credits and other personal property were required to be listed, either by the owner or his agent; provisions were made for notice; for action by the as-

sessor in case of failure to list; for a board of review, meeting at a specified time; for the delivery of lists (in tax books) to the county treasurers, who were duly authorized to receive and collect the taxes named therein; that personal property taxes unpaid on the 1st of March next after they became due should be deemed delinquent; for the filing of delinquent lists in the appropriate office; for issue of warrant; for the distraint of goods and chattels; for personal judgment on service of citation; and for proceeding against non-residents by attachment and publication of notice. (Gen. Stat. 1894, c. 11; Gen. Stat. 1878, c. 11.)

By section 1623, Gen. Stat. 1894, (Gen. Stat. 1878, c. 11, § 105,) it was provided that: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer."

Thus it appears that on the return of the delinquent tax list, the amount of the tax could be collected by distraint of goods and chattels, or by proceedings by attachment and publication, judgment in which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, for while the non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained, the defendant would not be cut off from any competent defence, as the delinquent list would not necessarily be held conclusive. In this case no defence on the merits appears to have been relied on except the want of *situs*.

Dewey v. *Des Moines*, 173 U. S. 193, cited by plaintiff in error, is not to the contrary. What was ruled there was that a citizen of one State cannot be cast in a personal judgment in another State on an assessment levied there on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction.

This brings us to consider the plea of the statute of limitations interposed as to the taxes for the years 1883 to 1888 inclusive.

Mrs. Bristol died in August, 1894; the will was admitted to

probate by the probate court of Ramsay County, October 19, 1894; Washington County filed its claim for taxes in that court April 18, 1895; the statute of limitations provided that actions "upon a liability created by statute" should be barred by the lapse of six years. Stat. 1894, c. 66, § 5136. This statute applied to actions brought in the name of or for the benefit of the State. § 5142. The right to proceed to enforce these taxes commenced the first of April of the year following that for which they were levied. If this had been a personal action brought against Mrs. Bristol in her lifetime, the plea of the statute was open to be defeated by the fact of her non-residence, (§ 5145,) but treating the filing of the delinquent lists as proceedings *in rem*, it is contended that the statute applied.

In *County of Redwood* v. *Winona & St. Peter Land Co.*, 40 Minnesota, 512, the statute of limitations of six years was held to apply to proceedings to enforce the collection of taxes against real estate, and to the same effect are *Mower County* v. *Crane*, 51 Minnesota, 201; *Pine County* v. *Lambert*, 57 Minnesota, 203; *State* v. *Norton*, 59 Minnesota, 424. In the first cited case it appeared that certain lands having been taxed, were in 1883 assessed and a tax levied for each year for fifteen years prior to that time. On an application for judgment against the land it was objected that the statute of limitations had run as to all taxes where the application for judgment could have been made six years or more prior to the time it was made, if the land had been taxed at the time it should have been taxed under the statute, and the court sustained the objection. It was held that by statute in Minnesota, the statute of limitations ran against the State the same as against an individual; that a tax was a liability created by statute; that although statutes of limitation may in terms be applicable only to actions, they are to be construed liberally and applied to all proceedings that are analogous in their nature to actions "so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies. Upon this principle they are held to apply to all claims which may be the subject of actions, however presented; also that they furnish a rule for cases analogous in their subject matter, but for which a remedy unknown to the

common law has been provided. They have also been applied by analogy to proceedings in admiralty, to claims in bankruptcy, or in probate court, although not within the strict letter of the statute. . . . A tax being a liability created by statute, and the filing of the delinquent list being, as the statute declares, and as we have held, the institution of an action against the land for the recovery of the tax appearing against it in the list; and, inasmuch as the nature of the right sought to be enforced, and not the mode of procedure, is the test,— we are unable to see why it should make any difference whether the action is *in rem* or *in personam*,—against the property instead of against its owner. We have therefore come to the conclusion that these proceedings are, within the meaning of the statute, 'an action upon a liability created by statute,' and are barred as to all taxes for the enforcement of which such proceedings might have been instituted more than six years before the commencement of the present proceedings, had such taxes been assessed in the proper year."

The estate of Mrs. Bristol is liable to respond to this claim because these taxes were lawfully levied in respect of her property situated in Minnesota when the levies were made; and the statute gave a lien for them against all her personal property within the jurisdiction. Collection could have been enforced by distraint, or by attachment, and in either case could only have been made out of the property sequestered. In the pending proceeding then which seeks to subject assets of the estate within the jurisdiction to payment of the claim it seems to us the ruling of the Supreme Court is applicable. In other words, the filing of the delinquent lists had reference to property, and a personal judgment could not have been taken thereon without service of citation.

Hence in a subsequent proceeding to enforce collection from property of the decedent, the rule which was applied to proceedings to obtain judgment against real estate would appear to be applicable in principle. If the county of Redwood had lost its right to enforce the assessments, (supposing they had been made when they should have been,) by lapse of time, the county

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of Washington may well be held subject to a similar deprivation in respect of the allowance of a portion of its claim.

Reversed, and the cause remanded with direction to exclude the taxes for the years 1883 *to* 1888, *inclusive, and to render judgment for the taxes and penalties after the latter year, with interest on the aggregate sum thereof from June* 29, 1898, *the date of the judgment below.*

Mr. Justice White concurred on the ground of *stare decisis.*

UNION REFRIGERATOR TRANSIT COMPANY *v.* LYNCH.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 207. Argued March 21, 1900.—Decided April 9, 1900.

Cars of the Union Refrigerator Transit Company, a corporation of Kentucky, engaged in furnishing to shippers refrigerator cars for the transportation of perishable freight, and which were employed in the State of Utah for that purpose, were subject to taxation by that State.

The Union Refrigerator Transit Company filed its bill in the District Court in and for Salt Lake County, State of Utah, against Stephen H. Lynch, treasurer of Salt Lake County and collector of taxes therein, alleging: "That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky; that its principal office and place of business is in the city of Louisville, in said State, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said times the sole property of the plaintiff, and are not and were not during any of the said time allotted,

leased, rented or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them in shipping.

"The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are and were during the said times engaged in was exclusively interstate commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said States to points in others of the said States; that plaintiff has not now and has not had any office or place of business within the State of Utah, and that all freight transported in plaintiff's cars in or through the State of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a State of the United States outside of the State of Utah to a point or points within the State of Utah, or from a point or points within the State of Utah to a point or points without the State of Utah, or between points neither of which were within the State of Utah; and that said cars were within the said State of Utah at no regular intervals nor in any regular number, and when in said State of Utah were only within it in transit, except to load or unload freight shipped from within out of said State or coming into said State from without the same or in the transportation of freight entirely through or across said State, and at such times the said cars were only transiently present for the said purposes and not otherwise.

"And plaintiff further alleges that said cars do not and did not abide, nor have they at any time had any *situs* within the said State of Utah, nor has this plaintiff, nor has it heretofore at any time had other property of any description whatsoever located within the State of Utah.

"And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said State for any purpose whatsoever.

"That, notwithstanding the aforesaid facts, the state board of equalization of the State of Utah unlawfully and wrongfully on the 14th day of August, 1897, assessed and valued, of the property of the plaintiff, ten cars of the aggregate assessment of $2600, for all purposes of county and state taxation for the year 1897, and thereafter wrongfully and unlawfully apportioned the said assessment to the several counties in the said State of Utah through which lines of railway pass and over which the said cars might pass or be transported; that among the counties to which said apportionment was made was the county of Salt Lake, and there was by the said board apportioned to said county of Salt Lake of the said assessment the sum of $210.00.

"That the taxes levied upon the said property so assessed and apportioned to Salt Lake County for state, state school, county, city and city school taxes amounted to the sum of $5.76; that the said tax was and is by reason of the aforesaid facts illegal and void."

Plaintiff then averred the payment of the tax, under written protest, claiming the tax to be illegal, in order to avoid the seizure and sale of its property and to prevent incurring the penalties provided by law, and prayed judgment for the sum of $5.76 and interest, and for costs. Defendant filed a general demurrer to the complaint, which was sustained, and, plaintiff electing not to amend but to stand on its complaint, judgment of dismissal with costs was entered. The cause was then taken to the Supreme Court of Utah and the judgment affirmed. 18 Utah, 378. Thereupon this writ of error was allowed by the Chief Justice of that court.

Mr. Percy Werner for plaintiff in error. *Mr. Parley L. Williams* was on his brief.

Mr. Joseph L. Rawlins for defendant in error. *Mr. Charles S. Varian* was on his brief.

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

The constitution of the State of Utah provided that: "All

property in the State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law;" and that: "All corporations or persons in this State, or doing business herein, shall be subject to taxation for state, county, school, municipal or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." Constitution, Art. 13, §§ 2, 10.

Some question was raised in the Supreme Court of Utah as to the proper construction and scope of the state statutes in respect of taxation, but the court held that by those laws all property, owned or used by railway, car, telephone, telegraph and other companies, within the territorial limits of the State, was subjected to taxation according to its value regardless of the domicil of its owner.

The contention on this writ of error is that the taxation of the ten cars of plaintiff in error was forbidden by the Constitution of the United States because they had no *situs* for that purpose in the State of Utah, and the tax imposed a burden on interstate commerce.

In *American Refrigerator Transit Company* v. *Hall*, 174 U. S. 70, quotations were made from the opinions in *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 530; *Adams Express Company* v. *Ohio*, 165 U. S. 194, and *Adams Express Company* v. *Ohio*, 166 U. S. 185, and the conclusion of the court was thus expressed: "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such

cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid."

The case before us involves the taxation by the State of Utah of certain cars belonging to a corporation of Kentucky; the case cited involved the taxation by the State of Colorado of certain cars belonging to a corporation of Illinois; and if this case comes within the rule laid down in that case, nothing further need be said.

In that case the facts were stipulated; and it appeared that the American Refrigerator Transit Company was a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis in said State; that it was engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars were the sole and exclusive property of the plaintiff, and that the plaintiff furnished the same to be run indiscriminately over any lines of railroad over which shippers on said railroads might desire to route them in shipping, and furnished the same for the transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; and plaintiff had not and never had had any contract of any kind whatsoever by which its cars were leased or allotted to or by which it agreed to furnish its cars to any railroad company operating within the State of Colorado; that it had and had had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points of the United States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in

such business aforesaid, and then only transiently present in said State for such purposes.

All these matters were set up, *mutatis mutandis*, in the complaint in this case in substantially the same language employed in setting forth the facts in that case. But it was also there stipulated: "That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said State for the purposes of taxation."

The complaint in this case contained no averment as to the average number of cars of plaintiff in error used in the State of Utah, but it did show that the company was doing business in Utah in the year for which the tax in question was levied, and that it was running its cars into and through the State, using, employing and caring for them there for profit, in the same manner as the cars in that case, and it was not alleged that the assessment by the state board of equalization was unreasonable, or unjust, or in excess of the valuation of other like property for taxation, or that the method of apportionment was erroneous. The presumption is that the action of the taxing officers was correct and regular, and that the number of cars assessed by the state board of equalization was the average number used and employed by plaintiff in error in the State of Utah during 1897.

The objection is not that too many cars were assessed, or that they were assessed too much, or in an improper manner, even if we could consider such questions, but simply that they could not be taxed at all. And this objection was considered and overruled in the case to which we have referred.

Judgment affirmed.

MR. JUSTICE WHITE did not hear the argument and took no part in the consideration and disposition of this case.

MURPHY *v.* MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 480. Argued February 28, March 1, 1900.—Decided April 9, 1900.

Murphy was tried in a state court of Massachusetts on an indictment charging him with embezzlement; was convicted; and was sentenced to imprisonment for a term, one day of which was to be in solitary confinement, and the rest at hard labor. He remained in confinement for nearly three years, and then sued out a writ of error, and the judgment was reversed on the ground that the sentence was unconstitutional. The case was then remanded to the court below to have him resentenced, which was done. Before imposing the new sentence the court said that as he had already suffered one term of solitary confinement, the court would not impose another, if a written waiver by the prisoner of the provision therefor were filed. He declined to file such a waiver, and the sentence was accordingly imposed. Upon his taking steps to have the sentence set aside, *held* that his contention in that respect was unavailing.

PLAINTIFF in error, a citizen of the Commonwealth of Massachusetts and of the United States, was tried in the Superior Court of Massachusetts on an indictment which charged him in sixty-four counts with the embezzlement of different sums of money on different days between July 19, 1892, and November 29, 1893, contrary to the provisions of section forty of chapter 203 of the Public Statutes of Massachusetts; was found guilty, and on May 29, 1896, was sentenced under chapter 504 of the statutes of 1895 to imprisonment in the state's prison of the Commonwealth at Boston for the term of not less than ten nor more than fifteen years, one day thereof to be in solitary confinement and the residue at hard labor, and on that day, in execution of said sentence, was committed to that prison. He remained in solitary confinement for one day and in the prison continuously from May 29, 1896, to January 7, 1899.

Opinion of the Court.

On June 8, 1898, he sued a writ of error out of the Supreme Judicial Court of Massachusetts, and on January 6, 1899, that court reversed the sentence of the Superior Court on the ground that the statute of 1895, c. 504, was unconstitutional so far as it related to past offenses, and remanded the case to the Superior Court under Public Statutes, c. 187, § 13, to be resentenced according to the law as it was when the offenses were committed, and before the statute under which he had been sentenced took effect. 172 Mass. 264.

January 7, 1899, he was brought before the Superior Court pursuant to that direction, and resentenced according to the provisions of Public Statutes, c. 203, § 20, and Public Statutes, c. 215, § 23, the sentence being to the state's prison for nine years, ten months and twenty-one days, the first day thereof to be in solitary confinement, and the residue at hard labor. Before imposing this sentence the court stated to Murphy's attorney that as Murphy had already suffered one term of solitary confinement for the offenses for which he was now to be sentenced, it would prefer not to sentence to solitary confinement, and that it would not do so, if a written waiver by the prisoner of the provision therefor were filed; but the attorney did not feel justified in filing such a waiver. Murphy duly excepted to the sentence last imposed, and requested that all his rights be reserved. Exceptions having been allowed, the case was carried on error to the Supreme Judicial Court, which overruled them. 54 N. E. Rep. 860. This writ of error was then sued out.

Mr. Ezra Ripley Thayer for plaintiff in error. *Mr. Louis D. Brandeis* and *Mr. Edward F. McClennen* were on his brief.

Mr. Hosea M. Knowlton for defendant in error. *Mr. Arthur W. DeGoosh* was on his brief.

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

The specification of errors in the brief of counsel is as follows: "The contention of the plaintiff in error is that the sentence under which he is now held puts him twice in jeop-

ardy, and that such double jeopardy abridges his privileges and immunities as a citizen of the United States, and deprives him of his liberty without due process of law."

Laying out of view the suggestion that the immunity from double jeopardy or double punishment of a citizen of Massachusetts, in Massachusetts, is an immunity possessed by him as a citizen of the United States as contradistinguished from a citizen of Massachusetts, we inquire whether any law of Massachusetts abridges such an immunity, and whether that or any other action of that Commonwealth deprives plaintiff in error of his liberty without due process of law. If there be no such law, and if he is suffering no such deprivation, we need not be curious in explanation of the particular ground of our exercise of jurisdiction.

The statutes of Massachusetts have provided since 1851 (act of April 30, 1851, c. 87) that " when a final judgment in a criminal case is reversed by the Supreme Judicial Court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." Acts of 1851, p. 602, c. 87; Pub. St. c. 187, § 13.

In this case it was on account of error in the sentence as originally imposed that that sentence was set aside. All the proceedings prior thereto stood unimpugned, and the Superior Court merely rendered the judgment which should have been rendered before. And this was done under the statute by direction of the Supreme Judicial Court, whose interposition had been invoked by plaintiff in error.

The legal effect of the statute was to make it a condition of the bringing of writs of error in criminal cases that if the error was one in the award of punishment only, that error should be corrected, and, as remarked by Chief Justice Shaw, this did not disturb the fundamental principles of right. *Jacquins* v. *Commonwealth*, 9 Cush. 279. Indeed, in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law. *Reynolds* v. *United States*, 98 U. S. 145, 168; *In re Bonner*, 151 U. S. 242; *Hen-*

derson v. *People*, 165 Illinois, 607; *Beale* v. *Commonwealth*, 25 Penn. St. 11. And we have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the State to the accused upon such conditions as the State deems proper. *McKane* v. *Durston*, 153 U. S. 684; *Andrews* v. *Swartz*, 156 U. S. 272; *Kohl* v. *Lehlback*, 160 U. S. 293, 297.

As this statute was reasonable, was intended for the benefit of the accused as well as of the community, and was entirely within the admitted powers of the State, we are unable to see that it is in itself open to attack as being unconstitutional; and as this plaintiff in error set the proceedings in question in motion, and they conformed to the statute, we do not perceive how they can be regarded as otherwise than valid.

In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.

Ball v. *United States*, 163 U. S. 662, illustrates the rule. There Millard F. Ball, John C. Ball and Robert E. Boutwell had been indicted, in the Circuit Court of the United States for the Eastern District of Texas, for the murder of one Box, and on trial Millard F. Ball had been acquitted and discharged, and John C. Ball and Boutwell convicted and sentenced to death. The condemned having brought the case here on error, it was held that the indictment was fatally defective, and the judgment was reversed and the cause remanded with a direction to quash the indictment. *Ball* v. *United States*, 140 U. S. 118. The mandate went down, the indictment was dismissed, and a new indictment was returned against all three defendants. To this Millard F. Ball filed a plea of former jeopardy and former acquittal, and John C. Ball and Boutwell filed a plea of former jeopardy by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment. Both these pleas were overruled, defendants pleaded not guilty, were convicted and sentenced to death.

Opinion of the Court.

On their writ of error this court held that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing. Mr. Justice Gray, delivering the opinion, said:

"An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth* v. *Peters*, 12 Met. 387; 2 Hawk. P. C. c. 35, § 3; 1 Bishop's Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. *Ex parte Parks*, 93 U. S. 18. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. *United States* v. *Sanges*, 144 U. S. 310."

The judgment was reversed as to Millard F. Ball, and judgment rendered for him upon his plea of former acquittal.

But as to John C. Ball and Boutwell, it was ruled that the Circuit Court rightly overruled their plea of former jeopardy, and it was said (163 U. S. 662, 671):

"Their plea of former conviction cannot be sustained, because upon a writ of error, sued out by themselves, the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them, need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. *Hopt* v. *Utah*, 104 U. S. 631; 110 U. S. 574; 114 U. S. 488; 120 U. S. 430; *Regina* v. *Drury*,

3 Cox Crim. Cas. 544; *S. C.* 3 Car. & Kirw. 193; *Commonwealth* v. *Gould*, 12 Gray, 171."

Tested by these rulings, plaintiff in error's original sentence was not void but voidable, and if the sentence had been complied with he could not have been punished again for the same offense. *Commonwealth* v. *Loud*, 3 Met. 328. But as the original sentence was set aside at his own instance, he could not allege that he had been in legal jeopardy by reason thereof.

In *Ex parte Lange*, 18 Wall. 163, Lange had been found guilty of an offense which was punishable by imprisonment *or* fine, but the Circuit Court sentenced him to imprisonment *and* fine. He paid the fine, and thereafter the Circuit Court vacated the former judgment, and sentenced him again to imprisonment only. It was held that it was a fundamental principle that no man could be twice punished by judicial judgments for the same offense, and that when a judgment had been executed by full satisfaction of one of the alternative penalties of the law, the court could not change the judgment so as to impose another. The present case does not fall within that decision, for here an erroneous judgment was vacated on the application of the accused; the original sentence had not been fully satisfied; and the second sentence was rendered in pursuance of the applicable statute.

We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered. And as the decision which he sought and obtained involved the determination that he had been improperly sentenced under chapter 504 of the Statutes of 1895, providing for so-called indeterminate sentences, but should have been sentenced under antecedent statutes, which differed from that, it followed that the second sentence must be a new sentence to the extent of those differences, and might turn out to be for a longer period of imprisonment.

Chapter 504 of the Statutes of 1895 provided for the establishment by the court of a maximum and minimum term of

imprisonment, and for a permit to the convict to be at liberty after the expiration of the minimum term, some changes being made in this regard by chapter 371 of the Statutes of 1898. Section 20 of chapter 222 of the Public Statutes, in force when the offences charged were committed, provided for certain deductions to be made for good behavior. These and other statutes bearing on the subject are fully set forth and examined in *Murphy* v. *Commonwealth*, 172 Mass. 264. And it is insisted that, under the present sentence, even if the prisoner received the maximum deduction, he cannot be released as soon as he might have been released under the original sentence, and that moreover he cannot receive as large deductions under this sentence as he might have received if it had been pronounced in the first instance.

But we agree with the Supreme Judicial Court in the opinion that even if this were so, it would make no difference in principle so far as the validity of the second sentence was concerned.

In *Jacquins' Case*, 9 Cush. 279, the Supreme Judicial Court, in lieu of the prior sentences, sentenced the defendant to certain years of imprisonment, "the term to be computed from the time when the first sentence commenced its operation."

In the case at bar, the accused was originally sentenced to imprisonment for the term of not less than ten nor more than fifteen years. This being set aside, and the Superior Court, being manifestly of opinion that imprisonment for twelve years and six months was the punishment demanded under the circumstances, deducted from twelve years and six months, two years, seven months and nine days, which he had already served, and sentenced him to nine years, ten months and twenty-one days. As the original sentence had been vacated on the application of the accused it is clear that if the second sentence were productive of any injustice the remedy was to be obtained in another quarter and did not rest with the court.

The Superior Court, being obliged to render a specific sentence, deducted the time Murphy had served notwithstanding the case really occupied the same posture as if he had sued out his writ of error on the day he was first sentenced, and the mere fact that by reason of his delay in doing so he had served a

portion of the erroneous sentence could not entitle him to assert that he was being twice punished. Perhaps the court was the more moved to do this because six months after Murphy had been sent to the state prison the Supreme Judicial Court indicated in *Commonwealth* v. *Brown*, 167 Mass. 144, that the indeterminate sentence act might be applicable to convictions for offences committed prior to its passage, although the question was not definitely presented and disposed of, and then to the contrary, until raised on Murphy's writ of error. 172 Mass. 264. But, however that may be, the plea of former jeopardy or of former conviction cannot be maintained because of service of part of a sentence, reversed or vacated on the prisoner's own application.

And so as to the infliction of one day's solitary confinement. The Massachusetts statutes provide that where the punishment of imprisonment in the state prison is awarded, solitary confinement not exceeding twenty days at a time shall form part thereof. This requirement was complied with here by the infliction of one day. This was part of the sentence, but not in itself a distinct and separate punishment, and when the sentence was vacated the second sentence necessarily contained some solitary confinement as part of the imprisonment. Apparently this might have been dispensed with by the consent of the convict, but this he refused to give.

In *People ex rel. Trezza* v. *Brush*, 128 N. Y. 529, 536, Trezza had been sentenced to death, and prosecuted an appeal to the Court of Appeals of New York, pending which he was taken to the state prison and detained in close confinement. He applied for the writ of *habeas corpus* on the ground that he had been once punished, which was denied. The Court of Appeals held that by the statute an appeal from a conviction in a capital case stayed the judgment of death only, and not that part of the judgment which provided for the custody of the defendant between his removal to the state prison and his execution; and Andrews, J., speaking for the court, said: "It not infrequently happens that the execution of a sentence to imprisonment continues, notwithstanding an appeal. The convict, if he obtains a reversal of the judgment, and is again convicted on a second trial, may be sentenced to a new term of imprisonment,

and the court is not bound to regulate the second sentence in view of the fact that the convict has already suffered imprisonment under the first sentence. The resentence in the present case was rendered necessary by reason of the fact that Trezza, by his own act in his own interest, had by his appeal prevented the execution of the death penalty at the time fixed by the first sentence."

Trezza also applied to the Circuit Court of the United States for the Southern District of New York for a writ of *habeas corpus*, which the court refused to grant, and its order was affirmed by this court on appeal. 142 U. S. 160.

In *McElvaine* v. *Brush*, 142 U. S. 155, McElvaine had been sentenced to death, and the judgment was reversed and a new trial granted. He was again convicted and sentenced, and the judgment affirmed on appeal. 125 N. Y. 596. McElvaine presented his petition for *habeas corpus* to the Circuit Court, which was denied, and the case brought to this court. The order was affirmed, and we said, among other things, that "so far as the confinement had taken place under the first sentence and warrant, that resulted from the voluntary act of the petitioner in prosecuting an appeal."

In *Brown* v. *New Jersey*, 175 U. S. 172, it was reiterated that "the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." We find no such denial or conflict in this case. As we have said, plaintiff in error must be deemed to have sought a correction of the original erroneous judgment, and held to abide the consequences. He seems to have then supposed that it might be decided that the prior statutes were repealed by the act of 1895, and that as he could not be sentenced under that act, he might be discharged altogether. In this it turned out that he was mistaken, as the Supreme Judicial Court adjudged that the prior statutes were still in force so far as he was concerned, and we concur with that court in holding that his present contention is equally unavailing to effect his release.

Judgment affirmed.

PETIT *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 194. Argued March 16, 1900. — Decided April 9, 1900.

Section 6513 of the General Statutes of Minnesota for 1894 provides that "All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community; *Provided, however*, That keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards, shall not be deemed a work of necessity or charity." *Held* that the legislature did not exceed the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity, while, as to all other kinds of labor, they have left that question to be determined as one of fact.

THE case is stated in the opinion.

Mr. Joseph W. Molineaux for plaintiff in error. *Mr. Albert E. Clarke* filed a brief for same.

Mr. W. B. Douglas for defendant in error. *Mr. C. W. Somerby* was on his brief.

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

Petit was tried and convicted of keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards, contrary to section 6513 of the General Statutes of Minnesota for 1894, and the judgment was affirmed by the Supreme Court of Minnesota. 74 Minn. 376. This writ of error was then allowed.

Section 6513 reads as follows: "All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health or comfort of the community: *Provided, however*, That keeping open a barber shop on Sunday

for the purpose of cutting hair and shaving beards, shall not be deemed a work of necessity or charity."

We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power of the State. The subject was fully considered in *Hennington* v. *Georgia*, 163 U. S. 299, and it is unnecessary to go over the ground again. It was there said: "The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease." And these observations of Mr. Justice Field, then a member of the Supreme Court of California, in *Ex parte Newman*, 9 Cal. 502, whose opinion was approved in *Ex parte Andrews*, 18 Cal. 678, in reference to a statute of California relating to that day, were quoted: "Its requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience, and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted." Well-nigh innumerable decisions of the state courts have sustained the validity of such laws.

But it is contended that by reason of the proviso this act must be held unconstitutional, because thereby restricted in its operation on the particular class of craftsmen to which Petit belonged as contradistinguished from other classes of labor. The proviso was added in 1887 to section 225 of the Penal Code of Minnesota of 1885, (Laws, Minn. 1887, c. 54.)

By the original statute all labor was prohibited, excepting the works of necessity or charity, which included whatever was needful during the day for the good order, health or comfort

of the community. As the Supreme Court said, if keeping a barber's shop open on Sunday for the purposes of shaving and hair cutting was not a work of necessity or charity, within the meaning of the statute as it originally read, the amendment did not change the law. And it would be going very far to hold that because out of abundant caution the legislature may have sought to obviate any misconstruction as to what should be considered needful, during that day, for the comfort of the community, as respected work generally so desirable as tonsorial labor, by declaring the meaning of the statute as it stood, therefore the law was transferred to the category of class legislation. The legislature had the right to define its own language, and the statute thus interpreted could not reasonably be held to have made any discrimination.

The question is not whether the bare fact of shaving some particular individual under exceptional circumstances might not be upheld, but whether the public exercise of the occupation of shaving and hair cutting could be justified as a work of necessity or charity.

In *Phillips* v. *Innes*, 4 Clark & Finnelly, 234, the House of Lords held that shaving on Sunday was not a work of necessity or mercy or charity. The act, 29 Car. II, c. 7, prohibited work on the Lord's day, "works of necessity and charity only excepted;" and by the Scotch statute of 1579, c. 70, it was enacted, among other things, that "no handy-labouring or working be used on the Sunday;" and the same prohibition was enacted by the statute of 1690, c. 7, which added to the private and public exercise of worship, "the duties of necessity or mercy." The case came to the House of Lords from the Court of Sessions, and Lord Chancellor Cottenham said: "This work is not a work of necessity, nor is it a work of mercy, it is one of mere convenience; and if your Lordships were to act upon this case as a precedent for other cases, founded upon no more than convenience, your Lordships would, I apprehend, be laying down a rule, by which the law of Scotland prohibiting persons from carrying on their ordinary business on Sundays, would be repealed, or rendered useless."

Lord Wynford concurred, saying: "It was not necessary that

people should be shaved on Sunday in a public shop; it was not an act of mercy, it was clearly an act of handicraft."

Lord Brougham was of the same opinion, and observed that "he whose object was gain, did not come within the exception."

In *Commonwealth* v. *Waldman*, 140 Penn. St. 89, 98, the Supreme Court of Pennsylvania said: "We are now asked to say that shaving is a work of 'necessity,' and therefore within the exceptions of the act of 1794. It is, perhaps, as much a necessity as washing the face, taking a bath, or performing any other act of personal cleanliness. A man may shave himself, or have his servant or valet shave him, on the Lord's day, without a violation of the act of 1794. But the keeping open of his place of business on that day by a barber, and the following his worldly employment of shaving his customers, is quite another matter; and, while we concede that it may be a great convenience to many persons, we are not prepared to say, as a question of law, that it is a work of necessity within the meaning of the act of 1794."

In *State* v. *Frederick*, 45 Arkansas, 347, the court ruled that: "The courts will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exceptions of the statute."

On the other hand, the Supreme Judicial Court of Massachusetts held in *Stone* v. *Graves*, 145 Mass. 353, that it could not be ruled, as matter of law, that the work of shaving an aged and infirm person in his own house on the Lord's day was not a work of necessity.

And in *Ungericht* v. *State*, 119 Indiana, 379, it was held by the Supreme Court of Indiana that it must be left to the jury, as a question of fact, to determine, under proper instructions from the court, what particular labor, under the circumstances, would constitute a work of necessity.

We think that the keeping open by barbers of their shops on Sunday for the general pursuit of their ordinary calling was, as matter of law, not within the exceptions of the statute as it read before the amendment.

But even if the question whether keeping open a barber's shop

on Sunday for cutting hair and shaving beards, under some circumstances, was a work of necessity or charity was a question of fact under the original act, which was foreclosed as such by the amendment, the result is the same.

Assuming that the proviso did have this effect, the Supreme Court was of opinion that the classification was not purely arbitrary. The court pointed out that the law did not forbid a man shaving himself or getting some one else to shave him, but the keeping open a barber's shop for that purpose on Sunday; that the object mainly was to protect the employees by insuring them a day of rest; and said: "Courts will take judicial notice of the fact that, in view of the custom to keep barbers' shops open in the evening as well as in the day, the employés in them work more, and during later hours, than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday, the employés would ordinarily be deprived of rest during half of that day.

"In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barbers' shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact."

We recognize the force of the distinctions suggested and perceive no adequate ground for interfering with the wide discretion confessedly necessarily exercised by the States in these matters, by holding that the classification was so palpably arbitrary as to bring the law into conflict with the Federal Constitution. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557.

Judgment affirmed.

CHRYSTAL SPRINGS LAND AND WATER COMPANY *v.* LOS ANGELES.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 41. Submitted March 15, 1900.—Decided April 9, 1900.

Decree below affirmed on the authority of the cases named in the opinion of the court.

THE case is stated in the opinion of the court.

Mr. John Garber for appellants.

Mr. Walter F. Haas for appellee. *Mr. S. O. Houghton* was on his brief.

THE CHIEF JUSTICE: Bill to quiet title to certain waters, water rights and works connected therewith. Bill dismissed for want of jurisdiction, and question of jurisdiction certified. Reported below, 82 Fed. Rep. 114; 76 Fed. Rep. 148.

Decree affirmed on authority of (1) *Phillips* v. *Mound City Association*, 124 U. S. 605; *California Powder Works* v. *Davis*, 151 U. S. 389, 395; *New Orleans* v. *De Armas*, 9 Peters, 224; *Borgmeyer* v. *Idler*, 159 U. S. 408; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430. (2) *Robinson* v. *Anderson*, 121 U. S. 522; *Florida Central Railroad* v. *Bell*, 176 U. S. 321; *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424.

PHINNEY *v.* SHEPPARD, &c., HOSPITAL TRUSTEES.

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

No. 392. Submitted March 19, 1900.—Decided April 9, 1900.

Dismissed on the authorities cited.

THIS was a motion to dismiss for want of jurisdiction.

Mr. William Pinkney White, *Mr. George R. Willis* and *Mr. Francis T. Homer* for the motion.

Mr. Abner McKinley and *Mr. E. J. D. Cross* opposing.

THE CHIEF JUSTICE: Cause reported in state court, 88 Maryland, 633. Writ of error dismissed on the authority of *Williams* v. *Eggleston*, 170 U. S. 304, 309; *Hamblin* v. *Western Land Company*, 147 U. S. 531; *Wilson* v. *North Carolina*, 169 U. S. 586, 595.

HENKEL *v.* CINCINNATI.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 206. Argued March 20, 21, 1900.—Decided April 9, 1900.

Dismissed on the authority of *Sayward* v. *Denny*, 158 U. S. 180, 183, and other cases cited in the opinion of the court.

THE case is stated in the opinion of the court.

Mr. L. Benton Tressing for plaintiff in error.

Mr. Wade H. Ellis and *Mr. Ellis G. Kinkead* for defendant in error.

Opinion of the Court.

THE CHIEF JUSTICE: Bill for injunction to restrain collection of a special assessment filed in Court of Common Pleas, Hamilton County, Ohio, and on hearing dismissed. Carried by appeal to circuit court of Hamilton County, heard there, and again dismissed. Appealed to Supreme Court of Ohio, and the judgment of the circuit court affirmed June 14, 1898, it being ordered "that a special mandate be sent to the circuit court of Hamilton County to carry this judgment into execution." June 21, "mandate issued," and "original papers sent to clerk." Opinion, 58 Ohio St. 726: "Judgment affirmed on authority of *Cleveland* v. *Wick*, 18 Ohio St. 303."

January 6, 1899, the Chief Justice of the Supreme Court of Ohio made and signed a certificate that the question whether the assessment was in violation of the Fourteenth Amendment was submitted to the court, and that the court decided that it was not.

The record does not show that any Federal question was raised prior to judgment, but it appears in the petition for writ of error from this court, and accompanying assignment of errors. The certificate of the Chief Justice could not confer jurisdiction. *Parmelee* v. *Lawrence*, 11 Wall. 36; *Powell* v. *Brunswick County*, 150 U. S. 433, 439; *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63, 69.

The writ of error is dismissed on the authority of *Sayward* v. *Denny*, 158 U. S. 180, 183; *Ansbro* v. *United States*, 159 U. S. 695; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131; *Keokuk and Hamilton Bridge Company* v. *Illinois*, 175 U. S. 626.

CAMDEN AND SUBURBAN RAILWAY COMPANY *v.* STETSON.

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

No. 174. Argued March 6, 1900. — Decided April 9, 1900.

This was an action brought in the Circuit Court of the United States for the District of New Jersey against a railway company, for an alleged injury to the plaintiff, caused by the neglect of the railway company while the plaintiff was a passenger on one of its cars. *Held* that that court had the legal right or power, under the statute of New Jersey and the United States Revised Statutes, to order a surgical examination of the plaintiff.

This case came here upon a certificate from the Circuit Court of Appeals for the Third Circuit, under the act of March 3, 1891, c. 517, § 6, 26 Stat. 826. The action was brought in the Circuit Court of the United States for the District of New Jersey by the plaintiff against the railway company to recover damages for an alleged injury to his person caused by the neglect of the defendant while the plaintiff was a passenger on one of defendant's cars. At the time that he brought suit plaintiff was a citizen of the State of Pennsylvania, the railway company being a corporation of the State of New Jersey. The alleged neglect and injury occurred on the 13th day of July, 1896, in the city of Camden in the State of New Jersey, and at that time the plaintiff was a citizen of that State.

On the 12th of May, 1896, the legislature of New Jersey passed and the governor approved an act (c. 202, p. 344) which reads as follows:

"1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination, to testify in the said cause

as to the nature, extent and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore."

When the case was called for trial on March 31, 1898, and after a jury had been impaneled, but before the case was opened to the jury, the defendant's counsel asked in open court that the plaintiff should submit himself to examination by a competent surgeon. The plaintiff would not consent, and the court held that it had no power to order the plaintiff to subject himself to examination by physicians against his will, and it therefore refused to make the order asked for by counsel for the defendant, who was thereupon allowed an exception to the ruling. The trial proceeded and resulted in a verdict and judgment for the plaintiff. The defendant brought the case by writ of error before the Circuit Court of Appeals, and that court desiring the instruction of this court upon the matter made the foregoing statement and ordered the following questions to be certified here:

"1. Is the above-recited statute of the State of New Jersey, the act of May 12, 1896, applicable to an action to recover damages for injury to the person brought and tried in the Circuit Court of the United States for the District of New Jersey?

"2. Is said statute applicable to an action to recover damages for injury to the person brought and tried in the Circuit Court of the United States for the District of New Jersey, where the injury occurred in the State of New Jersey, and both the plaintiff and the defendant at the time of the injury were citizens of that State?

"3. Had the Circuit Court the legal right or power to order a surgical examination of the plaintiff?"

Mr. E. A. Armstrong and *Mr. David J. Pancoast* for plaintiff in error.

Mr. Howard Carrow for defendant in error.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

An answer to the third question, "Had the Circuit Court the legal right or power to order a surgical examination of the plaintiff," will be all that is necessary for the action of the court below.

It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. *Union Pacific Railway* v. *Botsford*, 141 U. S. 250. In that case there was no statute of the State in which the United States court was held which authorized the order. There is no intimation in the opinion that a statute of a State directly authorizing such examination would be a violation of the Federal Constitution, or invalid for any other reason.

In this case we have such a statute, and by section 721 of the Revised Statutes of the United States it is provided that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases in which they apply."

Does not this statute of the State apply in trials at common law in the United States courts sitting in the State where the statute exists?

The case before us is a common law action; it is one to recover damages for a tort, which is an action of that nature. It was being tried in the State which enacted the statute, and the court was asked to apply such statute to the trial of an action at common law.

Neither the Constitution, treaties nor statutes of the United States otherwise require or provide. The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the State to recover damages for injury to the person. The statute comes

within the principle of the decisions of this court holding a law of the State of such a nature binding upon Federal courts sitting within the State. *Swift* v. *Tyson*, 16 Pet. 1, 18; *Nichols* v. *Levy*, 5 Wall. 433; *Watson* v. *Tarpley*, 18 How. 517, 520; *Ex parte Fisk*, 113 U. S. 713.

It was held in *United States* v. *Reid*, 12 How. 361, that the provision of the law of Congress did not extend to criminal offences against the United States, for that would be to give to the States the power of prescribing the rules of evidence in trials for offences against the United States. It was said, however, that the section was intended to confer upon the courts of the United States the jurisdiction necessary to enable them to administer the laws of the States.

We are not aware of any reason why this law of the State does not apply to courts of the United States under the section of the Revised Statutes above quoted. There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation, if made.

Counsel for the plaintiff refers in his argument to the opinion in the *Botsford case*, where it is stated (at page 256) that the question is one which is not governed by the law or practice of the State in which the trial is had, but that it depends upon the power of the national courts under the Constitution and laws of the United States, and he argues therefrom that the state statute is immaterial, and can furnish no foundation for the exercise of the power by the Federal court. We do not dispute that if there were no law of the United States which, in connection with the state law, could be referred to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of *Botsford*. But we say there is a law of the United States which does apply the laws of the State where the United States court sits, and where the State has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in Federal courts sitting in that State. In the *Botsford case* there was no state law, and consequently no foundation for the application of the law of the United States.

In *Ex parte Fisk*, 113 U. S. 713, the statute of the State of New York, in relation to the examination of parties before trial, was held to be in conflict with the act of Congress providing for the examination of witnesses in courts of the United States, and was, therefore, inapplicable in those courts; but the statute in this case is not in conflict with any statute of the United States. It does not conflict with section 861 of the Revised Statutes, providing for the oral examination of witnesses in open court. On the contrary, whatever information may be obtained by the surgeon who examines the plaintiff under the statute in question can be availed of only by the defendant's producing the witness and examining him in open court, or by deposition, if he come within the exception mentioned in section 863 and the following sections.

The validity of this statute has been affirmed by the Supreme Court of New Jersey in *McGovern* v. *Hope*, 42 Atl. Rep. 830; to appear in 63 N. J. Law. The opinion of the court was delivered by Mr. Justice Depue and the court held that the act was within the power of the legislature, and was not an infringement upon the constitutional rights of the party.

The validity of a statute of this nature has also been upheld in *Lyon* v. *Manhattan Railway Company*, 142 N. Y. 298, although the particular form of that statute would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence might not be enforced in courts of the United States sitting within the State of New York, but the validity of a statute providing for the examination of the person of a plaintiff in an action to recover for injuries is upheld and declared not to be in violation of the constitutional rights of the party.

The citizenship of the plaintiff at the time of the injury is not material so long as the court below has jurisdiction of the case and the parties at the time of the commencement of the action.

In those States in which it has been held that the court has inherent power to order the examination of a plaintiff in this class of action without the aid of a statute, all has been said that could be urged in favor of such power on grounds connected with public policy and the due and proper administration of

justice by the courts. This court has taken another view of the subject, in the decision of *Botsford's case*, above cited. But by reason of the statute of New Jersey, in which State this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States therein sitting have the power under the statute and by virtue of section 721 of the Revised Statutes of the United States to order the examination of the person of the plaintiff, and we, therefore, answer the third question of the court below in the affirmative, and

It will be so certified.

Mr. Justice Harlan dissented.

FORSYTH *v.* VEHMEYER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 180. Submitted March 13, 1900.—Decided April 9, 1900.

A representation as to a fact, made knowingly, falsely and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and such debt is not discharged by a discharge in bankruptcy.

This was a motion to dismiss. The case is stated in the opinion of the court.

Mr. John S. Miller and *Mr. M. W. Robinson* for the motion.

Mr. Edward Roby opposing.

Mr. Justice Peckham delivered the opinion of the court.

The defendant in error brought this action against one Jacob Forsyth, in the Superior Court of Cook County, in the State of

Illinois, in April term, 1891, upon a judgment in his favor which he had theretofore recovered against the said Jacob Forsyth. The defendant has died since the commencement of this action, and the plaintiff in error has been appointed administrator upon his estate. The judgment sued upon was entered at the June term of the Superior Court of Cook County, in the State of Illinois, held in Chicago in 1871, and the judgment record was destroyed by the great fire in that city on October 9, 1871.

To the declaration in the action upon this judgment the defendant pleaded (1) *nil debet;* (2) *nul tiel record;* (3) a discharge in bankruptcy, (meaning under the bankrupt act of 1867).

Plaintiff replied to the third plea, that the debt mentioned in the judgment was created by fraud, and therefore was not discharged under the bankrupt act.

Upon the trial the plaintiff, in order to prove the original judgment and its character, called as a witness the attorney who procured it, who testified that the declaration was in substance as follows: The plaintiff complains of the defendant in an action in trespass on the case, for that on the tenth day of August, 1868, in order to induce the plaintiff to advance to the defendant a large amount of money, to wit, the sum of twelve hundred dollars, the defendant falsely and fraudulently represented unto the plaintiff that the defendant had a large amount of birch cordwood, to wit, the amount of 200 cords, cut and piled up near the Pittsburgh and Fort Wayne Railroad in the county of Lake, State of Indiana, ready to be shipped to Chicago; that one Eldridge had contracted to purchase the wood at six dollars per cord in the city of Chicago, when shipped, and that if the plaintiff would advance to the defendant at the rate of five dollars per cord, for the two hundred cords of wood, the defendant would immediately ship the cordwood to the city of Chicago; that the plaintiff relying upon those representations as being true advanced to the defendant the sum of $1200; that the defendant shipped only the sum of forty cords of wood to Eldridge, upon which the plaintiff received the sum of six dollars per cord; that the representations of the defendant were false and fraudulent; that he did not have and never did have in the county of Lake and State of Indiana two hundred cords of birch

wood piled up ready for shipment to the city of Chicago to sell to Eldridge, but that he only had in the county of Lake, or anywhere else, the sum of forty cords of birch wood, which was shipped by the defendant to Eldridge; that the plaintiff was damaged to the extent of the amount that was alleged in the declaration, and therefore he brings this action for fraud and deceit against the defendant.

To this declaration the undisputed evidence shows that the defendant pleaded not guilty, and there was no other issue in the case. The verdict was, "That the jury found the defendant guilty and assessed the plaintiff's damages at $833.35." Judgment was duly entered upon the verdict, and it is this judgment which is sued upon in this action.

The present action was tried before the court, and upon the trial the defendant read in evidence a duly certified copy of his discharge in bankruptcy on December 30, 1880. The court found the issues in favor of the plaintiff, and ordered judgment in his favor, which was duly entered. Upon appeal to the Appellate Court the judgment was affirmed, and upon a further appeal to the Supreme Court that court also affirmed it, and the case is now here on writ of error to the Supreme Court of Illinois.

Unless the judgment sued upon was recovered on a debt created by fraud, the defendant's discharge in bankruptcy was a bar to the maintenance of this action.

The bankrupt act of 1867, section 33, 14 Stat. 517, 533; also Rev. Stat. section 5117, provided, "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act," etc.

The plaintiff in error contends that the original judgment was not recovered in an action for fraud and deceit, and even if it were, the fraud proved is not that kind of fraud which is debarred from a discharge in bankruptcy. He gave some evidence tending to show that the action was in the nature of one in assumpsit, but the finding of the court in plaintiff's favor must be held to be a finding that the action was for fraud.

The declaration proved alleges a false and fraudulent rep-

resentation by means of which the plaintiff below was induced to advance money to the defendant to his damage in a named amount. The defendant pleaded not guilty, and if the cause of action had been one in assumpsit, the plea at common law would have been non-assumpsit instead of not guilty. 3 Ch. Pl. 10th Am. 3d Lond. ed. pp. 908, 1030.

The declaration did not, it is true, contain the allegation that the representations of the defendant were false to his knowledge. It simply said that the representations of the defendant were false and fraudulent.

The opinion of the Appellate Court, in this case, which was adopted by the Supreme Court of the State, held that "the declaration testified to is too plainly in tort for false and fraudulent representations to require argument. The allegation that the representations were false and fraudulent implies that appellant knew of their falsity. . . . But even though an express allegation of the *scienter* were necessary, its omission would be cured by the verdict." We understand by this opinion that the court held the first action was for fraud and deceit and that the plaintiff was bound to have proved the fraud as alleged in the declaration in order to maintain the action. This decision involves no Federal question.

Where the state court has decided that the action was for fraud and deceit, and has held that in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed that the verdict and judgment in that action were obtained only upon proof and a finding by the jury of the fact of fraud. Judgment being entered after a trial upon such pleadings and upon a verdict of guilty, the question of fraud was not open for a second litigation upon the trial of this action. The defendant below in this action had full opportunity given him to prove what in fact was the declaration in and the character of the first action, and the findings of the court below in favor of the plaintiff must be regarded as a finding against the defendant upon the issue as to the character of that action. The evidence offered by him and rejected by the court was not admissible on the issue because it was not pertinent. The existence of the fraud must, therefore, be assumed in the

further progress of the case. The only matter left for this court to decide is whether a debt created by means of a fraud, such as is set forth in the declaration, is exempt from the effect of a discharge in bankruptcy.

The proper construction of the section of the act relating to such a discharge has been frequently before this court, and we regard the law upon the subject as quite well settled. There are many cases where it has been claimed that the discharge was operative, if the fraud proved was only constructive, and involved no moral turpitude or intentional wrong. Such cases are illustrated by that of *Hennequin* v. *Clews*, 111 U. S. 676. In that case the pledgee of stocks, held as security for a liability incurred by him for the pledgor, had thereafter hypothecated the stocks to secure a debt due from himself to another, and having failed to return to his pledgor such stocks when his liability for the pledgor had ceased, it was held that he was not thereby guilty of a fraudulent creation of his debt to the pledgor, and that it had not been incurred in a fiduciary capacity, so as to bar his discharge under the thirty-third section of the bankrupt act. Many of the cases bearing upon the subject are cited by Mr. Justice Bradley, who delivered the opinion of the court, and it is unnecessary to comment upon them here. He referred to the case of *Neal* v. *Clark*, 95 U. S. 704, where Mr. Justice Harlan, in delivering the opinion of the court, said: "Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section (33) means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

The *Hennequin case* was held to be governed by the principle announced in the case of *Neal* v. *Clark*, and the discharge was held effective.

In *Strang* v. *Bradner*, 114 U. S. 555, the rule as to the kind of fraud intended to be exempted from discharge by the bankrupt act was again adverted to, and it was again said that it was positive fraud or fraud in fact, involving moral turpitude or intentional wrong; not implied fraud which may exist without bad faith. In that case certain false and fraudulent misrepresentations of fact were made by one member of a partnership firm, by reason of which the debt was created, and it was held that it was a debt of that character which was not discharged under the bankrupt act, and the innocent members of the firm were liable upon the debt created by the fraudulent misrepresentations of another member of the firm.

Also in *Ames* v. *Moir*, 138 U. S. 306, 312, it was said: "If Ames made his call, with the knowledge that he was insolvent, and with the purpose of getting possession of the wines and shipping them out of the State without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent — and there was evidence that justified the jury in so finding — he was guilty of fraud in fact, involving moral turpitude or intentional wrong, and is not protected against the claim of the plaintiffs by his discharge in bankruptcy."

Within this rule, as maintained by the court, there can be no doubt that the defendant below was not discharged under the bankrupt act. A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent.

The courts below were, therefore, right in denying to the defendant any benefit by reason of his discharge in bankruptcy. The judgment of the Supreme Court of the State of Illinois is right, and must, therefore, be

Affirmed.

GUNDLING *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 209. Argued March 22, 1900.—Decided April 9, 1900.

The ordinance of the city of Chicago, authorizing the issue of a license to persons to sell cigarettes upon payment of one hundred dollars, and forbidding their sale without license, is no violation of the Federal Constitution, and the amount of the tax named for the license is within the power of the State to fix.

THE case is stated in the opinion.

Mr. Lee D. Mathias for plaintiff in error. *Mr. Charles H. Aldrich* was on his brief.

Mr. Frederic D. McKenney for defendant in error. *Mr. Charles M. Walker* and *Mr. Henry Schofield* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was convicted in a police court of the city of Chicago of a violation of an ordinance of that city forbidding the sale of cigarettes by any person without a license, and was fined fifty dollars. From the judgment of conviction he appealed to the Criminal Court of Cook County, where it was affirmed, and thence to the Supreme Court of the State, where it was again affirmed, and he now brings the case here on writ of error.

Sections 1, 2 and 8 of the ordinance referred to read as follows:

"SEC. 1. The mayor of the city of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the city of Chicago, in the manner following and not otherwise.

"Any person, firm or corporation desiring a license to sell cigarettes shall make written application for that purpose to

the commissioner of health, in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm if a copartnership, and person or persons in charge of the business, if a corporation, is or are persons of good character and reputation. The commissioner of health shall thereupon submit to the mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license, and if the mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the city of Chicago, with at least two sureties, to be approved by the mayor, in the sum of $500, conditioned that the licensed person, firm or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the city of Chicago now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine or sugar.

"Sec. 2. Every person, on compliance with the aforesaid requirements and the payment in advance to the city collector, at the rate of $100 per annum, shall receive a license under the corporate seal, signed by the mayor and countersigned by the clerk, which shall authorize the person, firm or corporation therein named to expose for sale, sell or offer for sale cigarettes at the place designated in the license; provided, that no license shall be granted to sell within 200 feet of a school house.

"Sec. 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any place within the city of Chicago without having first procured the license provided shall be fined not less than fifty dollars and not exceeding two hundred dollars for every violation of this ordinance, and a further penalty of $25 for each and every day the person, firm or corporation persists in such violation after a conviction for the first offence."

The other sections are not material to this inquiry.

The plaintiff in error made no application to the health commissioner to obtain a license from the mayor in accordance with the above mentioned ordinance. He specially set up in the courts below that the ordinance was invalid, because in violation of the Fourteenth Amendment as depriving him of his property without due process of law. He contended in the state courts that the common council of the city of Chicago had no right to pass the ordinance in question, because no such power was given to it under the general act of the State of Illinois which incorporated the city of Chicago. The Supreme Court of the State, however, in construing that act decided that it did authorize the city to pass the ordinance, and the plaintiff in error admits that this decision is conclusive upon us as the decision of a question of local law by the highest court of the State.

He makes two claims here upon which he bases the statement that the ordinance violates his rights under the Fourteenth Amendment of the Federal Constitution. Quoting from counsel's brief, these claims are "*First*, that the State itself, acting through the common council of the city of Chicago, is inhibited by the Federal Constitution from making those provisions in the ordinance which delegate to the mayor the entire subject of granting and revoking licenses to persons engaged in the business of selling cigarettes; *second*, that the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee of $100, a sum manifestly greater than the expense of issuing the license and providing for the regulation, thereby depriving persons of their liberty and property by an interference with their rights which is neither necessary to the protection of others nor the public health."

He contends that the ordinance vests arbitrary power in the mayor to grant or refuse a license to sell cigarettes, and that such arbitrary power is a violation of the amendment in question.

He claims also that he has been denied the equal protection of the laws, because in other kinds of business, where licenses are granted to persons engaged in any trade or occupation, no

member thereof is "singled out and subjected to the absolute supervision of an irresponsible magistrate while his neighbor is protected in his right by the customary safeguards of the law."

It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat*, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.

But assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

The case principally relied upon by the plaintiff in error is that of *Yick Wo* v. *Hopkins*, 118 U. S. 356, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to

the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some two hundred other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

"The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be entrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the State, and through it for the city to determine for itself, and that an ordinance providing

reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

As stated in *Crowley* v. *Christensen*, 137 U. S. 86, "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."

Whether there is or is not a delegation of power by the common council to the mayor, is not in this case a Federal question.

We have no doubt that the ordinance, so far as the objection above considered is concerned, was clearly within the power of the State to authorize, and must be obeyed accordingly.

The other objection made to the validity of the ordinance is that the amount of the license fee ($100) is an improper and illegal interference with the rights of the citizen, and is, therefore, a violation of the Fourteenth Amendment.

The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the State has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution.

Opinion of the Court.

The Supreme Court of Illinois has held that the city was authorized by the state law to impose the license fee.

In speaking of a license to do business, it was said in *Royall* v. *Virginia*, 116 U. S. 572, 579: "The payment required as a preliminary to the license is in the nature and form of a tax, and is due to the State which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the State, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort and convenience."

It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

There is no error in the record, and the judgment of the Supreme Court of Illinois is

Affirmed.

OHIO OIL COMPANY *v.* INDIANA (NO. 1).

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 84. Argued December 18, 19, 1899. — Decided April 9, 1900.

The provision in the act of March 4, 1893, of the State of Indiana "that it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles," is not a violation of the Constitution of the United States; and its enforcement as to persons whose obedience to its commands were coerced by injunction, is not a taking of private property without adequate compensation, and does not amount to a denial of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, but is only a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

THE title, preamble and first section of a law enacted March 4, 1893, by the State of Indiana, (Acts of 1893, c. 36, p. 300,) are as follows:

"An act concerning the sinking, safety, maintenance, use and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

"Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore,

"SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within

such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles."

The remaining sections of the law in question are printed in the margin.[1]

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[1] SEC. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one half inch as great as the hole of such well, to extend at least three feet above the salt water level, where salt water has been struck; where no salt water has been struck, such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with the diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil-bearing rock or rocks, and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball eight inches in diameter shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

SEC. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions, in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit.

The issue which this record presents, on the subject of the law just referred to, is this: Did the enforcement of the first section of the statute produce as to the persons whose obedience to its commands were coerced by injunction, a taking of private property without adequate compensation; that is, did the execution of the statute amount to a denial of due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United Statutes?

The controversy was thus initiated. The State of Indiana, through its attorney general, filed a complaint in the Circuit Court of the county of Madison in the State of Indiana, against the Ohio Oil Company, a corporation organized under the laws of the State of Ohio, but authorized to carry on its business in the State of Indiana, as it had complied with the regulations enacted by that State as to foreign corporations doing business therein. The cause of complaint was thus stated:

"Plaintiff says that for many years heretofore there has

SEC. 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly and severally, to recover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SEC. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well, and plug and fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

existed, underlying the counties of Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells and other counties of the State of Indiana, a large subterranean deposit of natural gas, occupying a reservoir of large extent, with well-defined boundaries, and utilized for fuel and light by the people of those counties and many other counties and cities of Indiana, including Indianapolis, Fort Wayne, Richmond, Logansport, Anderson, Muncie, Marion, Kokomo, and others of the most populous cities of said State, to which cities said gas is conducted, after being brought to the surface of the earth, through pipes and conduits, by means of which many hundreds of thousands of the people of the State of Indiana are now, and have been for more than ten years last past, continuously supplied with gas for light and fuel; that said natural gas, underlying the counties aforesaid and other portions of the State, is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when it is permitted to do so, with great force.

"The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural gas deposit to the State and to its citizens is many millions of dollars; that since the discovery of said gas deposit in 1886 immense sums of money have come into the State and have been invested in large manufacturing interests, and other vasts sums of money belonging to the people of the State of Indiana have been invested in similar enterprises, causing a great increase in the population, principally in the territory underlying which said gas is found. Many cities in and adjacent to the gas territory, including those named, are wholly dependent for fuel upon natural gas, and for that reason the people of the State of Indiana have become and are interested in the protection and continued preservation of the natural gas supply; that many millions of dollars invested in manufacturing and other properties in and near said gas territory are wholly dependent for their continued preservation and for the permanent value of their property upon said natural gas supply; that their location and establishment in said gas territory was due

to the presence of natural gas underlying the same, without which such enterprises could not operate at a profit, and that in the event the supply of gas should be exhausted in said territory many of such manufacturing enterprises, in which thousands of the citizens of Indiana find employment at remunerative wages, will be compelled to stop operation.

"That their employés will be thereby thrown out of employment, and many of them, being dependent upon their labor for support, may and will become charges upon the State and its several municipal subdivisions; that the property of said manufacturing enterprises and the vast investments depending upon them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now interested in said enterprises as aforesaid.

"That in the cities named and in all the territory known as the 'gas belt' the inhabitants have for years used practically no other fuel than natural gas; that their houses have, in many instances, been constructed with a view to the use of such fuel, and will have to be differently equipped before other kinds of fuel can be used; that the cost of natural gas as fuel to the people of the 'gas belt,' who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and that to the other inhabitants of the State using said natural gas it has become and is a source of great convenience, comfort and increased happiness, because of its cheapness, convenience and cleanliness as fuel.

"That many small villages in and near the gas territory have within a few years become flourishing and opulent cities.

"That the State's wealth and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas have been greatly increased, and will, in the event natural gas gives out, be correspondingly curtailed.

"That the State of Indiana, relying upon the permanent supply of natural gas, has at great expense equipped many of its public institutions, including the state-house, the Central and

other hospitals for the insane, the asylums for the blind and deaf and dumb, the institution for the care of orphans of American soldiers, and other public institutions owned and maintained by the State of Indiana and its various municipal subdivisions, together with the court houses in many counties, and a vast number of public schools, for the use of natural gas as a fuel, by which the cost of maintaining the public buildings and institutions above named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased.

"That the supply of natural gas underlying the territory aforesaid is so placed in such Trenton rock that the diminution or consumption of said gas taken from said reservoir affects and reduces correspondingly the common supply.

"That if the gas supply is husbanded and protected it will last for many years and continue to furnish the various cities named with abundant fuel, and the population, wealth and other material interests of the State will continue to be benefited and enhanced and the comfort, happiness and enjoyment of the people of the State greatly increased.

"That underlying a portion of said natural gas territory and at the same levels, occupying the interstices — said Trenton rock in common with said gas, are large quantities of petroleum oil; and that, because of the volatile character of said gas and the pressure under which it is confined in said Trenton rock when said reservoir is tapped by wells drilled into the same from the surface of the earth, said gas and oil will and do escape into the open air in great volumes, unless securely confined in tanks or other proper receptacles.

"That on or about the 25th day of May, 1897, said defendant, the Ohio Oil Company, drilled, near the city of Alexandria, in said Madison County, a number of wells into said gas and oil bearing rock, producing natural gas and petroleum as aforesaid in large quantities, which wells are known by the name of the land owner upon whose land they are situated, which name and the description of said wells are as follows, to wit."

The complaint then enumerated five gas and oil wells which

had been opened and were being operated by the defendant for extracting oil, and averred as follows:

"That instead of securely anchoring said wells and each of them when so drilled so as to confine within the same or within tanks or pipes or other safe receptacles the natural gas produced therefrom within two days after said wells were respectively completed and gas and oil was struck therein, the said defendants, ever since the completion of said wells, all of which have been completed for periods varying from four to nine months, have unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been greatly diminished, and the property of its citizens in and near said gas territory dependent upon the continued supply of said natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value.

"That the defendants and each of them avow their purpose to permit said gas to escape continuously and indefinitely hereafter from such wells, and refuse to make any effort to confine the same, but declare their purpose to drill other wells in said gas territory and permit the gas therefrom to flow and escape into the open air, and that if said gas continues to flow from said wells the supply of natural gas upon which the citizens of said State depend, as aforesaid, will be greatly diminished; that the pressure of said gas, as found in said Trenton rock, will be greatly diminished, and that by the diminution of said pressure water will accumulate in said rock stratum and ultimately entirely displace and overcome said gas supply.

"Plaintiff, therefore, says that, because of the wrongful acts of defendants above described, heretofore committed and now continuing, its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted."

Averring the irreparable injury to result from allowing the wells to continue to flow, as stated, the inadequacy of the enforcement of the penalties provided in the statute to meet the evil complained of, and the fact that a multiplicity of suits would be engendered if the writ of injunction prayed for was not issued, the bill charged —

"That the value of the gas wasted by permitting said several wells to remain open each day is of great value, and that, in addition to the value of the same, the whole gas territory or field is greatly damaged by permitting said wells to remain open, in that what is known as 'back pressure,' resulting from the confinement of said gas, is in a great measure relieved and destroyed when said gas is liberated in the manner aforesaid, and that said back pressure is necessary throughout said field in order to prevent the flow of water into said rock stratum and the consequent displacement of the gas therein contained; that, for the protection of said gas supply from the invasion of salt water, it is necessary that in the use of gas from wells drilled into said reservoir only a fraction of the entire volume of said wells should be used, to the end that the back pressure shall be maintained at as high a pressure as possible, and that any other or freer method of using said gas has a tendency to expose the same to danger of salt water, as aforesaid."

The prayer was as follows:

"And plaintiff therefore prays that a temporary order issue forthwith from this court prohibiting, restraining and enjoining said defendant, its agents, servants and employés, from further suffering or permitting the natural gas produced in said wells or any of them, or any part thereof, to longer escape therefrom, and that said defendant be ordered, directed and commanded forthwith to securely confine the same either by anchoring each of said wells or by confining the gas produced therefrom in tanks, pipes or other proper receptacles, and that failing or refusing so to do the sheriff of Madison County be ordered and directed forthwith to procure necessary materials and labor and thereby anchor, secure and confine the natural gas produced from said wells and each of them, and that the expense of so doing be taxed as part of the costs of this suit.

"And the plaintiff further prays that upon the final hearing of this cause said defendant company, its officers, servants, agents and employés, be perpetually enjoined and prohibited from further suffering said gas to escape, and that they be forever thereafter commanded to confine said gas safely and securely in pipes, tanks or other proper receptacles, and for all proper relief."

The temporary injunction issued as prayed for. The defendant appeared and demurred to the complaint as not stating a cause of action. This was overruled. The defendant then answered as follows:

"The defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

"The defendant admits that it drilled the well complained of herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

"That said well complained of was not drilled in or near any village, town or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as so constructed and operated is not dangerous to life or property.

"That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land owner the stipulated royalties therefor, and so operated the same with knowledge, approbation and consent of such land owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

"That in said well and in the same strata of rock whence such

oil was produced there were also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural and ordinary method of raising and saving oil in such cases.

"And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property and profits, will be entirely destroyed and the people of said county and State will be deprived of the use and profits of such oil, which is of vastly more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

"The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

"That in the territory where said well complained of is situated there are a number of paying oil wells, owned and operated by various persons and corporations, and said field, when

properly developed, may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county."

Referring to the law of Indiana, the context of which has already been stated, the answer contained this averment:

"This defendant further alleges that said act of the general assembly of the State of Indiana, as above set out, violates the Fourteenth Amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws."

The State demurred to the answer as not alleging facts sufficient to constitute a defence. This demurrer was sustained. The defendant refusing to answer further, a decree granting a permanent injunction was entered. An appeal having been prosecuted to the Supreme Court of the State of Indiana, in that court the decree of the trial court was in all respects affirmed. 50 N. E. Rep. 1125. This writ of error was thereupon allowed.

Mr. M. F. Elliott and *Mr. George Shirts* for plaintiff in error.

Mr. C. C. Shirley and *Mr. William M. Taylor* for defendant in error. *Mr. Merrill Moores* was on their brief.

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

The assignments of error all in substance are resolvable into one proposition; which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error, constituted a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment.

When this proposition is analyzed by the light of the facts which are admitted on the record, it becomes apparent that the foundation upon which it must rest involves two contentions which are in conflict one with the other; in other words, the argument by which alone it is possible to sustain the claim be-

comes, when truly comprehended, self-destructive. Thus, it is apparent, from the admitted facts, that the oil and gas are commingled and contained in a natural reservoir which lies beneath an extensive area of country, and that as thus situated the gas and oil are capable of flowing from place to place, and are hence susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. It is also undoubted that such wells, when bored from many points in the superincumbent surface of the earth, are apt to reach the reservoir beneath. From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of any one who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas. And hence, of course, it is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in every one who has the right to bore from the surface and tap the reservoir involves, in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to be dispersed in the atmospheric air, and by permitting the oil to flow without use or benefit to any one. These things being lawful, as they must be if the acts stated cannot be controlled by law, it follows that no particular individual having a right to make borings can complain, and thus the entire product of oil and gas can be destroyed by any one of the surface owners. The proposition, then, which denies the power in the State to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appropriated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: that property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken

was not property, and could not, therefore, be brought within the guarantees ordained for the protection of property.

The confusion of thought which permeates the entire argument is twofold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate, that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others. *Del Monte Mining Co.* v. *Last Chance Mining Co.*, 171 U. S. 55, 60. The question here arising does not require a consideration of the matters just referred to, but it is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs*

under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In *Brown* v. *Spilman*, 155 U. S. 665, 669, 670, these distinctive features of deposits of gas and oil were remarked upon. The court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown* v. *Vandergrift*, 80 Penn. St. 142, 147; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases, (Penn.) 103."

In *Westmoreland & Cambria Natural Gas Co.* v. *De Witt*, 130 Penn. St. 235, the Supreme Court of Pennsylvania considered the character of ownership in natural gas and oil as these substances existed beneath the surface of the earth. The court said:

"The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more

careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturœ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract was uncertain,' as said by Chief Justice Agnew in *Brown* v. *Vandergrift*, 80 Penn. St. 147, 148. . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

In *Hague* v. *Wheeler*, 157 Penn. St. 324, the question involved in the cause was the right of a land owner who had a gas well on his own land to complain of the escape of gas from a well situated on the land of another. After adverting to the rule embodied in the maxim, *sic utere tuo ut alienum non lœdas*, and after referring to the exceptional nature of the right to acquire ownership in natural gas and oil, it was decided that the complainant was not entitled to relief. The court said, 340, 341:

"Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. . . . In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provisions of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but,

subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute."

Again, in *Jones* v. *Forest Oil Company*, (January, 1900,) 44 Atl. Rep. 1074, the same subject was once more considered. The complaint was filed by one land owner having a gas well on his land to enjoin the owner of adjoining property from using in a gas well thereon a pump which was asserted to have such power that its operation would draw away the oil and gas from the well of the complainant to that of the defendant. Reviewing the cases to which we have just referred, and after quoting the language of Chief Justice Agnew, in *Brown* v. *Vandegrift*, *supra*, wherein as we have seen oil and gas were by analogy classed as "minerals *feræ naturæ*," the court decided:

"From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface."

Again, applying the consequences of the doctrine just stated, the court declared:

"If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible?"

A brief examination of the Indiana decisions, on the subject of oil and natural gas, and the right to acquire ownership thereto, will make it apparent that from the peculiar nature of these substances courts of that State have announced the same rule as that recognized by this court in *Brown* v. *Spilman*, *supra*, and which has been applied by the Supreme Court of the State of Pennsylvania. In *State ex rel. Corwin* v. *Indiana & Ohio Oil, Gas & Mining Co.*, 120 Indiana, 575, a law of the State of Indiana which made it unlawful for any person to conduct natural gas beyond the State, and imposing penalties for so doing, was assailed as unconstitutional because repugnant to the commerce clause of the Constitution of the United States. The court held the statute to be void for the asserted cause. The

property in natural gas when reduced to actual possession was decided to be like any other property, and therefore the subject of commerce, and within the protection of the Constitution of the United States. In *Jamieson* v. *Indiana Natural Gas & Oil Company*, 128 Indiana, 555, a law of that State which prohibited the transportation of natural gas through pipes at a greater pressure than three hundred pounds per square inch, or otherwise than by its natural flow, was attacked not only on the ground of its interference with the right of property which sprang into existence with the possession of the gas, but because also the act in question was a regulation of interstate commerce. Both contentions were decided to be without merit, substantially on the ground that the dangerous nature of the product, its susceptibility to explosion and the consequent hazard to life and property which might arise from its movement through pipes, made the act of transmitting a fit subject for police regulation. In the course of its opinion the court said:

"The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil or rocks of the earth. It is as strikingly local as coal or petroleum; and yet no one has ever questioned the power of a State to enact laws governing mining. . . . It is so essentially local that only local regulation can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world."

Again, said the court:

"The local and peculiar character of natural gas makes it almost impossible that it should be the subject of general national regulation. . . . Upon this point we affirm that natural gas is characteristic and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and peculiarities it is a proper subject for state legislation, and cannot, so far as regards local production, be made the subject of general legislation by Congress."

In *People's Gas Company* v. *Tyner*, 131 Indiana, 277 and

280, the controversy was this: A lot owner in a town filed a bill for an injunction to prevent a neighboring lot owner from using nitro-glycerine "to shoot" a gas well on his property. The court refused the injunction. In the course of the opinion it was said:

"It has been settled in this State that natural gas when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State* v. *Indiana & Ohio Oil Gas & Min. Co.*, 120 Indiana, 575. Water, petroleum, oil and gas are generally classed by themselves as minerals possessing in some degree a kindred nature."

After quoting authorities relating to subterranean currents of water, and treating gas and oil before being reduced to possession as of a kindred nature, the court said:

"Like water it is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The case of *Brown* v. *Vandegrift*, 80 Penn St. 142, from which we have previously quoted, was then referred to, and the analogies between oil and gas and animals *ferœ naturæ* were approved and adopted. In *Townsend* v. *State*, 147 Indiana, 624, the constitutionality of a statute forbidding the burning of natural gas in flambeau lights was attacked because it was asserted to violate the Fourteenth Amendment to the Constitution of the United States and various provisions of the constitution of the State of Indiana. The court held that the statute was not amenable to the assaults made upon it. In a full opinion reviewing the nature of the ownership in oil and natural gas, the power of the State to regulate and control their use and waste in the interest of all those within the gas field and of the public at large was elaborately considered. Reviewing its own previous adjudications, which we have cited, and those of the Supreme Court of the State of Pennsylvania, to which we have also referred, it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein

until by the actual drawing of the oil and gas to the surface of the earth they had reduced these substances to physical possession. It was further held that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the State could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein the gas and oil were deposited, as well as the public, had an interest, because in the preservation of these substances the well-being and prosperity of the entire community was largely involved. And it was upon the opinion announced in that case that the court rested its decree in the case now under review.

Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they, in every respect, harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the State of Indiana, to be as follows. Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits without violating the rights of the other surface owners.

If the analogy between animals *feræ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *feræ naturæ* belong to the "negative community;" in other words, are public things subject to the absolute control

of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. *Geer* v. *Connecticut*, 161 U. S. 519, 525. But whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer* v. *Connecticut*, *supra*. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal right in them all to take from a common source of supply, the two

substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument, upon which the attack on the statute must depend, involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them, in and to the substances contained in the common reservoir of supply, then as a necessary result of the right of property, its indivisible quality and the peculiar position of the things to which it relates, there must arise the legislative

power to protect the right of property from destruction. To illustrate by another form of statement, the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without devesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this, although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States.

These considerations are sufficient to dispose of the case. But as there are several contentions which seem to have been considered, in argument, as resting on different premises, though such in reason is not the case, we briefly notice them separately: First. It is argued that as the gas, before being allowed to disperse in the air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used the back pressure, on the best known pump, would, if not arresting its movement, at least greatly diminish its capacity. Hence it is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the State we may not interfere.

In view of the fact that regulations of natural deposits of oil

and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the Supreme Court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

Affirmed.

OHIO OIL COMPANY *v.* INDIANA (NO. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 83. Argued December 18, 19, 1899. — Decided April 9, 1900.

The judgment below in this case is affirmed for the reasons given in *Ohio Oil Company* v. *Indiana*, *ante*, page 190.

THIS case was argued with No. 84, *ante*, 190, and by the same counsel.

MR. JUSTICE WHITE delivered the opinion of the court.

The defendant below was sued for the sum of certain penalties imposed by law for allowing gas to escape into the atmospheric air from an oil and gas well. The statute by which the penalties were imposed is the one we have considered and passed on in an opinion this day delivered in *Ohio Oil Co.* v. *Indiana*, No. 84, of this term. The defendant demurred to the complaint, and when the demurrer was overruled answered. The answer alleged that the statute imposing the penalties was repugnant to the Constitution of the United States, on the same grounds which we have to-day disposed of in the case referred to. From a judgment awarding the penalties,

Opinion of the Court.

which was affirmed by the Supreme Court of the State of Indiana, this writ of error is prosecuted. For the reasons given in case No. 84 the judgment is

Affirmed.

OHIO OIL COMPANY *v.* INDIANA (NO. 3).

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 85. Argued December 18, 19, 1899. — Decided April 9, 1900.

The judgment below in this case is affirmed for the reasons given in *Ohio Oil Company* v. *Indiana*, *No. 1*, *ante*, page 190.

This case was argued with No. 84, *ante*, 190, and by the same counsel.

Mr. Justice White delivered the opinion of the court.

The Supreme Court of the State of Indiana affirmed a judgment of the trial court, awarding the sum of certain penalties incurred by violating a statute of the State of Indiana which came under our review in case No. 84, this day disposed of. The opinion in that case is conclusive of every question here arising, and for the reasons given in case No. 84, the judgment is

Affirmed.

OVERBY *v.* GORDON.

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

No. 168. Argued March 5, 1900. — Decided April 9, 1900.

The amount of the estate, as a whole, was the matter in dispute below, and it amounted to sufficient to give this court jurisdiction.

The sovereignty of the State of Georgia, and the jurisdiction of its courts at the time of the grant of letters of administration on the estate of Haralson did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia; and while the De Kalb county court possessed the power to determine the question of the domicil of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such fact in a proceeding *in rem*.

Pending proceedings for the appointment of an administrator in the District of Columbia, the personal assets of the deceased there situated were delivered up to the administrator appointed by the Georgia court. The trial court declined to rule that their delivery operated to protect those who made it as against an administrator appointed within the District. *Held* that this was a proper ruling.

The act of Congress of February 28, 1887, c. 281, has no relation to a case of this kind.

THE proceedings under review originated in the Supreme Court of the District of Columbia, by the filing in that court, on January 23, 1896, of a petition on behalf of Mrs. Gordon, the appellee herein. The object of the petition was to obtain the probate, as the last will and testament of Hugh A. Haralson, of a paper purporting to have been executed by Haralson, a copy of which is set out in the margin hereof,[1] and to obtain

[1] SAVANNAH, GA., *August* 14, 1895.

It is my will and desire that after my death the interest on my bonds be for the sole use and benefit of my sister Mrs. Fannie Gordon, and that after her death the interest on my bonds be for the sole use and benefit of her daughter and my niece Carrie Lewis Gordon.

It is my will and desire that none of my securities be sold or the investment changed until they mature.

a grant of letters of administration thereon, with the will annexed. It was averred that Haralson, at the time of his death and for several years prior thereto, had been a resident of the District of Columbia, and that he died on August 23, 1895, in the county of De Kalb, State of Georgia, possessed of personal property of the value of about ten thousand dollars, all of which, except an insignificant part thereof, was at the time in the District of Columbia. It was further averred that Haralson left surviving, as next of kin, three sisters, and four children of a deceased sister, and that all said next of kin, except the eldest sister (Elizabeth S. Overby), resided in the State of Georgia. Subsequently, on March 6, 1896, a caveat was filed, purporting in the body thereof to be on behalf of all the next of kin of the decedent other than Mrs. Gordon, but not signed by Mrs. Overby, contesting the validity of the alleged will and the claim that the deceased was at the time of his death a resident of the District of Columbia, and averring that at the time of his death Haralson was a citizen and resident of the State of Georgia.

On April 10, 1896, issues were framed upon the matters put at issue by the caveat and were ordered to be tried by the court, sitting as a Circuit Court, and a jury. The questions presented for decision were as follows:

"1. Was the said deceased at the time of his death a resident of the District of Columbia?

"2. Was the said deceased at the time of his death a citizen and resident of the State of Georgia?

"3. Was the said deceased at the time of the making of the paper writing purporting to be his last will and testament a resident of the District of Columbia?

"4. Was the said deceased at the time of the making of the paper writing purporting to be his last will and testament a citizen and resident of the State of Georgia?

"5. At the time of his death did any considerable part of

If Carrie Gordon should have no children at her death, these securities, with the residue of my estate, to be divided to my heirs at law.

HUGH HARALSON.

Witness: CHAS. A. MACATEE.

the personal estate of the said deceased lie within the District of Columbia?"

A trial of these issues, however, was not had until February, 1898. At said trial the caveators were represented by attorneys. From a bill of exceptions contained in the record before us it appears that Mrs. Gordon introduced evidence tending to show that both at the date of the testamentary paper in controversy and at the time of his death Haralson was a resident of the District of Columbia. Mrs. Gordon rested her case after the following admissions were made by counsel for caveators:

1. That at his death Haralson had on deposit in two banking institutions in the District of Columbia money and securities approximating nine thousand dollars in amount and value, which was the entire estate of the decedent, with the exception of about two hundred dollars found outside of said District; and,

2. That said assets within the District of Columbia had been removed therefrom by Logan Bleckley, (one of the caveators,) claiming to act as administrator of the estate of said decedent, under grant of letters issued in May, 1896, by a court of the State of Georgia, pursuant to proceedings initiated in said court on April 6, 1896.

It is recited in the bill of exceptions that "to sustain the issues on their part joined," the caveators offered in evidence a certified transcript of record from the De Kalb Court of Ordinary, De Kalb County, in the State of Georgia. This record showed the appointment in May, 1896, of Logan Bleckley as administrator.

It is further recited in the bill of exceptions that the transcript referred to was offered as tending to show that the decedent had died a resident of De Kalb County, Georgia, intestate, "and that Mrs. Gordon was thereby estopped to deny that fact." The trial court, however, refused to admit the record in evidence, and an exception was duly taken to such refusal. The jury answered "Yes" to the first, third and fifth questions submitted to them, and "No" to the second and fourth questions, thus sustaining the contentions of Mrs. Gordon. The answers were certified to the Orphans' Court, and thereupon an order was entered admitting the will

to probate and record as the last will and testament of the decedent, and letters of administration *cum testamento annexo* were decreed to issue to Hugh H. Gordon, a son of the petitioner. An appeal was thereupon taken by the caveators to the Court of Appeals of the District of Columbia. That court affirmed the order of the lower court, (Mr. Chief Justice Alvey dissenting,) (13 App. D. C. 392,) and a writ of error was then sued out from this court.

Mr. Samuel F. Phillips for plaintiffs in error. *Mr. Frederic D. McKenney* was on his brief.

Mr. Charles Cowles Tucker and *Mr. Henry E. Davis* for defendant in error.

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

Counsel for defendant in error urge in their brief an objection to the jurisdiction of this court, which we shall first consider and dispose of.

It is claimed that the writ of error should be dismissed "because the interests of the plaintiffs in error in respect of the judgment of the Court of Appeals of the District of Columbia, to which said writ of error was directed, are several, and the matter in dispute, exclusive of costs, as to no one of the said plaintiffs in error, exceeds the sum or value of five thousand dollars."

By act of February 9, 1893, c. 74, 27 Stat. 434, this court was authorized, among other things, to review a final judgment or decree of the Court of Appeals of the District of Columbia in any case where the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. What, therefore, was the matter in dispute in this controversy? The answer manifestly is that it was whether an estate valued at more than nine thousand dollars should pass in the mode provided in an alleged last will and testament, which, in effect, excluded the next of kin of the decedent from the enjoyment of the principal of the

estate, or in the mode provided by the law of the domicil of the decedent for the transmission of an intestate estate. On the one hand was Mrs. Gordon, a sister of the deceased, and representing the interests under the alleged last will, asserting the validity of that document, and opposed to her were the plaintiffs in error, some of the next of kin of the deceased, interested in establishing his intestacy. Had the trial court admitted in evidence the transcript of record from the De Kalb court, and given it the conclusive force contended for, it would seem beyond question that as to those interested in upholding the validity of the alleged will, the value of the estate affected by that instrument would have been the matter in dispute. The matter in dispute necessarily must be the same as to the unsuccessful next of kin who are prosecuting this writ of error, and the amount of whose several interests in the estate of the decedent was not a question litigated below. The case is analogous in principle to that of *Shields* v. *Thomas*, 17 How. 3. In that case it was held that where the representatives of a deceased intestate recovered a judgment against an administrator for an amount in excess of the sum necessary to confer jurisdiction to review, and such recovery was had under the same title and for a common and undivided interest, this court had jurisdiction, although the amount decreed to be distributed to each representative was less than the jurisdictional sum. In the case at bar, the contestants below sought not an allotment to them of their interests, if any, in the estate, but an adjudication that the alleged last will and testament possessed no validity, and that contention was advanced by virtue of a claim of common title in the next of kin of the decedent to the *corpus* of the estate, such title, if any, being derived from the law of the alleged domicil of the deceased. In this aspect, the amount of the estate was the matter in dispute. *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42, 51–52, and cases there cited. There is therefore no merit in the objection to the exercise of jurisdiction.

Coming then to the merits of the controversy, we find presented for our consideration the single question, Was the grant of letters of administration by the Court of Ordinary of De Kalb

County, Georgia, competent evidence upon the issue tried in the Supreme Court of the District of Columbia respecting the domicil of the decedent at the time of his death?

In determining this question it is important to keep in mind the following facts:

At the time when the proceedings before the De Kalb court were instituted, (April, 1896,) the estate of the deceased, with but a trifling exception, was within the District of Columbia. Not only this, but upon the ground that the domicil of Haralson at his death was the District of Columbia, the jurisdiction of a competent court of the District had been invoked as early as January 23, 1896, for the probate of an alleged last will and testament of Haralson and for the grant of letters of administration *cum testamento annexo;* and on March 6, 1896, the next of kin, other than the proponent of the alleged will, had filed a caveat in said court of the District of Columbia contesting the application for probate and grant of letters. Four days before the certification of issues framed by reason of such contest, to be tried before a jury, the caveators before the Supreme Court of the District of Columbia initiated the proceedings before the De Kalb County Court. It was upon the hearing had in the Supreme Court of the District of Columbia upon the issues certified on April 10, 1896, that the adjudication of the De Kalb County Court was offered in evidence upon the issue in respect to the domicil of the decedent at his death.

The transcript of record exhibiting such adjudication consists of: 1, an unverified petition of Logan Bleckley, as one of the next of kin and heirs at law of Hugh A. Haralson, asking that letters of administration be granted upon the estate of said deceased, upon the ground that he was a resident of the county of De Kalb at his death, and had died intestate, "leaving an estate, undevised, of real and personal property of the probable value of ten thousand dollars;" 2, consents of certain of the next of kin to the appointment of Bleckley; 3, the order of appointment; and, 4, the oath of office of the administrator, in which is embodied an averment that the decedent died intestate, so far as affiant knew or believed.

By section 3393 of the Georgia Code of 1895 an application

for grant of letters of administration was required to be made to the ordinary of the county of the residence of the deceased, if a resident of the State, and if not a resident, then in some county where the estate or a portion thereof was situated.

The next section, prescribing the notice to be given of an application, reads as follows:

"SEC. 3394. (2503.) *The citation.* The ordinary must issue a citation, giving notice of the application to all concerned, in the gazette in which the county advertisements are usually published, once a week for four weeks, and at the first regular term after the expiration of that time, the application should be heard or regularly continued."

The order of appointment is recited to have been made at the May term, 1896. It reads as follows:

"The petition of Logan Bleckley for letters of administration on the estate of Hugh A. Haralson, deceased, having been duly filed, and it appearing that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why said letters should not be granted; and it also appearing that said deceased died a resident of said county, intestate, and that said applicant is a citizen of this State and lawfully qualified for said administration, and no objection being offered thereto, it is therefore ordered by the court that the said Logan Bleckley be, and he is hereby, appointed administrator on the estate of said deceased, and that letters issue to him as such, upon his giving bond, with approved security, in the sum of twenty thousand dollars, and taking and subscribing the oath as provided by law."

As said by this court in *Veach* v. *Rice*, 131 U. S. 293, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of the Georgia administrator.

The transcript referred to, however, undoubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no contest was had in respect to the grant of letters.

Opinion of the Court.

Jurisdiction is the right to hear and decide, and it must be exercised, speaking in a broad sense, in one of two modes — either *in rem* or *in personam*.

It will be observed that the statutory notice above referred to was not required to be directed against named individuals nor had it for its object the obtaining of specific relief against any one, but it was to be general, and its purpose was to warn all persons that it was proposed by the court of ordinary to determine whether a legal representative should be appointed to administer the property of the deceased within the State of Georgia. The notice and proceeding was obviously intended to have no greater force or efficacy against persons resident in the State of Georgia than against individuals who might be resident without the state. It results that the proceedings referred to were not intended to constitute and did not amount to an action *in personam*. This results from the fact that they were devoid of the elements essential to an action *in personam ;* and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof, as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.

An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the court to adjudicate at all. In other cases, where the proceedings are in form *in personam*, but the court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of process, the action may proceed, as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court. *Roller* v. *Holly*, 176 U. S. 398. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.

From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicil would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject-matter or *res*, upon which the power of the court was to be exercised, was, therefore, the estate of the decedent.

The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State. To quote the language of Mr. Chief Justice Marshall in *Rose* v. *Himely*, 4 Cranch, 241, 277:

"It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*."

As said also in *Pennoyer* v. *Neff*, 95 U. S. 714, 722:

"Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

"The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. (Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2.) The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation out-

side of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, Confl. Laws, sect. 539."

Now, it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia. The decision in *Robertson* v. *Pickrell*, 109 U. S. 608, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, it was held that the act of Congress declaring the force and efficacy which the records and judicial proceedings of one State should have in the courts of another State did not require that they should have any greater force and effect in another State than in the State where such records and judicial proceedings originated and were had; that the probate of a will in one State, by a proceeding not adversary in character, merely established its sufficiency to pass all property which could be transferred in that State by a valid instrument of that kind, and the validity of the will in that State; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property situated in another State, except as permitted by the laws of such other State.

The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the De Kalb County Court was not entitled to probative force in the courts of another State in the controversy over the administration of assets not within the territorial jurisdiction of the State of Geor-

gia, at the time the grant of letters was made, finds support in the opinion delivered by Lord Blackburn in *Concha* v. *Concha*, 11 App. Cas. p. 541, a case referred to in terms of approval in *Thormann* v. *Frame*, 176 U. S. 350, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the *Concha case* were as follows:

After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughter and executors as to the domicil of the decedent, in favor of the domicil being in England, and not in Chili, as was claimed by the daughter. In a subsequent action before the Court of Chancery for distribution of the assets, the daughter again sought to litigate the question as to the domicil of her father, and her right to do so was finally adjudicated by the House of Lords. The executors or those who had succeeded them in the management of the administration suit attempted to avail of the decree of the probate court as conclusive upon the question of domicil, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res adjudicata*, by reason of the actual contest made by the daughter. The decree of the probate court, however, was held not conclusive *in rem* as to the domicil, because the finding as to domicil was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the probate court, and as estoppels must be mutual, the daughter could not be bound. This decision of the House of Lords, it will be borne in mind, was as to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion, Lord Blackburn (who perhaps had in mind doubts intimated in the Court of Appeals, 29 Ch. D. 268, 276, as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):

"What he (the Probate Judge) did decide was (and to that extent I think the decision was conclusive on everybody,) that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Creswell Creswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the judge of our probate court, saying: 'I find him to be a domiciled Englishman, and, therefore, on that account grant probate,' would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so."

Again, after referring to the fact that upon the executor proposing to prove the will, a caveat was entered upon which it was said the probate judge entered into an inquiry whether or not the testator was domiciled in England, and found that he was, Lord Blackburn observed (p. 564):

"It is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment *in rem*. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicil to distribute the property) would have respected the decision of the Judge Ordinary, it establishing that this

will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property—could it have been said that the Judge Ordinary having erroneously found that the testator was domiciled in England when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter *in rem* be decisive as regards the reason upon which the judge of the probate court had gone? I cannot think that it would be."

In *Blackburn* v. *Crawford's Lessee*, 3 Wall. 175, and a continuation of the same action under the title of *Kearney* v. *Denn*, (15 Wall. 51,) the sole question at issue in the action (ejectment) was the validity of an asserted marriage. At the trial the defendant offered in evidence, as a conclusive estoppel against all the lessors of the plaintiff and as *prima facie* evidence to support the issue on his part, a transcript from the records of the Orphans' Court of Prince George's County, Maryland, and proposed to read therefrom the verdict of the jury and the order of the Orphans' Court thereon on certain issues sent from the Orphans' Court to the Circuit Court of said county. These issues had been framed upon a contest, initiated in the Orphans' Court, by one of the lessors of the plaintiff who resisted an application of Blackburn for the grant to him of letters of administration on the estate of a certain intestate, such lessor asserting that he was nearest of kin to the intestate, and that letters should be granted to him. The verdict in the contest was against the validity of the claimed marriage. On the trial in the action in ejectment the jury found in favor of the fact of marriage. This court—the trial judge in the action in ejectment having excluded the transcript referred to—held that the decree upon the contest was competent evidence and operated an estoppel as against the lessor of the plaintiff who was a party to the contest, but that the adjudication did not affect the other lessors, who were not parties to such contest. Obviously, the decision proceeded upon the assumption that as the Orphans' Court possessed no general jurisdiction over the real

estate of a decedent, its action upon the application for grant of letters, regarded as a proceeding *in rem*, possessed no probative force in contests over such property. This, of course, in nowise impugned the principle that all parties to a contest, in proceedings in a probate court preliminary to and during the course of administration upon the estate of the decedent, upon a matter within the jurisdiction of the court, are concluded in every other court by the decision rendered, as to the facts upon which such decision necessarily proceeded. *Caujolle* v. *Ferrié*, 13 Wall. 465. And see *Butterfield* v. *Smith*, 101 U. S. 570.

We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicil of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.

Our conclusion being that the adjudication of the fact of domicil in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicil in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicil of the deceased. And this conclusion is not affected in the least by the circumstance that on the trial of the issue as to domicil had in the Supreme Court of the District of Columbia it was claimed that the assets within the District of Columbia at the time of the filing of the caveat by the next of kin had been thereafter, without the sanction of the court, removed from the District of Columbia by one of the caveators.

The trial court properly declined to rule that delivery of such assets operated to protect those who made the surrender, as against an administrator appointed within the District, subsequent, it is true, to such delivery, but as the result of proceedings for the appointment of an administrator which were pending in a proper court of the District at the time of the delivery and when the person in whose name the Georgia letters were issued was a party to the proceedings previously instituted and then pending in the District. Nor was the trial court required to determine that upon proper application to the Georgia court the administrator appointed by the court would not be ordered to deliver up the assets removed by him from the District.

Allusion has been made to an act of Congress of February 28, 1887, c. 281, 24 Stat. 431, which makes its lawful for any person or persons to whom letters testamentary or of administration may be granted by proper authority, in any of the United States or the territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District. We do not construe that statute, however, as having any relation to a case of the kind we are now considering. In other words, the statute cannot in reason be interpreted as directing that where a proper court of the District of Columbia had obtained jurisdiction by proceedings commenced before it for administration upon property within the District, it should be obliged to dismiss such proceedings because one who was a party before it chose, whilst issues in such proceedings were pending and undecided, to go to a State and there make application for letters of administration, basing such application upon the asserted fact that the deceased had been domiciled in such State.

Whilst it may be conceded that, in consequence of the statute, as a general rule, a debtor residing in the District of Columbia, of a deceased person, may be protected in making payment to an administrator appointed in another jurisdiction, the asserted domicil of the deceased, *Wilkins* v. *Ellett*, 108 U. S. 256, this does not make it necessary for us to decide that the payment

or delivery of the assets in the District of Columbia, which was made to the Georgia administrator after the commencement of proceedings for the administration of the assets within the District of Columbia, based upon the ground of the domicil of the deceased having been in said District, was lawful. To determine this question would involve a consideration of other provisions of the statute, and as to whether the person making the payment was or not to be charged with notice of the then pending proceedings in the Supreme Court of the District, which, of course, were matter of public record. The question, however, is not before us for review, and we do not, therefore, express an opinion in regard thereto.

Further, in the light of the decision of the Supreme Court of Georgia in the case of *Thomas* v. *Morrisett*, 76 Georgia, 384, and an analogous decision by the Supreme Court of Errors of Connecticut, in *Willett's Appeal from Probate*, 50 Conn. 330, it would seem altogether probable that the De Kalb County Court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Columbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration.

Finding no error in the record, the judgment of the Court of Appeals of the District of Columbia is

Affirmed.

Mr. Justice Brown concurred in the result.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* SCHMIDT.

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

No. 178. Argued March 12, 13, 1900. — Decided April 9, 1900.

The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein; and all its requirements are complied with provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.

The mere fact that in this case the proceeding to hold the Louisville and Nashville Company liable was by rule does not conflict with due process under the Fourteenth Amendment, since forms of procedure in state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.

Although the Louisville and Nashville Company appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character except the set-off was pleaded or suggested in any form, and this court cannot be called upon to conjecture that defences existed which were not made, and to decide that proceedings in a state court have denied due process of law because defences were denied when they were not prosecuted.

THE three corporations directly or indirectly involved in this controversy are the Northern Division of the Cumberland and Ohio Railroad Company, the Louisville, Cincinnati and Lexington Railway Company and the Louisville and Nashville Railroad Company. In order to abbreviate we shall refer to them respectively as the Cumberland and Ohio, the Cincinnati and Lexington and the Louisville and Nashville.

On July 2, 1879, the Cumberland and Ohio mortgaged its road to secure its certain negotiable bonds.

On July 28, 1879, the Cumberland and Ohio leased its road for thirty years to the Cincinnati and Lexington. The lease provided that if the earnings of the Cumberland and Ohio proved inadequate to pay the interest on the bonds, secured by the mortgage above referred to, the lessee, the Cincinnati and Lex-

ington, would "supply the deficiency so far as it may be done by appropriating the net earnings, or so much as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said first party's line." The lease provided that the lessee, the Cincinnati and Lexington, should not assign the contract without the consent of the lessor, the Cumberland and Ohio. Contemporaneously with the execution of the lease and in order to secure the carrying out of the stipulation providing for the application of certain stated earnings of the Cincinnati and Lexington to the payment of the interest on the bonds of the Cumberland and Ohio, the former corporation executed a mortgage in favor of the bondholders of the Cumberland and Ohio, hypothecating the net earnings on the Cincinnati and Lexington arising from business coming from the leased line. Although the Cumberland and Ohio did not abandon its corporate life and preserved its formal existence, all its railroad and appurtenances as a result of the lease passed from its own to the control of the Cincinnati and Lexington.

In November, 1881, the Cincinnati and Lexington conveyed all its property to the Louisville and Nashville, and made to the latter an assignment of the lease of the property of the Cumberland and Ohio. Despite the fact that the assignment of the lease was not approved by the original lessor, the Cumberland and Ohio, as provided in the lease, the Louisville and Nashville took control of both the roads of the Cincinnati and Lexington and Cumberland and Ohio, and operated the same, reaping all the revenues of every kind arising therefrom. In 1885, default having supervened in the payment of the interest on the bonds of the Cumberland and Ohio, issued and secured as above stated, the trustee under the mortgage commenced proceedings against the Cincinnati and Lexington to enforce the mortgage on net earnings derived from business of the Cumberland and Ohio. It is not denied that at the time the action was commenced the fact of the transfer of the property of the Cincinnati and Lexington and the assignment of the lease of the Cumberland and Ohio to the Louisville and Nashville was known to the trustee. However, the Cincinnati and Lexington was the only party made defendant. The relief

sought was a discovery of the amount of net earnings, derived from business coming from the Cumberland and Ohio, and a decree for the amount, when ascertained, for the benefit of the mortgage bondholders. A most protracted and hotly contested lawsuit ensued. The question of earnings coming to the Cincinnati and Lexington from business over the Cumberland and Ohio was thoroughly explored by reports, expert examination of books, testimony, etc., resulting in what is denominated by counsel for the plaintiff in error in their brief as a "wilderness of figures." At last a final decree was entered fixing the earnings which under the contract were attributable to the mortgage creditors of the Cumberland and Ohio, at the sum of $53,565.62, which the defendant was ordered to pay into court with interest by a day stated. The sum not having been paid a rule was taken on the defendant to compel performance, and in response it was answered:

"That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

The sale referred to in this answer being that which had been made by the Cincinnati and Lexington of all its property, including the assignment of the lease held by it from the Cumberland and Ohio to the Louisville and Nashville. In reply to a rule taken on the defendant to report the amount of net earnings which had accrued subsequent to the period embraced by the decree for $53,565.62, the defendant said:

"States and shows to this court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland and Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

Thereupon the plaintiff sought leave by an amended and supplemental petition to make the Louisville and Nashville a party defendant to the cause. Among others the following averments were contained in the petition:

"Plaintiffs state that prior thereto the said Louisville and Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati and Lexington Railway Company, and as such stockholder took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati and Lexington Railway Company and all its said properties.

"Plaintiffs state that after the execution of said deed of November 1, 1881, said Louisville and Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati and Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern Division of the Cumberland and Ohio Railroad Company aforesaid, and began to operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

"Plaintiffs state that at all times since November 1, 1881, said Louisville and Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern Division of the Cumberland and Ohio Railroad and the said Louisville, Cincinnati and Lexington Railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case, and ascertained and adjudged in the several judgments of this court, and finally adjudged in the opinion and judgment of the Court of Appeals herein, all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati and Lexington Railway Company.

"Plaintiffs further state that the Louisville and Nashville Railroad Company at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati and Lexington Railroad Company actually knew all the provisions of the

lease, mortgages and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages and contracts, from the time of its said purchase until the 1st day of April, 1883, and knew at all times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said Louisville, Cincinnati and Lexington Railway Company, and of the Northern Division of the Cumberland and Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and properties of the Louisville, Cincinnati and Lexington Railway Company and the Northern Division of the Cumberland and Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati and Lexington Railway Campany, and filed all other papers which were filed herein on behalf of the defence, and itself employed counsel in this case to make defence in the name of the Louisville, Cincinnati and Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defence of this action, and has been in court defending this action and has controlled the defence thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the — day of ——, 1885, and from the time the said Louisville and Nashville Railroad Company caused the answer to said petition to be filed herein on the — day of ——, 1886."

The leave to file was denied on the ground that it was too late to do so after judgment. This order, refusing to allow the amendment, was affirmed by the Court of Appeals of the State of Kentucky. That court, however, in its opinion intimated that the amendment was not necessary if the averments of the supplemental and amended petition were true, and that under the facts the Louisville and Nashville might be proceeded against by rule to show cause. 99 Kentucky, 143. Following the path thus pointed out by the Court of Appeals, a rule in the lower

court was applied for to compel the Louisville and Nashville to pay the amount of the judgment. The court considered the suggestion which had been made, in the opinion of the Court of Appeals, as not binding on it, and hence declined to allow the rule on the ground that the Louisville and Nashville not having been named as a defendant in the proceeding could not be by rule condemned to pay the judgment. The Court of Appeals reversed the order of the trial court and directed the rule to issue as prayed for. The court in effect held that as the affidavit by which the rule was supported in substance charged that the Louisville and Nashville prior to and during the entire suit had operated the roads from which the revenues accrued which were in controversy, and that that corporation had in substance volunteered in the cause to defend the same in the name of the technical defendant; had carried on the defence through its own counsel, had paid all the expenses of the litigation; the officers of the corporation which was technically a defendant being the officers of the Louisville and Nashville, therefore, the Louisville and Nashville had had under the laws of Kentucky due notice of the suit, and ample opportunity to defend, in fact had actually carried on the defence, and could hence be condemned by rule to pay the judgment. The trial court thereupon entertained and issued the rule, which was served on the Louisville and Nashville. That corporation for answer to the rule said, among other things:

First. "That it is not a party to this suit. It has not been named in any pleading in the case as a party, and there is no averment made in any pleading in the case against this respondent, or that is applicable to this respondent, and no judgment or order has ever been entered in this case against this respondent, and no process has ever issued against or ever been served on this respondent."

Second. "There has never been a time from the institution of this suit up to this time when this respondent could, with propriety, have filed an answer setting up its defences against the alleged claim of the plaintiff, and to require it now to pay into court upon this rule the amount stated in the rule, or any other amount, would be to deprive this respondent of its prop-

erty without due process of law, contrary to the Constitution of the United States in such cases made and provided."

The answer then pleaded a set-off to the amount of $16,524.37, which it was claimed the Louisville and Nashville should be allowed if it was held bound to pay the judgment. The conclusion of the answer was as follows: "Wherefore having fully responded, this respondent prays that the rule herein be discharged." The court, having expressed in a careful opinion its view that the Louisville and Nashville could not be condemned, by rule, because it had not been a technical party to the record, nevertheless, considering itself bound by the action of the Court of Appeals, made the rule absolute, and entered a decree against the Louisville and Nashville Railroad, condemning it to pay the judgment, subject to the set-off which had been pleaded in the answer to the rule, and this judgment was affirmed by the Court of Appeals of the State of Kentucky as a delay case. By an allowance of a writ of error the cause is now here for review.

Mr. Helm Bruce and *Mr. James P. Helm* for plaintiff in error. *Mr. H. W. Bruce* was on their brief.

Mr. John G. Simrall and *Mr. Edmund F. Trabue* for defendant in error. *Mr. Temple Bodley*, *Mr. John C. Doolan*, *Mr. Benjamin F. Washer* and *Mr. James S. Pirtle* were on their brief.

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

It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Wilson* v. *North Carolina*, 169 U. S. 586.

Opinion of the Court.

The claim of the plaintiff in error (the Louisville and Nashville) is that the decree rendered against it did not constitute due process of law, first, because it had no notice of the suit, it not having been summoned as a party defendant; and, second, that as it was not made a nominal party defendant and served with process as such, it had no adequate opportunity to make defence. In support of the second contention various provisions of the Kentucky law have been referred to in the argument, from which it is deduced that the Louisville and Nashville would have been without right in the proceeding brought, not against it, but against the Cincinnati and Lexington, to make defences which may have appertained and been relevant to the Louisville and Nashville, and might not have related to the Cincinnati and Lexington, the party defendant on the record. But the answer to these contentions is that the necessary effect of the opinion and decree of the court of last resort of Kentucky, is to hold, first, as a matter of fact, that, although not a technical defendant, the Louisville and Nashville became voluntarily, in the name of the Cincinnati and Lexington, the real, although not the nominal, defendant in the cause, and during the long years of this protracted litigation was in legal effect an actor in the courts of Kentucky seeking, by every possible means, to defeat the claim of the plaintiff. The conclusions of fact found by the court of last resort of Kentucky are not subject to reëxamination by this court. Clearly, also, the inevitable result of the conclusion of the Court of Appeals of Kentucky is that it was the duty of the Louisville and Nashville, having come in voluntarily in the cause to defend its interest, under the name of the technical defendant, if it had defences which were personal to itself, to have made such an appearance on its own behalf as to enable it to make them, and that the statutes of Kentucky not only authorized this course, but obliged the Louisville and Nashville to have followed it. Accepting as we do the interpretation placed by the courts of last resort of Kentucky on the law of that State, the contention of the plaintiff in error is at once demonstrated to be without merit. Besides the conclusiveness of what we have just said, there is another view which is equally decisive. The record shows no offer of any defence whatever, by

the Louisville and Nashville, which was refused by the courts below. On the contrary, every defence made is shown to have been entertained, fully considered and to have been ultimately decided. The argument then reduces itself to this: That one who has voluntarily appeared in a cause and actively conducted the defence is to be held to have been denied, by the courts of the State, the right to make a defence which was never presented. Moreover, even if we put out of view altogether all the proceedings had in the original cause during the many years when the suit was pending, and confine our attention solely to the events which took place after the application for the rule to show cause, on the Louisville and Nashville, the same conclusion is rendered necessary. It is undoubted that the Louisville and Nashville was made a party defendant to the rule in the most technical sense, and was actually served. It made answer and asserted its set-off. The mere fact that the proceeding to hold it liable was by rule does not conflict with due process under the Fourteenth Amendment, for, as we have seen, forms of procedure in the state courts are not controlled by the Fourteenth Amendment, provided the fundamental rights secured by the amendment are not denied. But it is argued whilst it is true the effort by rule to enforce responsibility for the judgment did not violate the Fourteenth Amendment, and service of the rule was adequate notice, yet no opportunity to defend was afforded, because all right to defend had been cut off by the previous judgment. In effect it is asserted the rule summoned the corporation to show cause why it should not pay a judgment to which, under the previous decree, there was no right on its part to make any defence whatever. In other words, it is said the right to proceed by rule was upheld by the Kentucky court because the Louisville and Nashville was bound by the judgment and therefore the rule rested on an assumption which precluded the setting up of any defence to it. But the answer to this argument is plain. Although the Louisville and Nashville appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character, except the set-off, was pleaded or suggested in any form whatever. The argument, therefore,

asks us to say that the Louisville and Nashville in the proceeding in which it was duly served, and to which it responded and as to which it had its day in court, was deprived of defences which it never asserted, and that due process of law was not administered to it because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defences existed which were not made and to decide that proceedings in a state court have denied due process of law because defences were denied, when they were not presented. And especially must that be so where the court of last resort of the State, on review of all the proceedings, has held that full opportunity to make every defence was afforded. True it is that in *Rees* v. *City of Watertown*, 19 Wall. 107, 123, it was said: "Whether in fact the individual has a defence . . . is not important. To assume that he has none, and therefore that he is not entitled to a day in court, is to assume against him the very point he may wish to contest." But this truism was stated with reference to a case where it was argued that a condemnation without notice could be justified on the assumption that if notice had been given no defence could have been made. Manifestly, the principle can have no application to a case where there was notice, and the presumption which we are asked to invoke is that although no defences were pressed they may have possibly existed.

Affirmed.

Syllabus.

THE ALBERT DUMOIS.

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

Nos. 139, 272. Argued January 31, 1900. — Decided April 9, 1900.

In January, 1897, the navigation of the Mississippi River below New Orleans was governed by the rules and regulations of 1864, (Rev. Stat. sec. 4233) and also by the supervising inspectors' rules for Atlantic and Pacific inland waters.

A steamer ascending the Mississippi within 500 feet of the eastern bank, made both colored lights of a descending steamer, approaching her "end on, or nearly end on." She blew her a signal of two whistles and starboarded her wheel. *Held:* That she was in fault for so doing, and that this was the primary cause for the collision which followed. *Held* also: That the fact the descending steamer seemed to be nearer the eastern bank and that her lights were confused with the lights of other vessels moored to that bank, was not a "special circumstance" within the meaning of Rule 24, rendering a departure from Rule 18 necessary "to avoid immediate danger," since if there were any danger at all, it was not an immediate one, or one which could not have been provided against by easing the engines and slackening speed.

Exceptions to general rules of navigation are admitted with reluctance on the part of courts, and only when an adherence to such rules must almost necessarily result in a collision.

The descending steamer, running at a speed of twenty miles an hour, made the white and red lights of the Dumois, the ascending steamer, upon her port bow, and blew her a signal of one whistle to which the Dumois responded with a signal of two whistles, starboarded her helm, shut in her red and exhibited her green light. *Held:* That the descending steamer, the Argo, in view of her great speed, should at once upon observing the faulty movement of the Dumois, have stopped and reversed, and that her failure to do so was a fault contributing to the collision; and that the damages should be divided.

While a steamer may be so built as to attain the utmost possible speed, she ought also to be provided with such means of stopping or changing her course as are commensurate with her great speed, and the very fact of her being so fast and apparently uncontrollable is additional reason for greater caution in her navigation.

The nineteenth rule, which declares that the vessel which has the other on her own starboard side shall keep out of the way of the other," does not absolve the preferred vessel from the duty of stopping and reversing, in case of a faulty movement on the part of the other vessel.

Statement of the Case.

The representatives of two passengers on the descending steamer who lost their lives, filed a libel against the owner of the ascending steamer for damages, and recovered. *Held:* That as both vessels were in fault, one half of such damages should be deducted from the amount recovered from the Dumois, notwithstanding that the local law gave no lien or privilege upon the vessel itself.

The limited liability act applies to cases of personal injury and death, as well as to those of loss of, or injury to, property.

This was a libel in admiralty filed by Oscar M. Springer, owner of the steamer Argo, a small vessel of forty-eight tons burthen, against the steamship Albert Dumois, to recover damages sustained by a collision between these two vessels in the early morning of January 28, 1897, in the Mississippi River, about eighty miles below the city of New Orleans. An intervening libel was also filed against the Dumois by the crew of the Argo, to recover the value of their clothing lost by the collision.

Upon the seizure of the Dumois, one Anders Jakobsen, of Christiana, Norway, appeared as claimant and owner, and on February 3, 1897, filed a petition for a limitation of liability, in which he also denied any negligence on behalf of the Dumois. Upon the same day, Marie B. Bourgeois de Blesine, mother of Faure de Blesine, a passenger on board the Argo, filed a libel *in personam* against Jakobsen, claiming damages for the death of her son through the negligence of the Dumois. Her suit was thereupon consolidated with that of Springer, and treated as a petition against the stipulation given for the release of the steamer under the proceedings for a limitation of liability. Upon the appraisement of the Albert Dumois at the sum of $30,000, and pending freight at the sum of $1333.75, and the filing of a stipulation to pay these sums into court, an order was issued enjoining further proceedings against the steamship and her owner, and directing all persons claiming damages by reason of the collision to appear before a commissioner and make proof thereof.

On May 5, 1897, Genevieve Keplinger Hester, widow of Harrison P. Hester, a passenger on the Argo, and natural tutrix of his minor child, filed an intervening petition under the limited liability proceedings, claiming damages for the death of her

husband, and alleging that the same was caused solely through the fault of the Dumois.

Thereafter, on December 16, 1897, Springer, as the owner of the Argo, filed a surrender of his vessel and pending charter money to the intervening claimants against the Dumois, and prayed for relief under the limited liability act.

The case of the Argo as set forth in her libel, and answer to the petition of the owner of the Dumois for a limitation of liability, was this: On January 27, 1897, at seven o'clock in the evening, the Argo started from the port of New Orleans on a trip to the jetties at the mouth of the Mississippi River. Upon the following morning, about 12.40 A. M., while proceeding down the middle of the river, at or near Oyster Bayou, the master noticed the white and red lights of a steamer coming up stream about 500 feet from the east bank and immediately gave a signal of one blast of his whistle, signifying that he would turn to starboard and pass on the port side of the approaching steamer, to which the latter responded with two blasts of her whistle, and began crossing the river, shutting out her red and showing her green light. Thereupon the Argo promptly responded with one blast of her whistle, still claiming her right to pass on the port side of the approaching steamer, and put her helm hard-a-port to clear the Dumois, as she had the right to do, and as in the judgment of her master it was best for her to do. Whereupon the Dumois continued her course across the river and blew a danger signal of three blasts of her whistle, but too late to avoid a collision, the Argo striking the Dumois while she was crossing the Argo's bow about eight feet abaft her stem, causing the Argo to fill with water and sink about four minutes thereafter, whereby she was totally lost and two of her passengers were drowned.

The case of the Dumois was that, while proceeding up the Mississippi River, about half-past twelve at night, on a voyage from Port Limon, Costa Rica, to New Orleans, with her full complement of officers and seamen, she had reached a point in the Mississippi River, about eighty miles below the city of New Orleans, and was proceeding up the river as close to the east bank as it was safe for her to do, at a moderate speed of about

nine miles an hour, when her watch discovered the lights of a steamer coming down the river close to the east bank, nearly "head and head," but somewhat upon the starboard bow of the Dumois; that the Dumois, before any signal was given by the approaching steamer, gave two clear and distinct blasts of her steam whistle, indicating that she desired to pass the Argo to the left, starboard to starboard, and at the same time her wheel was put to starboard. In answer, the Argo wrongfully responded to this signal with one blast of her whistle. Thereupon the pilot of the Dumois, fearing that the Argo had misunderstood his signal, immediately repeated it, and at once caused three or more short blasts of her whistle to be given in quick succession, to indicate danger, and at the same time stopped and backed her engines; but the Argo neglected to stop and back, and kept her course and speed until her pilot saw the green or starboard light of the Dumois, when he attempted to pass her by putting his wheel hard-a-port, which brought the Argo in collision with the steamship, striking her at right angles on the starboard side, about ten feet abaft the stem, from which collision the Argo sank and became a total loss.

Upon a hearing upon pleadings and proofs the District Court announced in an oral opinion its conclusion that the collision was caused solely by the fault of the Dumois, and awarded the libellant Springer $11,000 for the loss of the Argo; to Mrs. Hester, $5000; to Mrs. de Blesine, $2500, and to the crew of the Argo the respective sums claimed by them.

From this decree the owner of the Dumois appealed to the Circuit Court of Appeals, assigning in substance as error that the collision was caused through the sole fault of the Argo, and that the amount awarded was excessive. An appeal was also taken by Springer, claiming that the amount awarded him as the value of the Argo was too small; but no appeal was taken by the intervening libellants.

The Circuit Court of Appeals reversed the decree of the District Court, holding that both vessels were in fault for the collision, and that as between the owners of the steamships the damages should be divided. It further increased the allowance of damages to Springer to $15,000, and assessed those sustained

by the Dumois at $185. It was further decreed that Springer recover $7,500 of the Dumois and her bondsmen, subject to a credit of one half of the damages of the Dumois, and one half of the amounts decreed in favor of Mrs. Hester and Mrs. de Blesine, leaving a balance due upon this decree in favor of Springer of $3657.50, for which he was awarded execution. 59 U. S. App. 108. Both parties filed petitions for rehearing, which were denied.

Whereupon both parties applied for and were granted writs of certiorari from this court.

Mr. Richard De Gray and *Mr. Timothy E. Tarsney* for Springer.

Mr. Wilhelmus Mynderse for the Albert Dumois.

Mr. John D. Rouse and *Mr. William Grant* filed a brief on behalf of Jakobsen.

Mr. George Denègre, *Mr. J. P. Blair* and *Mr. Walter D. Denègre* filed a brief on behalf of Mrs. Hester.

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

This collision occurred in January, 1897, in the Mississippi River about eighty miles below New Orleans, and the steamers in their signals and manoeuvers were governed by the original rules and regulations of the act of 1864, reproduced in Rev. Stat. § 4233. A brief review of the numerous acts subsequent thereto upon the same subject will show that the act of 1864 continued in force upon the Mississippi River at the time of this collision.

1. The original act, now known as Rev. Stat. sec. 4233, was adopted from the British Orders in Council of 1863, was made of general application "in the navigation of vessels of the Navy and of the mercantile marine of the United States," and was supplemented by secs. 4412 and 4413, giving the board of supervising inspectors power to "establish such regulations to be

observed by all steam vessels in passing each other, as they shall from time to time deem necessary for safety."

This code remained in force substantially unaffected by legislation until March 3, 1885, when the "revised international regulations for preventing collisions at sea" were adopted by act of Congress, act of March 3, 1885, c. 354, 23 Stat. 438, and made applicable to "the navigation of all public and private vessels of the United States upon the *high seas* and in all *coast waters* of the United States, *except* such as are otherwise provided for." By section two all laws inconsistent with these rules were repealed, "*except* as to the navigation of such vessels within the *harbors, lakes and inland waters* of the United States." As to such waters, the original code of 1864 remained in force, explained and supplemented by the rules of the supervising inspectors. *The Delaware*, 161 U. S. 459, 463; *The New York*, 175 U. S. 187, 193.

On August 18, 1899, Congress adopted a new code "to be followed by all public and private vessels of the United States upon the *high seas* and in all waters connected therewith, navigable by seagoing vessels," act of August 19, 1890, 26 Stat. 320, article thirtieth of which declared that "nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any *harbor*, *river* or *inland waters*." The second section repealed all inconsistent laws, and the third section provided that the act should take effect at a time to be fixed by the President by proclamation issued for that purpose. This act was amended by act of May 28, 1894, c. 83, 28 Stat. 82, providing certain lights for small vessels. By another act of June 10, 1896, c. 401, 29 Stat. 381, amending the law with regard to signals, it was declared in the second section that the original act as amended should "take effect at a subsequent time to be fixed by the President by proclamation," although another act approved February 23, 1895, c. 127, 28 Stat. 680, had already provided that it should take effect at a time to be fixed by the President. The President at first declared that the act should take effect March 1, 1895, 28 Stat. 1250, which date was subsequently postponed by another proclamation, 28 Stat. 1259.

By still another proclamation of December 31, 1896, 29 Stat. 885, it was declared that the act of August 19, 1890, as subsequently amended, should take effect July 1, 1897.

Meantime, however, and on February 8, 1895, 28 Stat. 645, Congress passed another code, c. 64, to be "followed in the navigation of all public and private vessels of the United States upon the *Great Lakes* and their *connecting and tributary* waters as far east as Montreal," to take effect March 1, 1895. This act repealed the act of 1864 so far as it applied to the Great Lakes and their connecting waters. All this legislation, however, left the harbors, rivers and other inland waters of the United States unaffected either by the acts of 1885, 1890 or 1895; and to make the intention of Congress more certain in this particular, on February 19, 1895, c. 102, 28 Stat. 672, Congress enacted that the original provisions of sections 4233, 4412 and 4413 of the Revised Statutes, and regulations of the supervising inspectors pursuant thereto, shall be followed on the *harbors*, *rivers* and *inland waters* of the United States, and the provisions of said sections were declared special rules duly made by local authority relative to the navigation of such waters, as provided for in article thirty of the act of August 19, 1890, above quoted. Section four provided that the words "inland waters" should not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal, and that the act should not, in any respect, affect the act of February 8, 1895.

Finally on June 7, 1897, c. 4, 30 Stat. 96, Congress adopted a set of regulations to be "followed by all vessels navigating all *harbors*, *rivers* and *inland waters* of the United States, except the Great Lakes and their connecting and tributary waters, as far east as Montreal, and the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries." This act, as well as that of August 19, 1890, adopting regulations for preventing collisions at sea, was amended February 19, 1900, so far as it related to lights on steam pilot vessels; but as this act of 1897 was approved June 7, to take effect four months thereafter, it is unnecessary to consider to what waters it is applicable. It certainly has no bearing upon this collision, which took place

January 28, 1897, and is cited merely as a part of the history of Congressional action upon the general subject.

The effect of all this legislation was at the time of the collision, and perhaps is still, to leave the rivers emptying into the Gulf of Mexico, subject to the provisions of the original act: Rev. Stat. section 4233.

2. If the legislation of Congress in this connection be somewhat complicated, the result is at least clear that the navigation of the Mississippi was subject to the original rules and regulations of Revised Statutes, § 4233; but the rules of the supervising inspectors, supplementary thereto, are ambiguous, and in one respect quite difficult of interpretation. There are three sets of these rules: 1. Pilot rules for Atlantic and Pacific inland waters; 2. Pilot rules for Western rivers; 3. Pilot rules for the Great Lakes and their connecting tributary waters as far east as Montreal. The third may be left out of consideration in this case.

The pilot rules for Western rivers are entitled "Rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers whose waters flow into the Gulf of Mexico, and their tributaries." There can be no doubt whatever that these rules apply to the Mississippi and its tributaries, and there could be no doubt that they applied to the river below New Orleans, were it not for Rule XIV, which declares that "the line dividing jurisdiction between the pilot rules on Western rivers and harbors, rivers and inland waters, at New Orleans, shall be the lower limits of the city." This should evidently be construed as if it read: "The line dividing jurisdiction between the pilot rules on Western rivers and *the pilot rules* on harbors, rivers and inland waters at New Orleans shall be the lower limits of the city." This excludes the Mississippi below New Orleans, and indicates that some other rules are applicable.

But on referring to the pilot rules for the Atlantic and Pacific coast inland waters, we find them entitled "Rules and regulations for the government of pilots of steamers navigating *harbors*, *rivers* and *inland waters*, (except the Great Lakes, the Red River of the North, and *rivers emptying into the Gulf of*

Mexico and their tributaries,) when meeting or approaching each other, whether by day or night, and as soon as fully within sound of the steam whistle." Rule IX of these pilot rules contains the same provisions as Rule XIV of the pilot rules for Western rivers, namely, that the line dividing jurisdiction between pilot rules on Western rivers and harbors and inland waters at New Orleans shall be the lower limits of the city. There could be no doubt whatever that the intention was to divide the jurisdiction as to the Mississippi River between the rules applicable to Western rivers, and the rules for Atlantic and Pacific coast inland waters, were it not for the fact that in the entitling of these latter rules rivers emptying into the Gulf of Mexico are excepted. But we are of opinion that these words were intended as a general exception of the waters covered by the pilot rules for Western rivers, and that they were not intended to apply to the Mississippi below New Orleans, in view of the provision of both sets of rules that the pilot rules for Western rivers should cease to be applicable at the lower limits of that city. As New Orleans is practically the head of navigation for foreign trade, it was perfectly reasonable that the supervising inspectors should apply to the lower Mississippi the rules and regulations adopted for the harbors, rivers and inland waters navigated by vessels engaged in foreign trade, while they still left the regulations provided for Western rivers to remain applicable to the Mississippi above New Orleans, where the commerce is almost altogether domestic in its character. The only alternative of this proposition is to hold that the supervising inspectors intended to exempt from their jurisdiction altogether the waters of the Mississippi below New Orleans, some 150 miles in length—a supposition so improbable that it must be rejected at once. We hold, therefore, that the Atlantic and Pacific coast rules apply to these waters.

Such being the rules and regulations applicable to this case, we are remitted to the inquiry how far they were obeyed, and how far disregarded by the vessels concerned in this collision. The night was clear and starlight, the river substantially straight at this point and about half a mile wide, with no obstruction or other special circumstances, under Rule 24, rendering a departure

from the general rules necessary in order to avoid immediate danger. In short, the conditions were all favorable to safety, and the collision could not have occurred without egregious fault on the part of one or both vessels. In endeavoring to locate this fault we are at liberty to consider the movements of each vessel from its own standpoint, and without attempting to reconcile the conflicting statements of the two crews, or to settle disputed questions of fact, to inquire upon the showing made by each whether that vessel was guilty of fault contributing to the collision.

3. As to the Albert Dumois: She was a Norwegian vessel, 210 feet long, drawing 17 feet of water and was bound up the river to New Orleans. While proceeding up the east side of the river at a speed of about nine miles an hour, and from 250 to 500 feet from the east bank, she made directly ahead, and at a probable distance of about half a mile, saw the white and colored lights of the Argo coming down the river. Her theory of the case was, and the entire testimony of her watch showed, that the Argo was approaching her "end on, or nearly end on," within the meaning of Rule 18, which declares that "if two vessels, under steam, are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Notwithstanding this, however, the wheel of the Dumois was put to starboard, and a signal of two whistles blown to the Argo, manifesting an intention on the part of the Dumois to sheer out into the river and pass the Argo starboard to starboard. Her excuse for doing this was her own proximity to the east bank and a cluster of white lights belonging to a tug and two luggers inside of the Argo, and in fact moored to the east bank of the river.

We cannot, however, accept this as a "special circumstance" within the meaning of Rule 24 rendering a departure from Rule 18 necessary "to avoid immediate danger," since if there were any danger at all it was not an immediate one, or one which could not have been provided against by easing the engines of the Dumois and slackening her speed. Exceptions to the general rules of navigation are admitted with reluctance on

the part of the courts, and only when an adherence to such rules must almost necessarily result in a collision—such, for instance, as a manifestly wrong manœuver on the part of an approaching vessel. *Belden* v. *Chase*, 150 U. S. 674, 699; *The Britannia*, 153 U. S. 130; *The Test*, 5 Notes of Cases, 276; *The Superior*, 6 Notes of Cases, 607; *The Khedive*, 5 App. Cases, 876; *The Benares*, 9 Prob. Div. 16; Marsden on Collisions, 480. As was said in *The John Buddle*, 5 Notes of Cases, 387: "All rules are framed for the benefit of ships navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, however wisely framed. It is, at the same time, of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such a deviation necessary, are most distinctly approved and established; otherwise, vessels would always be in doubt and doing wrong."

The case of *The Concordia*, L. R. 1 Ad. & Ecc. 93, resembles much the instant case in this particular. That was a collision between two steam vessels meeting nearly end on in the river Thames. Defendants alleged that the helm of their vessel was put to starboard to avoid a barge. It was held that the burden of proof that a departure from the rule, which required both steamers to port, was necessary in order to avoid immediate danger, rested upon the defendants, and that in the absence of sufficient evidence to show what became of the barge, the defendants had failed in their proof, and were therefore in fault for the collision, the result of not porting their helm. See also *The Agra*, L. R. 1 P. C. 501.

Manifestly the Argo had a right to rely upon the Dumois pursuing the usual course of putting her helm to port, and her failure to do so was likely to raise a doubt on the part of the Argo as to her own duty, and to bring about the collision it was designed to avoid. If, as insisted by the crew of the Argo, the Dumois was nearer to the east bank than the descending steamer, and exhibited to the latter her white and red lights only, the fault of the Dumois in starboarding and crossing the course of the Argo becomes still more manifest. The fact put

forward by the pilot of the Dumois, that the Argo seemed so close to the luggers that she appeared to be one of them, (although contradicted by the testimony of the libellant that the Argo was in the middle of the river,) was one which undoubtedly called for caution on the part of the Dumois, but it did not involve an immediate danger which justified a departure from the general rule.

4. The Argo, a vessel of forty-eight tons burthen, 101 feet in length and drawing six feet of water, had been chartered by some representatives of the press to meet, at the mouth of the river, a Congressional committee sent to inspect the jetties, and to report the proceedings of the committee. According to her inspection certificate the Argo should have had one pilot, one engineer and a crew of five men, but as they were in great haste to get away, Messrs. Hester, Lindauer and Blesine, newspaper correspondents, all of whom were said to be familiar with the management of water craft, agreed to enroll themselves as part of the crew, and if necessary to lend a hand. Their assistance does not seem to have been of any great value, as they all "turned in" immediately upon coming on board. The Argo left New Orleans about seven o'clock in the evening, having on board a master, who also served as pilot, an engineer, a fireman, one deck hand and a steward, who also served as cook, besides the newspaper correspondents. She took her course down the river at a speed of about twenty miles an hour, and at the time of making the lights of the Dumois was either in the middle of the river or between that and the east bank. There was conflict of evidence upon her exact location, but in the view we have taken of the case it does not become necessary to determine this with accuracy. Her testimony indicates that she made the white and red lights of the Dumois upon her port bow, and blew her a signal of one whistle; that the Dumois responded with a signal of two whistles, starboarded her helm, shut in her red and exhibited her green light, and took her course across the path of the Argo. The Argo again blew her a signal of one whistle, to which the Dumois again responded with two, followed it with a danger signal, and the Argo, still maintaining her great speed, put her wheel hard-a-port, struck

the Dumois upon her starboard bow, and was herself almost immediately sunk by the force of the impact.

The master of the Argo excuses his failure to stop and reverse, which it was his duty to do as soon as he saw the wrong manœuver of the Dumois, by the fact that the starboarding of the Dumois put him in a position in which he was obliged to decide instantly what ought to be done; that, in the exercise of his best judgment, he determined to put his helm hard-a-port, and endeavor to cross the bows of the Dumois; and that, if he made a mistake in this particular, it was an error *in extremis*, for which the Argo is not responsible. The argument is undoubtedly entitled to great weight, but we think the real error was not committed *in extremis*. The theory of the Argo is that she was coming down the middle of the river, and that she made the Dumois on her port bow exhibiting a red light. She was running herself at twenty miles an hour, with the added force of the current. The Dumois was running against the current at the rate of nine miles an hour. That the Dumois must have starboarded and shown her green light some time before the Argo ported, is evident from the place of the collision, which was to the westward of the middle of the river, and, upon the theory of the Argo, was near the westerly bank. As the Dumois was within five hundred feet of the easterly bank when she starboarded,—the river at that point being about 2500 feet wide,—she must have run under her starboard helm about a quarter of a mile before reaching the point of collision. Now, if the Argo had promptly ported as soon as she heard the cross-signal or observed the starboarding of the Dumois, she would inevitably have passed the point of intersection before the Dumois reached it. The fault of the Argo was not in the hard-a-port order when the collision was inevitable, but in failing to stop and reverse at once as soon as she noticed the starboarding of the Dumois. The testimony from the Dumois indicates that she blew her first whistle and starboarded as soon as the Argo's lights were seen, and that if the Argo had starboarded and reversed, the collision would not have occurred. The truth seems to be that the Argo did not port when giving her first signal, but waited for some time, and then put her helm hard-a-port, but too late to be of any avail.

Opinion of the Court.

The testimony indicates that the Argo is chargeable with an infraction of the third rule of the supervising inspectors in failing to stop and reverse after receiving the cross-signals from the Dumois. This rule requires that "if, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and repeated blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered and understood, or until the vessels shall have passed each other. Vessels approaching each other from opposite directions are forbidden to use what has become technically known among pilots as 'cross-signals,'—that is, answering one whistle with two, and two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in rules, which for any reason he deems injudicious to comply with, instead of answering with a cross-signal, must at once observe the provisions of this rule."

The master also seeks to excuse himself by alleging that the Argo was so constructed that her headway could not have been stopped in time to be of any service. This may be true, and yet the Dumois should not be held responsible for the faulty construction of the Argo in this particular. While a steamer may be so built as to attain the utmost possible speed, she ought also to be provided with such means of stopping or changing her course as are commensurate with her great speed; and the very fact of her being so fast and apparently uncontrollable is an additional reason for the greater caution in her navigation. Her increase of speed should have been obtained with as little increase of risk to other vessels as was possible, and if any precautions in that direction were neglected, it was a fault for which she alone ought to be called upon to respond. This court has repeatedly held the fault, and even the gross fault of one vessel, does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require. *The*

Maria Martin, 12 Wall. 31; *The America*, 92 U. S. 432; *The Lucille*, 15 Wall. 676; *The Sunnyside*, 91 U. S. 208.

But counsel for the Argo also insists that, as the two vessels, from the moment the Argo ported and the Dumois starboarded, were upon crossing courses, the nineteenth rule which declares that "the vessel which has the other on her own starboard side shall keep out of the way of the other," applied, and that the Dumois should have ported, and the Argo was bound, under the case of *The Britannia*, 153 U. S. 130, to keep her course and speed. We are reluctant, however, to say that, where two vessels are meeting end on or nearly end on, under the 18th rule, the faulty movement of starboarding by one absolves the other from the obligation of Rule 21, which requires that "every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

In the case of *The Britannia*, the decision of the court that of two crossing steamers the preferred vessel should have kept her course and speed, was put upon the ground that the course of the Britannia, the obligated vessel, was precisely what might have been anticipated, and did not warrant the Beaconsfield, the preferred vessel, in disregarding the injunctions of the twenty-third rule, which required her to keep her course. It was intimated that a different conclusion might have been reached if it had appeared that the Britannia was herself violating a rule of navigation. Now, as it appears from the testimony of the Argo's crew that they not only heard the signal of two whistles from the Dumois, but saw her turn under her starboard wheel, and exhibit her green light when she should have ported, they were at once apprised of the fact that she was violating a rule of navigation, and that prompt action was required to avoid a collision.

The fact that the Argo was short handed and was also running without a proper lookout, though not decisive of a fault contributing to the collision, may be taken into consideration as bearing upon the probabilities of the case, and raising a presumption against her.

We are of opinion that the Dumois was primarily in fault

for this collision, in starboarding instead of porting when she first sighted the Argo; and while the case with respect to the Argo is by no means free from doubt, the majority of the court are also of opinion that the Argo was in fault for failing to observe the twenty-first rule, which required her to stop when risk of collision was involved, as well as the third rule of the supervising inspectors to the same effect.

5. There was no error in fixing the value of the Argo at the sum of $15,000 — an increase of $4000 over the amount fixed by the District Court. The evidence of her builders was that she originally cost $18,000, and that, if she had been kept in good repair, she would have been worth two thirds of that amount at the time of the collision. There was also testimony to the effect that her owner had, at the time of the collision, concluded a sale of one half the Argo for $7500, and that it was to have been delivered and the money paid for this moiety on the day following that upon which she was lost, and upon her return to the city. This is better evidence of her actual value than the conflicting opinions of experts more or less friendly to the owner, who put her value at from $8500 to $30,000. As the District Court and the Circuit Court of Appeals agreed that her value did not exceed $15,000, we should be unwilling to increase that amount unless upon clear proof of inadvertence or mistake.

There was no error in refusing to allow interest upon her valuation. The allowance of interest in admiralty cases is discretionary, and not reviewable in this court except in a very clear case. *The Scotland*, 118 U. S. 507, 518.

6. In the assessment of damages an important question arose as to whether a moiety of the amounts awarded to Mrs. Blesine and Mrs. Hester should be deducted from the amount recoverable by the owners of the Argo. The libel of Mrs. Blesine was filed against Jakobsen as owner of the Dumois, and process of attachment prayed against his goods and chattels, credits and effects. This libel, subsequently consolidated with that of Springer, was treated as a petition against the bond given for the release of the steamer under the proceedings for a limited liability. A similar petition was filed by Mrs. Hester. In the

following December, Springer, the libellant and owner of the Argo, surrendered to the claimants and intervenors his vessel and the freight. These intervening libels, as well as that of the seamen, proceeded as one suit, and in the decree of the Circuit Court of Appeals Mrs. Blesine was awarded $2500 and Mrs. Hester $5000, one half of which was deducted from the amount awarded to Springer.

Admitting that if these intervening libels had been filed against Springer as owner of the Argo, nothing could have been recovered of him by reason of the total loss of the Argo and her freight, and the consequent extinguishment of personal liability on the part of the owner, does it follow that the Dumois is not entitled to deduct from the amount awarded to the Argo; or, in other words, to recover of the Argo one half of the amount payable to these libellants, in view of the fact that the Argo was also in fault? We think this question is practically answered by prior decisions of this court.

The case of *The North Star*, 106 U. S. 17, arose from the mutual fault of two steamers, in which one, the Ella Warley, was totally lost. The court awarded the owners of the Ella Warley so much of their damage as exceeded one half of the aggregate damage sustained by both vessels. The owners of the Warley contended that, as she was a total loss, her owners were not liable at all, and that they were entitled to one half of their damages in full, without deduction for the half of the damage sustained by the North Star, the other vessel. We held, however, that the admiralty rule that where both vessels are in fault they must bear the damage equally, applied, and that the one suffering least should be decreed to pay to the other the amount necessary to make them equal, namely, one half of the difference between the respective losses sustained, and that when this resulting liability of one party to the other has been ascertained, then, and not before, was the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. "It will enable him to avoid payment *pro tanto* of the balance found against him." "The contrary view," said the court, "is based on the idea that, theoretically, (supposing both vessels in fault,) the owners of one are liable to

the owners of the other for one half of the damage sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one half of the damages sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. . . . These authorities conclusively show that according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties."

In *The Chattahoochee*, 173 U. S. 540, which was also a collision occasioned by the mutual fault of a steamer and a schooner, followed by a total loss of the latter, the survivor was permitted to deduct from one half of the damages recovered for the loss of the vessel one half of the value of the cargo of the latter, notwithstanding the total loss of the schooner, and the fact that under the Harter act she would not have been liable to the owner of the cargo for negligence in navigation. We held in that case that the sunken vessel was not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability had been fixed upon the principle of an equal division of damages.

The case under consideration is distinguishable from this only in the fact that the intervening libels are for loss of life, for which no lien is given upon the vessel in the absence of a local law to that effect, while in the case of *The Chattahoochee* the libel sought to recover for the loss of the cargo, for which a lien was given by the law maritime upon the vessels in fault.

Assuming for the present that the question of lien is material, we are next to inquire whether such lien is given by the local law of Louisiana. We are cited in this connection to two articles of the Civil Code, the first of which, Art. 2315, as amended in 1884, declares that "every act whatever of man that causes damages to another, obliges him by whose fault it happened to repair it; the right of this action shall survive, in

case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be."

It was held by us in *The Corsair*, 145 U. S. 335, a case arising out of a collision which also took place on the lower Mississippi, that this local law did not give a lien or privilege upon the vessel, and that nothing more was contemplated by it than an ordinary action according to the course of the law as administered in Louisiana.

Our attention is also called by the owners of the Dumois to subdivision 12 of Art. 3237 of the Civil Code, which reads as follows: "Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect or want of skill in the direction or management of any steamboat, barge, flatboat, water craft or raft, the party injured shall have a privilege to rank after the privileges above specified." No reliance was placed upon this article in the case of *The Corsair*, probably because it was thought to refer only to losses or damages to persons still living, and that an action would lie in favor of the party injured. Certainly, if this article had been supposed to give a remedy for damages occasioned by death, to the representatives of the deceased person, it would never have escaped the attention of the astute counsel who participated in that case.

The question whether "damage done by any ship," jurisdiction over which was given to the High Court of Admiralty in England, included actions brought by the personal representatives of seamen or passengers killed in a collision, has been the subject of many and conflicting judicial opinions in the English courts, a summary of which may be found in *The Corsair*, 145 U. S. 345, and was finally settled against the jurisdiction by the House of Lords in the case of *The Franconia*, 10 App. Cases, 59.

In this country the law is so well settled that by the common

law no civil action lies for an injury resulting in death, that we need only refer to the case of *Insurance Co.* v. *Brame*, 95 U. S. 754, and to the same doctrine applied in admiralty in the case of *The Harrisburg*, 119 U. S. 199. The object of Article 3237 was not to extend the cases in which damages might be recovered to such as resulted in death, but merely to provide that, in cases of damages to person or property, where such damage was occasioned by negligence in the management of any water craft, the party injured should have a privilege or lien upon such craft. We deem it entirely clear that the article was not intended to apply to cases brought by the representatives of a deceased person for damages resulting in death.

But it does not necessarily follow that because there is no lien there can be no deduction of a moiety of these damages from the sum awarded to the Argo. Neither the case of *The North Star* nor that of *The Chattahoochee* is put upon the ground of a lien, since in both cases the vessel against which the deductions were made were totally lost by the collision, and in *The Chattahoochee* the provisions of the Harter act would have exonerated her, even if no total loss had occurred. But no extended discussion of this is necessary, since the question is settled by the case of *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, in which it was unanimously held that the limited liability act applied to cases of personal injury and death, as well as to those of loss of, or injury to, property. This was an independent libel *in personam* against the steamship company to recover damages for death, and the company pleaded in defence certain proceedings in a case of limited liability instituted by it and then pending. There was a statute of Massachusetts relied upon, which gave a personal remedy but no lien upon the vessel. The loss occurred within the jurisdiction of that State. The single question presented was whether the limited liability act applied to damages for personal injury and loss of life, and thus deprived those entitled to damages of the right to entertain suit for recovery, provided the ship owner had taken appropriate proceedings to limit his liability. The court, after a careful examination of the law of limited liability of ship owners, had no difficulty

in reaching the conclusion that it covered the case of injuries to persons as well as that of injury to goods and merchandise, and that these proceedings were a good defense to the libel.

It follows that the claims of the intervening libellants, Mrs. Blesine and Mrs. Hester, were valid claims under the limited liability act, notwithstanding that there was no lien under the local law, and that there was no error in deducting a moiety of these claims from the amount awarded Springer.

Upon the whole case we are of opinion that the decree of the Circuit Court of Appeals was right, and it is therefore, as to both cases,

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE PECKHAM dissented.

KNIGHTS OF PYTHIAS *v.* WITHERS.

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

No. 170. Argued March 6, 1900. — Decided April 9, 1900.

By the rules of the beneficial or insurance branch of the Supreme Lodge Knights of Pythias, persons holding certificates of endowment or insurance were required to make their monthly payments to the Secretary of the subordinate section before the tenth day of each month; and it was made the duty of the Secretary to forward such monthly payments at once to the Board of Control. If such dues were not received by the Board of Control on or before the last day of the month, all members of the section stood suspended and their certificates forfeited, with the right to regain their privileges if the amounts were paid within thirty days after the suspension of the section; provided, no deaths had occurred in the meantime. There was a further provision that the section should be responsible to the Board of Control for all moneys collected, and that the officers of the section should be regarded as the agents of the members, and not of the Board of Control. The insured made his payments promptly, but the Secretary of the section delayed the remittance to the Board of Control until the last day of the month, so that such remittance was not *received* until the fourth day of the following month. The insured in the meantime died. *Held:* That the Supreme Lodge having undertaken to

control the Secretary of the section by holding the section responsible for moneys collected, and requiring him to render an account and remit each month, — a matter over which the insured had no control,—he was thereby made the agent of the Supreme Lodge, and that the provision that he should be regarded as the agent of the insured was nugatory, and that the insured having made his payments promptly, his beneficiary was entitled to recover.

This was an action originally begun in the Circuit Court of Hale County, Alabama, by Josephine R. Withers, to recover of the defendant the amount of a certain certificate or policy of insurance upon the life of her husband.

The case was removed to the Circuit Court of the United States for the Middle District of Alabama, upon the petition of the defendant and upon the ground that the Supreme Lodge Knights of Pythias was a corporation organized by act of Congress, and hence that the controversy arose under the Constitution and laws of the United States.

The case was submitted to a jury upon an agreed statement of facts, and the court instructed a verdict for the plaintiff in the sum of three thousand dollars, the amount of the policy, with interest, upon which verdict a judgment was entered for $3392.54. The case was taken by writ of error to the Circuit Court of Appeals, which affirmed the judgment. 59 U. S. App. 177. Whereupon the defendant sued out a writ of error from this court.

The facts, so far as they are material, are stated in the opinion of the court.

Mr. Aldis B. Browne for plaintiff in error. *Mr. Alexander Britton* and *Mr. H. H. Field* were on his brief. *Mr. Thomas G. Jones* and *Mr. Charles P. Jones* filed a brief for same.

Mr. Edward De Graffenried for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

The Supreme Lodge Knights of Pythias is a fraternal and benevolent society, incorporated by an act of Congress of

June 29, 1894, 28 Stat. 96, as the successor of a former corporation of the same name, organized under an act approved May 5, 1870. The beneficial or insurance branch of the order is known as the endowment rank, which is composed of those members of the order who have taken out benefit certificates. Such members are admitted into local subordinate branches known as Sections. The members of each Section elect their own president and secretary. The endowment rank is governed by a Board of Control whose officers are a president and secretary, and whose place of business is in Chicago. The endowment rank is governed by a constitution and general laws enacted by the Supreme Lodge, and by rules and regulations adopted by the Board of Control and approved by the Supreme Lodge.

On January 1, 1883, Robert W. Withers made application for membership in the endowment rank, and in that application made the following statement: "I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." His application was accepted, and, after receiving a certificate under the first act of incorporation which he voluntarily surrendered, he received the certificate upon which this action is brought. This certificate recited the original application for membership dated January 1, 1883, the surrender of the former certificate and the application for transfer to the fourth class, which were "made a part of this contract, . . . and in consideration of the payment heretofore to the said endowment rank of all monthly payments, as required, *and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws*, the sum of $3000 will be paid by the Supreme Lodge, etc., to Josephine R. Withers, wife, . . . upon due notice and proof of death *and good standing in the rank at the time of his death*, . . . and it is understood and agreed that any violation of the within mentioned conditions or other

requirements of the laws *in force governing this right* shall render this certificate and all claims null and void, and the said Supreme Lodge shall not be liable for the above sum or any part thereof."

Withers was a member of Section 432, at Greensboro, Alabama, of which one Chadwick was secretary. By the laws of the endowment rank Withers was required to pay $4.90 monthly in accordance with his age and the amount of his endowment.

In January, 1894, defendant adopted and promulgated the following general laws:

"SEC. 4. Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of Section without notice, on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the certificate of endowment and all right, title and interest such member or his beneficiaries may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited certificate. If approved by the medical examiner-in-chief and accepted by the Board of Control, a new certificate shall be issued, and the rating shall hereafter be at the age of nearest birthday to the date of the last application."

"SEC. 6. The secretary of the Section shall forward to the Board of Control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the Board of Control on or before the last day of the same month the Section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the Secretary of the Board of Control to the President and Secretary of such Section.

"Provided, that the Section whose membership has forfeited

their endowment, and whose warrant has been suspended, shall regain all right as a Section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said Section shall pay to the Board of Control the amount of all monthly payments, assessments and dues accrued upon said members."

"SEC. 10. Sections of Endowment Ranks shall be responsible and liable to the Board of Control for all moneys collected by the secretary or other officers from the members for monthly payments, assessments or dues not paid over to the Board within the time and manner prescribed by law. Officers of Sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the Board of Control or of the Endowment Rank or of the Supreme Lodge."

For over twelve years Withers made his monthly payments as required by law to the secretary of the Section, and the money was regularly remitted to the Board of Control at Chicago. His last payment was made prior to October 10, 1895, as required by section 4, for the dues of that month. As there were a large number of members in the Section, and as their dues were not all collected until the latter part of the month, the secretary of the Section did not send the money to the Board of Control until October 31, when he mailed to the secretary of that board a cheque covering all the amounts due by all the members of the Section for that month. The letter did not leave the post office until the next day, and was received by the Board of Control November 4. No notice was ever mailed by the Board of Control to Withers notifying him of his suspension; but on November first, as required by section six, the secretary of the Board of Control mailed to Mr. Chadwick, the secretary of the Section at Greensboro, a notice of the suspension of all members thereof, with an intimation that the members of the Section might regain their rights under certain conditions therein named. No notice was mailed to the President of the Section. In view of the technical character of the defence, it is worthy of mention that the Board of Control did not strictly comply with its own regulation in this particular.

Opinion of the Court.

Upon receiving the remittance, and on November 4, the secretary of the Board of Control mailed the following postal card to the secretary of the Section: "Office Board of Control, Chicago, November 4, 1895. Received of Section No. 432 one hundred and thirteen 30–100 dollars in payment of monthly payments and dues for October, 1895, on condition that all members for whom above payment is made were living at date of this receipt. H. B. Stolte, Secretary Board of Control."

The insured was suddenly taken ill and died of an attack of cholera morbus on November 1, 1895. Proofs of death were waived by the defendant, which, however, refused to pay the amount of the certificate.

It is hardly necessary to say that the defence in this case is an extremely technical one, and does not commend itself to the average sense of justice. It ought to be made out with literal exactness. It is admitted that Withers for twelve years paid all his dues promptly to the secretary of the Section as required by section 4 of the general laws, and that the failure of the Board of Control to receive them on or before the last day of the month was the fault of the secretary, and not of the insured. The whole defence rests upon the final clause of section 10, declaring that "officers of Sections are the agents of the members and shall in nowise be considered as the agents of the representatives of the Board of Control of the endowment rank or of the Supreme Lodge." It appears to have been the habit of the secretary, Mr. Chadwick, not to remit each payment as it was made, but to allow all the dues of each month to collect in his hands and to remit them together by a cheque covering the whole amount, about the close of the month. In this connection he makes the following statement: "It had never been the custom of my office for me to send the money off by the twentieth of the month," (although section 6 required him to forward it immediately after the tenth.) "I usually sent the money off about the last days of the month. For the previous year I had mailed to the secretary of the Board of Control the dues of the Section as follows: October 27, 1894, November 28, 1894, December 29, 1894, January 29, 1895, February 27, 1895, March 30, 1895, April 29, 1895, June 29, 1895, July 8, 1895,

August 29, 1895, September 28, 1895, October 28, 1895, October 31, 1895—all of which sums were accepted by the Board of Control."

The position now taken by the defendant, that in receiving the money from the insured members, and remitting the same to the Board of Control, the secretary of the Section was the agent of the insured and not of the Board of Control, is inconsistent with the requirement of section 4, which makes it obligatory upon policyholders to pay their monthly dues to the secretary of the Section, and to him only, as well as with the provision of section 10, that "Sections of endowment rank shall be responsible and liable to the Board of Control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments or dues not paid over to the board within the time and manner prescribed by law." The question at once suggests itself to whom does the money belong when paid to the secretary of the Section? If to the insured, it was within his power to reclaim it at any time before it was remitted. If to the Board of Control, it was the duty of the secretary of the Section to remit it. Why, too, should the Board of Control attempt to deal with it at all beyond requiring it to be paid them by a certain day? Section 10 is a complete answer, since that makes the Sections responsible to the Board of Control from the moment the money is collected, and section 6 makes it the duty of the secretary to remit it at once.

There seems to have been an attempt on the part of the defendant to invest Mr. Chadwick with the power and authority of an agent, and at the same time to repudiate his agency. But the refusal to acknowledge him as agent does not make him the less so, if the principal assume to control his conduct. It is as if a creditor should instruct his debtor to pay his claim to a third person, and at the same time declare that such third person was not his agent to receive the money. It would scarcely be contended, however, that such payment would not be a good discharge of the debt, though the third person never accounted to the creditor; much less, that it would not be a good payment as of a certain day, though the

remittance, through the fault of the person receiving it, did not reach the creditor until the following day.

The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policyholders had absolutely no protection. They were bound to make their monthly payments to the secretary of the Section, who was bound to remit them to the Board of Control; but they could not compel him to remit, and were thus completely at his mercy. If he chose to play into the hands of the company, it was possible for him, by delaying his remittance until after the end of the month, to cause a suspension of every certificate within his jurisdiction; and in case such remittance was not made within thirty days from such suspension (sec. 6) apparently to make it necessary under section 4 for each policyholder to regain his membership by making a new application, surrendering his forfeited certificate, making payment of the required membership fee, undergoing a new medical examination, and paying a premium determined by his age at the date of the last application. In other words, by the failure of the secretary, over whom he had no control, to remit within thirty days every member of the Section might lose his rights under his certificate and stand in the position of one making a new application, with a forfeiture of all premiums previously paid. The new certificate would, of course, be refused if his health in the meantime had deteriorated, and the examining physician refused to approve his application. This would enable the company at its will to relieve itself of the burdens of undesirable risks by refusing certificates of membership to all whose health had become impaired since the original certificate was taken out, though such certificate-holder may have been personally prompt in making his monthly payments.

It could not thus clothe the secretaries of the Sections with the powers of agents by authorizing them to receive monthly payments and instructing them to account for and remit them to

the Supreme Lodge at Chicago, and in the same breath deny that they were agents at all. The very definition of an agent, given by Bouvier, as "one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it," presupposes that the acts done by the agent shall be done in the interest of the principal, and that he shall receive his instructions from him. In this case the agent received his instructions from the Supreme Lodge, and his actions were, at least, as much for the convenience of the Lodge as for that of the insured. If the Supreme Lodge intrusted Chadwick with a certain authority, it stands in no position to deny that he was its agent within the scope of that authority.

The reports are by no means barren of cases turning upon the proper construction of this so-called "agency clause," under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others, it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policyholder, and in all, it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice. Wherever the agency clause is inconsistent with the other clauses of the policy, conferring power and authority upon the agent, he is treated as the agent of the company rather than of the policyholder. The object of the clause in most cases is to transfer the responsibility for his acts from the party to whom it properly belongs, to one who generally has no knowledge of its existence. It is usually introduced into policies in connection with the application, and for the purpose of making the agent of the company the agent of the party making the application, with respect to the statements therein contained.

It was formerly held in New York in *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47, and *Alexander* v. *Germania Fire Ins. Co.*, 66 N. Y. 464, that, where the insured had contracted that the person who had procured the insurance should be deemed his agent, he must abide by his agreement; and where

such person had, through fault or mistake, misstated in the application to the company the declarations of the assured, the latter must suffer for the error or wrong.; but in a subsequent case, *Whited* v. *Germania Fire Ins. Co.*, 76 N. Y. 415, this doctrine was held to be limited to such acts as the agent performed in connection with the original application, and that in a renewal of the policy such party was treated as the agent of the defendant, for whose acts it was bound; and that it was within his power to make a valid waiver of the conditions of the policy. Said the court in its opinion: "That he was the agent of the defendant it would be fatuous to deny; were it not for a clause in the policy" (the agency clause) "upon which the defendant builds. . . . But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured . . . he may not be taken into the service of the insurer as its agent also; or if he is so taken, the insurer must be bound by his acts and words, when he stands in its place and moves and speaks as one having authority from it; and *pro hac vice*, at least, he does then rightfully put off his agency for the insured and put on that for the insurer. . . . Nor will it hold the plaintiff so strictly to the contract he made as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them and while under authority from the defendant to act for it." So in *Sprague* v. *Holland Purchase Ins. Co.*, 69 N. Y. 128, the insured signed a blank form of application, which was filled up by the company's agent without any knowledge or dictation of the insured. There were false statements therein, occasioned by the mistake or inadvertence of the agent. The policy contained the agency clause, as well as the condition that the application must be made out by the defendant's authorized agent, and it was held, using the language of the court in the *Whited case*, that the latter clause "swallowed down" the former, and that there was no warranty binding upon the plaintiff.

In *Patridge* v. *Commercial Fire Ins. Co.*, 17 Hun, 95, it was said of the agency clause: "This is a provision which deserves

the condemnation of courts, whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the agent of the assured. . . . Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. When a contract is, *in fact*, made through the agent of a party, the acts of that agent in that respect are binding on his principal."

In *Nassauer* v. *Susquehanna Ins. Co.*, 109 Penn. St. 507, 509, under a by-law providing that "in all cases the person forwarding applications shall be deemed the agent of the applicant," it was held, under the circumstances of the case, that the agent of the company soliciting insurance was not the agent of the applicant, and that such by-law was not binding upon him. Although the insured is supposed to know at his peril the conditions of the policy, that will not bind him to a provision which is not true, and one which the company had no right to insert therein. "We do not assent," said the court, "to the proposition that the offer" (that the agent made his own valuation of the property) "was incompetent, because Laubach was the agent of the assured in filling up the application and forwarding it to the company. He was not the agent of the assured. The latter had not employed him for any purpose. He was the agent of the defendant company, and as such called upon the assured and solicited a policy, and having obtained his consent, proceeded to fill up the application for him to sign. As to all these preliminary matters the person soliciting the insurance is the agent of the company." The court, speaking of the agency clause, observed: "This court, in the case above cited, *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331, characterized a somewhat similar provision as a 'cunning condition.' The court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of

fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein. He was not bound to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was on the contrary the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence a by-law of the company of which he had no knowledge, and by which he was bound, could not affect him in matters occurring before the granting of the policy. And even a by-law of a mutual company which declares that black is white does not necessarily make it so." Similar cases are those of *Eilenberger* v. *Protective Ins. Co.*, 89 Penn. St. 464; *Susquehanna &c., Ins. Co.* v. *Cusick*, 109 Penn. St. 157; and *Kister* v. *Lebanon Ins. Co.*, 128 Penn. St. 553.

The case of *Lycoming &c., Ins. Co.* v. *Ward*, 90 Illinois, 545, resembles the case under consideration. In that case it was held that, where the assured contracts with one as the agent of the insurer, believing him to be such, and does not employ such supposed agent to act for him in obtaining insurance, such person has no power to act for or bind the insured, though the policy may provide that the person procuring the insurance shall be deemed the agent of the insured, and not of the company. Plaintiff paid the premium to the person with whom she contracted for the insurance, and of whom she obtained the policy. It was held that such person, assuming to be the agent of the company, the payment was binding upon the company, whether he paid the money over or not. In that case the person to whom the money was paid was not in reality an agent of the company, although plaintiff believed him to be such, but only a street insurance broker, who represented himself to be the agent of the company. Said the court: "Under such circumstances who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was

an innocent party in the transaction, or should it fall upon the company, who alone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company."

In Indiana it is also held that a recital in the policy that the broker obtaining an insurance is the agent of the insured is not conclusive upon that subject. *Indiana Ins. Co.* v. *Hartwell*, 100 Indiana, 566. In *North British &c., Ins. Co.* v. *Crutchfield*, 108 Indiana, 518, the agency clause was held to be absolutely void as applied to a local agent, upon whose counter signature the validity of the policy, by its terms, was made to depend.

In *Boetcher* v. *Hawkeye Ins. Co.*, 47 Iowa, 253, it was held that, if the assured had the right to believe the soliciting agent was the agent of the company, the insertion of a clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage.

Speaking of the agency clause in *Continental Ins. Co.* v. *Pearce*, 39 Kansas, 396, 401, it is said: "This is but a form of words to attempt to create on paper an agency, which in fact never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when, in fact, such relation never existed. We do not believe the entire nature and order of this well established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an

unreal authority." See also *Kausal* v. *Minnesota &c., Ins. Asso.*, 31 Minnesota, 17, in which the act of an insurance agent in making out an incorrect application was held chargeable to the insurer, and not to the insured, notwithstanding the insertion of an agency clause in the policy.

In *Planters' &c., Ins. Co.* v. *Myers*, 55 Mississippi, 479, 498, 506, an agency clause in a policy of insurance was held to be void, as involving a legal contradiction. The applicant made truthful answers to certain interrogatories propounded by the agent, who stated certain things that were not true. They were held not to be binding upon the insured. Speaking of the agency clause, it is said: "The verbiage of this condition is not candid; it seems to have been used with studied design to obscure the real purpose. It is a snare, set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the application; nor is the agent in his printed instructions enjoined to inform those with whom he treats of it. . . . Its inevitable effect is to greatly weaken the indemnity on which the assured relied. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land their agents and representatives to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them; and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves and the establishment of it between other parties."

The case of *Schunck* v. *Gegenseitiger Wittwen und Waisen Fond*, 44 Wisconsin, 369, is almost precisely like the instant case. The constitution of the defendant corporation, whose governing body or directory was elected by the several "groves," (corresponding to the sections in this case,) of the United Ancient Order of Druids, declared that every member whose assessment was not paid by his grove to the directory within thirty days after demand made, forfeited his claim to have a certain sum in the nature of life insurance paid to his widow, or heirs,

after his death. It was held that, in view of all the provisions of such constitution, the benevolent object of the corporation, and the fact that the several groves are, at least, as much its agents to collect and pay over the dues of their members, as they are agents of the latter, in case of a member whose dues have been fully paid to his grove at the time of his death, the amount of insurance might be recovered, notwithstanding a default of the grove in paying over such dues to the defendant.

The agency clause was also once before this court in the case of *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, in which a clause in the policy that the person procuring the insurance to be taken should be deemed the agent of the assured and not of the company, was held to import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in the matters immediately connected with the procurement of the policy, and that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.

In the following cases the officers of the subordinate lodge, or conclave, were treated as the agents of the Supreme Conclave in the matter of granting extensions of time for the payment of assessments: *Whiteside* v. *Supreme Conclave*, 82 Fed. Rep. 275; *Knights of Pythias* v. *Bridges*, 39 S. W. Rep. (Tex.) 333.

In the case under consideration it may be immaterial, except as bearing upon the equities of the case, that the agency clause was introduced into the general laws of the order in January, 1894, eleven years after the first certificate was issued to the assured, and nearly nine years after the certificate was issued upon which suit was brought. There is no evidence that it was ever called to Withers' attention, or that he had actual knowledge of it. If he were bound at all, it could only be by the stipulation in his original application, and by the terms of his certificate that "he would be bound by the rules and regulations of the order, now in force or that may hereafter be enacted." All that is required of him is a full compliance with such laws, and there is not the slightest evidence that he failed

personally in any particular to comply with any laws of the order, present or future. The only failure was that of the secretary of the Section, who, to say the least, was as much the agent of the order as he was of Withers, although the latter is sought to be charged with his dereliction by a clause inserted in the general laws, long after the certificate was issued. The decisive consideration is this: Chadwick was the agent of the defendant, and of the defendant only, after the receipt of the money from Withers. Under section 10 he then became responsible for it to the Board of Control. In rendering his monthly accounts and paying over the money he acted solely for the defendant. From the time he paid the money to Chadwick the insured had no control over him, and was not interested in its disposition. Unless we are to hold the insured responsible for a default of this agent, which he could not possibly prevent, we are bound to say that his payment to this agent discharged his full obligation to the defendant. That it should have the power of declaring that the default of Chadwick, by so much as one day, (and it did not exceed four days in this case,) to pay over this money, should cause a forfeiture of every certificate within his jurisdiction, is a practical injustice too gross to be tolerated.

Without indorsing everything that is said in the cases above cited, we should be running counter to an overwhelming weight of authority, were we to hold that the agency clause should be given full effect regardless of other clauses in the certificate or the by-laws, indicative of an intention to make the officers of subordinate lodges agents of the supreme or central authority. We should rather seek to avoid as far as possible any injustice arising from a too literal interpretation, and only give the clause such effect as is consistent with the other by-laws and with the manifest equities of the case. We are, therefore, of opinion that in this case the secretary of the Section was in reality the agent of the Supreme Lodge from the time he received the monthly payments, and that the insured was not responsible for his failure to remit immediately after the tenth of the month.

We have not overlooked in this connection the case of *Camp-*

bell v. *Knights of Pythias*, 168 Mass. 397, in which a different conclusion was reached upon a similar state of facts. In that case plaintiff put his right to recover upon the theory that the mailing of the remittance was a compliance with the requirement of section six that such payments and dues should be *received* on or before the last day of the month. This position was held by the court to be untenable. It was said that the money must have been actually *received* at the office of the Board of Control before the end of the month. The question of agency was not considered, and the trend of the argument is so different that the case cannot be considered an authority upon the propositions here discussed. The cases of *Peet* v. *Knights of Maccabees*, 83 Michigan, 92, and *McClure* v. *Supreme Lodge*, 59 N. Y. Sup. 764, are not in point.

The judgments of the Circuit Court and of the Court of Appeals were right, and they are therefore

Affirmed.

ARNOLD *v.* HATCH.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 183. Argued March 14, 1900. — Decided April 9, 1900.

A farmer made an arrangement with his son under which it was agreed that the latter should undertake the management of the farm, farm implements and live stock, make all repairs, pay all taxes and other expenses, sell the products of the farm, replace all implements as they wore out, keep up all live stock, and have as his own the net profits. It was further agreed that each party should be at liberty to terminate the arrangement at any time, and that the son should return to his father the farm with its implements, stock and other personalty, of the same kind and amount as was on the farm when the father retired, and as in good condition as when he took it. *Held*, that no sale of the farm property was intended; that the title to the same remained in the father, and that the property was not subject to execution by creditors of the son.

This was an intervening petition by the defendant in error,

Lewis Hatch, filed in the District Court for the Northern District of Illinois, in the case of *Joseph G. Heim, Receiver*, v. *Frank W. Hatch*, praying for the release by the marshal and a return to petitioner of a large amount of cattle and other farm property alleged to belong to him, and levied upon by the marshal as the property of Frank W. Hatch.

The cause originated in an action begun in the District Court for the Northern District of Illinois by Joseph G. Heim, as receiver of the First National Bank of Southbend, Washington, against Frank W. Hatch, to enforce against the defendant an individual liability as a stockholder of the bank, which had become insolvent. Defendant having made default, a judgment was rendered against him in the sum of $4351.09 and costs, for which an execution was issued and levied upon the cattle and other farm property in dispute. Whereupon Lewis Hatch, the father of Frank W. Hatch, filed this petition, to which the plaintiff in error, John W. Arnold, marshal for the Northern District of Illinois, made answer, denying the petitioner's ownership of the property, and admitting his levy upon it as the property of Frank W. Hatch.

The case came on for trial before a jury, and resulted in a verdict for the petitioner, upon which judgment was entered. On writ of error from the Circuit Court of Appeals this judgment was affirmed. 60 U. S. App. 659. Whereupon plaintiff in error, Arnold, sued out a writ of error from this court.

Mr. Kenesaw M. Landis for plaintiff in error.

Mr. George A. Dupuy for defendant in error.

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

This case presents the frequent question of the title and ownership of personal property, levied upon as the property of an execution debtor, and claimed by another party. The undisputed facts are that, in 1883, the petitioner, Lewis Hatch, who then and for about twenty-five years prior thereto, had re-

sided upon and worked a large farm in McHenry County, Illinois, made a contract with his son, Frank W. Hatch, a young man just out of school, under which it was agreed that the latter should undertake the management of the farm, farm implements and live stock, make all repairs, pay all taxes and other expenses, replace all implements as they were worn out, keep up all live stock, and have as his own the net profits. It was further stipulated that each party should be at liberty to terminate the arrangement at any time, and that the son should turn back to his father the farm with its implements, stock and other personalty, of the same kind and amount as was on the farm when the father retired, and in as good condition as when he took them.

As all questions connected with the veracity of witnesses, the *bona fides* of this arrangement, and its exact terms, are forestalled by the verdict of the jury, we are bound to consider the case as if the arrangement had been reduced to writing, and such writing were the only evidence bearing upon the subject. As the only testimony in the case was that of the father and the son, and as their statements were entirely harmonious, we are simply to inquire as to the correctness of the charge of the court to the jury, that, if they believed the arrangement was substantially such as was stated by the petitioner and his son, it did not have the effect in law to vest the title to any of the property or proceeds of the farm in Frank W. Hatch, although he may have had power to sell the same to others without any further authority from his father. There was evidence showing, not only that the son assumed the entire management of the farm, but that he was at full liberty to sell and dispose of its products, to replace old stock and implements with new, and to appropriate the net proceeds to himself; and that his only obligation was to return the property on demand, or substituted property of the same kind and amount, whenever either party should see fit to terminate the arrangement.

We do not know that it is necessary to fix an exact definition to the relations between these parties, or to determine whether the law of master and servant, landlord and tenant, or bailor and bailee, governed the transaction. The main object is to

ascertain the intent of the parties with respect to the ownership of the property. There is no doubt that the title to the farm remained in the father, who continued to occupy the homestead and provided accommodations for certain of the farm hands; that the arrangement was made with his son soon after he left school, and apparently for the purpose of starting him in business. He was then unmarried, and lived in the same house with his father, who furnished the board of the hired men until after the son was married, when, after living some time with his wife in the homestead, he built at his own expense a small house for his own use about twenty or thirty rods distant from that of his father, although some of the hired men still lodged with the latter. In 1887, the son, Frank W. Hatch, gave up the arrangement, moved with his family to Texas, and settled there with the intention of making it his home. Upon going there he left all the stock upon the farm just as he had received it from his father. He subsequently became dissatisfied, and returned to his father's farm under the same arrangement. He continued under this arrangement until 1892, when he went to the State of Washington for the purpose of locating there; invested in real estate and apparently in bank stock, in which he appears to have been unfortunate. Again returning to Illinois, he resumed the management of the farm.

It further appeared from the tax schedules of personal property in that school district that the property in question was assessed in the name of Frank W. Hatch. While this testimony was doubtless entitled to consideration, the jury evidently did not give it great weight, as it was part of the agreement between the father and son that the latter should pay the taxes.

There was also evidence that, in the spring of 1897, the son sold to his father for $1000 a quantity of wool produced on the farm; but as it was also a part of the agreement that the son should have the product of the farm, there was nothing inconsistent with it in this sale of the wool.

It is very evident from this testimony that no sale of the farm property was intended. There was no purchase price agreed upon, no time fixed for the payment; and the reservation that the arrangement might be terminated the day after it was made,

as well as that it might indefinitely continue, is wholly inconsistent with the theory of a sale. Indeed, the only *indicium* of a sale is the provision that the identical property received need not be returned, but that other property of a similar kind might be substituted. Plaintiff in error relies in this connection upon a line of cases which hold that, where a man turns over personal property to another, under an arrangement by which the latter is not obliged to restore the specific articles of property, but is at liberty to deliver other property of the same kind and value, the receiver becomes the owner of the property; as where wheat is delivered to an elevator with the understanding that the obligation to return it shall be discharged by the delivery of other like wheat, Story on Bailments, § 439; *Lonergan* v. *Stewart*, 55 Illinois, 44; *Bretz* v. *Diehl*, 117 Penn. St. 589; *Smith* v. *Clark*, 21 Wend. 83; *Johnston* v. *Browne*, 27 Iowa, 200, although even then, a usage to return substituted property may turn the transaction into a bailment. *Erwin* v. *Clark*, 13 Michigan, 10. But these authorities have no application to the case under consideration. Here there was no provision for a substituted property beyond that required by the nature of the property delivered. The arrangement was to be indefinite in its continuance. The property was mostly animals which would necessarily die, be sold or slaughtered in a few years, and a gradual substitution of their progeny or other similar cattle, and a renewal of worn out implements, was all that was contemplated. The stipulation that this might be done was a mere incident of the main agreement by which the property was to be returned in like good order and condition as received.

The son was undoubtedly entrusted with extensive powers, but no greater than the management of a large farm would necessarily require. The father had become an old man, and naturally wished to rid himself of the responsibility, even of supervision, and to put his son upon the footing of an independent farmer. It is possible that he contemplated leaving the property to his son upon his death; but it was clearly his intention to reserve the power of revoking the arrangement in case it did not prove satisfactory to him. As the father remained in possession of the farm, there was nothing in the mere fact that he

entrusted his son with the management, that was necessarily calculated to mislead creditors into the belief that the latter was the owner of the property. Apparently the receiver was unable to produce evidence manifestly inconsistent with the agreement as sworn to by both father and son, and their testimony authorized the jury to find the ownership of the property to be in the former.

Similar agreements have been sustained as against creditors in a number of cases. *Chatard* v. *O'Donovan*, 80 Indiana, 20; *Wilbur* v. *Sessin*, 53 Barb. 258; *Bowman* v. *Bradley*, 101 Penn. St. 351; *Kerrains* v. *People*, 60 N. Y. 221; *Haywood* v. *Miller*, 3 Hill, 90; *Brown* v. *Scott*, 7 Vermont, 57; *Peters* v. *Smith*, 42 Illinois, 422; *State* v. *Curtis*, 4 Dev. & Battle Law (N. C.), 222.

There was no error in the judgment of the Court of Appeals, and it is therefore

Affirmed.

HYDE *v.* BISHOP IRON COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 126. Argued January 29, 30, 1900.—Decided April 9, 1900.

On the evidence set forth in the statement of facts and in the opinion of the court, it is *held*, that there was on the part of the entryman a distinct violation of section 2262 of the Revised Statutes, with regard to contracts by which the tract for which he applies is not to inure to another's benefit, and the adverse judgment of the court below is sustained.

On April 3, 1895, the Bishop Iron Company, one of the defendants in error, filed in the District Court of the Eleventh Judicial District of Minnesota, in and for the county of St. Louis, its complaint in ejectment, alleging that it was the absolute owner in fee simple and entitled to the immediate possession of the undivided $\frac{13}{25}$ of the following described land, situate in the county of St. Louis, to wit: The N.E. $\frac{1}{4}$ of the S.W.

$\frac{1}{4}$ of section 30, township 63 north, range 11 west of the fourth principal meridian, and that it was the lessee of the remaining undivided $\frac{12}{25}$ of said land under a lease in writing from and executed by the owners in fee simple of said remaining undivided $\frac{12}{25}$, by the terms of which lease plaintiff was entitled to the immediate, sole and exclusive possession of said undivided $\frac{12}{25}$; that the defendant, the present plaintiff in error, on January 1, 1895, wrongfully and unlawfully entered into and took possession of said tract, and had ever since kept possession thereof. The prayer of the complainant was for possession, for costs and disbursements. The defendant answered and filed a cross petition, and on his application certain parties were made defendants to that cross petition. He subsequently filed an amended answer and cross petition.

In the latter these facts are alleged: That ever since August 20, 1884, the petitioner has been in the actual, open and exclusive possession of the tract in controversy; that at the time of his taking possession it was unoccupied and unsurveyed land of the United States; that prior to July 20, 1885, the lands in that district were duly surveyed and an approved plat thereof filed in the land office at Duluth, Minnesota, that being the land office of the district in which those lands are situated; that on July 20, 1885, he duly offered to the local land office and made application to file his declaratory statement for said tract and lots 5 and 6 and the S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of said section 30, and tendered the fees required by law to be paid on said application and filing; that he was informed by the local land officers that they would reject such application unless limited to the tract in controversy; that he then and there notified said local land officers that his house and the land he cultivated were upon and within said tract, and that he desired and intended to claim the same as a preëmption, whether or not he was successful in a contest which he had in reference to the other tracts in the application; that he was told by them that if he was a settler in good faith his rights would be protected; that on the same day, but without his knowledge, the register made this indorsement upon the application:

"Land Office, Duluth, Minn., July 20th, 1885. The within

application to file D.S. on the within described land is refused as to the S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ and lots 5 and 6 of Sec. 30, T. 63, R. 11 W. for the reason that the date of settlement alleged herein does not antedate the unadjusted location of Sioux half breed scrip No. 19 E, in the name of Orille Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the preëmption law subsequent to said date of filing of said scrip, to wit, June 16, 1883, you are allowed thirty days for appeal, and are advised that if you fail to do so within that time, this decision will be final."

That said officers retained said application, and also indorsed it as follows: "Filed Aug. 20, 1885;" that ignorant of this last indorsement, and within the proper time, after July 20, 1885, he formally appealed from the action of the local land office to the Commissioner of the General Land Office, which appeal was duly transmitted to that office on August 20, 1885; that thereafter, and on October 15, 1885, one Joseph H. Sharp, claiming to be the attorney in fact of James H. Warren, located the tract in controversy in the name of the said Warren, filing in support of said location certain Chippewa Indian scrip; that petitioner was ignorant of this location and filing until April 10, 1886, and then he made application in the local land office to contest said selection and location, and this application was also transmitted by the local land officers to the General Land Office at Washington.

The cross petition further alleged that on June 16, 1883, and before the surveys had been made of these lands, Orille Moreau, by her attorney in fact, located Sioux half breed scrip Nos. 19 D and 19 E on lands therein described by metes and bounds, which locations, after the surveys, were adjusted by the local land officers in the name of the locator, as follows: Scrip No. 19 D upon lots 3, 5 and 6 and the S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of said section 30, and No. 19 E upon lots 1 and 2 and the S.W. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ and the N.W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of said section 30; that on October 9, 1884, petitioner instituted a contest in the local land office against the said location of scrip No. 19 D, and on October 19, 1884, Angus McDonald a like contest against the

location of said scrip No. 19 E; that on the hearing of this latter contest the following testimony was received:

"*Testimony of S. F. White.*

"S. F. White, being duly sworn upon oath, deposes and says: I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the contestants in these cases to secure me for advances and legal services and I am unable to find it. I supposed until about two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning when I made a last final search through my safe and have been unable to find it, and have no idea where it is."

"*Testimony of Mr. Hyde.*

"Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

"A. Yes, there was a contract.

"Q. Where is it?

"A. I don't know.

"Q. When and where did you see it last?

"A. I have not seen it since it was drawn by Mr. White.

"Q. What did it contain?

"A. It contained when I prove up on the land I was to secure him on a one half interest.

"Q. Who witnessed the contract?

"A. Powers, McDonald and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White."

"*Mr. McDonald's Testimony.*

"Mr. White has furnished me the supplies to keep me on the

claim. I am making the improvements for myself. I don't know of any one being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

"The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim with the understanding that he is to have a half of it if we secure it."

Redirect:

"Q. The half interest you speak of Mr. White is to have was to be a deed of or security upon a half of the land for advances and services?

"A. It was a security.

"Q. This interest you have spoken of as to Mr. Powers and which you say you cannot fix the amount of, what was that? Was it not simply that he was to be paid for his time and services and there was no telling how much he would have to put in it?

"He was to be paid for his time; that is all I mean by an interest he was to have."

Cross-examination:

"I am to let him have an interest in the land when I get it to pay him for his time and services. The contract I have with Mr. White for this one half is in writing.

"Q. When you get this land is it not the understanding between you and Mr. White that you are to deed him an undivided one half interest in it?

"A. No, sir; we never mentioned a deed.

"Q. What do you mean then by saying that White was to have a half interest?

"A. To secure him for advances.

"Q. Then if it was to secure him for advances made, how can you give him a half interest unless you deed him one half?

"A. I could not very well.

"Q. Then your understanding is you are to deed him one half interest in it?

"A. No; that is not my understanding.

"Q. Really you do not know anything about it, do you?

"A. I know my own transaction about it, but I don't know White's;"

that no further or other evidence was taken on either of said hearings relative to the said contract with the said White; and that by agreement this testimony offered in the McDonald case was to be considered in determining the validity of both locations, to wit, that of No. 19 D as well as that of No. 19 E. The cross petition then stated that such testimony was improperly admitted; that it was irrelevant, incompetent and immaterial because not bearing upon the question of the validity of these scrip locations; that the local land officers upon the termination of the hearing found the scrip locations valid, and both the petitioner and McDonald appealed therefrom to the Commissioner of the General Land Office; that the Commissioner reversed the decision of the local land officers and held the scrip locations invalid, and from his decision an appeal was taken by the locator to the Secretary of the Interior, who, on February 18, 1889, affirmed the decision of the Commissioner of the General Land Office, but erroneously and contrary to law held that said lands were open to entry by the first legal applicant. The cross petition then proceeded to show that for five succeeding years proceedings were continued in the land department at Washington and before the local land office at Duluth, in which repeated hearings and contests were had in reference to the validity of these scrip locations, and also of the location made by Warren of Chippewa scrip on the tract in controversy, the outcome of which was a final decision that Warren's application to enter this land with the Chippewa Indian scrip was valid and entitled to priority, and on the strength of that a patent was issued to him, and from him the plaintiff obtained its title.

Demurrers were interposed to the amended cross petition, which were sustained. On appeal to the Supreme Court of the State this ruling on the demurrers was on July 24, 1896, affirmed. 66 Minnesota, 24. Thereafter, in the district court, a reply was filed to the amended answer. The case came on for hearing on pleadings and proofs at the November term, 1896. Findings of fact and conclusions of law were made by the trial court and judgment entered for the plaintiff, which judgment was, thereafter, on April 22, 1898, affirmed by the Supreme Court, 72 Minnesota, 16, to reverse which judgment this writ of error was sued out.

Mr. John Brennan and *Mr. Louis A. Pradt* for plaintiff in error. *Mr. Arthur L. Sanborn* and *Mr. Louis K. Luse* were on their brief.

Mr. James K. Redington for defendants in error. *Mr. Frank B. Kellogg* and *Mr. J. H. Chandler* were on his brief.

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

The testimony is not preserved in the record and no question can arise upon the findings of fact, for they are simply to the effect that the plaintiff had the legal title to an undivided $\frac{1}{2}\frac{3}{5}$ and the leasehold right from the legal holders of the remaining $\frac{1}{2}\frac{2}{5}$, and that the defendant was in possession without any color of title or right to the lands, so that the only questions which can be considered are those which arise upon the demurrers to the amended cross petition.

Upon the facts disclosed in that cross petition we remark that as the contest in reference to this tract was pending before the land department for nine years and carried on with exceeding vigor, as shown by the record of the frequent motions, applications and so forth on the part of the respective parties, it would seem impossible to believe that the department was not fully advised of the facts respecting the locations and entries. We are not called upon to determine

whether every step in this protracted controversy was carried on with technical accuracy in the matter of procedure, and it may be, as counsel contend, that upon some of the motions and in some of the contests testimony was received which was not pertinent to that particular phase of the controversy, but it is quite evident that in one form or another, on some motion or another, in some stage of the proceedings, all the facts and claims of either party were fully presented, considered and determined by the department. This is not a case on error, in which the regularity of every step taken in the land department is to be considered and determined and upon that inquiry judgment entered, affirming or reversing its decision, but it is an independent suit in the courts in which the inquiry is whether the parties to the proceedings in the land department had full and proper notice of those proceedings, whether the department heard the claims and evidence offered by each party, and then whether upon the facts as found by it there was any error in matter of law in its decision. It may be remarked in passing that there is no allegation of corruption or perjury, or any of the grounds upon which sometimes a court of equity will set aside the conclusion of another tribunal even where the proceedings are regular in form. And as it is evident from the showing made in the cross petition that both parties were often and fully heard and no limitation placed upon their right to offer testimony, we must accept as conclusive the findings of fact made by the department, and inquire simply whether the law was properly adjudged.

Coming now to the merits of the controversy, the defendant, the cross petitioner, made a single application to enter 160 acres, one quarter of which is the tract in controversy. There were not two separate applications, one to enter the 40 and another the remaining 120 acres, and it cannot now be treated as though there were two. If the applicant was guilty of any violation of law such violation vitiated the proceeding *in toto*. This is not like *Cornelius* v. *Kessel*, 128 U. S. 457, in which an entry of two tracts was sought, one of which was not at the disposal of the United States by reason of its being within a swamp land grant to the State, and it was held that the validity of the

entry as to the other was not affected thereby. In that case there was no wrong on the part of the entryman. He had acted in good faith, had not attempted any fraud, or to do anything in disregard of the mandates of the statutes, either in letter or spirit, and obviously the land department erred in cancelling the entire entry by reason of its covering land not subject to disposal. Here there was a distinct violation of law on the part of the entryman, and one which vitiated the application as a whole. The Revised Statutes, sec. 2262 require a preëmption applicant to make affidavit "that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself," and also provide that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same." It was this statute which the land department found the applicant had violated, in that he was seeking to enter a portion of the land, not solely for his own benefit, but also in part for the benefit of others. It would be a gross perversion of the spirit of this statute to permit a party who has made a single application to enter a tract of land to ignore its unity after it has been proved that he has made a contract in defiance of the statute in reference to half the land, and have it divided into two separate and independent applications, and then his application sustained and his title confirmed as to that part of the land in respect to which he had made no contract. Such a construction would enable an applicant without any risk to speculate on the chances of escaping detection in his effort to violate the statute and thwart the purposes of Congress in the disposal of public lands.

No one can read the testimony which was offered before the land officers without perceiving that there was sufficient in it to justify a finding that the applicant had made a contract in direct violation of the statutory provisions. It is true he himself testified that he was to secure Mr. White "on a one half interest," but the contract itself was not produced, having in some way disappeared, and McDonald, who was a party to it

(for it was a joint contract between White, the applicant, and McDonald,) testified that Mr. White, paying expenses, did so under an agreement that he was to have half of the land. We do not stop to inquire whether an agreement to give a mortgage for money advanced comes within the letter or spirit of the statute, for there was enough in the testimony to justify the conclusion of the department that it was a contract to divide the land when obtained, and it is not the province of the courts to review such finding of fact.

These are the only questions which we deem of importance, and finding no error in the record the judgment of the Supreme Court of Minnesota is

Affirmed.

KEIM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 57. Submitted March 5, 1900. — Decided April 9, 1900.

Keim was honorably discharged from the military service by reason of disability resulting from injuries received in it. He passed the civil service examination, and, after service in the Post Office Department, was transferred to the Department of the Interior at his own request. Soon after he was discharged because his rating was inefficient. No other charge was made against him. *Held* that the courts of the United States could not supervise the action of the head of the Department of the Interior in discharging him.

This case comes on appeal from a decree of the Court of Claims dismissing appellant's petition. 33 C. Cl. 174. The findings of that court show that petitioner was on April 17, 1865, honorably discharged from the military service of the United States by reason of disability resulting from injuries received in such service. He passed the civil service examination, and on May 7, 1888, was appointed to a clerkship in the Post Office Department. On March 16, 1893, at his own request and on the certificate of the Civil Service Commission, he was trans-

ferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau, with a salary of $1200 per year. On March 1, 1894, his salary was reduced to $1000 per annum, at which salary he continued to serve to July 31, 1894, when he was discharged, and has not since been permitted to perform the duties of his clerkship, although ready and willing to do so. The discharge by the Secretary of the Interior was made upon this recommendation from the Commissioner of Pensions: "The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him. William Lochren, Commissioner." The fourth and sixth findings are as follows:

"IV. At the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of a clerk in plaintiff's place; the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, retained at the time of plaintiff's discharge, and now retains, other clerks of the same division who have received since plaintiff's discharge, and are now receiving, the same salary, to wit, $1000 per annum (one receiving $1200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who are not shown to this court, except as in these findings set forth, to have possessed at the time of plaintiff's discharge better or inferior business capacity for the proper discharge of the duties of their said offices than the qualifications for the said duties possessed by plaintiff at that time. On or about the day plaintiff received notice of his discharge additional clerks were appointed to duties in the same division in which he served in said bureau who never rendered any military or naval service. It does not appear that any of these clerks were regarded or reported as inefficient by any superior officer; nor does it appear that those so retained or those thereafter appointed possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by the plaintiff."

"VI. There is no evidence that the plaintiff made any effort to secure other employment, or that he has, or has not, been employed at any kind of work from and after his said discharge

July, 1894. Nor is there evidence as to the difference in amount between his salary while in the government service and any moneys he might have earned or could have reasonably earned or has earned in other ways since his said discharge."

The petitioner requested additional findings, of which the only portions material to this inquiry are in the latter part of finding 3, that "he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times, since said last-named date, stood ready and willing to discharge the duties thereof." And finding 5: "That petitioner was at the time of his so-called discharge an efficient clerk, and discharged his duties faithfully and efficiently, and at the time of his said discharge he possessed and now possesses the necessary business capacity for the proper discharge of the duties of said clerkship."

These findings the court declined to make, "deeming said requested findings, if true, to be irrelevant to the issue presented."

Mr. John C. Chaney for appellant.

Mr. Assistant Attorney General Boyd for the United States.

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

Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.

It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government. Thus, in *Decatur* v. *Paulding*, 14 Pet. 497, 515, in which was presented the question of the right of the Circuit Court of the District of Columbia to issue a writ of mandamus to the Secretary of the Navy to perform an executive act not merely ministerial but

involving the exercise of judgment, it was said by Chief Justice Taney:

"The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

The same proposition was reaffirmed in *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, in an elaborate opinion by Mr. Justice Bradley. See also *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *Boynton* v. *Blaine*, 139 U. S. 306. In *United States* v. *Schurz*, 102 U. S. 378, 396, it was said by Mr. Justice Miller:

"Congress has also enacted a system of laws by which rights to these lands may be acquired and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that, so long as the legal title to these lands remained in the United States and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. "It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated

inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." *In re Hennen*, 13 Pet. 230, 259; *Parsons* v. *United States*, 167 U. S. 324. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed.

The Revised Statutes, sec. 1754, provide:

"Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

But this does not avail the petitioner. He was preferred for appointment and held under that appointment for years. There was no disregard of that section either in letter or spirit; no evasion of its obligations. He was not appointed on one day and discharged on the next, but after his first appointment continued in service until it was found that he was inefficient.

Section 3 of the act of August 15, 1876, 19 Stat. 169, is:

"That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

In section 7 of the Civil Service act of 1883 (22 Stat. 406) is this proviso:

"But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes."

But these sections do not contemplate the retention in office of a clerk who is inefficient, nor attempt to transfer the power of determining the question of efficiency from the heads of departments to the courts. The proviso in section 3 of the act of August 15, 1876, expressly limits the preference to those "equally qualified."

No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy. Congress has generously provided for the discharge of those obligations in a system of pensions more munificent than has ever before been known in the history of the world. But it would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks simply because they had been honorably discharged from the military or naval service. The preference, and it is only a preference, is to be exercised as between those "equally qualified," and this petitioner was discharged because of inefficiency. That, it may be said, does not imply misconduct but simply neglect, but a neglected duty often works as much against the interests of the Government as a duty wrongfully performed, and the Government has a right to demand and expect of its employés not merely competency, but fidelity and attention to the duties of their positions.

Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a

duty which is strictly judicial in its nature. It would seem strange that one having passed a civil service examination could challenge the rating made by the commission, and ask the courts to review such rating, thus transferring from the commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and if courts should not be called upon to supervise the results of a civil service examination equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

We see no error in the conclusions of the Court of Claims, and its decree is

Affirmed.

CONSOLIDATED CANAL COMPANY *v.* MESA CANAL COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 200. Submitted March 15, 1900. — Decided April 9, 1900.

This court, in view of the finding of the court below as to the influence of the dam placed by the Mesa Company upon the flow of water in the canal of the Consolidated Company, is concluded as to the question of fact.

An injunction will not issue to enforce a right that is doubtful, or to restrain an act, the injurious consequences of which are doubtful.

The dam built by the Mesa Company although it had the effect of raising the flow of water in its canal so as to destroy the water power obtained by the Consolidated Company through the construction of its canal, was not an infringement of the rights secured to the Consolidated Company under the contract set forth in the statement of the case.

THIS case comes on appeal from a decision of the Supreme Court of the Territory of Arizona, 53 Pac. Rep. 575, affirming

a decree of the District Court of Maricopa County in favor of the defendant in a suit brought by the appellant to restrain the defendant from maintaining in its canal a dam in such a way as to impede the flow of water in appellant's canal, or to destroy a certain water power claimed by appellant.

The facts as shown by the findings and statement prepared by the Supreme Court are as follows: The appellee was the owner of the Mesa Canal. On January 10, 1891, it made a contract with A. J. Chandler, who subsequently transferred his rights thereunder to the appellant. The material portions of the contract are as follows:

"This article of agreement, made and entered into this 10th day of January, A. D. 1891, by and between the Mesa Canal Company, a corporation duly organized and legally existing under and by virtue of the laws of the Territory of Arizona, having its principal office and place of business at Mesa city in the county of Maricopa and Territory of Arizona, party of the first part, and A. J. Chandler of the city of Phœnix, in the county and Territory aforesaid, party of the second part, witnesseth:

"That, whereas, the said party of the first part is an irrigating corporation, and as such is now the owner operating the Mesa Canal in said county and Territory.

"And, whereas, said party of the second part desires to increase the size and capacity of said canal between the point in Salt River where the water is now taken out, or by consent of the directors of the Mesa Canal Company may hereafter be taken out, and a point in said Mesa Canal known as 'Ayers' head gate,' so as to increase the flow of water through said portions of said canal as aforesaid, and for the purpose of the party of the second part, his associates and assigns, obtaining water thereby through said canal, and in order to have the said canal increased in size, dimensions and capacity without cost or expense to said party of the first part, and without in any way interfering with the rights, titles, interests nor privileges of said party of the first part in and to said canal and the water flowing through said canal, except as hereinafter provided.

* * * * * * * *

"Now, therefore, the Mesa Canal Company, party of the first part, for and in consideration of the sum of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration and purposes herein contained and expressed, does for itself and for its successors or assigns hereby grant unto the said A. J. Chandler, his associates, heirs or assigns, forever, the following rights and privileges upon the terms and conditions herein expressed, viz.:

"That the said A. J. Chandler, his associates, heirs or assigns, shall have the right and privilege of entering upon any and all of the following portions of said Mesa Canal at any time prior to the first day of March, A. D. 1891, for the purpose of widening and enlarging and increasing the size and capacity of said Mesa Canal between the point in Salt River where the water is now or may hereafter be taken out for said canal, and a point on said canal known as 'Ayers' head gate,' and enlarge and increase the size and dimensions of the main dam and head gates at the point of commencement of said canal in Salt River, and enlarge and increase the size and capacity of said Mesa Canal so that the same when so enlarged and increased in size shall have a carrying capacity in addition to its present carrying capacity not exceeding forty thousand inches of water miners' measurement, nor less than ten thousand inches of water miners' measurement, and said enlargement shall be fully made and completed by the thirtieth day of December, A. D. 1891. The present carrying capacity of said Mesa Canal for the purpose of this agreement shall be seven thousand inches miners' measurement.

"All the cost and expense of enlarging and increasing the size of said dam, head gate and canal as aforesaid shall be borne and paid by the party of the second part, his associates, heirs or assigns, forever. And said enlargement shall be made without in any way interfering with any of the rights, titles, interests or privileges of said party of the first part in and to the said canal and the water flowing through said canal, except as hereinafter provided.

"The party of the first part hereby reserves the right to fur-

ther enlarge said portion of the Mesa Canal whenever they deem it necessary to do so, provided such enlargement shall not interfere with or lessen the rights or privileges herein granted to the party of the second part, his associates or assigns.

* * * * * * * *

"Said party of the second part, his associates or assigns, shall in enlarging said main dam, head gates and canal as aforesaid, in all respects enlarge said dam, head gates and canal in a good, substantial and workmanshiplike manner, according to the most approved methods of constructing and building irrigating canals.

"All suits, liabilities, costs, expenses or judgments, and all damages or loss incurred or sustained by the party of the first part caused by said enlargement, shall be borne by the party of the second part, his associates or assigns forever, and all suits or proceedings against the party of the first part by reason of said enlargement to be defended at the expense of the party of the second part.

"It is expressly understood and agreed by the parties hereto, their successors or assigns, that at all times when there is an abundance of water in Salt River liable to appropriation and flowage through said canal when so enlarged, then and at all such times the said party of the first part shall have the right to use from said canal in addition to the amount hereinbefore specified as the capacity of said canal two thousand inches of water, miners' measurement.

"The management and control of the canal between the point known as 'Ayers' head gate' to and including the dam in Salt River when so enlarged as aforesaid shall be in the party of the second part, his heirs, associates or assigns. Provided, that the party of the second part, his heirs, associates or assigns, shall before he or they are entitled to receive or use any water through said canal, first deliver to the party of the first part, their heirs or assigns, at the point in said Mesa Canal known as 'Ayers' head gate,' and shall continue to deliver, the seven thousand inches of water miners' measurement above expressed as the carrying capacity of said Mesa Canal, or such portion thereof as may be apportioned to said Mesa Canal by decree of any court. Provided, the stockholders who are now using or may

hereafter use water above the 'Ayers' head gate' shall have their water delivered to them as at present above the 'Ayers' head gate' aforesaid, or said stockholders shall have their water delivered to them at the 'Ayers' head gate' with the other stockholders, as they may demand. Provided, further, that the water shall be delivered to the party of the first part after the completion of said canal as aforesaid for a period of five years without cost to the party of the first part, their successors or assigns, and thereafter for a sum not exceeding three dollars per share per year forever, to be paid for in the same manner as they now pay for the same.

* * * * * * * *

"Provided, further, that if the said party of the second part, his associates, heirs or assigns, shall neglect to deliver water as agreed herein, or shall fail to carry out any of the terms of this agreement, and shall be notified by the directors of the Mesa Canal Company of such failure or neglect to carry out the terms of this agreement, and shall still neglect to carry out the terms of this agreement for a period of ten days thereafter, or in such case as a break in the canal, head gates and dam whereby the water is turned out for a period of five days, then and at all such times it is hereby agreed by the party of the second part, his heirs, associates or assigns, that the directors of the Mesa Canal Company shall have the right and power to take full charge and control of said enlarged portion of said Mesa Canal without process of law, and the same shall become the property of the Mesa Canal Company and shall so remain until the party of the second part, his associates, heirs or assigns, shall fully comply with the term and requirements of this agreement, and then shall revert back to the party of the second part, his associates, heirs or assigns, and shall be and remain in the party of the second part, his associates, heirs or assigns, so long as the terms of this agreement shall be by them complied with.

"This agreement shall not give or convey to the party of the second part, his associates, heirs or assigns, any title or ownership in or to the capital stock of said Mesa Canal Company, but shall only convey such privileges and rights as are herein mentioned."

Statement of the Case.

The appellant, as the transferee from Chandler, enlarged and reconstructed the Mesa Canal down to a place called the "Division Gates," which point had by mutual consent been substituted for Ayers' head gate as the point of division of the waters, and delivery by the appellant to the appellee of the water to which the latter was entitled. In thus enlarging and reconstructing the canal the appellant raised the grade thereof for the purpose of carrying the water at a higher elevation, thereby enabling the canal to cover more and other lands, and at the point where the division gates were located the elevation was about five feet above the grade of the canal before reconstruction, and by the construction of those gates at that point the appellant delivering the water to the appellee secured a fall of five feet in the water thus delivered.

Other findings were as follows:

"After appellant had delivered the water in the manner aforesaid for some years, the appellee built a dam in its canal a short distance below the division gates that raised the water and caused it to flow through a lateral ditch, which enabled the appellee to irrigate some lands on which it had not been able to place water through its canal from its former elevation. The effect of this raise in the water was to reduce the fall at the division gates.

"After appellee had built its dam and backed up the water, as aforesaid, appellant had constructed a water wheel and a mill for grinding grain to be driven thereby, and had erected them at the division gates, so that the wheel was turned by the water as it fell from the division gate into the Mesa Canal, a distance of about five feet. Afterwards appellant increased the height of the dam that it had formerly built to such an extent that it raised the surface of the water and backed the same up against the division gate in such manner as to destroy three and one half feet of the five feet fall and totally destroyed the water power.

"The water raised by the dam and the water affording the water power thus destroyed is the 7000 inches of water which appellant is obligated by the terms of the agreement afore-

mentioned to first deliver to the appellee before said appellant is entitled to receive or use any water through said canal.

"A further result of the erection of the water in appellee's canal below the division gates was to very slightly, if at all, impede the flow of water in appellant's canal above the division gates and thereby detract very slightly from the carrying capacity of appellant's canal.

"The cost of the reconstruction of the canal from Ayers' head gate to the division gates exceeded ten thousand dollars, and the water power created at the fall was equal to about forty horse power."

Mr. John D. Pope for appellant.

Mr. C. M. Frazier, *Mr. Rufus C. Garland* and *Mr. W. W. Wright, Jr.*, for appellees.

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

While the title to any portion of the Mesa Canal may not have been changed by this contract, yet for convenience we shall speak of that portion thereof under the control of the appellant as its canal, and of the balance as the appellee's canal.

In view of the finding of the Supreme Court we need not stop to consider any question in respect to the influence of the dam placed by appellee upon the flow of water in appellant's canal, and this notwithstanding the fact that in the trial of the case much of the testimony, pro and con, was in reference to that matter. We are concluded as to the question of fact by the finding, and it is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling. *Parker* v. *Winnipiseogee Lake Company*, 2 Black, 545, 552.

We pass, therefore, to the only substantial question, which is, whether the dam built by appellee, having the effect as it did of raising the flow of water in its canal so as to destroy the water power obtained by appellant through the construction of

its canal, was an infringement of the rights secured to appellant by the contract of January 10, 1891. The appellant seems to be of the opinion that by that contract it had a right to raise its canal to such an elevation as it saw fit while the appellee had no such liberty. We search the contract in vain for any express stipulation to that effect. If the appellant had a right to raise the grade of its canal five feet, we see nothing to forbid the appellee to raise its grade to the same height. There is no reference in the contract to water power. Obviously the only matter then contemplated was a supply of water for irrigation purposes. The appellee is styled "an irrigating corporation, and as such . . . operating the Mesa Canal." The expressed purpose of appellant was "obtaining water thereby through said canal." The water power was evidently an afterthought, suggested by the condition of things when the appellant had finished the reconstruction of its canal. The appellant must point to some stipulation in the contract which the action of the appellee has broken, for the entire right given by it to the appellant is declared to be "without in any way interfering with the rights, titles, interests or privileges of said party of the first part in and to said canal, and the water flowing through said canal, except as hereinafter provided."

No right passed to the appellant except that which was expressly named. All other rights, titles, interests or privileges were retained by the appellee. The appellant was to deliver the 7000 inches of water out of the enlarged canal, and the appellee was to receive and pay therefor. The appellant was to increase the carrying capacity of the canal not less than 10,000 nor more than 40,000 inches, and this surplus water it had a right to use. But the appellee reserved the right if it saw fit at any time to still further enlarge the carrying capacity of the canal, and the only limitation in respect to such enlargement was that it should not "interfere with or lessen the rights" granted to the appellant. What were those rights? Obviously the right to take and use the surplus over 7000 inches of water flowing through the canal, as enlarged by appellant.

It may be that neither party to this contract could change the grade of its canal so as to compel the other to make a like

change of grade. Thus, when the appellant, in the first instance, enlarged and reconstructed its canal, it raised the grade five feet. If it had seen fit to lower the grade five feet, instead of raising it, doubtless in order to fulfil its contract of delivery it would have had to provide some pumping arrangements, and could not have demanded that the appellee lower its grade five feet in order to receive the water. And so it may be that the appellee could not now raise its grade ten feet and then demand that the appellant either raise its grade five feet more or put in pumping works to insure the delivery of the water. But as to any action which does not interfere with the delivery of water by the appellant to the appellee, there is nothing in the contract to restrain at least the appellee from doing as it pleases with its canal.

It does not appear that the appellee was acting maliciously and for the mere sake of injuring the appellant. On the contrary, its purpose as disclosed was to irrigate lands which it had not theretofore been able to irrigate from its former elevation, and we know of no reason why it had not a right to do so. It made no stipulation as to the lands which it should irrigate. It had the same right which it had before the contract of enlarging or reducing the number of acres reached by the flow of its water. It does not appear that the lands which it was seeking to irrigate by raising the elevation in the upper part of its canal could have been reached in any other way, and it was not bound to desist from any enlargement of its own business for the mere benefit of the appellant or to enable the latter to enjoy something which was not conveyed to it by the terms of the contract.

We need not stop to inquire what are the rights of separate appropriators of water, in the absence of a contract. We are dealing with those which grow out of this contract, bearing in mind that all rights are reserved to the appellee which are not in terms granted to the appellant. If 7000 inches of water was more than sufficient to supply the territory which it was then irrigating, there is nothing which forbade the appellee to enlarge that area, and in order to enable it to reach that larger area it might make any change in the construction of

its canal—at least any change which did not interfere with the free delivery of the water by the appellant.

We see no error in the decision of the Supreme Court of Arizona, and its judgment is

Affirmed.

UNITED STATES *v.* HARRIS.

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

No. 169. Argued March 5, 6, 1900.—Decided April 9, 1900.

A receiver of a railroad is not within the letter or the spirit of the provisions of the act of March 3, 1873, c. 252, 17 Stat. 584, entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States," now incorporated into the Revised Statutes as sections 4386, 4387, 4388 and 4389.

THIS was a suit brought in November, 1895, in the District Court of the United States for the Eastern District of Pennsylvania, by the United States against Joseph S. Harris, Edward M. Paxson and John Lowber Welsh, receivers of the Philadelphia and Reading Railroad Company, to recover a penalty in the sum of five hundred dollars for an alleged violation of sections 4386, 4387, 4388 and 4389 of the Revised Statutes of the United States.

There was a verdict in favor of the United States, but afterwards, on a question reserved at the trial, judgment was entered in favor of the defendants *non obstante veredicto.* 78 Fed. Rep. 290. Thereupon a writ of error was sued out from the Circuit Court of Appeals for the Third Circuit, and on March 14, 1898, the judgment of the District Court was affirmed. 57 U. S. App. 259. The cause was then brought to this court on a writ of *certiorari.*

Mr. Solicitor General for the United States.

Mr. John G. Lamb for Harris.

Mr. Justice Shiras delivered the opinion of the court.

This was an action to recover penalties for an alleged violation of the laws of the United States relating to the transportation of live stock; and the question involved is whether the defendants, who were in charge and control of the Philadelphia and Reading Railroad as receivers, appointed by the Circuit Court of the United States, were liable in such an action.

The act under which this suit was brought was passed March 3, 1873, and was entitled "An act to prevent cruelty to amimals while in transit by railroad or other means of transportation within the United States." It appears in the Revised Statutes as sections 4386, 4387, 4388 and 4389, as follows:

"Sec. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one State to another, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine or other animals from one State to another, shall confine the same in cars, boats or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

"Sec. 4387. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of the owner or person in custody thereof; and such company, owners or masters shall in such case have a lien upon such animals for food, care and

custody furnished, and shall not be liable for any detention of such animals.

"SEC. 4388. Any company, owner or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats or other vessels in which they can and do have proper food, water, space and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

"SEC. 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the Circuit or District Court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations which come to their notice or knowledge."

The contention on behalf of the Government is that, by the words "any company," used in section 4388, Congress intended to embrace all common carriers, whether by rail or water, upon whom the duty was imposed by section 4346 of unloading and feeding the animals; that the word "company" is used in a popular sense as signifying the person or persons, the association or corporation, carrying on the business of a common carrier by rail or water; that, as shown by its title, the act in question was a humane one, designed to prevent cruelty to animals while in course of interstate transit; that the regulations were to be complied with whenever animals were transported by rail or boat from one State or another; and that whoever had charge of the railroad or the boat had to see that these wholesome and humane regulations were obeyed or had to pay the penalty for violating them.

To strengthen the argument that Congress intended to include even receivers when managing a railroad under an appointment by a court, the Government's counsel calls attention

to the provisions of the second and third sections of the act of August 13, 1888, c. 866, 25 Stat. 433, 436, reading as follows:

"SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It is claimed that the effect of such legislation is to place receivers upon the same plane with railway companies as respects their liability to be sued for acts done while operating a railroad.

Upon the whole, the proposition of the Government's counsel is that the words "any company, owner or custodian of such animals," used in section 4388, are intended to cover all those who can possibly violate the preceding two sections; that the words "every company" must, therefore, be held to include a railroad company, whether a person, a partnership or a corporation, and whether acting individually, or through officers or receivers.

It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the States and of the United States, whose object is to promote the safety, comfort and convenience of the travelling public. But

we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress when prescribing a penalty for any company, owner or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?

It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and an attentive examination has brought us to the same conclusion.

It must be admitted that, in order to hold the receivers, they must be regarded as included in the word "company." Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

It may well be that Congress, in omitting to expressly include receivers in these sections, intended to leave them subject to the control and direction of the courts, whose officers they are. It does not, therefore, follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed.

We cannot better close this discussion than by quoting the language of Chief Justice Marshall, in the case of *United States* v. *Wiltberger*, 5 Wheat. 76:

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases." See likewise *Sarlls* v. *United States*, 152 U. S. 570.

The judgment of the Circuit Court of Appeals is

Affirmed.

CREDITS COMMUTATION COMPANY *v.* UNITED STATES.

SAME *v.* DEXTER.

SAME *v.* AMES.

Nos. 233, 234, 235. Submitted February 26, 1900. — Decided April 9, 1900.

When leave to intervene in an equity case is asked and refused, the order denying leave is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding.

The action of the court below, in denying the petitions to intervene, was an exercise of purely discretionary power, and was not final in its character.

On October 9, 1893, Oliver Ames, 2d, and Samuel Carr, executors of Frederick L. Ames, deceased, and Peter B. Wyckoff and Edwin F. Atkins filed in the Circuit Court of the United States for the Eighth Circuit a bill of complaint against the Union Pacific Railway Company and a number of other companies in which the Union Pacific Railway Company had interests, praying for the appointment of receivers, the enforcement of certain alleged liens, and the administration of the properties of the Union Pacific Railway Company. On October 13, 1893, S. H. H. Clark, Oliver W. Mink and Ellery Anderson were appointed receivers, and on November 13, 1893, upon petition of the Attorney General of the United States, John W. Doane and Frederick R. Coudert were appointed additional receivers.

On January 21, 1895, a bill of complaint was filed in the said Circuit Court by F. Gordon Dexter and Oliver Ames, 2d, as trustees of the first mortgage of the Union Pacific Railway Company, to foreclose that mortgage.

At the May term, 1897, the United States filed, in the Circuit Court of the United States for the Eighth Judicial Circuit, a bill of complaint against the Union Pacific Railway Company, and against S. H. H. Clark, Oliver W. Mink, Ellery Anderson, John W. Doane and Frederick R. Coudert, who had theretofore, on October 13, 1893, in the suit brought in said court by Oliver Ames, Samuel Carr and others against the said Union Pacific

Railway Company, been appointed receivers therefor, and against F. Gordon Dexter and Oliver Ames, as trustees, the Union Trust Company of New York, as trustee, J. Pierpont Morgan and Edwin F. Atkins, trustees, the Central Trust Company of New York, as trustee. The object of this bill was to secure a decree of foreclosure of the subsidy lien of the United States upon the property of the Union Pacific Railway Company between Council Bluffs, Iowa, and a point five miles west of Ogden, Utah.

On April 28, 1897, the Credits Commutation Company, a corporation of the State of Iowa, filed a petition in each of said three cases, praying for leave to intervene therein as a party, and to be heard to assert certain alleged rights and interests. On May 22, 1897, the Combination Bridge Company, a corporation of the State of Iowa, also filed petitions in said cases for leave to intervene therein for the same reasons set forth at length in the petitions of the Credits Commutation Company. On May 24, 1897, after hearing the counsel of the respective parties, an order was entered by the Circuit Court denying the prayers for leave to intervene, and on the same day an appeal was allowed to the Circuit Court of Appeals for the Eighth Circuit. On December 7, 1898, motions by the appellees to dismiss said appeals were sustained, and said appeals were accordingly dismissed; and thereupon the appellants in open court prayed an appeal to this court, which was allowed. *Credits Commutation Company* v. *Ames' Executors*, 62 U. S. App. 728. Motion to dismiss or affirm was submitted.

Mr. John F. Dillon, *Mr. W. R. Kelly* and *Mr. G. M. Lambertson* for the motion.

The Attorney General and *Mr. John C. Cowin* filed a brief in support of the motion.

Mr. Henry J. Taylor and *Mr. John C. Coombs* opposing.

Mr. Justice Shiras delivered the opinion of the court.

The Credits Commutation Company and the Combination

Bridge Company, corporations of the State of Iowa, filed petitions for leave to intervene in three suits against the Union Pacific Railway Company. The object of those suits was to enforce by foreclosure the payment of bonds secured by mortgage and of a debt due to the United States created by certain subsidy bonds, and, pending such proceedings, the appointment of receivers to prevent the disintegration of properties of the railway company.

The Combination Bridge Company is the owner of a bridge across the Missouri River at Sioux City. The Credits Commutation Company is the owner of the stock of the bridge company, and also of interests in the capital stock of certain railroads connected by the said bridge. The petition alleges that the Credits Commutation Company was organized for the purpose of connecting said bridge and railroads with the Union Pacific Railway.

The Union Pacific Railway Company is a consolidated company, composed of the Union Pacific Railroad Company and the Kansas Pacific Railway Company, and Congress, by the act of July 1, 1862, in order to "secure to the Government the use of the same," conferred upon said companies grants of large and valuable tracts of the public lands, and further subsidized said companies by an advance to them of the public credit in the form of bonds of the United States. The fifteenth section of the said act of July 1, 1862, was in the following terms:

"And be it further enacted, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors and assigns, as if the words had been properly added thereto."

The petition alleges that the Credits Commutation Company was organized in the latter part of 1894, but admits that said company has abstained from making any application to the President of the United States to fix the place at which and the

just and equitable terms upon which said company should build a railroad to connect with the road of the Union Pacific Railway company, because the latter company had been embarrassed and all its property was in the hands of receivers, and bills to foreclose in behalf of the holders of mortgage bonds and to enforce the creditor rights of the United States had been filed. It seems to be the theory of the petitioners that, under the provisions of the act of Congress, they have a right to connect their railroads, now or to be constructed, with the railroad of the Union Pacific Railway Company, and that they have, therefore, a right to intervene in the foreclosure proceedings, in order to protect their right to so connect and to protect the right of the public in such railroad connections.

As heretofore stated, the Circuit Court denied the petitions for leave to intervene, and upon appeal to the Circuit Court of Appeals that court dismissed the appeals. The view of the Circuit Court of Appeals was that the order of the Circuit Court refusing leave to intervene was not a final judgment or decree from which an appeal could be taken, and that, at any rate, the action of the lower court in refusing leave to intervene was not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention. 62 U. S. App. 728, 732.

To show that the Circuit Court, in denying the petition for leave to intervene, was not exercising the usual discretion of a chancellor in passing upon a petition of an outside party for leave to intervene, but adjudicated the petitioners' rights asserted in the petitions, as if upon demurrer thereto, we are pointed to the language used: "Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene."

It is urged that the Circuit Court declined to treat the subject as of one of discretion, and elected to determine the legal rights of the petitioners, so as to preclude them from resorting thereafter to some other tribunal, and that, therefore, its judgment was a final one and properly reviewable on appeal.

Opinion of the Court.

We cannot accept this view of the meaning and effect of the order in question. What was sought in the petitions was leave to intervene in a pending and undetermined cause, and that right alone was determined. The very terms used by the court, that the facts stated were "not sufficient to show that the petitioners, or either of them, have a legal right to intervene," shows that what was considered was the right to intervene. That right refused, the petitioners were left free to assert such other rights as they might possess in any other tribunal. That this was the view of Judge Sanborn himself is seen in the following language of his opinion:

"Whatever the petitioner's right or interest may be, it is nothing more than a contingent, speculative future possibility. It is contingent, because it is conditioned upon the construction of a railroad. It is speculative, because it depends for its existence upon the question whether or not capitalists shall see sufficient profit in the construction of such a railroad to induce them to put in the necessary money for that purpose. It is future, because it has not yet come into existence, and it is possible because it may come into existence. Courts of equity are not accustomed, perhaps they have not the power, to adjudicate upon possible rights which are not in being and which are merely susceptible of coming into being at some unlimited time in the future."

The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:

"When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. . . . It is doubtless true that cases may arise where the denial of a third party to intervene therein would be

a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character. The petitioners were under no obligation to intervene in the litigation against the Union Pacific Railway Company to preserve their alleged right to form a junction with the road of that company when they should have completed their own road to a suitable junction point. The question which they sought to litigate in the pending litigation, could, we think, with more propriety and with less difficulty, have been litigated by an independent bill after they had completed, or were about completing, their line to a suitable junction point. Prior to that time the questions which they sought to raise by means of the intervening petitions were speculative questions, which the lower court, as we think, very properly, refused to consider or determine."

In *Connor* v. *Peugh*, 18 How. 394, it was said by Mr. Justice Grier, giving the opinion of the court:

"On the 5th of June, 1855, the tenant in possession came into court for the first time, and moved to set aside the judgment and execution issued thereon, and to be allowed to defend the suit for reasons set forth in her affidavit. The court refused to grant this motion, 'whereupon the said Mary Ann Connor prayed an appeal.'

"The tenant in possession having neglected to appear and have herself made defendant and confess lease, entry and ouster the judgment was properly entered against the casual ejector. No one but a party to the suit can bring a writ of error. The tenant having neglected to have herself made such, cannot have a writ of error to the judgment against the casual ejector. The motion made afterwards to have the judgment set aside and for

leave to intervene was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is the subject of a bill of exceptions or a writ of error."

In *Ex parte Cutting*, 94 U. S. 14, it was held that an appeal does not lie from an order of the court below, denying a motion in a pending suit, to permit a person to intervene and become a party thereto. *Guion* v. *Liverpool, London, &c., Ins. Co.*, 109 U. S. 173, is to the same effect.

Whether the contention of the petitioners that, under the legislation of Congress, they and railroad companies similarly situated had a right to connect with the road of the Union Pacific Railway Company, or shall have such a right with respect to that road in the hands of purchasers under the decree of foreclosure, at such places and upon such just and equitable terms as the President of the United States may prescribe, were not questions that, under the pleadings and evidence, were before the Circuit Court for its determination; and as its action, in denying the petitions to intervene, was an exercise of purely discretionary power, and not final in its character as respects such alleged right to connect, we think the Circuit Court of Appeals was right in holding that the appeals could not be entertained by that court, and its decree, dismissing the same, is accordingly

Affirmed.

MR. JUSTICE MCKENNA took no part in the decision of the cases.

SARANAC LAND AND TIMBER COMPANY *v.* COMPTROLLER OF NEW YORK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 94. Argued December 21, 22, 1899. — Decided April 9, 1900.

Turner v. *New York*, 168 U. S. 90, is affirmed and followed to the point that "the statute of New York of 1885, c. 448, providing that deeds from the comptroller of the State of lands in the forest preserve, sold for nonpayment of taxes, shall, after having been recorded for two years, and in any action brought more than six months after the act takes effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, is a statute of limitations, and does not deprive the former owner of such lands of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States," and is held to be decisive.

This is an action of ejectment brought to recover a tract of 7500 acres of forest land, known as the northwest quarter of township 24, Great Tract One, Macomb's Purchase, situated in Franklin County, in the Northern District of the State of New York.

The plaintiff deraigned title by various mesne conveyances from one Daniel McCormick, who became the grantee of the State of New York in 1798. The defendant claims through deeds executed to the State of New York in pursuance of sales for taxes.

The defendant also set up as a defence a six months' statute of limitations contained in chapter 448 of a law enacted in 1885 —certain statutes against champerty—the illegal organization of the plaintiff in error, and a former adjudication made on an application to cancel one of the tax sales under which the State claimed title.

The first sale upon which the title of the State is based was made in 1877 for unpaid taxes of 1866 to 1877, inclusive. A certificate was issued dated October 18, 1877, showing a sale to the State of the whole of the northwest quarter for the sum of $2756.40, and subsequently a deed in the usual form, and dated

June 9, 1881, which was recorded in Franklin County clerk's office June 8, 1882.

The subsequent sales were made respectively in 1881 for the unpaid taxes of 1871 to 1876; in 1885 for those of 1877 to 1879; in 1890 for those of 1881 to 1885. At all of the sales except the first one the property was treated as already state property, and struck off to the State without giving opportunity for bids. Certificates and deeds were duly issued to the State in pursuance of the sale of 1881 and 1885 in due form, and duly recorded in the clerk's office of the proper county. A certificate alone was issued in pursuance of the sale of 1890.

The taxes for the years 1866 and 1867 were assessed against the whole quarter as one parcel. In the years 1868, 1869 and 1870 the whole quarter was not assessed, and so much of it as was assessed was placed upon the rolls in two parcels, and described as follows:

"Township 24, Great Tract One, Macomb's Purchase; N.W. $\frac{1}{4}$, excepting 1000 acres, lying in N.W. corner; also 1215 acres which is water, leaving 5285 acres.

"Macomb's Purchase, Great Tract One, township 24, 1000 acres, lying in the northwest corner of northwest quarter."

There was evidence tending to show that on the tract in controversy there were bodies of water, but no part of them was within the parcel of 1000 acres laid out in a square form in the northwest corner.

In December, 1894, the defendant caused a notice to be published once a week for three successive weeks in a newspaper published in Franklin County, of which the following is a copy:

"To whom it may concern:

"Notice is hereby given that the following is the list of wild, vacant forest lands located in the county of Franklin to which the State holds title, and that from and after three weeks from the 22d day of December, 1894, possession thereof will be deemed to be in the comptroller of this State, pursuant to the provisions of section 13 of chapter 711, Laws of 1893.

"William J. Morgan,
"Deputy Comptroller."

Statement of the Case.

The list attached to this notice contained the land in question.

When the testimony in the case was closed the counsel for each of the respective parties, with the approval of the court, admitted that there was no question of fact in the case to be submitted to the jury; that the issues depended upon the construction that the court should give to the law; and thereupon the jury was discharged, and a written stipulation waiving a jury trial was signed by the attorneys of record for the respective parties and filed with the clerk.

The plaintiff requested the court to rule on certain propositions of law which were based on the assumption of the sale of the tract in one parcel for the aggregate unpaid taxes for several years, and claiming the following as jurisdictional defects in the sale and not cured or validated by chapter 448 of the Laws of 1885, or chapter 711 of the Laws of 1893: The sale of the whole tract for taxes which were assessed against separate and distinct parcels of it; such sale when during one or more of the years a part of the tract was not assessed; such sale when some of the taxes were assessed against the whole tract and others against a part only; insufficiency of the description to identify and distinguish the parcel sold; that at the sale of 1881 the comptroller treated the property as that of the State, and struck it off to the State without giving opportunity for other bids; and that chapter 448 of the Laws of 1885 was unconstitutional and void, and repugnant to the Fourteenth Amendment of the Constitution of the United States.

These propositions of law the court refused to affirm, and the court's action is assigned as error.

It is also urged that it was error to admit in evidence over the objection of the plaintiff the deed from the State made on the sale of 1881 conveying to the State two parcels of land in the northwest quarter of township 24 by the following description:

"Macomb's Purchase, Great Tract One, township 24, northwest quarter, 5285 acres, more or less, being all that remains of the said northwest quarter after excepting therefrom 1000 acres in the northwest corner thereof, and 1215 acres covered by water; 1000 acres in the northwest corner of the northwest quarter."

Also in receiving in evidence the certificate of sale as sued on the sale of 1890, because it was not in evidence of a legal title.

The assignments of error may, as is said in the brief of plaintiff in error, be reduced in a general way to two—

"First. Is chapter 448 of the Laws of New York of 1885 a valid and constitutional law when set up by the State in its own favor?

"Second. Were the defects shown to exist in the tax sales or either of them of such nature as to be beyond the reach of that law if valid, accepting the construction which has been put upon it by the New York court?"

The act referred to is inserted in the margin.[1] The Circuit Court found in favor of the State, basing its decision upon the constitutionality of chapter 448, following *Turner* v. *New York*, 168 U. S. 90, and holding also the law to be curative of the defects urged against the validity of the tax sales. 83 Fed. Rep. 436. The complaint was filed January 25, 1895. The plaintiff sued out this writ of error.

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[1] Laws 1885, chapter 448.

An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled, "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

SEC. 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled, "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws

Mr. Frank E. Smith for plaintiff in error. *Mr. Thomas F. Conway* was on his brief.

Mr. Theodore E. Hancock for defendant in error. *Mr. John C. Davies* was on the brief.

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

If chapter 448 is constitutional, its limitation attached some years before this action was commenced. It was held constitutional by this court in *Turner* v. *New York*, 168 U. S. 90. The contention now is, however, that our conclusion depended upon reasoning not applicable to the case at bar. It is said that to the validity of a statute of limitations a remedy precedent to and during the period of limitation must exist, and that a remedy did exist we assumed was decided by the state court as a state question, and that on a writ of error to its judgment we were bound by the ruling, and for that reason affirmed the judgment. But the pending case being on error to a United

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directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

Sec. 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

States court, we not only may, but must, exercise an independent judgment—decide for ourselves, not follow the state court, whether a remedy existed.

But was the conclusion in the *Turner case* as dependent as contended? The question is best answered by the case itself.

The action was brought in the state court, and was replevin for logs cut upon wild forest lands. The State claimed title through sales for delinquent taxes and deeds executed in pursuance of them. The defendant attacked the deeds, alleging the invalidity of the taxes for 1867 and 1870, and offered evidence to show that the oath of the assessors to the assessment roll of 1867 was taken on August 10, instead of on the third Tuesday of August; and that the assessors omitted to meet on the third Tuesday to review the assessment for that year.

The State objected to the evidence as immaterial because the comptroller's deed was made conclusive evidence of those matters by the statute of the State of 1885, c. 448—the statute now in controversy. To the objection it was replied that the statute infringed the first section of the Fourteenth Amendment to the Constitution of the United States. The State's objection, however, was sustained, and judgment was directed and entered for the State, which was affirmed by the Court of Appeals, 145 N. Y. 451.

Mr. Justice Gray delivered the opinion of this court. He stated the law of 1885 establishing a forest preserve and the creation of a forest commission and its duties, and that at the date of the passage of the statute the time for redemption from tax sales was two years. He then stated the enactment and provisions of the law whose constitutionality was attacked, the time of the tax sales, the time for redemption and its expiration, the period the comptroller's deeds were on record and the time that they became conclusive, and said:

"The statute, according to its principal intent and effect, and as construed by the Court of Appeals of the State, was a statute of limitations. *People* v. *Turner*, 117 N. Y. 227; *Same* v. *Same*, 145 N. Y. 451. It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into con-

sideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628, 632, 633; *In re Brown*, 135 U. S. 701, 705–707.

"The statute now in question relates to lands sold and conveyed to the State for non-payment of taxes; it applies to those cases only in which the conveyance has been of record for two years in the office where all conveyances of lands within the county are recorded, and it does not bar any action begun within six months after its passage. Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the State in the opinion that the limitation of six months, as applied to a case of this kind, is not repugnant to any provision of the Constitution of the United States.

"It was argued in behalf of the plaintiff in error that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the Court of Appeals in the case at bar, and in the subsequent case of *People* v. *Roberts*, 151 N. Y. 540, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct application to the comptroller to cancel the sale or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local constitution and laws."

The decision establishes the following propositions:

1. That statutes of limitations are within the constitutional power of the legislature of a State to enact.

2. That the limitation of six months was not unreasonable.

3. That the statute took away no remedy which the landowner had before its passage.

4. That the state court held he had a remedy, although there was difference of opinion whether it was by direct application to the comptroller to cancel the sales or by action of ejectment against the comptroller or forest commissioners.

5. That as the state courts decided he had a remedy it was not for us to determine what that remedy was under the local constitution and laws — that is, whether it was either a direct application to the comptroller or by action of ejectment.

What, then, did this court assume, that it did not decide or ought now to decide? Counsel for plaintiff in error say that —

"The *Turner case* established the sufficiency of the time allowed by the law now in question, but it treated the existence of a court competent to try the disputed rights and of a person liable to be sued for that purpose as questions of state law, and foreclosed by the judgment of the state court. These things ought now to be decided and not assumed."

The case, however, as we have seen, was not so limited. It decided more than that the time allowed by the statute was reasonable and sufficient. It also decided that the statute took away no remedy the landowner had before its passage, and that the law of the State gave him a remedy. What it precisely was — which of the three enumerated ones it was — was not decided. Not, however, because of the assumption of anything, but because it was not demanded. And why? The question presented was the constitutionality of the statute. That depended upon the existence of a remedy in the landowner during the period of its limitation, and whether a remedy existed what better evidence or authority could there be than the decisions of the courts interpreting the laws of the State? To accept them as such was not to assume anything without deciding it. It was to ascertain a necessary element of decision, and then exercising decision. This was our duty then and it is our duty now, and the fact that the case comes for review from the Circuit Court of the United States neither enforces nor justifies different considerations. If a precedent or coincident remedy is neces-

sary to the constitutional validity of a statute of limitations, the existence of such remedy is necessary to be decided, and it depends upon the same considerations, and must be upon the same examination, no matter in what court it may be presented or may come.

The reasoning of the *Turner case* was therefore complete, and we think it is decisive against the contention of the plaintiff in error. The sufficiency of the remedies enumerated was not contested. It is not contested now. The existence of remedies is denied, but to the reasoning which attempts to support the denial we reply by repeating what we said in the *Turner case* — that as the New York Court of Appeals has uniformly held that the landowner had a remedy, "it is not for us to determine what that remedy was under the local constitution and laws."

The defects which plaintiff in error claims to have been in the assessments and to have been jurisdictional are stated as follows:

"1. The sale of the whole tract of land in question for the aggregate unpaid taxes of several years when, during one or more of those years, a part of the tract sold was not assessed or taxed at all.

"2. The sale as one tract of two or more parcels separately assessed.

"3. The assessment of taxes by a description so uncertain as not to identify the parcel of land taxed.

"4. Treating the land on the sale as already the property of the State, and denying opportunity for competitive bidding."

The first two are treated by counsel as similar and dependent upon the same grounds of objection. The specification of those grounds is that at the sale of 1877 the whole quarter, containing 7500 acres, was sold as one parcel for the aggregate unpaid taxes of 1866–1870 inclusive, amounting with interest and costs to $2756.40, but that it was not assessed as a whole except for the years 1866 and 1867; that for the years 1868, 1869 and 1870 it was assessed in two parcels; (1) the northwest quarter of township 24, "excepting 1000 acres lying in the northwest corner; also 1315 acres which is water;" and (2) "1000 acres lying in the northwest corner of the northwest quarter." And that

1215 acres was not assessed at all for those years. The plaintiff in error, however, does not show that it was in any way injured by the manner of selling. Its counsel supposes a possible severalty of ownership of the different parcels, and claims a cause of action from an injury which might have resulted to some one else. "We take it to be settled law," counsel say, "that the constitutionality of a statute is to be tested not so much by what *is done* as what *may be done* under it. . . . The present record is silent as to the actual ownership of the different parcels of the quarter in question during the years 1866–1870, but plainly they might have been the subject of separate ownership." And counsel proceeds to show how a separate owner, if he had existed, would have been embarrassed in his right of redemption by the necessity of paying some other person's taxes besides his own, and of which he had not been notified during the pendency of the tax proceedings.

We are not concerned with what might have been, but only with what was. The plaintiff in error now sues as owner of the whole tract, and if there was a several ownership of it, or of parts of it, such ownership should have been shown if anything can be claimed from it. We may not suppose it from this record. It is manifest that the manner of sale could do no injury to the owner of the whole tract. Its separation in parcels on the assessment roll would be artificial and mere description. It would not affect its value, would not require the owner to pay some one's else taxes, would not make him pay more than was justly due from him either before a sale or after a sale if he then desired to exercise the right of redemption.

But even if we should suppose a several ownership of the lands at the time of the assessment or sale, we do not think that the defects in the latter were jurisdictional, and certainly of all other defects the law of 1885 is not curative only—it is one of limitation. It matters not, therefore, what the rights of any predecessor of the plaintiff might have been if seasonably asserted. They were not seasonably asserted, and they are, therefore, now precluded.

The law is like any other statute of limitations. It is not

affected by what the rights of plaintiff in error were. Whatever they were their remedy is gone, and the title and possession of the State, whatever may have been the defects in the proceedings of which they are the consummation, cannot now be disturbed. This was the ruling in *Marsh* v. *Ne-Ha-Sa-Ne Park Association*, 25 App. Div. 34, where the cases were reviewed, and we think correctly interpreted.

In *People* v. *Turner*, 117 N. Y. 227, the remedies of the landowner before and after a sale were considered, and the law defined as one of limitation. The court said: "Considered as an act of limitation, the only question in relation thereto is whether such limitation is just and gives the claimant a reasonable opportunity to enforce his rights. (See authorities, *supra.*) Under all the circumstances of the case it cannot, we think, be said, as a question of law, that the time afforded is unreasonable. Considered as establishing a rule of evidence, the only question for examination is whether property is necessarily taken without due process of law."

That case seems to have been qualified somewhat by *Joslyn* v. *Rockwell*, 128 N. Y. 334, where it was decided that the law was not conclusive against jurisdictional defects. But *People* v. *Turner* was reaffirmed in 145 N. Y 451. If the cases are in conflict the latter must prevail, but assuming their reconciliation to be in the character of the defects passed on, they are equally authoritative against plaintiff in error.

In *Joslyn* v. *Rockwell* two defects were said to be jurisdictional: The payment of taxes and the occupation of the lands. Of the latter it was said: "The act of 1885 (chap. 448) is one, by its title, relating 'to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes.' It is provided that occupied lands are not the lands of non-residents. 1 Rev. Stat. 389, § 3. And where lands of a non-resident of a county are occupied by a resident of the town an assessment to the owner in the 'non-resident' part of the roll is illegal, and the lands should be assessed to the resident occupant. *People* v. *Wemple, Comptroller*, 117 N. Y. 77. If the lands were occupied the act of 1885 would not apply." In the case at bar there is no such fact to preclude the application of the law.

In the case of *Meigs* v. *Roberts, Comptroller*, recently decided by the Court of Appeals of New York, *Joslyn* v. *Rockwell*, has been explained and limited, and *People* v. *Turner* again affirmed.

The action was ejectment, and the plaintiff Meigs traced his title by a chain of conveyances from an original grant by the State in 1798. The defendant justified his possession under deeds to the State in pursuance of sales for taxes. One of them was assailed on account of an alleged defect in the notice of redemption published by the comptroller. The defendant pleaded that the action was not brought within the time prescribed by the provision of chapter 448 of the Laws of 1885 and subsequent laws. The trial court dismissed the complaint on the ground that the land was in the occupation of the State, and suit could not be maintained against it without its consent. An appeal having been taken, the Appellate Division reversed the judgment and granted a new trial, holding that the action could be maintained, but also holding that the notice of redemption of the tax sale of 1881 was fatally defective, and that the deed made in pursuance of the sale did not pass title, and that the defect was not cured by the provisions of chapter 148, (subsequently reënacted in part in 1891 and 1893,) which makes the conveyance of the comptroller upon tax sales, after the two years from its record in the county in which the lands are situated, conclusive evidence of the regularity of the proceedings in which conveyance was made.

The case was taken to the Court of Appeals, which reversed the Appellate Division.

The court said:

"We do not find it necessary to pass upon many of the questions which have been elaborately argued before us, or even the one upon which the decision of the trial court proceeded. We are of opinion that the lapse of time between the record of the conveyance of 1881 and the commencement of this action barred the right to the plaintiff to maintain it, even assuming the other questions in the case should be resolved in his favor. The learned Appellate Division held that the failure to publish a proper redemption notice was jurisdictional as to the subsequent conveyance of 1884, and, hence, not cured by chapter 448 of the laws of 1885, and cited *Ensign* v. *Barse*, 107 N. Y. 329, and *Joslyn*

v. *Rockwell*, 128 N. Y. 334, as authorities for that proposition. We think the learned court took too narrow a view of the statute of 1885. This statute, though in some aspects a curative law, is primarily and essentially much more; it is a statute of limitation. It was distinctly held to be such in two decisions of this court, *People* v. *Turner*, 117 N. Y. 227; *Same* v. *Same*, 145 N. Y. 459, and by the Supreme Court of the United States, *Turner* v. *New York*, 168 U. S. 90. A curative act in the ordinary sense of that term is a retrospective law, acting on past cases and existing rights. The power of the legislature to enact such laws is therefore confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings, or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. Cooley's Constitutional Limitations, p. 454. A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Foster* v. *Foster*, 129 Mass. 559. But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right. *Terry* v. *Andrews*, 95 U. S. 628; *Turner* v. *New York*, *supra*. *Ensign* v. *Barse*, *supra*, was strictly a case of a retrospective statute, for no period of time was given within which any party affected could assert his rights. The same is true of *Cromwell* v. *McLain*, 123 N. Y. 474. In *Joslyn* v. *Rockwell*, *supra*, as well as in the two cases of *People* v. *Turner*, all of which arose under the statute of 1885, there is to be found a discussion of defects which it was claimed were jurisdictional, and not cured by that act. Such discussion, however, is not to be construed as authority for the proposition that jurisdictional defects in legal proceedings which are beyond the scope of retrospective legislation will equally take a claim out of the bar of a statute of limitations. The existence of such defects was necessarily considered in the authorities cited, because the statute of 1885 in terms exempted from its operation cases where

the taxes had been paid, or where there was no legal right to assess the land on which they were laid. There is no exception, however, as to defects in notice of redemption or in their publication; on the contrary, it is expressly provided that the comptroller's deed, after the lapse of the requisite time, shall be conclusive evidence that 'all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and regularly given.'"

These considerations dispose also of the other objections to the assessment and sale. If further comment be needed as to the insufficiency of the description, it may be brief. It is based on the possibility of there having been more or less land than 1215 acres covered by water. But whether there were depends upon a question of fact, and what the court found we are not informed by the record. Not insisting on that, however, the evidence of the plaintiff tended to show that the area covered was 1035 acres; the evidence of the defendant tended to show that the area was 1284 acres. Even if the court found the latter, the difference between it and the assessment did not make the description insufficient. A description of land for the purposes of taxation is sufficient if it affords the means of identification and does not positively mislead the owner. Cooley on Taxation, 407; *Keely* v. *Sanders*, 99 U. S. 443.

The assessment was not of the land covered by water. That was an exception from a larger tract, and an error of a few acres in a part so completely defined by its character surely did not so impair the identity of the larger tract as to hide it from the search or knowledge of its owner, whether he was anxious or indifferent about his taxes.

The same comment can be made of the "1000 acres lying in the northwest corner of the northwest quarter" of the tract, whether we regard it as a parcel or an exception from another parcel. *Jackson* v. *Vickory*, 1 Wend. 407; *Dolan* v. *Trelevan*, 31 Wisconsin, 147; *Bowers* v. *Chambers*, 53 Mississippi, 259; *Doe ex dem. Hooper* v. *Clayton*, 81 Alabama, 391.

The other assignments of error it is not necessary to specifically notice nor the defences of champerty and the alleged illegal organization of the plaintiff in error.

Judgment affirmed.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* GARDNER.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 160. Submitted March 5, 1900. — Decided April 9, 1900.

There is no substantial difference between the Federal question in this case raised in the Supreme Court of Minnesota, and that raised in it here.

The act of Minnesota of March 2, 1881, c. 113, authorizing the consolidation of several railroad companies created a new corporation, upon which it conferred the franchises, exemptions and immunities of the constituent companies; but that did not include an exemption of stockholders in the old companies from the payment of corporate debts, or their liability to pay them.

In a State having a constitutional provision imposing liability on stockholders, if the legislature intended those of a new corporation created by it should be exempt, it would express the intention directly, and not commit it to disputable inference from provisions which apply by name to the corporation.

On the merits, this case presents the question of the liability of the individual plaintiffs in error upon a judgment which was recovered by one Revilo F. Parshall against the Minneapolis and St. Paul Railway Company, and assigned to the defendant in error.

A motion, however, is made to dismiss, on the ground that this court has no jurisdiction.

The Minnesota Western Railway was incorporated by the Territory of Minnesota, by an act of its legislature, approved March 3, 1853. The usual powers of a corporation were conferred, and the company was authorized to construct a railroad from and to certain points in the Territory.

Power was reserved to alter or amend the act. There was no provision fixing the liability of stockholders. The act was several times amended changing the route of the road in some particulars.

In 1858 the State of Minnesota was admitted into the Union, and its constitution contained the following provision: "Each

stockholder in any corporation shall be liable to the amount of stock held or owned by him." Art. 10, sec. 3.

It was amended in 1872 so as to except the stockholders of corporations organized for carrying on any kind of manufacturing or mechanical business.

On February 4, 1870, the provision of the act of 1853, reserving the right to alter or amend the act was repealed.

After the passage of the act of 1870 the company changed its name to the Minneapolis and St. Louis Railway Company.

No steps were taken towards construction or acquiring any line of railroad until 1869. The actual construction was commenced during the fall of 1870, since which time the said company or the consolidated company, hereafter mentioned, has operated and maintained a line of railway in the State.

By an act approved March 2, 1881, in addition to other powers conferred, the Minneapolis and St. Louis Railway Company, and any other railway companies in the construction of whose lines it has aided, or whose lines were at the time held under lease by it, were authorized to consolidate. The act provided for the manner of consolidation, the name of the new corporation which might be "the name of either corporation party thereto or any other name"—the transfer of the properties of the old corporations, the retirement of their stock and the issue of new, and defined the purposes and powers of the new corporation. It is inserted in the margin.[1]

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[1] Chapter 113, Special Laws 1881, p. 651.

An act to amend an act entitled An act to amend an act entitled An act to incorporate the Minnesota Western Railroad Company, approved March third (3d,) one thousand eight hundred and fifty-three, (1853,) and the acts amendatory thereof, approved February fourth, one thousand eight hundred and seventy (1870).

Be it enacted by the Legislature of the State of Minnesota: SECTION 1. That the act entitled An act to amend an act entitled An act to incorporate the Minnesota Western Railroad Company, approved March third (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870), be amended by adding thereto the following sections, to wit:

SECTION EIGHT. The Minneapolis and St. Louis Railway Company, formerly known as the Minnesota Western Railroad Company, in addition

The consolidation was made as provided in the act by agreement between the Minneapolis Railway Company, the Minne-

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to the powers already conferred upon it by the laws of the Territory of Minnesota and of the State of Minnesota, is hereby authorized to make or acquire, from time to time, any extension of the lines of railway now owned and operated by it, or of those hereafter constructed and operated by it according to law, into the States of Iowa, Missouri, Kansas, Nebraska and Wisconsin, and into the Territory of Dakota, or into one or more of the same. *Provided*, That authority shall exist or be given in or by the States or Territory into which its lines are so extended, to make or acquire and maintain such extensions.

SECTION NINE (9). The said Minneapolis and St. Louis Railway Company shall have power to acquire, from time to time, by lease or purchase, or exchange of stock or otherwise, any other railroad or railroads, whether within or without this State, whose lines connect with its own lines as they now exist or as they shall be extended, either directly or by means of intervening lines. Such acquisition shall be made upon such terms as shall be agreed upon by a contract in writing between the respective corporations. But the same shall not be consummated until first approved by two-thirds in amount of the stockholders of each such corporation, either given at a regular or called meeting of such stockholders, or by a consent expressed in writing. In either case a copy of such contract, together with the evidence of such consent of the stockholders, shall be filed in the office of the secretary of State.

SECTION TEN (10). It shall and may be lawful for the said Minneapolis and St. Louis Railway Company to merge and consolidate its capital, franchises and property with the capital stock, franchises and property of any other railroad company or companies organized under the laws of this State or under the laws of any other State or Territory of the United States, in the construction of whose lines the said Minneapolis and St. Louis Railway Company shall have aided, or whose lines of railway are or shall, at the time of such consolidation, be held under lease by the said Minneapolis and St. Louis Railway Company; *Provided*, That the lines of railway of the companies or corporations so consolidating shall form a continuous line of railway with each other, or by means of any intervening railway, bridge or ferry. But no such consolidation shall be made by the said company with any other railroad corporation, or the lessees, purchaser or manager of any railroad corporation owning or controlling a parallel or competing line.

Such consolidations shall be made under the conditions, provisions and restrictions and with the powers hereinafter mentioned and contained, that is to say:

First (1st). The directors of the company proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, which agreement shall prescribe the terms and conditions thereof, and the mode of carrying the

apolis and Duluth Railroad Company, the Minnesota and Iowa Railroad Company, and the Fort Dodge and Fort Ridgely

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same into effect; the name of the new corporation, which may be the name of either corporation party thereto, or any other name; the number, names and places of residence of the directors and other officers thereof, who shall be the directors and officers thereof for the first (1st) year. The amount of the capital stock of the new company, which shall not exceed the amount of twenty million (20,000,000) dollars, the number of shares into which such capital stock is to be divided (which stock may be divided into classes, with such preferences in respect to any of the classes as may be agreed upon), the amount or par value of each share; the manner of converting or exchanging the capital stock of each of the said companies so consolidating into or for that of the new corporation and the terms of such conversion, the manner of compensating stockholders in each of the old corporations who decline to convert their stock into the stock of the new corporation; and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of such companies or railroads.

Second (2d). Such agreement of the directors shall not be deemed to be the agreement of the said old corporations until after it has been submitted to the stockholders of each of the said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty (30) days, specifying the time and place of such meeting and the object thereof, to be addressed to each of such stockholders when their place of residence is known, and deposited in the post office, and published at least three (3) successive weeks in one newspaper in each of the cities, counties or towns in which the said corporations have their principal office or business, and is sanctioned by such stockholders by a vote of at least two-thirds in amount of the stockholders present at such meeting, either in person or by proxy, each share of the capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders, separately, it shall be deemed the agreement of the said old corporations.

Third (3d). If the holder of any stock in either of the corporations existing under the laws of this State and so consolidated at the time of making such consolidation, shall be dissatisfied with the same, the consolidated company shall pay to such dissatisfied stockholder or stockholders the full actual value of his or their stock immediately prior to such consolidation, which value shall be assessed and fixed by three disinterested commissioners, appointed for that purpose by the Supreme Court of this State, upon the application of either party, made upon twenty (20) days' notice, but the said company shall not be compelled to pay for the stocks of such dissatisfied stockholder or stockholders unless he or they shall give written notice of such dissatisfaction to the president, secretary or treasurer of the company whose stock shall be held by him or them, within three (3) months after

Railroad Company, and articles of incorporation were duly filed in pursuance of the act.

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such consolidation shall have been consented to by the requisite number of stockholders.

SECTION ELEVEN (11). Upon the approval of such agreement and act of consolidation as hereinbefore provided, and upon the filing of the same or a copy thereof, in the office of the secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall possess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the State.

SECTION TWELVE (12). Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of said corporations, as well as all the stock, subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to, and vested in such new corporation without further act or deed, and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations parties to the said agreement and act, and the title to all real estate, taken by deed or otherwise under the laws of this State, vested in either of said corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

SECTION THIRTEEN (13). The rights of all creditors of and all the holders of liens upon the property of either of said corporations parties to said agreement and act, shall remain and be preserved unimpaired, and shall be assumed and borne by the new corporation, and the respective corporations shall be deemed to continue in existence so far as necessary to preserve the same, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been originally incurred or contracted by it. No suit or action or other proceeding now pending before any court or tribunal in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the existing corporation to final judgment, or

The consolidated company thereafter entered upon and until the 2d of November, 1894, enjoyed the franchises, rights, property and earnings of the constituent corporations.

The Minneapolis and Duluth Railroad Company was a Minnesota corporation, and the Fort Dodge and Fort Ridgely Railroad Company and the Minnesota and Iowa Southern Railroad Company were Iowa corporations; and the laws of the State of Iowa authorized the incorporators of railroad companies to exempt themselves from personal liability for the corporate debts, by embodying in the articles of incorporation an article or provision declaring the exemption. This was done.

On and prior to June 28, 1888, the Minneapolis and St. Louis Railway Company executed three mortgages, one of which was to the Central Trust Company of New York, dated June 1, 1881, to secure outstanding bonds of the aggregate par value of $1,382,000, together with interest thereon, at the rate of six per cent. per annum.

This mortgage was duly foreclosed, and the railroad properties, rights and franchises covered by it duly sold, and the title confirmed by final decree to the assignee of the purchaser.

The defendant in error was a judgment creditor of the Consolidated Company, being assignee of a judgment recovered by

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such new corporation may be, by order of the court, on motion, substituted as a party; suits may be brought and maintained against such new corporation for all causes of action in the same manner as against other railroad corporations in this State.

SECTION FOURTEEN (14). All the provisions of the general laws of this State, in regard to railroad corporations, shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this State. *Provided*, that, nevertheless, the privileges, franchises, exemptions, immunities, hitherto granted to the Minneapolis and St. Louis Railway Company shall continue to and be vested in such new corporation with the same effect as if originally granted thereto, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided.

SECTION TWO. This act shall take effect and be in force from and after its passage.

Approved this second day of March, A. D. 1881.

R. F. Parshall, in the Circuit Court of the United States for the District of Minnesota, for personal injuries received by him from the railway company.

The individual plaintiffs in error were shareholders of that company, and each acquired his stock between November, 1884, and the date of the commencement of this suit, but was not a shareholder of either of the companies which formed the Consolidated Company.

The answer of the individual defendants denied liability under the constitution and laws of the State of Minnesota, alleged the incorporation of the Minneapolis and St. Louis Railway Company prior to the adoption of the constitution and statutes, and that it was incorporated in the year 1853, under and pursuant to the provisions of chapter 66 of the Special Laws enacted by the legislature of the Territory of Minnesota, under and by the name of the Minnesota Western Railroad Company, which name was subsequently changed to the Minneapolis and St. Louis Railway Company, substantially as set forth in the first division of the complaint; that the liability of the stockholders of said Minnesota and St. Louis Railway Company was fixed by said act of incorporation, and not otherwise; and that the constitutional provision and laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf.

The trial court rendered judgment for the defendant in error, which was affirmed by the Supreme Court of the State, 73 Minnesota, 517, and this writ of error was sued out.

On the appeal to the Supreme Court of the State it was assigned as error, among others, that the trial court erred in holding that the state constitution if applied to the defendant railway company did not violate section 10, article 1, of the Constitution of the United States in that the provisions of section 3, article 10, impaired the obligation of the charter contract contained in chapter 66, Laws of 1853, Territory of Minnesota. Also in holding that the constitutional provision of the State, if applied to defendant in error, is not in violation of the Fourteenth Amendment of the Constitution of the United States, in that the State by and through the provisions of section 3, article 10, as-

Counsel for Parties.

sumed to impair and destroy rights theretofore vested in the defendants (plaintiffs in error).

Also in holding that the defendant railway company was not created until the passage of the act of 1881, that the legislature intended by the act to create or did in fact create a new corporation, or intended to or did abridge or modify the rights, privileges or immunities theretofore possessed by the Minneapolis and St. Louis Railway Company; or if a new corporate entity was created that it did not possess such rights, privileges and immunities, including the exemption from double liability upon its stock created by the act of 1853, and also possessed by the other constituent corporations of the consolidation.

The assignments of error in this court claim that the Supreme Court of the State held, and erred in holding, the constitutional provision imposing liability on stockholders valid against plaintiffs in error, and not to be in violation of the contract created by the act of 1853, the benefits of which act were vested, continued and perpetuated in the plaintiffs in error by the act of 1881, and not to be in violation of that provision of the Constitution of the United States, which prohibits any State from impairing the obligations of a contract, and not in violation of the Fourteenth Amendment of the Constitution of the United States, in that it assumes to impair and destroy rights vested by the act of 1853 and the act of 1881.

It is also claimed that the court held, and erred in holding, that the constitution of the State if enforced against plaintiffs in error was not in violation of section 10, article 1, of the Constitution of the United States, and did not impair the obligations of the contract between the State and plaintiffs in error, embodied in the act of 1881.

Also that the consolidation of the several railroad corporations pursuant to the act of 1881 created a new corporation.

Mr. William Strauss for plaintiffs in error. *Mr. Albert E. Clarke*, *Mr. W. W. Dudley* and *Mr. L. T. Michener* were on his brief.

Mr. F. W. M. Cutcheon for defendant in error.

Opinion of the Court.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

To sustain the motion to dismiss for want of jurisdiction, the defendant in error contends that the Federal question raised here was not that raised in the court below, and therefore cannot be entertained, and that besides there was a question not Federal decided by the court sufficient to support its judgment.

(1.) No right under the Constitution of the United States was claimed in the answer. But the protection of section 10, article 1, and the Fourteenth Amendment of that instrument, was invoked in the assignment of errors on appeal to the Supreme Court and urged upon its consideration. It is true they claimed the law of 1853 as the contract and not explicitly that of 1881. But they also claimed that the act of 1881 did not create a new corporation, and whether it did or not, that the act continued the immunity from liability for the corporate debts to the stock and stockholders of the consolidated corporation. We think this makes substantial identity between the Federal question in the Supreme Court of the State and in this court.

(2.) But it is said the state court did not decide the Federal question, but decided that the act of 1881 created a new corporation, which became subject to the constitutional provision imposing liability upon stockholders for corporate debts, and that the court rested its judgment on that construction. The court said: "Whatever may be the liability of the several (constituent) corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." And again: "Other questions have been raised and discussed by the respective counsel, but a decision upon them by this court in this action is entirely unnecessary, and we express no opinion thereon." This was in effect to deny the existence of the contract claimed by plaintiffs in error. But it is the duty of this court to decide for itself the fact of contract and its impairment, and the motion to dismiss must, therefore, be denied.

The territorial act of 1853 by which the Minnesota Western Railroad was incorporated is claimed primarily to be the contract which is impaired. It gave immunity to the stockholders of that company from liability for the corporate debts, or rather did not impose such liability. It is claimed that the constitution of the State of 1858 violated this contract. It imposes liability upon each shareholder of any corporation to the amount of stock held or owned by him. It is self-executing. *Willis* v. *Mabon*, 48 Minnesota, 140.

The act of 1881 is also claimed as a contract which became binding on the State by the acceptance of its provisions by the several railroad companies, and is impaired by the application of the constitution of the State.

If the Minnesota Western Railroad or its stockholders, or any of the other railroad companies or their stockholders, were parties to this suit, the questions presented would be simpler. But neither of the companies is party to the suit nor are the stockholders parties. Their rights are asserted to be transferred to the plaintiffs in error by virtue of the act of 1881.

The argument is that prior to the adoption of the state constitution the stockholders of the original corporation created by the act of 1853 were exempt from personal liability for corporate indebtedness; that prior to consolidation, under the act of 1881, the stockholders of the constituent companies were also exempt. It is hence contended that it is immaterial whether the Minneapolis Railroad Company is the original of that name chartered by the act of 1853, or a new corporation created by the consolidation. If it is identical, it is argued, with the original company its stockholders are exempt, because its charter contract is older than the constitution of the State. If it is a new company its stockholders are nevertheless exempt, because it is the settled law in Minnesota that its legislature may transmit *existing* franchises, immunities and exemptions vested in one corporation to a *new corporation*, although it could not grant new franchises of the same class to such corporation. And that the legislature has exercised this power and specifically vested in the consolidated company, *first*, all the franchises, privileges and immunities of each of the constituent companies,

and, *second*, the particular privileges, exemptions and immunities granted to the Minnesota Western Railroad Company.

We think that there is no doubt whatever that the act of 1881 created a new corporation. It is so designated, not only expressly but by distinction from the old corporations. The original Minneapolis and St. Louis Railway Company was given power (section 9) to acquire by lease or purchase other railroad lines or consolidate with certain other railroads. (Section 10.) It chose the latter, and the conditions of the consolidation are prescribed. The consolidation is to be accomplished by an agreement of the directors of the companies proposing to consolidate, and the agreement is to provide the terms and mode of carrying the same into effect, the name of "the *new* corporation, which may be the name of either corporation party thereto, or any other name," the number, names and residences of the directors and other officers, the amount of capital stock and the number of shares into which it is to be divided, and the classes and par value, the manner of converting the stock of the consolidating companies into that of the *new* corporation, and the manner of compensating the stockholders of the *old* corporations who declined to convert their stock into the stock of the *new* corporation, and many other details.

Section 11 is as follows:

"Upon the approval of such agreement and act of consolidation, as hereinbefore provided, and upon the filing of the same, or a copy thereof, in the office of the secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall possess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the State."

There can be no doubt, therefore, that a new corporation

was created with new stockholders, and the case is brought in close similarity to *Shields* v. *Ohio*, 95 U. S. 319. In that case as in this there was a consolidation of railroad companies, and it was held a new corporation was formed. In that case as in this one of the companies claimed a special right under its charter (the right to charge such tolls as it might deem "reasonable,") and its transmission to the new corporation by the provision of the act authorizing consolidation, which declared: "And such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations by the several acts incorporating the same, or relating thereto respectively, and shall be subject to all the duties imposed by such acts, so far as the same may be consistent with the provisions of this act."

The claim was rejected. Mr. Justice Swayne, speaking for the court, said:

"The legislature had provided for the consolidation. In each case before it took place the original companies existed, and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporation subsisted. All the old and the new could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view.

"There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter. *Railroad Company* v. *Harris*, 12 Wall. 65. It was, therefore, indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation—no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. The language was

brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases."

In the case at bar, however, the grant to the new corporation is claimed to be not only of the franchises of the constituent companies, but of their "exemptions"—not only of the franchises of the original Minnesota and St. Louis Railway Company, but of its "exemptions and immunities." But what franchises, exemptions and immunities? The designation is definite —those of "each of said corporations," those "hitherto granted to the Minneapolis and St. Louis Railway Company"—not those of or those granted to the stockholders of either company. And the distinction must be observed—the distinction between a corporation and its stockholders. It is made in many cases. This court has recognized it for the purposes of taxation. To judge of the intention of the legislature, whether it is in accordance with or against the policy and provisions of the constitution of the State, the distinction ought to be recognized. The exemption of stockholders from the payment of corporate debts or their liability to pay them, (individual liability,) is the concern of the stockholders and the corporate creditors.

We do not mean to say that such an exemption may not be secured by the charter of a corporation and protected to its stockholders by the Constitution of the United States from impairment by subsequent state legislation. But we do mean to say that in a State having a constitutional provision imposing liability on stockholders, if the legislature intended that those of a new corporation created by it should be exempt it would express the intention directly, and not commit it to disputable inference from provisions which apply by name to the corporation.

The question is as to the intention of the legislature, and in ascertaining that intention it must be remembered that the act of 1853 did not grant immunity to the stockholders of the Minnesota Western Railroad from liability. The immunity resulted because liability was not imposed, and this legal right of

the stockholders of that corporation, we do not think, can be said to have been transmitted to the stockholders of the new corporation created by the act of 1881 by the grant to it of the "immunities heretofore granted to the Minneapolis and St. Louis Railway Company."

Besides, the grant of power to the new corporation had adequate purpose. As was said in *Shields* v. *Ohio*, *supra*, powers and faculties were necessary to be bestowed upon the new organization, and this could be done directly, as it was to a great extent, or by reference, and would be supposed to be done in subordination to constitutional restrictions. Nor does the provision of section 14, which makes the new corporation subject to the general laws of the State, except as to the privileges, franchises, exemptions and immunities hitherto granted to the Minnesota and St. Louis Railway Company, conflict with the supposition. That provision had its explanation in the previous laws applying to that company. After its incorporation in 1853 the Minnesota Western did nothing, and nothing was done in pursuance of the purpose of its incorporation until after the act of 1870, authorizing a change of its name to the Minnesota and St. Louis Railway Company. That act gave it new powers, authorized the creation and issuance of different classes of stock, and provided a means of taxation, and exempted it from all other taxation. But it is not necessary to extend the discussion farther.

We have not deemed it necessary to consider the effect of the constitutional provision as an amendment to the act of 1853, or the power of the legislature to pass the act of 1881 if it could be construed as contended for by plaintiffs in error. We construe it differently, and determine against their contention. In other words, we hold that the legislature did not intend by the act of 1881 to give immunity to the stockholders of the new corporation from the liability imposed by the constitution of the State.

Judgment affirmed.

CAFFREY *v.* OKLAHOMA TERRITORY.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 182. Argued March 13, 14, 1900.—Decided April 9, 1900.

The plaintiff in error was county clerk of Oklahoma County, Oklahoma Territory. The territorial board of equalization increased the valuation of property in the county, assessed for taxation, twenty-four per cent, and officially notified him of their action. He refused to act upon the notice, and a writ of mandamus was issued from the supreme court of the Territory, to compel him to do so. He declined to obey the writ, was cited for contempt, was adjudged guilty, and was committed to prison until he should comply. There was no evidence, and nothing tending to show that he had any pecuniary interest in the increase. The case being brought here by writ of error and on appeal: *Held*, that as there was nothing to show that the plaintiff in error and appellant was interested in the increase to the extent of five thousand dollars, therefore, under the statute of March 3, 1885, c. 355, 23 Stat. 443, this court had no jurisdiction.

THE case stated in the opinion.

Mr. John S. Flannery and *Mr. James R. Keaton* for plaintiff in error and appellant. *Mr. Francis J. Kearful* was on their brief.

Mr. Frederick C. Bryan for defendant in error and appellee. *Mr. Harper S. Cunningham* and *Mr. Charles Dick* were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of mandamus brought by the Territory of Oklahoma on the relation of Harper S. Cunningham, attorney general of the Territory, against Richard F. Caffrey, county clerk of Oklahoma County.

The territorial board of equalization, composed of the Gov-

ernor, the territorial secretary and the auditor, increased the assessed valuation of the property of Oklahoma County twenty-four per cent, and notified the plaintiff in error and appellant thereof, as county clerk.

He refused to comply with the order, and this action was brought in the supreme court of the Territory to compel compliance therewith.

An alternative writ of mandamus was issued, to which he made return and answer. In his return and answer he admitted that he had been duly notified of the order of the board of equalization, and had failed to comply with it, and alleged that it was illegal and void, because, first, the board had no jurisdiction or legal authority to make it; second, that it was not made for the purpose of equalizing the valuation of property, but for other and illegal purposes; that it was made arbitrarily, and without evidence other than the assessment roll; that the valuation of the property of Oklahoma County, as shown by the assessment roll, was fair and as high as the property of Pottawatomie County, which the board took as the basis of equalization; that a large part of the property whose valuation was increased consisted of money.

He also alleged that he was prevented from complying by an order of the board of county commissioners.

He prayed "that he be granted a hearing in behalf of the taxpayers of his county in order that he may establish by competent proof the allegations of fact hereinbefore set out, and that upon a final hearing he have judgment against the relator for his costs in this behalf laid out and expended."

A motion was made by relator to quash the answer and return, which was granted, and on the 21st of September, 1898, judgment was entered granting a peremptory writ of mandamus against the plaintiff in error and appellant.

Declining to obey the writ, he was cited for contempt, and such proceedings were had on the citation that he was adjudged guilty, and committed to jail until he should comply with the writ, and the case was then brought here.

A motion is made to dismiss for want of jurisdiction in this court, which we think should be granted.

It is provided by the act of March 3, 1885, that no appeal or writ of error shall hereafter be allowed from any judgment or decree in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, or unless the validity of a patent or a copyright is involved, or a treaty or statute of, or an authority exercised under, the United States, is drawn in question. 23 Stat. 443.

There is controversy between the parties, respectively supported by affidavits, whether the effect of the order of the territorial board of equalization is to increase the taxes of the county $3179.27, or $28,751.87. But whether it is one sum or the other, the plaintiff in error and appellant does not show that he has any interest in it. He does not allege that he is a property owner or a taxpayer of the county. He alleges he is its county clerk, and bases his resistance to the order of the territorial board of equalization upon his duty as such officer.

However this may have justified his action, of which we express no opinion, or may have caused a dispute which the territorial court had jurisdiction to pass on and determine, it does not give us jurisdiction. To justify our taking jurisdiction there must be a controversy which involves pecuniary value exceeding $5000 to the party appealing. In other words, there must be a dispute which involves a sum in excess of $5000, and such sum, or property of its value, must be taken from him by the judgment which he seeks to review.

Colvin v. *Jackson*, 158 U. S. 456, is in point. It was a suit in equity to restrain the issue of bonds by the city of Jacksonville, and was brought in the Circuit Court of the United States for the Northern District of Florida. Colvin alleged that he was a taxpayer, and that the amount of taxes that would be assessed upon the property owned by him in the city would exceed two thousand dollars. This was denied, and the complainant then contended that not the amount of his taxes but the amount of the bonds proposed to be issued, (one million dollars) was the amount in controversy. The Circuit Court dismissed the case for want of jurisdiction, and this court sustained the ruling, saying by the Chief Justice that "the amount of the interest of

complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect to that, we have no doubt the ruling of the Circuit Court was correct." *El Paso Water Co.*, v. *El Paso*, 152 U. S. 157, was cited and approved.

In the pending action the plaintiff in error and appellant has neither gained nor lost any money or money's worth by the judgment of the supreme court of the Territory.

The writ of error and appeal are

Dismissed.

Richard F. Caffrey *v.* Oklahoma, No. 274.

Error to and appeal from the supreme court of the Territory of Oklahoma. Counsel in this cause having stipulated that the same judgment shall be entered in this case as in No. 182, the writ of error and appeal are

Dismissed.

BLACK *v.* JACKSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 107. Submitted February 1, 1900.— Decided March 26, 1900.

By a petition filed by Jackson against Black in the District Court of Kay County, Oklahoma Territory, the following case was made: On the 17th day of November, 1896, Jackson made a homestead entry upon the S.W. $\frac{1}{4}$ sec. 26, T. 28, R. 2 east, I. M. The same land prior to that date had been embraced in a homestead entry made by Black, but that entry was finally held for cancellation by the Secretary of the Interior, who by a decision rendered October 26, 1896, denied Black's motion for review and allowed Jackson to make entry of the land. After that decision Black continued to remain in possession of the west eighty acres of the tract, and refused and neglected to vacate the same, although requested to do so. He had upon the land a barbed wire fence and other improvements attached to the realty. It was alleged that he was financially unable to respond in damages for any injury he was causing the plaintiff by trespassing upon the land, and that plaintiff had no adequate remedy other than by this suit. The relief asked was a mandatory injunction to restrain the defendant from entering upon or in any manner trespassing

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upon or using any portion of the land embraced in the plaintiff's homestead entry; from removing or in any manner destroying the fence or other improvements on the lands that were permanently attached thereto; and for such other and further relief as the court deemed just and right. The defendant filed an answer, but it was withdrawn that he might file a demurrer. He demurred to the application for an injunction upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action and the court was without jurisdiction of the subject-matter of the action. The demurrer was overruled, and the defendant after excepting to that ruling filed an amended answer. In this answer he set up title in himself as a homestead settler, set forth the manner in which it had been acquired, alleged that the value of the property was $6000, and prayed judgment. In his original answer he claimed that he was entitled to a trial by jury, and in his amended answer he insisted that his rights could not be disposed of in equity before the court only. The trial court sustained a demurrer to the answer, and the defendant declining to further answer, judgment was rendered for the plaintiff as prayed for in the application for a mandatory injunction, the defendant being enjoined from in any manner entering upon the premises in question or exercising any control or possession over them except for the purpose of removing therefrom his improvements, including buildings and fences for which thirty days' time was given, which judgment was sustained by the Supreme Court of the Territory. *Held:*

(1) That this court has jurisdiction as the amount involved is beyond the jurisdictional amount.

(2) That the case made out by the plaintiff was not such as to entitle him to a mandatory injunction, and that the court of original jurisdiction erred in determining the cause without a jury.

By a petition filed by Jackson against Black in the District Court of Kay County, Oklahoma Territory, the following case was made:

On the 17th day of November, 1896, Jackson made a homestead entry upon the S.W. $\frac{1}{4}$ sec. 26, T. 28, R. 2 east, I. M. The same land prior to that date had been embraced in a homestead entry made by Black, but that entry was finally held for cancellation by the Secretary of the Interior, who by a decision rendered October 26, 1896, denied Black's motion for review and allowed Jackson to make entry of the land. After that decision Black continued to remain in possession of the west eighty acres of the tract, and refused and neglected to vacate the same, although requested to do so. He had upon the land a barbed wire fence and other improvements attached

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to the realty. It was alleged that he was financially unable to respond in damages for any injury he was causing the plaintiff by trespassing upon the land, and that plaintiff had no adequate remedy other than by this suit.

The relief asked was a mandatory injunction to restrain the defendant from entering upon or in any manner trespassing upon or using any portion of the land embraced in the plaintiff's homestead entry; from removing or in any manner destroying the fence or other improvements on the lands that were permanently attached thereto; and for such other and further relief as the court deemed just and right.

The defendant filed an answer, but it was withdrawn that he might file a demurrer. He demurred to the application for an injunction upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action and the court was without jurisdiction of the subject-matter of the action. The demurrer was overruled, and the defendant after excepting to that ruling filed an amended answer.

In the first paragraph of the amended answer the defendant alleged that he had resided upon the land in question since about the 16th day of September, 1893, claiming a right thereto under the laws of the United States; that at the time of settlement thereon and thereafter he was a legally qualified homestead claimant; that he had done no act of any kind or nature since the 16th day of September, 1893, disqualifying him to hold the land as a homestead; that on the 31st day of October, 1895, he filed a homestead entry upon the land, and afterwards the plaintiff filed a contest against such entry upon the ground that his settlement as a homestead claimant was prior to that of defendant and prior to the filing of defendant's homestead entry; that it had been finally determined and decided by the Land Department of the United States that defendant's settlement upon and entry of the land was subsequent to that of plaintiff, and defendant's homestead entry was cancelled and plaintiff allowed to make homestead entry upon the sole ground that plaintiff's settlement was prior to the settlement and homestead entry of the defendant; that during the time he had resided upon the land, defendant had

placed thereon lasting and valuable improvements, worth about $500, claiming to be entitled to the benefit of the laws of the United States and of the Territory of Oklahoma relating to occupying claimants; and that his rights "cannot be disposed of in a case in equity before the court only."

The second paragraph of the answer alleged that on the 16th day of September, 1893, and thereafter the defendant was a native-born citizen of the United States, in all respects qualified to make homestead entry upon the land in question; that on that day, after 12 o'clock, central standard time, (a signal for starting from the outer line of the Cherokee outlet being given,) he ran from the 100-foot strip along the south line of the State of Kansas that had been measured, staked off, and reserved as a gathering place for those desiring to "run" for lands in the Cherokee outlet, and made all possible haste to secure and settle upon a suitable piece of land as a homestead; that there were many thousands of people along that line, more than could secure homes in the outlet, allowing one hundred and sixty acres to each qualified entryman; that the plaintiff, not observing the law, the proclamation of the President, and the rules governing the opening of those lands to settlement, and for the purpose of gaining an unlawful and undue advantage of defendant and others seeking a home in the outlet, crossed the 100-foot reserve around the outer boundary of the lands prior to 12 o'clock noon, central standard time, September 16, 1893, and unlawfully and wrongfully entered upon the lands embraced within the outlet and within the 100-foot reservation known as the Chilocco reservation, and at the hour of noon, when the outlet was opened to settlement, started on the race for a home from the south line of that reservation and about three and one half miles south of the 100-foot reservation along the northern boundary of the Cherokee outlet, and thereby wrongfully, unlawfully, and unjustly started in the race for a home three and one half miles in advance of the defendant and others who observed the law of Congress opening the lands to settlement and the President's proclamation pursuant thereto; that plaintiff's prior settlement was wholly by reason of said advantage; that plaintiff filed in the United States land office at Perry, Oklahoma Territory, a contest

against defendant's homestead entry made upon the land described in the petition on the 31st day of October, 1893, and as grounds for the contest alleged and claimed that he, plaintiff, settled upon the land in question, claiming it as his homestead prior to the settlement and homestead entry of defendant; that upon the trial of such contest it was conclusively proven and admitted by plaintiff that he had started upon the race from the south line of the Chilocco reservation as stated; that upon such trial the register and receiver of the land office at Perry, Oklahoma Territory, found from the evidence that plaintiff had started upon the race from the point and in the manner mentioned, and also that his settlement upon and claim of the land was prior to that of defendant, and the qualification of the plaintiff to acquire a homestead on account of his having entered upon the land in violation of the act of Congress opening the same to settlement and the President's proclamation pursuant thereto was directly in issue between plaintiff and defendant in the contest case; but that the register and receiver, although finding from the evidence and admissions of plaintiff that he had so entered upon said land, misunderstood and wrongfully interpreted and misapplied the law in relation to the qualification of plaintiff to take and hold the land as a homestead, and expressly found as a matter of law that plaintiff was not disqualified as "a sooner" by reason of having entered upon the land in the manner aforesaid.

The answer also alleged that the defendant duly appealed from the decision of the register and receiver to the Commissioner of the General Land Office, presenting to that officer the same question with reference to the disqualification of plaintiff to acquire title to the land as a homestead, but that the Commissioner misapplied the law and wrongfully and unlawfully sustained the conclusion of the register and receiver in that regard; that the defendant then appealed to the Secretary of the Interior, to whom the same legal question was submitted, and the Secretary also misapplied the law in relation to the qualification of plaintiff and wrongfully and unlawfully sustained the findings of the Commissioner; that the defendant duly filed his motion for review in the case, in which the question as to the qualifica-

tion of plaintiff was presented, and urged a reconsideration and reversal, but the Secretary, still misunderstanding and misapplying the law, wrongfully and unlawfully refused a review, and wrongfully and contrary to law cancelled the homestead entry of defendant and permitted plaintiff to make homestead entry of the land, although plaintiff was at the time and still is wholly disqualified to acquire title to it based upon a prior settlement by reason of his having entered upon the Cherokee outlet in violation of law; that by reason of such disqualification the plaintiff could never acquire the title to the land, nor a greater estate therein than a trust estate for the sole benefit of the defendant; that defendant was lawfully entitled to reside upon the land as a homestead and acquire the title thereto by compliance with the laws of the United States and the rules of the Land Department; and that plaintiff, being disqualified to acquire title, should not be heard in this action to demand that defendant be ejected from the land and his home and improvements thereon.

The answer further alleged that if the defendant were ejected from the land and his home and improvements thereon the plaintiff would relinquish to the Government of the United States for a valuable consideration all his claim to and interest in the land, and the same would "be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein; that said land, with the improvements thereon by this defendant, could be transferred in the manner aforesaid for the sum of $6000; that he has been by temporary order of this court restrained from exercising the right of possession and control over all of said land, with the exception of about five acres occupied by his dwelling and improvements immediately surrounding the same, and that he is ready and willing to execute to the plaintiff a good and sufficient bond to compensate him for all loss of every kind or nature occasioned by defendant's occupancy and detention of said five acres and improvements, provided defendant is allowed to retain his possession thereof and so remain in position to assert his rights to all of said land as soon as he can possibly do so in accordance with law."

The defendant prayed: First. That the plaintiff be not allowed to further maintain his action for the possession of the land or any part thereof. Second. That in the event that prayer was not granted the plaintiff be denied the right to maintain his action to the extent of wholly ejecting the defendant from the five acres and his dwelling and improvements situated thereon until such time as the plaintiff acquired a patent to the land and the defendant was in a position to commence suit for the purpose of having plaintiff's title so acquired declared to be held in trust for him.

The trial court sustained a demurrer to the answer, and the defendant declining to further answer, judgment was rendered for the plaintiff as prayed for in the application for a mandatory injunction, the defendant being enjoined from in any manner entering upon the premises in question or exercising any control or possession over them except for the purpose of removing therefrom his improvements, including buildings and fences, for which thirty days' time was given.

This judgment was affirmed in the Supreme Court of the Territory. That court in its opinion held (using the words of the syllabus prepared by the court) that "where adverse claimants are residing upon a tract of land and each claiming the same as a homestead by virtue of priority of settlement, and the Land Department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary, when he has already resided upon the land a sufficient length of time, under the law, to enable him to make final proof for the land." 6 Okla. 751.

Mr. John W. Shartel and *Mr. S. H. Harris* for appellant.

Mr. Fred. Beall for appellee.

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

1. The final judgment of the Supreme Court of the Territory

can be reëxamined here if the value of the matter in dispute be sufficient to give this court jurisdiction. The defendant claimed to have acquired by his entry and settlement a vested interest in the entire land covered by his entry, and insisted that even if the plaintiff obtained a patent therefor the title would be held in trust for him. He proceeds in his defence upon the ground that after residing upon the land for the period designated in the statute he will be entitled under the law to a patent. It ought not to be assumed that he will put himself in such position that he cannot demand a patent. Although the naked legal title remains in the United States in trust for the person who may earn it, we think that in determining the value of the matter in dispute we should look at the value of the land, not simply at the value of the right of present possession. According to the weight of proof, the value of the land embraced by the homestead entry of Black is more than the sum required for our jurisdiction. 23 Stat. 443, c. 355; 26 Stat. 81, 86, c. 182, § 9. Besides, the demurrer admitted the averment in the answer to the effect that the land with the defendant's improvements thereon could be transferred in the manner stated in the answer for the sum of $6000. The motion to dismiss the appeal must therefore be overruled.

2. This case having been determined on demurrer to the answer, it must be taken as true that Black resided upon the land in dispute on and after September 16, 1893, claiming the right to do so in virtue of the laws of the United States and of a homestead entry made before the one made by Jackson. It appears that the Land Office recognized the prior right to be in Jackson. This action of the Land Office, Black contends, was erroneous in matter of law, and he has announced his purpose, in the event a patent is issued to Jackson, to institute appropriate judicial proceedings, the object of which will be to have it declared that the legal title is held in trust for him. He insists that although, in the absence of fraud, the courts will not go behind the facts found by the Land Department in any contest before it relating to the administration of the public lands, he is not concluded by the decision of that department upon questions of law.

If parties are injuriously affected by any action of the Land

Department based upon an erroneous view of the law, the courts have power in some form to protect their rights against such illegal action. In *Cornelius* v. *Kessel*, 128 U. S. 456, 461, this court said: "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision or correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." So in *Sanford* v. *Sanford*, 139 U. S. 642, 647, it was said that where the matters determined by the Land Office "are not properly before the department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected" — citing *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Baldwin* v. *Stark*, 107 U. S. 463, 465.

As to Jackson's right to possession, it is clear that although successful in his contest with Black before the Land Office, no patent could issue to him under the original homestead law until after the expiration of five years from the date of his entry, and not then except upon proof that he, or if he be dead his widow, or if she be dead her heirs or devisees, prove "by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, [required by § 2290 of the Revised Statutes,] and makes affidavit that no part of such land has been alienated, except as provided in § 2288, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." Rev. Stat. § 2291. But by the third section of the act of May 14, 1880, entitled "An act for the relief of settlers on public lands," 21 Stat. 140, c. 89, it was provided "that any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back *to the date of settlement*, the same as if he settled under the preëmption laws."

It thus appears that Jackson holds only an inchoate title to the land in dispute, and that he may so conduct himself before making final proof and securing final certificate as to forfeit his right to obtain a patent based upon the decision of the Land Office.

By the decree below the defendant is enjoined from entering upon the premises in question or exercising any further control or possession over them, except to remove his improvements within thirty days after the decree. In his original answer the defendant claimed that he was entitled to a trial by jury, and in his amended answer he insisted that his rights could not be disposed of in equity before the court only.

What circumstances under the laws of Oklahoma will justify the use of a mandatory injunction for the purpose of ousting a person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt by the decisions of the Supreme Court of that Territory. *Sproat* v. *Durland*, 2 Okla. 24; *Peckham* v. *Faught*, 2 Okla. 173; *Reaves* v. *Oliver*, 3 Okla. 62; *Woodruff* v. *Wallace*, 3 Okla. 355; *Procter* v. *Stuart*, 4 Okla. 679; *Barnes* v. *Newton*, 5 Okla. 428; *Laughlin* v. *Fariss*, 7 Okla. 1; *Glover* v. *Swartz*, 58 Pac. Rep. 943; *Brown* v. *Donnelly*, 59 Pac. Rep. 975. Some of the decisions seem to restrict the right to such an injunction to cases in which the defendant was a mere trespasser upon the particular land in dispute without color or pretense of claim or title, while others recognize the appropriateness of that remedy where a plaintiff seeks possession after succeeding in a contest before the Land Office with one who at the initiation of such contest was in peaceable possession and in good faith contending for his right to such possession.

We think that the decision in *Laughlin* v. *Fariss*, 7 Okla. 1, 5–7, 9, 11, should be accepted as a correct exposition of the law of the Territory. What was that case? One F. M. Fariss made a homestead entry on land and received a certificate of cash entry. The interest so acquired was conveyed by deed to W. D. Fariss. Before F. M. Fariss made his final proof, Laughlin filed against him a contest on the ground of prior settlement. That contest finally came before the Secretary of the Interior for review and was decided adversely to Laughlin. Subsequently, and before F. M. Fariss made his final proof, Laughlin filed another contest alleging that Fariss was disqualified to make a homestead entry by reason of having entered the Oklahoma country in violation of law. Fariss' assignee sued Laughlin, alleging that he was entitled to the sole and exclusive occupancy of the land, and asking that an injunction be awarded restraining Laughlin from cultivating or interfering with the land and removing him from the premises.

The questions presented to the Supreme Court of Oklahoma for decision in that case were: 1. Did the petition show that plaintiff had an equitable title to the tract of land in contro-

versy? 2. If so, was that title a sufficient basis for an action at law for the recovery of the possession of the land? 3. Should questions 1 and 2 be answered in the affirmative, then the inquiry was whether the petition contained a sufficient statement of facts to justify the relief sought and obtained?

The court answered the first question upon the authority of *Laughlin* v. *Farris*, 7 Okla. 1, 6, in which it was held that "when a homestead entryman has complied with all the requirements of the Federal statutes applicable to the disposal of the tract of land occupied by him, and has made his final proof, paid the amount of money required and received final certificate therefor, he has a complete equitable title to said land, with the naked legal title only remaining in the Government."

In answering the second question in the affirmative, the court referred to section 614 of the territorial Code of Civil Procedure which provides: "In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by section 127, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." Stats. Okla. (1893) 864, Title Procedure — Civil. Section 127 here referred to provides that "in any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it." The Supreme Court of the Territory said, 7 Okla. 6: "It would seem that the language of this section is too plain to need the support of authority to show that an equitable title or estate in land is a sufficient basis for an action in the nature of ejectment, but if such were necessary it can be found in abundance by consulting the decisions of the Supreme Court of the State from which the statute was taken" — citing *Simpson* v. *Boring*, 16 Kan. 248; *Kansas Pac. Ry. Co.* v. *McBratney*, 12 Kan. 9; *Duffey* v. *Rafferty*, 15 Kan. 9; *State* v. *Stringfellow*, 2 Kan. 263; *Atchison, Topeka &c. Railroad* v. *Pracht*, 1 Pac. Rep. 319. The court added: "It is also apparent that the allega-

tions contained in plaintiff's petition regarding his title and right of possession are amply sufficient to entitle him to maintain *an action of forcible detainer for the possession of said tract of land. Price* v. *Olds*, 9 Kan. 66; *Conaway* v. *Gore*, 27 Kan. 122."

The third question was answered in the negative, the court reaffirming the principle announced in *Richardson* v. *Penney*, 6 Okla. 328, in which it was said: "We still hold to the well, if not universally, established doctrine that, when a party has a plain and adequate remedy at law he cannot invoke the powers of a court of equity to issue its writ of injunction."

In the course of its opinion the court having stated that it was conceded that the action of forcible entry and detainer would lie in a case like the one then before it, said: "This remedy by injunction, both mandatory and prohibitive in character, may and does sometimes become a very far-reaching and oppressive, as well as a speedy and effective one, and should only be granted by courts of equity in cases where the applicants therefor bring themselves clearly within the well-defined and established rules authorizing the issuance of same; hence, such courts rarely deem it necessary or advisable to interfere in this manner, to aid a person endeavoring to recover the possession of real property" — citing High on Injunctions, 2d ed. §§ 354, 355 and 360, and *Lacassagne* v. *Chapuis*, 144 U. S. 119, 124. The rule, the court observed, was clearly and concisely stated by this court in *Lacassagne* v. *Chapuis*, in which it was said: "The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. . . . The plaintiff has a full, adequate and complete remedy at law, and the case is not one for the jurisdiction of a court of equity."

The Supreme Court of the Territory thus concluded its opin-

ion in *Laughlin* v. *Fariss:* "We hold that the action of injunction will not lie to adjust possessory rights to a tract of land after the equitable title thereto has passed from the Government of the United States and become vested in an individual, unless in a case which presents some recognized special ground therefor, which must be one other than that one party claims that he is the owner and entitled to the immediate possession thereof and that the other party unlawfully and without any right whatever holds and retains such possession. We therefore conclude that the facts, stated by the plaintiff below in his amended petition, are not sufficient to entitle him to the interference of a court of equity."

In the decision in *Laughlin* v. *Fariss* all the justices of the Supreme Court of the Territory concurred, including those who constituted the majority when the present case was decided. And we cannot find that that court has in any case withdrawn or qualified the ruling that an entryman, out of possession and having a decision by the Land Office in his favor, may proceed against his adversary in possession by an action of forcible detainer and thus obtain possession without resorting to the extraordinary remedies used by courts of equity. According to the decisions of that court, Black, as between himself and his successful adversary, was in possession without color of title. Now, by the statutes of the Territory, in the Article relating to forcible entry and detainer, if it be found that lands and tenements after a lawful entry "are held unlawfully," then the justice "shall cause the party complaining to have restitution thereof;" and it is provided that proceedings under that Article may be had in all cases "where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession." Stats. Okla. 1893, 919, 920, §§ 4805, 4806.

In the opinion in the present case the Supreme Court of the Territory said nothing about defendant's contention that he was entitled to a trial by jury. Speaking by the same justice who in the court below delivered the opinion in the present case, the Supreme Court of the Territory in *Barnes* v. *Newton*, 5 Okla. 428, 432, conceded that in a case between contesting entrymen

the one who obtained the decision of the Land Office might avail himself of the statutory provisions relating to forcible entry and detainer, but that such a remedy was not sufficiently efficacious, for the reason that "by delays and appeals a party in possession of a homestead could keep his adversary out of possession of the land for years." But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. *Robinson* v. *Campbell*, 3 Wheat. 212, 223; *Payne* v. *Hook*, 7 Wall. 425; *Van Norden* v. *Morton*, 99 U. S. 378; *Smyth* v. *Ames*, 169 U. S. 466, 516. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in "suits at common law" where the value in controversy exceeds twenty dollars. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States. *Webster* v. *Reid*, 11 How. 437, 460; *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 466; *Springville* v. *Thomas*, 166 U. S. 707. So that a court of a Territory authorized as Oklahoma was to pass laws not inconsistent with the Constitution of the United States, 26 Stat. 81, 84, c. 182, § 6, could not proceed in a "common law" action as if it were a suit in equity and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity. And this evidently is in accordance with the statutes of Oklahoma providing that while the court must try issues of law, unless referred in the mode prescribed, "issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived or a reference be ordered." Stat. Okla. 1893, 809, § 4156.

In the case before us no special grounds are disclosed that would authorize the court to issue a mandatory injunction and determine without a jury the issue as to the right of possession.

If it be said that the plaintiff's residence upon the land for a given time is necessary in order that he may earn a patent, the answer is that the defendant is not alleged to be in the actual possession of the entire land embraced by the plaintiff's entry. Nor does it appear that the plaintiff may not, without interference by the defendant, maintain a residence upon that part of the land which is not in the actual possession of the defendant and do all that may be requisite in order to earn a patent. We may also observe that it is not alleged that the defendant is doing any actual injury to the part of the land remaining in his possession. It does not appear that he has done anything except to continue in possession of that part. If Black prevents Jackson from taking possession of the 80 acres in question, he is entitled to bring his action of forcible detainer and to recover possession unless it appears that the Land Office erred, as matter of law, in deciding for him. It is not meant by this that an action of forcible detainer is the only remedy that can be adopted by the plaintiff.

As in Oklahoma the distinction between actions at law and suits in equity is abolished — each action being called a civil action, whatever the nature of the relief asked, Okla. Stat. 1893, 764, § 3882 — we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury in respect of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode.

3. One of the defenses made by Black is that the plaintiff entered upon the land in violation of the act of March 1, 1889, 24 Stat. 759, c. 317, and of the act of March 2, 1889, 25 Stat. 980, 1005, c. 412, as well as of the proclamation of the President of March 25, 1889, 26 Stat. 1544, 1546. The acts and proclamation referred to related to the lands obtained by the United States under the agreement with the Muscogee or Creek Nation of Indians in the Indian Territory. The contention of the defendant is that the plaintiff by his conduct disqualified himself from acquiring any interest in the tract of land here in dispute which was part of the lands obtained from the Muscogee or

Creek Indians, and consequently the Land Office erred as matter of law in its decision for the plaintiff. *Smith* v. *Townsend*, 148 U. S. 490; *Payne* v. *Robertson*, 169 U. S. 323; *Calhoun* v. *Violet*, 173 U. S. 60, 62. No opinion was expressed on this question by the Supreme Court of the Territory, and we need not now express an opinion. If the plaintiff should proceed against the defendant in some other mode than by injunction, the facts connected with his alleged unlawful entering upon the lands opened for settlement under the above acts and proclamation can all be proved, and any question arising out of them as to his disqualification to acquire any interest whatever in the land in dispute can then be determined.

We are of opinion that the case made out by the plaintiff was not such as to entitle him to a mandatory injunction, and that the court of original jurisdiction erred in determining the cause without a jury.

The decree of the Supreme Court of the Territory is therefore reversed, and the cause is remanded with directions to set aside that decree, and for such further proceedings as will be consistent with law and this opinion.

POTTS *v.* HOLLEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 143. Submitted February 1, 1900. — Decided March 26, 1900.

For the reasons stated in the opinion in *Black* v. *Jackson*, *ante*, 349, the court holds that the issue of fact involving the right of possession of the premises in dispute could not properly be determined without the aid of a jury, unless a jury was waived; and that the case made by the plaintiff was not such as to entitle him to a mandatory injunction.

This action was commenced by petition filed in the District Court for Kay County, Oklahoma Territory.

The plaintiff Hollen, the appellee here, alleged that on the

13th day of October, 1893, he made a homestead entry of the southeast quarter of section 32, township 28 north, of range 3 east, I. M., in Perry land district, Oklahoma Territory, which land office had jurisdiction over that tract, and the officers of which had authority to make and allow such entry; that there was filed in that office at Perry a certified affidavit of contest by defendant Potts; that under the allegations of that contest the case went to a hearing, after which a decision was rendered in favor of plaintiff and the contest case was dismissed, from which decision defendant appealed, but not within the time required by law, to the Commissioner of the General Land Office who affirmed the decision of the local land office; that the defendant filed an amended contest affidavit before the Commissioner, which was rejected and the motion for rehearing was denied; that the defendant appealed from the Commissioner's decision, and on the 9th day of June, 1896, the Secretary of the Interior passed upon the case and affirmed the action of the Commissioner; that all the proceedings before the Interior Department upon which the defendant was entitled to be heard with reference to such land contest had been had and the case was fully closed; that under and by virtue of his homestead entry the plaintiff was entitled to the exclusive use, benefit and possession of all the southeast quarter of section 32, township 28 north, range 3 east; that under claim of right, based upon the contest so dismissed, defendant entered upon said quarter section and entered into possession of a part thereof, erecting or causing to be erected a house and other improvements thereon, and still maintained possession of a portion of the section under the protest and against the wishes of plaintiff and without claim or color of title thereto; that defendant at the time had pending before the Department of the Interior no contest or claim or right or title to said tract or piece of land; that defendant was insolvent and unable to respond in damages to the plaintiff, and her possession of and improvements upon the tract prevented the plaintiff from properly cultivating and using that portion of the land in her possession; that defendant threatened, by retaining the possession of a portion of the tract, to involve the plaintiff in many vexatious suits, to his great and irreparable damage

and injury; that she had been in possession of a portion of the land since a short time after the opening of the Cherokee outlet; that the plaintiff had no adequate remedy at law; that the defendant had used, cultivated and controlled about 25 acres of the land to plaintiff's damage in the sum of one hundred and fifty dollars; and that the rents and profits of the land so used by the defendant would amount to about one hundred and fifty dollars.

The relief asked was that the defendant, her agents and employés, be restrained from interfering with the plaintiff's possession, use and occupancy of the land included in his homestead entry; that she be enjoined from cultivating, improving or occupying any part of the tract; and that she be permitted within a time to be fixed to remove therefrom any improvements made by her prior to the plaintiff's homestead entry, and vacate the land on the order of the court.

The defendant in her answer admitted that "defendant [plaintiff] has the homestead entry in said land and that defendant filed a contest against said entry," but denied each and every other material allegation of the petitioner. The defendant also alleged that "she filed a contest against the said entry of the said Hollen, charging and alleging in substance that plaintiff was disqualified to enter and hold lands by reason of having entered the Cherokee outlet prior to 12 o'clock noon of September 16, 1893, and run from the south side of the Chillocco reservation, which is three and one half miles south of the lines established in the President's proclamation; that said contest was rejected and defendant duly appealed, and while said cause was still pending defendant filed her amended affidavit of contest against said entry, a copy of which said contest is attached to plaintiff's petition, marked 'Exhibit C,' and hereby referred to and made a part of this answer. Defendant further alleges that within the time required by the rules of practice in the Land Department, to wit, July 22, 1896, she filed a motion for a review of the Secretary's decision of June 9, 1896, a copy of which said motion is hereto attached, marked 'Exhibit A,' and made a part hereof; and that said cause is

now and was pending at the commencement of this action in the Land Department of the United States."

The plaintiff filed a reply denying "each and every material allegation" in the defendant's answer.

To sustain the issues on his part the plaintiff introduced in evidence an official communication to the register and receiver at Perry, Oklahoma, from the Commissioner of the Land Office dated November 24, 1896, which showed that the defendant's motion for a review of the previous action taken in the contest case had been denied by the Land Department. That communication concluded: "The case is hereby closed, and you will advise said Potts that she may, if she elects, file a new contest against the entryman Hollen incorporating the charge set out in her amended affidavit in due time the action taken, transmitting therewith evidence of notice hereof and of the decision of the department." The plaintiff then testified in his own behalf, stating that he had the homestead entry on the land in dispute; that the defendant was residing on part of it, about 25 acres. The plaintiff having rested upon this proof, the defendant demurred to the evidence upon two grounds: 1. It did not sustain the allegations of the petition. 2. It did not show that the plaintiff had a cause of action. The demurrer was overruled, an exception to that action of the court being taken. The defendant stood upon the demurrer and introduced no evidence.

The trial court without a jury rendered judgment for the plaintiff, enjoining the defendant from interfering with his right to possess and control the land in question, "except that the defendant is hereby given the right to enter upon and harvest the fall wheat crop she has sown upon the land in dispute, and is to remove said wheat from said land within thirty days after the same is ripe and fit to cut;" and she was further enjoined and restrained "from removing or interfering [with] or injuring in any way any well of water that she may have placed upon said land, and all growing timber or trees that she may have placed upon said land, and any growing timber or trees that she may have planted."

The Supreme Court of the Territory affirmed the judgment

of the inferior court. The syllabus of its opinion, prepared by the court, is as follows: "Injunction—When properly granted. —A filed a homestead entry for a tract of Government land. B initiated a contest, alleging that A was disqualified from entering the land. The contest was by the Land Department decided in favor of A. During the pendency of such contest B filed an amended affidavit of contest, alleging a different ground of disqualification upon the part of A. Shortly after B first instituted the first contest, B in some manner became possessed of about 25 acres of the land, and held such possession until after the final decision upon the first contest. Held, that upon the authority of *Sproat* v. *Durland*, 2 Okl. 24, A was entitled to an injunction restraining B from interfering with the possession of A, and requiring him to remove from the land in dispute." 6 Okla. 696.

From the judgment of the Supreme Court of the Territory the defendant appealed to this court.

Mr. John W. Shartel and *Mr. S. H. Harris* for appellant.

Mr. Fred. Beall for appellee.

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

The motion to dismiss the present appeal is denied. The land in question is shown to be of greater value than five thousand dollars. In addition to the affidavits filed on the subject of value, the record contains an order made by the Supreme Court of the Territory on the application for appeal stating that more than the above amount was involved in the action. This order we assume was based upon proof as to value.

One of the assignments of error is that the Supreme Court of the Territory erred in holding that the trial court had jurisdiction of the subject of the action and the right to entertain the suit as a proceeding in equity and without a trial by jury.

For the reasons stated in the opinion in *Black* v. *Jackson*, just decided, we adjudge that the issue of fact involving the right of possession of the premises in dispute could not properly

be determined without the aid of a jury, unless a jury was waived. Without repeating what was said in that opinion, we also hold that the case made by the plaintiff was not such as to entitle him to a mandatory injunction.

The decree is reversed and cause remanded for such further proceedings as may be consistent with this opinion.

Reversed.

WESLEY *v.* EELLS.

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

No. 176. Argued and submitted March 9, 1900.—Decided April 9, 1900.

Specific performance of an executory contract is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case.

A court of equity will not compel specific performance if under all the circumstances it would be inequitable to do so.

It is a settled rule in equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation.

Speaking generally, a title is to be deemed doubtful where a court of coordinate jurisdiction has decided adversely to it or to the principles on which it rests.

THE case is stated in the opinion.

Mr. William H. Lyles for appellant.

Mr. Arthur St. J. Newberry for appellee.

Mr. William A. Barber as *amicus curiæ*, filed a brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States for the Northern District of Ohio by Wesley a citizen of New York against Eells a citizen of Ohio.

Opinion of the Court.

The case made by the bill was as follows: The State of South Carolina, being the owner in fee of certain real estate situated in the city of Columbia in that State — part of the property being known as Agricultural Hall — caused the same to be sold at public auction, Wesley becoming the purchaser.

By the terms of sale the purchaser was required to pay in cash one third of the price and to execute his bond and mortgage on the property to secure payment of the balance in two equal annual instalments with interest from the date of purchase, the obligor to have the option of paying the whole or any part of the sum so secured before the maturity thereof.

At the instance of Wesley the Commissioners of the Sinking Fund of South Carolina executed a deed in fee simple for the property to one J. W. Alexander who consented to act as trustee for the plaintiff, the deed however not containing any declaration of the trust. Thereupon Alexander executed to the Treasurer of the State his bond for the payment of the purchase price — the mortgagor being accorded the privilege of paying before maturity the whole or any part of the money secured.

The mortgage not having then been filed for record, and Wesley having furnished to Alexander a sufficient amount of what is known as South Carolina Revenue Bond Scrip, the latter tendered to the state Treasurer of South Carolina in such scrip the principal and interest of the above bond. That officer had authority to receipt for the sum due on the bond and mortgage. The tender was refused by the state Treasurer.

By the laws of South Carolina a tender in full of the amount due on a mortgage of real or personal property at any time when the mortgagor has the right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage, whether the amount be accepted or not and whether the mortgagor keeps himself in a position to make good the tender or not.

Notwithstanding the tender, the state Treasurer caused the above mortgage to be recorded in the proper office.

Subsequently, Alexander conveyed the premises in question to Wesley.

The bill contains a statement of the history of the above-mentioned revenue bond scrip and of the plaintiff's connection therewith. Reference was made to the act of the General Assembly of South Carolina approved the 15th day of September, 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," and to the act approved the 2d day of March, 1872, entitled "An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same," which provided for the issue of certificates of indebtedness styled revenue bond scrip, which should express that the sum mentioned therein was due by the State to bearer, and that the same would be received in payment of taxes and all other dues to the State except special taxes levied to pay interest on the public debt. By the fourth section of the above act of 1872 the faith and funds of the State were pledged for the ultimate redemption of the revenue bond scrip and county treasurers were required to receive the same in payment of all taxes levied by the State, except in payment of special taxes levied to pay interest on the public debt, and the state Treasurer and all other public officers were required to receive the same in payment of all dues to the State.

The plaintiff had received from the state Treasurer of South Carolina under the circumstances detailed in the bill (which need not be repeated) a large amount of revenue bond scrip. He stated that he was the owner and holder of the scrip received by him and charged in his bill that by the tender to the state Treasurer the Alexander mortgage had been extinguished by operation of law.

The revenue bond scrip referred to was in the following form:

$100. No. 21. $100.

Revenue Bond Scrip.

The State of [Palmetto Tree] South Carolina.

Columbia, S. C., *March* —, 1872.

Receivable as one hundred dollars in payment of all taxes

and dues to the State, except special tax levied to pay interest on public debt.

NILES G. PARKER, *State Treasurer.*

One hundred dollars. One hundred dollars.

Such being Wesley's relations to the mortgaged property he made a written contract with Eells whereby he agreed for the price of $20,000 to be paid in cash to convey to the latter in fee simple the premises in question, free from any valid lien or incumbrance whatever.

The plaintiff offered to deliver to Eells a deed for the premises in fee simple and demanded payment of the purchase price. But Eells refused to receive the deed or to pay the price, alleging that the scrip tendered by Alexander were not valid obligations of South Carolina and therefore did not constitute a legal tender of the amount due the State nor operate as an extinguishment of the mortgage.

The plaintiff brought into court and tendered a deed to Eells and offered to agree that the plaintiff might retain so much of the price for the property as would protect it against any taxes that had accrued upon it.

The relief asked was a decree that the defendant should accept the deed tendered to him and pay the purchase price of the property, less any sum to meet the taxes assessed upon it.

The defendant admitted in his answer that there were no liens or incumbrances upon the property except the mortgage described in the bill and such taxes as were due thereon to the State and to the city of Columbia. But he alleged that the statute authorizing revenue bond scrip to be received in payment of dues to the State had been repealed, and county auditors and county treasurers forbidden to collect any taxes for the redemption of such scrip; that the act under which the scrip was issued was in violation of the Constitution of the United States forbidding the States from emitting bills of credit and also in violation of the constitution of South Carolina, and such scrip was null and void.

The defendant stated in his answer that he had always been and was then willing to perform his contract, provided he re-

ceived a full and perfect title to the premises free from any valid lien and was protected in the quiet and peaceable possession thereof.

The plaintiff filed a general replication, and the cause was submitted on the pleadings and certain documentary evidence showing the history of the revenue bond scrip, the legislation of South Carolina, and certain decisions of the Supreme Court of that State.

The Circuit Court of the United States held that the bond scrip issued under the act of March 2, 1872, were bills of credit and void; that the tender of scrip by Alexander to the state Treasurer was therefore not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State; and that the Agricultural Hall property was still incumbered by the mortgage and plaintiff could not give defendant a clear title to it. The bill was dismissed at the plaintiff's cost.

In the memorandum of evidence used by stipulation of the parties reference was made to the case of *Tindal* v. *Wesley*, 167 U. S. 204, 221. But the decision there has no bearing upon the present case. That was an action by Wesley to recover the possession of the property here in dispute — the defendants being in possession only in their capacities as officers or agents of South Carolina, and insisting that the suit against them was, in legal effect, one against the State within the meaning of the Eleventh Amendment of the Constitution of the United States. "The settled doctrine of this court," it was said in that case, "wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf. . . . Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent." These extracts indicate the scope of the decision in *Tindal* v. *Wesley* and make it clear that that decision does not determine any question now presented.

Opinion of the Court.

The vital question in the present case is whether the plaintiff was entitled to a decree for specific performance. The plaintiff bases his right to such a decree upon the ground that Alexander's tender of revenue bond scrip to the Treasurer of South Carolina had the effect to extinguish the lien of the mortgage executed by him, and consequently that plaintiff's deed conveying the fee would give to Eells a good title. This view assumes that the revenue bond scrip tendered by Alexander to the state Treasurer was legally receivable in payment of the amount on the Alexander bond and mortgage. But as will be seen from an examination of the cases of *State ex rel. Shiver* v. *Comptroller General*, 4 S. C. 185, and *Auditor* v. *Treasurer*, 4 S. C. 311, the Supreme Court of South Carolina has held that the revenue bond scrip issued under the act of March 2, 1872, were bills of credit which the Constitution of the United States forbade the States to emit, and therefore were null and void. And in that view the court below concurred. What then will be the effect of a decree in the Circuit Court of the United States sitting in Ohio requiring the defendant to pay the amount he agreed to pay and to take the deed tendered him by the plaintiff? What would the defendant get under such a decree in consideration of the amount paid by him for the property? He would get a deed from Wesley for premises covered by a mortgage of record which the highest court of the State in which the property is situated will presumably hold not to have been discharged by the tender of revenue bond scrip. And we do not perceive that Eells could by any affirmative action on his part bring the question of the validity of that tender before any court in South Carolina for adjudication. He could not sue the State against its consent, and no suit except one to which the State was a party would effectively reach such a question and release the property from the incumbrance created by the Alexander mortgage. So that if compelled to take Wesley's deed Eells would be powerless to have his title made clear of record, unless the State brought suit to foreclose the mortgage and thereby enabled him in defence to relitigate the question already concluded in the courts of that State by judicial decision. It is thus manifest that a decree for specific performance would put upon him a title that

was not at all marketable and could not become such except by successful litigation.

In *Hennessy* v. *Woolworth*, 128 U. S. 438, 442, this court said: "Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case" — citing *Willard* v. *Tayloe*, 8 Wall. 557, 567; *Marble Co.* v. *Ripley*, 10 Wall. 339, 357; 1 Story's Eq. Jur. § 742; *Seymour* v. *Delancey*, 6 Johns. Ch. 222, 224. To the same effect are *McCabe* v. *Matthews*, 155 U. S. 550, 553; *Rust* v. *Conrad*, 47 Mich. 449, 454; *Petty* v. *Roberts*, 7 Bush, 410, 419; *Huntington* v. *Rogers*, 9 Ohio St. 511, 516. A court of equity will not compel specific performance if under all the circumstances it would be inequitable to do so. *Starnes* v. *Newsom*, 1 Tenn. Chy. Rep. 239, 244; *Parish* v. *Oldham*, 3 J. J. Mar. 544, 546; *Clowes* v. *Higginson*, 1 Ves. & Beames, 524, 527.

Again, it is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation. *Morgan's Heirs* v. *Morgan*, 2 Wheat. 290, 299, 301; *City of Tiffin* v. *Shawhan*, 43 Ohio St. 178, 183. And, speaking generally, a title is to be deemed doubtful where a court of coördinate jurisdiction has decided adversely to it or to the principles on which it rests. Fry on Specific Performance, 3d ed. § 870 and authorities there cited. One of the grounds upon which a decree for specific performance was denied in *Hepburn* v. *Auld*, 2 Cranch, 262, 278, was that it would impose upon the defendant the necessity of bringing a suit to perfect his title.

The principle is well illustrated in *Jeffries* v. *Jeffries*, 117 Mass. 184, 187, which was a suit for the specific performance of a written agreement for the purchase of certain real estate. One of the objections to the title was that it was incumbered by conditions that would interfere with the enjoyment of the property. The Supreme Judicial Court of Massachusetts there said: "Hence the propriety and the necessity of the rule in equity that a defendant, in proceedings for specific performance, shall

not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it. *Richmond* v. *Gray*, 3 Allen, 25; *Sturtevant* v. *Jaques*, 14 Allen, 523; *Hayes* v. *Harmony Grove Cemetery*, 108 Mass. 400. He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title." So in *Lowry* v. *Muldrow*, 8 Rich. Eq. 241, 247, the court said that on bills for specific performance of contracts concerning lands, "courts of equity do not force the purchasers to take anything but a good title, and do not compel them to buy lawsuits." Numerous other American cases announce the same rule.

The principle is also illustrated in many English cases. In *Parker* v. *Tootal*, 11 H. L. Cas. 143, 158, it was said to be an established rule of equity not to compel a purchaser to take a doubtful title. In *Rose* v. *Calland*, 5 Ves. 185, 187, which was a suit by devisees in trust to obtain the specific performance of an agreement entered into by the defendant for the purchase of an estate, certain reasons were given why the plaintiff could not make a sufficient title, one of which was that the Court of Exchequer, in *Nagle* v. *Edwards*, 3 Anstr. 702, had announced principles which, if followed, would prevent the defendant from obtaining such a title as he ought to have. The Lord Chancellor said: "If I was to send this case to the master, I should create a needless expense; for upon the case in the Court of Exchequer, *Nagle* v. *Edwards*, which I have looked into, my difficulty is this: Can I make a person take a title in the face of that decision? If I do, I decree him to enter into a lawsuit. . . . I desire to be understood as not entirely agreeing with the determination of the Court of Exchequer. But I should be in a strange situation in desiring a purchaser to take this title, because I think the point a pretty good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense." So in *Price* v.

Stange, 6 Madd. Chy. 159, 165, in which the Vice Chancellor said: "In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision." In *Pyrke* v. *Waddingham*, 10 Hare, 1, 8, it was held that the court will not compel a purchaser to take a title that "will expose him to litigation or hazard."

We are of opinion that the plaintiff's title is not such as a court of equity should compel the defendant to accept. He should not have been compelled to accept it even if the court below had been of opinion that the revenue bond scrip tendered by Alexander were not bills of credit.

Upon the grounds stated, and without expressing any opinion upon the question whether the revenue bond scrip referred to were or were not bills of credit within the meaning of the Constitution of the United States, the decree below is

Affirmed.

Ex parte BAEZ.

ORIGINAL.

No. . Submitted March 26, 1900. — Decided April 12, 1900.

It is well settled that this court will not proceed to adjudication where there is no subject-matter upon which the judgment of the court can operate: and although the application in this case has not reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which the petitioner complains would have terminated, the court feels constrained to decline to grant leave to file the petition for a writ of *habeas corpus* and *certiorari;* but, in arriving at this conclusion, it is not to be understood as intimating, in any degree, an opinion on the question of jurisdiction, or the other questions pressed on its attention.

On March 26 a motion was made for leave to file the following petition for the writ of *habeas corpus* and *certiorari:*

"Your petitioner, Ramon Baez, by Tulio Larrinaga, for him-

self and in his behalf, respectfully shows that he is a native-born inhabitant of the island of Puerto Rico, formerly a dependency of the Kingdom of Spain, but at the time of the occurrences hereinafter narrated belonging to and forming a part of the territority of the United States of America.

"Your petitioner was also formerly a subject of his Imperial Majesty the King of Spain, but since long prior to the occurrences herein complained of and ever since, to and including the present time, he has neither owed nor acknowledged allegiance to any other nation or sovereignty than that of the United States of America.

"Your petitioner represents unto this honorable court that he is wrongfully, improperly, unjustly and illegally imprisoned and restrained of his liberty at Humacoa, in and on said island of Puerto Rico, by one Samuel C. Bothwell, called and styled as and being the marshal of the United States provisional court for the department of Puerto Rico.

"By act of Congress approved April 25, 1898, it was declared that a state of war had existed and then existed between the United States of America and the Kingdom of Spain, and thereafter, in the course of the prosecution of such war, the military forces of the United States invaded and conquered the island of Puerto Rico and have ever since remained in possession and control thereof.

"December 10, 1898, a treaty of peace was signed at Paris, France, between the duly accredited representatives of the United States of America and Her Majesty the Queen Regent of Spain; and the same having been duly reported to the Senate of the United States, ratification thereof was advised by the Senate on February 6, 1899, and, having been ratified by the President of the United States on said date and subsequently by Her Majesty the Queen Regent of Spain, ratifications thereof were exchanged at Washington on the 11th day of April, 1899, and the treaty was proclaimed by the President of the United States on the same day.

"By said treaty it was provided, among other things, as follows:

"'ART. II. Spain cedes to the United States the island of Porto

Rico and other islands now under Spanish sovereignty in the West Indies, . . .'

"'ART. XI. All Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong.'

"Prior to the ratification of said treaty of peace and on or about the 12th day of August, 1898, a protocol or agreement between the United States and the Kingdom of Spain was signed at the city of Washington by the representatives of the two nations, under and by virtue of the terms of which a suspension of hostilities between said nations was declared by the President of the United States.

"By article IV of the said protocol it was agreed that Spain should evacuate Porto Rico and that commissioners should be appointed by the signatory powers for the purpose of arranging and carrying out the details of such evacuation.

"Thereafter an evacuation commission was appointed by the President of the United States, and a similar commission was appointed by the government of Spain, and the commissioners subsequently assembled in the city of San Juan, Porto Rico, and duly arranged the terms of such evacuation, which were accepted by the respective governments, and the evacuation and retirement of the Spanish forces from the island of Puerto Rico occurred on the 18th day of October, 1898.

"Thereupon, and on said date, Major General John R. Brooke, commanding the forces of the United States, in compliance with the orders of the President, assumed the government of the said island of Porto Rico, and by General Order No. 1, of said date, established the military 'Department of Puerto Rico.'

"Said order, among other things, contained the following:

"'The provincial and municipal laws, in so far as they affect the settlement of private rights of persons and property and provide for the punishment of crime, will be enforced unless they are incompatible with the changed conditions of Porto

Rico, in which event they may be suspended by the department commander.'

"Your petitioner further shows that after said 12th day of August, 1898, hostilities ceased to exist in the island of Porto Rico between the forces of the United States and of Spain, and that since the 11th day of April, 1899, war has ceased to exist between the nations, and also since the last-named date, if not prior thereto, there has been and is now a condition of peace existing throughout said island of Porto Rico, and there has been neither a state of war with any foreign power in the said island, nor has there been any internal or domestic rebellions, revolutions or dissensions, nor any failure to recognize the authority and sovereignty of the United States.

"Since the occupation of Porto Rico by the United States authorities the civil courts of that island have been in session exercising the same jurisdiction and in substantially the same form as during the Spanish occupation of the island, and such courts were exercising their ordinary civil and criminal jurisdiction during all of the times hereinafter mentioned.

"On the 27th day of June, 1899, by General Order No. 88, of Brigadier General George W. Davis, United States Army, then commanding the department of Porto Rico, and the supreme military authority in said island, there was established a 'United States Provisional Court for the Department of Porto Rico.'

"Said General Order 88, among other things, provides as follows:

"'SEC. II. The judicial power of the provisional court hereby established shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common law offences within the restrictions hereinafter specified.'

"'SEC. IV. The decisions of said courts shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules and records shall conform as nearly as practicable to those observed and kept in said Federal courts. . . .

"'SEC. V. The provisional court shall consist of three judges,

one of whom shall be known as the law judge, and the other two as associate judges, one United States district attorney, one marshal, one clerk, three deputy clerks, one stenographer and reporter, one interpreter, one bailiff and janitor, and one messenger. The law judge shall preside and shall determine and decide all technical questions of law. A majority vote of the bench shall determine all questions of fact. The jury system may be introduced or dispensed with in any particular case in the discretion of the court.

"'SEC. VI. The judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States.

"'SEC. VII. The district attorney shall be authorized to present to the court information against all parties for violations of United States statutes and regulations. He shall also in like manner present informations for violations of orders issued by the department commander relating to civil matters, which may be referred to him from these headquarters. . . .

"'SEC. VIII. In order to define more clearly certain branches of the criminal jurisdiction of the provisional court, it is hereby provided that it shall include and be exclusive in the following classes of cases:

"'1st. All offences punishable under the statutory laws of the United States, such as those indicated in paragraph I of this order.

"'2d. Offences committed by or against persons, foreigners or Americans, not residents of this department, but who may be traveling or temporarily sojourning therein, or against the property of non-residents.

"'3d. Offences against the person or property of persons belonging to the army or navy, or those committed by persons belonging to the army or navy, not properly triable by military or naval courts; but not including minor police offenses.

"'4th. Offences committed by or against foreigners or by or against citizens of another State, district or Territory of the United States, residing in this department.'

"'SEC. XI. If any party litigant shall feel aggrieved by the judgment or decree of said court, a stay of ninety days shall

be granted such party before the execution of such judgment or decree, upon the filing of a bond by him with sureties in an amount and with such conditions as the court may determine, for the purpose of allowing such party to make application to the Supreme Court of the United States for a writ of certiorari or other suitable process to review such judgment or decree. But if at the end of said ninety days such process has not been issued by the Supreme Court execution shall forthwith issue.'

"'SEC. XVI. The court shall adopt an appropriate seal which shall be procured by the treasurer of the island. The clerk of the court shall have the custody of the seal for use in attesting legal documents in the usual manner.

"'SEC. XVII. In accordance with the provisions of paragraph V of this order the following appointments are announced to take effect July 1st, 1899.'"

[Here followed the designation of a "law judge;" a "provisional United States Attorney;" two military officers as "associate judges;" and another as "clerk."]

"'Private Samuel C. Bothwell, troop D, 5th U. S. cavalry, is detailed on special duty as marshal of the U. S. provisional court.'

"By General Order 216 of said department, dated December 18, 1899, section XI of General Order 88, hereinbefore set forth, was amended so as to read as follows:

"'If any party litigant shall feel aggrieved by the judgment or decree of said court, a stay of ninety days shall be granted such party before the execution of such judgment or decree, upon the filing of a bond by him with sureties in an amount and with such conditions as the court may determine, for the purpose of allowing such party to make application to the Supreme Court of the United States for a writ of certiorari or other suitable process to review such judgment or decree.

"'For good cause, this court may extend the time of filing such application and record in the office of the clerk of the supreme or appellate court aforesaid.

"'The stay of execution granted by this court shall be in force until the final disposition of the case by the supreme or appel-

late court aforesaid, provided that the party availing himself of the provisions of this section shall not be guilty of negligence in prosecuting his application before the said supreme or appellate court.'

"On the 21st day of September, 1899, by General Order 145 of said department, issued by Brigadier General George W. Davis, United States Army, as aforesaid, provision was made for the holding of municipal elections in said island of Porto Rico, and certain rules and regulations governing the right of the inhabitants to vote at such elections and the manner of exercising such suffrage were therein provided for, among others the following:

"'SEC. V. An elector to vote at such elections shall possess the following qualifications:

"'*a.* He must be a *bona fide* male resident of the municipality.

"'*b.* He must be over twenty-one years of age.

"'*c.* He must be a taxpayer of record at the date of his registration, or he must be able to read and write.

"'*d.* He must have resided upon the island of Puerto Rico for two years next preceding the date of his registration, and for the last six months of said two years within the municipality where the election is held.'

"Thereafter, by General Orders 160 of said department, issued October 12, 1899, General Orders 145 were amended so as to read in part as follows:

"'SEC. VIII. He must be a taxpayer of record in the municipality in which he votes at the date of this order, or he must be able to read and write. Persons who pay insular or municipal taxes of any kind, in their own right or name, or in the name of their lawful wife or minor child, or the members of a firm, corporation or copartnership, paying taxes, and the heirs of an estate that pay taxes, are deemed taxpayers under the meaning of this clause. But administrators, guardians, trustees, agents or other persons who pay taxes for other than themselves or their lawful family are not taxpayers within its meaning through such payment.'

"'SEC. XVI. Any person who fraudulently votes, or attempts

or offers to fraudulently vote, or attempts to influence or control others to fraudulently vote, at any public election, shall, upon conviction thereof, be subject to a fine not exceeding one hundred dollars, or to imprisonment at hard labor not exceeding three months, or to both such fine and imprisonment, in the discretion of the court.'

"Thereafter, by special orders of the military authorities commanding the said department, an election was ordered to be held on the 31st day of October, 1899, in the city of Guayama, Porto Rico, for the election of the ordinary municipal officers of said city to fill the offices in the plan of civil government established by the military authority of the United States.

"Your petitioner represents that, being duly qualified in accordance with law and the general orders aforesaid, he voted at said election for the candidates of the party to which he belonged, and thereafter, on or about the 10th day of November, 1899, he was arrested and taken into custody by one Samuel C. Bothwell, marshal of said United States provisional court of the Department of Porto Rico, and brought before said provisional court, and was there charged by the district attorney thereof, in an information or complaint which was read to him, with having illegally voted at the said election in the city of Guayama heretofore mentioned.

"Your petitioner pleaded 'Not guilty' to said charge, and thereafter said United States provisional court proceeded to try him for said alleged offence, although your petitioner objected to the jurisdiction of said court and denied that he had committed any crime or offence cognizable by said court, and further objected on the ground that no presentment or information had been returned by a grand jury, and further that he was deprived of a trial by jury in said cause, a jury trial having been demanded by him and refused by said court.

"After hearing the evidence in said proceeding, said provisional court found your petitioner 'Guilty,' and sentenced him to imprisonment at hard labor in the jail of Humacao, Porto Rico, for a period of thirty days.

"Thereupon, in accordance with the provisions of section XI of General Orders 88, as amended and heretofore referred to,

your petitioner applied for a stay of execution of ninety days, to permit him to make application to this honorable court for a writ of certiorari or other suitable process, to review the action, and to set aside the judgment of said provisional court.

"Such application was granted; and the time allowed under said section having expired, your petitioner has been taken into custody by the said Samuel C. Bothwell, marshal as aforesaid, and is by him now unlawfully restrained of his liberty and compelled to perform infamous tasks.

"The proceedings of said United States provisional court are set forth at large in the duly certified copy of the transcript of the record in said court submitted herewith.

"Your petitioner further alleges that he is advised that said United States Provisional Court for the Department of Porto Rico had no jurisdiction or lawful authority under the Constitution and laws of the United States to cause the arrest of your petitioner or to proceed against him in manner and form aforesaid, and that said pretended process, arrest, order, trial and judgment, and warrant whereby your petitioner was committed to the custody of said Samuel C. Bothwell, and whereby, in custody of said Samuel C. Bothwell, he is imprisoned and restrained of his liberty, as aforesaid, were and are, each and all of them, in violation of the Constitution of the United States and the just rights of your petitioner, and are without authority of law and void.

"Your petitioner further alleges that said United States provisional court had no jurisdiction to try him for the alleged offence with which he is charged for the reasons following, among others:"

[The reasons were here set forth at length.]

"Your petitioner further avers that more than thirty other persons, residents of said island of Porto Rico, were apprehended and tried by said provisional court upon the same or similar charges to those preferred against him, and such persons were likewise found guilty and sentenced to undergo like punishment, but the sentences of the court in such other cases have been stayed pending the determination of your petitioner's application herein."

[Here followed the prayer.]

The petition was signed: "Ramon Baez, by Tulio Larrinaga;" and was verified as follows:

"DISTRICT OF COLUMBIA, *ss:*

"Tulio Larrinaga, being duly sworn, deposes and says:

"That he is an inhabitant of Porto Rico and knows the petitioner, Ramon Baez;

"He has read the foregoing petition by him subscribed and knows the contents thereof, and —

"That the matters and things therein stated are true of his own knowledge except as to matters therein stated on information or belief, and as to those matters he believes them to be true.

"Further, this petition is signed and verified by him for and on behalf of the said Ramon Baez for the reason that the petitioner is confined in the island of Porto Rico, and to delay this application by sending the same for the signature and affidavit of the petitioner himself would greatly retard, if not entirely defeat, the relief thereby sought to be obtained.

"TULIO LARRINAGA."

Subscribed and sworn to before a notary public March 24, A. D. 1900.

Mr. Frederic D. McKenney for the motion.

Mr. Solicitor General opposing.

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

Application to file this petition was made to the court on March 26, when, under pressure of the mass of business under advisement, we were about to take a recess until April 9, of which recess the bar had been previously advised.

No notice of the application having been given, on suggestion of counsel for the United States, leave was granted, according to the usual course, and in view of the conceded importance of the questions involved, to submit a brief in opposition within a

week, and three days were allowed counsel for petitioner to reply. These briefs were subsequently duly filed.

It appears from the petition and accompanying papers that the alleged proceedings against petitioner were stayed at his instance, from December 11 until March 16 to enable him to apply to this court in the premises, but no such application was made. And it further appears that petitioner was not restrained of his liberty until up to March 16, and that such restraint was to continue for thirty days from that date, which would expire April 15.

The petition is not signed or verified by Baez, but on his behalf, and the affidavit does not state that the application is made by authority or at the request of Baez, or any facts showing that he was unable to make it, except the averment by affiant that "this petition is signed and verified by him for and on behalf of the said Ramon Baez for the reason that the petitioner is confined in the island of Porto Rico, and to delay this application by sending the same for the signature and affidavit of the petitioner himself would greatly retard, if not entirely defeat, the relief thereby sought to be obtained." The affidavit was sworn to on the 24th of March in the District of Columbia.

Assuming, however, that the application is made in accordance with the wishes of Baez, we should have been better satisfied if the delay in the presentation of the petition had been accounted for. The fact that on March 24 it was impracticable to send to Porto Rico to petitioner for him to act, does not explain why the assertion of his alleged rights was delayed so long, but rather shows that our interposition would be unavailing, if we took jurisdiction.

Section 756 of the Revised Statutes provides in relation to the writ of *habeas corpus:* "Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond the distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days." This section was taken almost literally from the Habeas Corpus Act, chap. 2 of the 31st Car. II, which was designed to remedy procrastination

and trifling with the writ. Prior to that act the mode of compelling a return was by taking out an *alias*, and then a *pluries* writ, and thereafter issuing an attachment. A reasonable time has always been allowed for making the return, and it is not to be presumed that one will not be made. *Stockdale* v. *Hansard*, 8 Dowling, 474; *Mash's Case*, 2 Wm. Bl. 805. And see *United States* v. *Bollman et al.*, 1 Cr. C. C. 373, where the Circuit Court of the District of Columbia refused to issue an attachment until three days had expired after the service of the writ. Hurd on Hab. Corp. (2d ed.) 236; Church on Hab. Corp. (2d ed.) § 126.

In this case, if the writ of *habeas corpus* had been issued April 9, the next court day after the petition for the writ was presented to this court, the imprisonment of petitioner would have expired six days after the issue of the writ, and fourteen days before the person having him in custody would be required to make his return, and, before the case could be heard upon the writ and return the prisoner would no longer be in custody.

The grave questions of public and constitutional law sought to be brought into judgment by this application would have become merely moot questions so far as the decision thereof could affect any right or interest of the petitioner. And this would be so even if we issued the writ and attempted to deal with the prisoner by a preliminary order. Before he could be communicated with and brought before us he would be freed from restraint. *In re Callicott*, 8 Blatchford, 89.

As was said in *Stockdale's case*, we cannot presume that a return would not be made, and even if made at once, as it must be made from Porto Rico, it would nevertheless be too late for any action of ours to be effectual.

True the issue of the writ might be waived by the Government or we could enter a rule and proceed in the absence of the prisoner and at once, by agreement, *Medley, Petitioner*, 134 U. S. 160; *In re Burrus*, 136 U. S. 586; but the motion for leave to file has been resisted, and there has been no intimation of a disposition to speed the proceedings. Under these circumstances we cannot shut our eyes to the fact that before definitive action could be had, the application would abate.

Syllabus.

It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition.

The situation was the same April 9, and these observations are applicable as of that date.

In arriving at this conclusion we are not to be understood as intimating in any degree an opinion on the question of jurisdiction or other questions pressed on our attention.

Leave denied.

WERLEIN *v.* NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 189. Argued March 16, 1900. — Decided April 16, 1900.

The city of New Orleans commenced an action in March, 1895, in the Civil District Court for the Parish of Orleans, in Louisiana, to recover from Werlein a tract of land of which he was in possession, having acquired title under the following circumstances: In March, 1876, one Klein commenced an action against the city, to recover principal and interest on certain city bonds, and obtained judgment for the same in 1876. Under a writ of *fieri facias* real estate of the city was seized to satisfy the judgment, and was advertised for sale. The city commenced a suit against Klein to prevent the sale, and obtained an interlocutory injunction. After hearing this injunction was dissolved, and the complaint was dismissed. The property was then sold under the judicial proceeding to a purchaser through whom Werlein claims title. This suit was brought by the city to set aside that sale, on the ground that it was null and void, because the real estate was dedicated to public use long before the alleged sale, and formed part of the public streets of New Orleans; that it was not susceptible to alienation or private ownership or private possession. Judgment was rendered in favor of the city, which was affirmed by the Supreme Court of the State. *Held:*

Statement of the Case.

(1) That this court had jurisdiction to revise that judgment:
(2) That if there were no question of a prior judgment, proof that the land had been properly dedicated for a public square to the public use, and therefore had been withdrawn from commerce, would furnish a defence to the claim by any person of a right to sell the property under an execution upon a judgment against the city:
(3) That as the city did not set up that defence, although it was open to it to do so, in the former action, it could not set it up now:
(4) That although the city holds property of such a nature in trust for the public, that fact does not distinguish it from the character or in which it holds other property, so as to bring the case within the meaning of the rule that a judgment against a man as an administrator does not bind him as an individual:
(5) That the former judgment should have been admitted in evidence upon the trial of this action.

This action was commenced in March, 1895, by the city of New Orleans in the Civil District Court for the parish of Orleans in the State of Louisiana, for the purpose of recovering from the defendant below, Philip Werlein, a certain lot of land situated in that city and described in the petition and of which he was in possession. The facts upon which the suit was brought are as follows:

In March, 1876, one John Klein, a citizen of the State of Mississippi, commenced an action against the city of New Orleans in the Circuit Court of the United States in the District of Louisiana, for the recovery of over $89,000 and interest upon certain bonds issued by that city, and fully described in the plaintiff's petition. The city filed an answer denying all and singular the allegations contained in the plaintiff's petition. The case came on for hearing before the court without a jury, a jury being waived, and resulted in a judgment for the plaintiff against the city for the sum of $89,000, with six per cent interest, as stated in the judgment, which was entered on May 2, 1876. The plaintiff, in order to obtain satisfaction, issued a *fieri facias* on the judgment to the marshal, who thereupon seized and took into his possession all the right, title and interest of the city in and to the portion of ground described in the marshal's return to the writ (and being the premises in question) and advertised the property for sale. The city of New Orleans thereupon commenced an action against Klein

in the United States Circuit Court for the Eastern District of Louisiana, to prevent him from selling the property under his judgment.

In its bill of complaint the city alleged the recovery of judgment by Klein against the city, that he had issued a writ of *fieri facias* upon such judgment for the purpose of enforcing satisfaction of the same and had seized under the writ the property already described, which was advertised to be sold on a day named in the bill, and that Klein had no right to issue the writ in that suit, or to cause the seizure, advertisement or sale of the property thereunder, for the reasons and causes stated in the bill, which were, (1) that he had registered the judgment in the office of the administrator of public accounts for the city of New Orleans in accordance with an act of the legislature passed in the year 1870, and, therefore, had no right to issue any writ for the collection of the judgment against the city; (2) because Klein had assigned and transferred all his interest in the judgment before the writ was issued, to certain parties named; (3) that the writ upon which the property had been seized and advertised to be sold had issued for a larger sum than was due on the judgment: the city therefore prayed for an injunction restraining Klein, his attorneys and agents, from proceeding further in the advertisement and sale of the property under the writ; that the seizure of the property by the marshal might be adjudged to be illegal and void, and for general relief.

An order to show cause why an injunction *pendente lite* should not issue was granted, and upon a hearing it was ordered to issue.

The defendant Klein answered the bill, admitted the seizure of the property, and that it was advertised for sale; also, that he had procured his judgment to be registered as alleged in the bill, but denied that he thereby lost or forfeited any other remedy for the enforcement of the judgment, especially that of an ordinary execution; admitted the assignment of his judgment, but alleged that it was only as a security or pledge, and denied that the writ issued for a larger sum than was due, and he therefore asked that the injunction *pendente lite* might be

dissolved, the perpetual injunction denied, and for such further relief as might be proper.

The case came on for hearing on bill and answer, and the court "Ordered, adjudged and decreed that the interlocutory injunction issued be dissolved, an injunction refused, and complainant's bill of complaint dismissed with costs." The judgment was signed June 19, 1878.

After the entry of the judgment dissolving the injunction and dismissing the bill, the marshal took proceedings to sell the property which he had seized, and on August 21, 1878, sold the same to Andrew C. Lewis, the highest bidder, through whom by several mesne conveyances the appellant claims title, and from the time of the above sale he or his grantors have been in possession.

The petition in the present suit, filed by the city, describes the premises in question, and alleges that the defendant, appellant herein, is in possession thereof, and unjustly claims title thereto with the improvements thereon, valued in all at $15,000. The city avers that the defendant is not and never was the owner of the property, and that his only alleged title thereto is derived through mesne conveyances from a sale made by the United States marshal to Andrew C. Lewis, as above stated. The city further alleges that the sale by the marshal to Lewis was absolutely null and void, and that no title or right whatever in or to the property passed by that sale to Lewis or through him to the defendant herein; that the property was dedicated to public use long prior to the date of the marshal's sale, by Bertrand and John Gravier, and that it forms part of the place Gravier, in the Faubourg St. Mary, in the city of New Orleans, and that the property was at the date of the marshal's sale and has ever since been unsusceptible to alienation or private ownership or of private possession, and that the defendant's possession is illegal and in bad faith. The petition further alleges that the city was invested by law with the administration and possession, for the public benefit, of all property in the city dedicated to public use, and that it had the right to sue for the recovery of the possession of and to establish the title and right of use of the public to any such property,

and the petition therefore prayed that the city might have judgment against the defendant, decreeing the property purchased at the sale to be property dedicated to public use, and recognizing plaintiff's right to the possession and administration of the same, and ordering the defendant to deliver to plaintiff possession of the property free from all incumbrances, and for costs.

The defendant answered the bill, and set up therein the recovery of the judgment of Klein against the city, the seizure of the property thereunder, the commencement of suit by the city to enjoin the sale of the property, and the judgment of the court thereon dismissing that bill and dissolving the injunction, and defendant therefore alleged that the right of Klein to proceed and sell the land described in the petition, under his execution, was in and by that judgment recognized, affirmed and established, and such right was therefore *res judicata.*

Other defences were set up denying that the land had in fact ever been dedicated to public use or that it had ever been so used; also alleging that the city had regularly collected taxes upon the property ever since its purchase by Lewis, (more than fifteen years,) and that by reason of the facts the city was estopped from maintaining its action.

Upon these pleadings the parties went to trial, and the plaintiff, after giving evidence tending to prove its case, admitted that the defendant held a regular chain of title from and through Lewis, the purchaser of the land under the sale by the United States marshal, but denied the validity of such title. The defendant offered in evidence an exemplification of the proceedings and judgment in the suit brought to enjoin the sale by the marshal, which offer was made for the purpose of proving the plea of *res judicata.* The plaintiff objected to the evidence on the ground that the cause of action involved in the suit was not identical with the cause of action in the suit on trial, because the sole and only issues decided in the other suit were whether John Klein, having registered his judgment against the city of New Orleans in the office of the comptroller, pursuant to a statute of the State, and having elected that method of collecting his judgment, had not waived his right to pursue any other

method of collection; also whether John Klein was the owner of the judgment, and if so, whether he was estopped by having registered in the office of the comptroller a transfer of the same, and also whether the judgment was not subject to certain credits; whereas the issue involved in this case was whether the property upon which it is alleged the execution was levied and the property sold was legally subject to such seizure and sale; also that the thing demanded in the other suit was not the same thing demanded in this suit, the prayer in the other being for an injunction restraining Klein from selling the property in dispute, whereas the thing demanded in this case was a decree declaring the sale effected by Klein absolutely null and void. The court sustained the objection and refused to admit the evidence, and the defendant duly excepted.

Oral evidence was then given for the purpose of sustaining the other defences set up by the defendant, and the trial having been concluded, the judge made a finding in favor of the complainant, and judgment was thereupon entered decreeing that the property described therein was property dedicated to public use, and that the right of the city to the possession and administration of such property must be recognized, and the defendant was ordered to deliver possession of the property to the city free from all incumbrances.

An appeal was taken from the judgment to the Supreme Court of the State of Louisiana, where it was affirmed, and the defendant below has brought the case here on writ of error.

Mr. Edwin T. Merrick for plaintiff in error.

Mr. R. A. Tichenor for defendant in error. *Mr. Samuel L. Gilmore* filed a brief for same.

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

The defendant in error has made a motion to dismiss the writ of error on the ground of want of jurisdiction. We think it must be denied. The sole question in the case is in regard to the validity of the exception to the decision of the trial court

refusing to admit in evidence the judgment recovered in the United States Circuit Court in the action of the city of New Orleans against Klein.

The defendant herein in his answer specially set up such judgment, and claimed that under and by virtue thereof the city was concluded from maintaining its action; the state court refused to give effect to the judgment, and the denial of this right was excepted to by the defendant, and was also assigned as error in the state Supreme Court. In such case we think a Federal question exists. *Pittsburgh, Cincinnati, &c., Railroad* v. *Long Island Trust Company*, 172 U. S. 493, 507, and cases there cited; *Phœnix Insurance Company* v. *Tennessee*, 161 U. S. 174, 184. Whether full faith and credit have been given the judgment of a Federal court by the courts of a State is a Federal question, and that question exists in this case.

Upon the merits we have simply to inquire whether the courts below erred in their decision refusing to admit in evidence the judgment in the chancery suit above mentioned.

The judgment in that suit was between the city as complainant and Klein as defendant, and it had reference to the proceedings of the marshal in the execution of his writ issued upon the judgment of Klein against the city. The defendant in this suit traces his title back to Lewis, who purchased upon the sale under the marshal's writ, and so when the defendant is sued in this action he stands as privy to one of the parties to the chancery suit, and can claim the same rights in the judgment therein as an adjudication, which Lewis or Klein could have claimed if either were in possession of the property, and this suit had been brought against the one in possession.

The law in relation to the effect of a judgment between the same parties is well known, but its proper application to particular cases is sometimes quite difficult to determine. The following authorities treat of the subject very fully and exhaustively: *Cromwell* v. *County of Sac*, 94 U. S. 351; *Davis* v. *Brown*, 94 U. S. 423; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1; *Delabigarre* v. *Second Municipality of New Orleans*, 3 La. Ann. 230; *Slocomb* v. *Lizardi*, 21 La. Ann. 355.

In the first cited case, it was said that a former judgment between the same parties (or their privies) upon the same cause of action as that stated in the second case constitutes an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Where the second action between the same parties is upon a different claim or demand, the judgment in the former action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

So in *Davis* v. *Brown*, *supra*, Mr. Justice Field, in delivering the opinion of the court, said in speaking of a prior judgment: "The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

In *New Orleans* v. *Citizens' Bank*, (*supra*, at p. 396,) Mr. Justice White, speaking for the court, said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

To the same effect is *Southern Pacific Railroad* v. *United States*, *supra*.

The same rule is substantially laid down in the cases above cited from the Louisiana reports.

Now, what was the demand and what was the thing adjudged in the chancery suit between the city of New Orleans and Klein? In that suit the city alleged that Klein had seized under a writ of *fieri facias*, in his action against the city, certain property which was described in the complainant's bill, which he threatened to sell, and which was advertised to be sold on a certain day, and the city alleged "that the said John Klein has no right to issue the said writ of *pluries fieri facias*

in said suit, or to cause the seizure, advertisement and sale of the said property thereunder," and it set forth in its bill the grounds (already stated) for such an allegation.

The sole cause of action was the apprehended and threatened sale of the property, which sale, the complainant alleged, would be illegal. All the other facts set up in the bill were but the grounds justifying and proving, as contended, the allegation that Klein had no right to sell the property, and it was this illegality of the threatened sale that was the sole cause or foundation of the action; it was the matter in dispute and the subject of contest. If the property were not legally subject to seizure and sale, then it would clearly be an illegal sale if consummated, and that fact would be material in proof of the cause of action of the city.

Upon the trial the court adjudged that defendant had the right to sell the property, and it therefore dissolved the injunction and dismissed the bill, and judgment to that effect was duly signed and entered. This would seem to be a full and complete adjudication upon the right of defendant Klein to sell the property seized under his writ. That right would not exist if the property were not the subject of a legal sale. Whether or not it was thus subject was an inquiry which the court would have had jurisdiction to make had it been alleged in that suit.

It is, however, contended that as the city had only set up certain facts as the foundation of its action to prevent the alleged illegal sale of the property, the judgment only bound it as to those facts, and therefore it is now urged that the city in this action was at liberty to prove other facts which would also show that Klein had no right to sell the property, namely, that the property had long before the sale been dedicated to public use, and the city therefore had no right to alienate it, nor had any one the right to sell it upon an execution issued on a judgment against the city.

It is not disputed that if there were no question of a prior judgment in this case, proof that the land had been properly and duly dedicated for a public square to the public use and therefore had been withdrawn from commerce, would furnish a defence to the claim by any person of a right to sell the prop-

erty under an execution upon a judgment against the city. *New Orleans* v. *United States*, 10 Pet. 662, 731, 736; *Police Jury* v. *Foulhouze*, 30 La. Ann. 64; *Police Jury* v. *McCormack*, 32 La. Ann. 624; *Kleine* v. *Parish of Ascension*, 33 La. Ann. 562; *Leonard* v. *City of Brooklyn*, 71 N. Y. 498.

Assuming the law to be as thus stated, the question in this case is, what effect has this judgment under discussion upon the rights of the parties?

The fact now alleged would have furnished in the chancery suit but another ground or reason upon which to base the claim of the city, that Klein had no right to sell the property under his writ. In other words, it would have been additional proof of the cause of action set forth in that suit. The city would have had the right to set that fact up in its bill and to have proved it on the trial, and, if proved, it would have been foundation for a judgment enjoining the sale of the property; but the fact would have been nothing more than evidence of the right of the city to obtain the injunction asked for in the chancery suit, and we think it was the duty of the city to set up in that suit and to prove any and all grounds that it had to support the allegation that Klein had no right to seize or sell the property.

The threatened sale might have been illegal for a number of reasons, based upon widely divergent facts, but whatever those reasons were, the facts upon which they rested were open to proof in the chancery action, and if the city desired the benefit of them, they should have been alleged and proved. It would seem to be quite clear that the plaintiff could not be permitted to prove each independent fact in a separate suit. Suppose the city had only set up the fact of the registry of the judgment as a ground for enjoining the sale, and after a trial on that issue it had been beaten and judgment had gone against it, could the city after that have commenced another suit for the same purpose, and set up as a ground for the alleged illegality of the sale the assignment of the judgment by Klein? In such second action would not the judgment in the prior action conclude the city? If not, then on being beaten on a trial of that issue the city could commence still another action

based on the allegation that the judgment had been paid. Thus, as many different actions as the city might allege grounds for claiming the sale would be illegal could be maintained *seriatim*, and no one judgment would conclude the city except as to the particular ground upon which the city proceeded in each particular case. And yet all these different grounds would simply form evidence upon which the original cause of action was based, namely, the alleged illegality of the apprehended sale. They would form simply separate facts upon which the cause of action might rest. There is no difference in the nature of the ground now urged in this case from the other grounds actually set up in the chancery suit.

It is true that in the chancery suit the thing demanded was an injunction restraining Klein from selling the property, while in this suit it is a decree declaring the sale effected by Klein absolutely null and void. But the two demands, though different in terms, are in substance the same, and are founded upon the same cause of action, viz., the total illegality of the sale, whether threatened or accomplished. The demand in the later action is simply altered to conform to the fact that there had been a sale of the property, while the demand in the former suit was based upon the fact that there had not been a sale, and the relief demanded was an injunction to prevent such sale. In substance and effect the thing demanded is the same in both cases.

It is contended, however, that the ground now urged for the illegality of the sale, namely, a long prior dedication of the property to public use, is of a totally different nature from the grounds which were set up in the chancery suit; that the city there appeared in a different capacity from that in which it now appears, and that it was, therefore, unnecessary to allege or prove this ground in that suit, and that a judgment in the former suit in favor of the right of Klein to sell this property does not conclude the city from proving that he had no such right by reason of the character of the property sold. Although the city has been more than fifteen years in discovering this defence, yet, nevertheless, it is now argued that a judgment against the city in the chancery suit being a judgment against

it in a different capacity from that in which it appears in this action as a trustee for the public, the rule applies in such a case as it sometimes does in the case of a judgment against A B, in relation to property held by him as executor or as trustee, which would be no evidence for or against A B in his individual and personal capacity. *Collins* v. *Hydorn*, 135 N. Y. 320. Although there are exceptions even to that rule. *Morton* v. *Packwood*, 3 La. Ann. 167; *Fouché* v. *Harrison*, 78 Georgia, 359.

We think there is no double capacity in this case, and that the city appears in the same character and capacity in both these suits, and that in this suit it is bound by the judgment in the chancery suit.

The title to land which has been dedicated to public use, as for a highway or public square in a city, is in the city as trustee for the public, and it has been held, in the case of such a dedication of land in a proposed city, to be thereafter built, that the fee will remain in abeyance until the proper grantee or city comes *in esse*, when it will vest in such city. A dedication to the public may exist where there is no city or town or corporate entity to take as grantee, and in such case, while the fee may remain in the individual who dedicates the land, he will be estopped from setting it up as against the public who may be interested in the use of the land according to its dedication. Nevertheless, when a dedication is made in an existing city, the city takes title as trustee. These statements are borne out by the following cases: *Pawlet* v. *Clark*, 9 Cranch, 292; *Beatty* v. *Kurtz*, 2 Pet. 566; *Cincinnati* v. *White's Lessee*, 6 Pet. 431, 435, 436; *Barclay* v. *Howell's Lessee*, 6 Pet. 498; *New Orleans* v. *United States*, 10 Pet. 662; *Police Jury* v. *Foulhouze*, 30 La. Ann. 64.

Although the city holds property of such nature in trust for the public, that fact does not distinguish it from the character or capacity in which the city holds its other property, so as to bring the case within the meaning of the rule that a judgment against a man as an administrator does not bind him as an individual. The city holds all property which it owns, as trustee for the public, although certain classes or kinds of property, such as the public streets, the public squares, the court

house and the jail, cannot be taken on execution against it, for reasons which are plain to be seen. Such property is so necessary for the present and daily use of the city as the representative of the public, as well as for the use of the public itself, that to allow it to be taken on execution against the city would interfere so substantially with the immediate wants and rights of the public whose trustee the city is, and also with the due performance of the duties which are imposed upon the city by virtue of its incorporation, that it ought not to be tolerated. Other property which the city might hold, not being so situated, might be taken on execution against it, but it nevertheless holds that very property, as trustee. It holds it for the purpose of discharging in a general way the duties which it owes to the public, that is, to the inhabitants of the city. The citizens or inhabitants of a city, not the common council or local legislature, constitute the "corporation" of the city. 1 Dillon on Municipal Corporations, 3d ed. sec. 40. The corporation as such has no human wants to be supplied. It cannot eat or drink or wear clothing or live in houses. It must as to all its property be the representative or trustee of somebody or of some aggregation of persons, and it must, therefore, hold its property for the same use, call that use either public or private. It is a use for the benefit of individuals. A municipal corporation is the trustee of the inhabitants of that corporation, and it holds all its property in a general and substantial, although not in a strictly technical, sense in trust for them. They are the people of the State inhabiting that particular subdivision of its territory, a fluctuating class constantly passing out of the scope of the trust by removal and death and as constantly renewed by fresh accretions of population. The property which a municipal corporation holds is for their use and is held for their benefit. Any of the property held by a city does not belong to the mayor, or to any or all of the members of the common council, nor to the common people as individual property. If any of those functionaries should appropriate the property or its avails to his own use, he would be guilty of embezzlement, and if one of the people not clothed with official station should do the like, he would be guilty of larceny. So we see

that whatever property a municipal corporation holds, it holds it in trust for its inhabitants, in other words, for the public, and the only difference in the trust existing in the case of a public highway or a public square, and other cases, is that in the one case the property cannot be taken in execution against the city, while in other cases it may be. The right of the city is less absolute in the one case than in the other, but it owns all the property in the same capacity and character as a corporation, and in trust for the inhabitants thereof. Views similar to these have been heretofore substantially expressed by the late Judge Denio, in speaking for the Court of Appeals of New York in *Darlington* v. *Mayor*, 31 N. Y. 164.

From these considerations we are of opinion that there is no difference in the character of the title by which a municipal corporation holds these two classes of property, but there is simply a difference in the power which such corporation can exercise over its property in the two cases. That difference arises from the peculiar nature of the use of the property, which in the one case requires it to be inalienable and not liable for the debts of the city, while in the other case it is open both to alienation and to sale under execution. In each case the character or capacity in which the city in fact holds the title is the same.

We, therefore, think the former judgment should have been admitted in evidence upon the trial of this action. By that judgment it conclusively appears that this property was legally sold upon the execution on Klein's judgment, and that the purchaser at the sale obtained a title which was good. This title the plaintiff in error now owns, and it must prevail against the claim of the city.

The judgment of the Supreme Court of Louisiana must be reversed, and the cause remanded to that court for further proceedings not inconsistent with the opinion of this court, and it is so ordered.

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

AMERICAN EXPRESS COMPANY *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 220. Argued November 9, 1899.—Decided April 16, 1900.

A proceeding for a mandamus is "a suit" within the meaning of that term as employed in Rev. Stat. § 709.

A Federal question, which was decided in the court below, is involved in this suit.

The statute of June 13, 1848, c. 448, "to meet war expenditures, and for other purposes," does not forbid an express company, upon which is imposed the duty of paying a tax upon express matter, from requiring the shipper to furnish the stamp, or the means of paying for it.

THE Attorney General of the State of Michigan on the relation of George F. Moore and others commenced proceedings in the Circuit Court of Wayne County, Michigan, against the American Express Company. The company was described as "a joint stock association organized and existing under the laws of the State of New York and having its principal business office located in the city of New York, in said State." It was averred that the company complied with the requirements of certain statutes of the State of Michigan and had obtained the necessary certificate authorizing it to carry on an express business in that State, and in order to conduct such business had a large number of agents and offices in the State. The petition then alleged that on June 13, 1898, the Congress of the United States passed an act commonly designated as the War Revenue Act, by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a one cent stamp. After referring to the text of the act of Congress on the above subject, it was alleged that by the provisions of the law in question the primary and absolute duty was imposed upon express companies to provide the receipt and to affix and cancel the one cent stamp as required by law. The following averments were then made:

"That by reason of a desire of the respondent (the express company) to avoid the payment of the stamp tax, so called, and to impose such obligation on the shipper, the respondent

herein refuses to accept any goods for transportation unless such shipper attaches the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnishes the money or means for that purpose to the said company, and that the said company thereby not only avoids its duty under said act of Congress to pay and bear its proportion of the revenues to meet war expenditures as provided by said act, but violates its duty as a common carrier to receive, accept and deliver such goods, wares and merchandise so offered and tendered to it for that purpose."

A number of instances were specified where it was averred the express company on the tender to it of packages for transportation as a common carrier had refused to receive the same and to issue receipts therefor "unless a stamp of the value of one cent was paid or provided" by the shipper. It was charged that the conduct of the express company was in violation of the obligations imposed upon it by the act of Congress in question, and constituted a refusal to perform its duty as a common carrier. The prayer was for a mandamus commanding the company to receive packages for transportation by express and issue a receipt with stamp duly canceled thereon, without seeking to compel shippers who might tender packages for carriage either to pay for the one cent stamp or to provide the means for so doing.

The answer of the express company admitted that it required persons who tendered packages for carriage, by express, either to pay or provide the means for defraying the cost of the one cent stamp, but denied that its conduct in so doing was a violation of the act of Congress by which the one cent tax on express receipts was imposed. On the contrary, it was averred that the act of Congress, when properly construed, although imposing the absolute duty to issue a receipt for every package as therein provided, left the question of who should pay for the stamp free for adjustment between the shipper and the express company. By the act of Congress, it was asserted, the express company had, therefore, the right or privilege of insisting that those who offered packages to be carried by express should either furnish the one cent stamp or provide the means of pay-

ing for it. It was, moreover, alleged that the company had in effect but increased its rates on each shipment by adding to the previous rates the sum of the stamp tax. And it was averred that this increase the company was not forbidden to make, by the act of Congress imposing the one cent stamp tax, and that the rate as increased by exacting that the one cent stamp should be furnished or that its value be paid for by the shipper was just and reasonable, and was not in conflict with the act of Congress. The answer was in effect demurred to as not stating a defence. The case was submitted for decision on petition and answer. The court ordered the mandamus to issue substantially as prayed for. The cause was then removed by writ of *certiorari* to the Supreme Court of the State of Michigan, where the judgment of the trial court was affirmed. 77 Northwestern Rep. 317. By an allowance of a writ of error the judgment of the Supreme Court of the State is before us for review.

Mr. Lewis Cass Ledyard for plaintiff in error.

Mr. C. E. Warner for defendants in error.

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

We will first dispose of the claim that this court is without jurisdiction to review the judgment, and that hence the writ of error should be dismissed. The contention is based upon the following: 1, that the proceeding below, being for a mandamus, was not a "suit" within the meaning of that term as employed in section 709 of the Revised Statutes; and 2, because no Federal question is involved and no such question was below decided.

The first proposition is not tenable. *McPherson* v. *Blacker*, 146 U. S. 1, 24; *Hartman* v. *Greenough*, 102 U. S. 672.

The second is likewise without merit. From the summary of the pleadings just made, in the statement of the case, it is apparent that the issue between the parties involved an assertion on the one side that the act of Congress imposed on the express company the absolute duty of furnishing the receipt, of

affixing the stamp thereto and canceling the same. The argument that it was hence a violation of the duty, imposed upon the express company by the act of Congress, for the company either to demand the stamp or the amount thereof from the shipper, and that it was also a violation of the act of Congress for the express company to increase its rates to the extent necessary to accomplish the result of securing the reimbursement of the amount of the one cent stamp tax. On the other hand, the defence of the express company was that under the act of Congress it had the right, privilege or immunity (which it specially set up and claimed) of demanding the payment of the one cent or of increasing its rates to the extent that the tax imposed a burden upon it, provided only the rates charged were just and reasonable. The question thus presented was in substance the only one decided by the Supreme Court of the State. In stating the issues arising for its decision the court said: "The main question in the case relates to the construction to be placed upon the act in question," that is, the act of Congress. After a review of the provisions of the statute it was decided that under it the express company could not in any event or by any means transfer the burden of the tax in question. Considering the right of the express company to increase its rates to the extent necessary to secure the payment of the tax by the shipper, the court said:

"It is contended, however, that the company has the right to make new regulations and establish new rates to meet all this burden. It is contended that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax and thus cast upon the shipper the burden which the act of Congress puts upon the company. This is but an evasion and a subterfuge to avoid the terms of the act."

The foregoing reasoning was supplemented by comment upon the fact that the increase of rate resulting from the charge of one cent on each package was made without reference to the distance each package was to be carried. We do not, however, understand the remarks on this subject as implying that the

court below decided that the rate as increased by the one cent was intrinsically unreasonable without regard to the provisions of the act of Congress, but only that the rate as so increased was unreasonable, because an attempt on the part of the express company to shift the burden of the tax imposed upon it by the act of Congress, and hence was by legal inference forbidden by that act. No other view is possible when the state of the record is considered. As we have seen, the controversy was submitted on petition and answer. It is nowhere, however, averred in the petition that the rates, with or without the addition of the tax, were intrinsically unjust and unreasonable; while in the answer, following an averment as to the enactment of the stamp act and its resulting effects, it was averred as follows:

"Respondent therefore decided to raise and did raise its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act.

"And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates for transportation."

As, therefore, upon the submission of the cause upon the pleadings, there was no controversy as to the intrinsic reasonableness of the increased rates, it follows that if we were to hold that the court below had decided that the increased rates were unreasonable in themselves, we would conclude that the court below had so held, although it was substantially admitted on the record by both parties that the increase of rates was just and reasonable, if not forbidden by the act of Congress. But such action cannot be attributed consistently with reason and justice. This being the state of the case, the Federal question presented is wholly unaffected by what was said by the court on the subject of the right of the corporation to increase its charges by the amount of the tax. As there was no allegation that the rates existing prior to the imposition of the one cent stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for each pack-

age the exact amount of the increased cost for transporting the package, occasioned as to each package, by the specific imposition on each by the act of Congress of the one cent stamp tax. But to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge the assumption must be made that the act of Congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method. And no other view is, in reason, possible when the averments of the answer are borne in mind. It hence results that the Federal question, although changed in form of statement, remains in substance the same. In the changed form it is as follows: Did the act of Congress deprive the express company of the right to shift the burden of the tax by increasing the rate by the exact amount distinctly and separately imposed by the act upon each shipment, and hence render the charge unreasonable, which would be in itself reasonable, except for the hypothesis that the act of Congress renders all efforts to shift the tax illegal.

It follows that the case as made by the pleadings, and which was decided below, involved a right, privilege or immunity under the act of Congress, which was specially set up and claimed by the express company, to contract with the shippers for the payment of the tax provided by the act of Congress, or to increase its rate, within the limit of reasonableness, to the extent of such tax, which right, privilege or immunity was denied and held to be without merit by the court below. There is therefore jurisdiction. Rev. Stat. § 709.

The controversy which is contained in the merits of the cause is resolvable into three questions: First. Does the act of Congress impose upon the express company the duty of making a receipt for a package tendered to it, and does it also forbid the express company from requiring the shipper to furnish the stamp to be affixed to the receipt, or of supplying the means of paying for the same? Second. If the act of Congress does impose such duty on the express company and does inhibit it from requiring that the shipper furnish the stamp or the means of paying for it, does the act further forbid the express com-

pany from seeking to cast the burden on the shipper by an increase of rates? Third. And, as a corollary of the second proposition, does an increase of rate by an express company which is otherwise just and reasonable become unlawful, under the act of Congress, because such increase is made with the purpose of shifting the burden of the one cent tax from its own shoulders to that of the shipper?

The first proposition is unnecessary to be considered, since even although it be conceded that the act of Congress imposes on the express company the duty of paying the one cent stamp tax, this admission would not be at all decisive of the cause unless also it be ascertained under the second proposition, that the act of Congress also forbids the express company from shifting the burden of the tax by means of an increase of rates. And no necessity for passing on the first proposition arises from the mere fact that the decision of the second proposition requires a consideration of the provisions of the statute which it would be necessary to take into view if the first proposition was under consideration.

It is also to be observed that the second and third propositions which involve, the one the right to shift the burden of the tax by exacting that the one cent be provided and the other the power to increase rates within the limits of the requirement that the charges as increased be reasonable, both depend upon the same considerations.

Indeed, the question into which all the issues are ultimately resolvable is whether the right exists to shift the burden, of course ever circumscribed by the duty of not exceeding reasonable rates. If it does not, that is, upon the hypothesis that it not only can be, but is forbidden, then it must result that all methods adopted to attain the prohibited result are void. On the contrary, if the right to seek to shift the burden obtains then the substantial result of what is done becomes the criterion, and the mere fact that the motive, announced, for a reasonable increase of rates, is declared to be a shifting of the burden, cannot prevent the exercise of the lawful right.

The special provisions of the law upon which the case turns are the first paragraph of section 6 and the express and freight

clause of Schedule A, forming a part of section 25. 30 Stat. 451, 459.

The paragraph of section 6 referred to is as follows:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Now, there is nothing in the provisions just quoted which, by the widest conjecture, can be construed as expressly forbidding the person upon whom the taxes are cast from shifting the same by contract or by any other lawful means. An inference to the contrary arises from the fact that the duty is imposed in the alternative on "any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued."

The language of the express and freight clause of Schedule A is as follows:

"EXPRESS AND FREIGHT: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading

shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offence, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The argument is that as it is made the duty of the express company to make and issue "a bill of lading, manifest or other evidence of receipt and forwarding for each shipment, . . . and there shall be duly attached and cancelled, as in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of the value of one cent;" therefore, the obligation is imposed absolutely on the express company, not only to make and furnish the receipt, but to issue it with the stamp duly cancelled. But as we have said though the correctness of the claim be *arguendo* taken for granted, such concession does not suffice to dispose of the essential issues. They are that by the statute the express company is forbidden from shifting the burden by an increase of rates, although such increased rates be in themselves reasonable. As no express provisions sustaining the propositions are found in the law, they must rest solely upon the general assumption that because it is concluded that the law has cast upon the express company the duty of paying the one cent stamp tax, there is hence to be implied a prohibition restraining the express company from shifting the burden by means of an increase of rates within the limits of what is reasonable. In other words, the contention comes to this, that the act in question is not alone a law levying taxes and providing the means for collecting them, but is moreover a statute determining that the burden must irrevocably continue to be upon the one on whom it is primarily placed. The result follows that all contracts or acts shifting the burden, and which would be otherwise valid, become void. To add by implication such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes

is naturally presumed to effectuate. Indeed, it seems almost impossible to suppose that a purpose of such a character could have been contemplated, as the widest conjecture would not be adequate to foreshadow the far reaching consequences which would ensue from it. To declare upon what person or property all taxes must primarily fall is a usual purpose of a law levying taxes. To say when and how the ultimate burden of a tax shall be distributed among all the members of society would necessitate taking into view every possible contract which can be made, and would compel the weighing of the final influence of every conceivable dealing between man and man. A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant therefore from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burdens of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and in its final analyses would deny the existence of all rights of property. And this becomes more especially demonstrable when the nature of a stamp tax is taken into consideration. A stamp duty is embraced within the purview of those taxes which are denominated indirect, and one of the natural characteristics of which is, although it may not be essential, that they are susceptible of being shifted from the person upon whom in the first instance the duty of

payment is laid. We are thus invoked by construction to add to the statute a provision forbidding all attempts to shift the burden of the stamp tax when the nature of the indirect taxation which the statute creates suggests a contrary inference. And, in this connection, although we have already called attention to the consequences which must generally result from the application of the doctrine contended for, it will not be inappropriate to refer to certain of the provisions of the act now under consideration, which more aptly serve to make particularly manifest the consequences indicated. Thus, perfumery, patent medicines and many other articles are required by the statute to be stamped by the owner before sale. The logical result of the doctrine referred to would be that the price of the articles so made amenable to a stamp tax could not be increased, so as to shift the cost of the stamp upon the consumer. Yet it is apparent that such a construction of the statute would be both unnatural and strained.

The argument is not strengthened by the contention that as the law has imposed the stamp tax on the carrier, public policy forbids that the carrier should be allowed to escape his share of the public burdens by shifting the tax to others who are presumed to have discharged their due share of taxes. This argument of public policy if applied to a carrier would be equally applicable to all the other stamp taxes which the law imposes. Nor is the fact that the express company is a common carrier and engaged in a business in which the public has an interest and which is subject to regulation, of importance in determining the correctness of the proposition relied upon. The mere fact that the stamp duty is imposed upon a common carrier does not divest such tax of one of its usual characteristics or justly imply that the carrier is in consequence of the law deprived of its lawful right to fix reasonable rates. Unquestionably a carrier is subject to the requirement of reasonable rates, but as we have seen, no question of the intrinsic unreasonableness of the rates charged arises on this record or is at issue in this cause. As previously pointed out, to decide as a matter of law that rates are essentially unreasonable from the mere fact that their enforcement will operate to shift the

burden of a stamp tax would be in effect but to hold that the act of Congress by the mere fact of imposing a stamp tax forbids all attempts to shift it, and consequently that the carrier is deprived by the law of the right to fix rates, even although the limit of reasonable rates be not transcended. This reduces the contention back to the unsound proposition which we have already examined and disposed of.

There is a special provision of the law which grants affirmatively the right to add the tax to the cost of an instrument, and hence it is urged this express authority in one case is pregnant with the denial of a right to do so in other cases. The clause in the statute referred to is found in a paragraph of Schedule A, whereby a stamp tax is imposed on "Bill of exchange, (inland,) draft, certificate of deposit drawing interest or order for the payment of any sum of money. . . ."

The second and concluding sentence of the paragraph reads as follows:

"And from and after the first day of July, eighteen hundred and ninety-eight, the provisions of this paragraph shall apply as well to original domestic money orders issued by the government of the United States, and the price of such money orders shall be increased by a sum equal to the value of the stamps herein provided for."

Without the provision last quoted, authority would have been wanting to increase the cost of a government money order, by adding the sum of the tax imposed upon such order to the charge therefor, because the charge for a money order was fixed by law. This at once explains the necessity for conferring authority to add to the cost of the money order the amount of the stamp tax. Instead, therefore, of giving rise to the suggestion that the right to shift the burden of other stamp taxes was taken away in all cases where there was liberty and power to contract, the provision relied on is persuasive to the contrary. For, clearly, the express authority conferred to do that which the law otherwise forbade in consequence of the want of power in a government official, cannot with reason be held to imply a prohibition against doing that which was not forbidden by law. The argument, in effect, amounts to this and nothing more;

that, because it was imperatively necessary to confer a power upon a government officer which, owing to statutory restriction, he otherwise would not have possessed, therefore the legal deduction must be drawn that freedom of contract as between those who had the right to contract was destroyed.

But it is asserted that the War Revenue Act of 1898 was modelled upon the act of July 1, 1862, providing internal revenue tax, 12 Stat. 432, and as the act of 1862 plainly manifested the purpose of Congress to impose a stamp tax on express companies and to forbid them from shifting the burden arising from such tax, therefore the act under consideration should be construed as having the same effect. The fact that the present act was modelled upon the act of 1862 is undoubted, (see section 94 of the act of 1862, 12 Stat. 475,) but the text of the act of 1862 expressed no restraint upon the power of shifting by contract or by an increase of rates within the limit of the requirement that they should be reasonable. It follows that testing the present act by that of 1862 throws no additional light upon the controversy. The claim that the act of 1862 contained a prohibition against shifting is thus inferred. By the act of 1862 a stated per centum of tax was imposed upon the gross receipts of railroads, steamboats and ferryboats, as well as toll bridges. (Section 80, 12 Stat. 468.) After providing for the levy and collection of the taxes in question, the following proviso was applied to the section by which the taxes just referred to were levied: "*Provided*, That all such persons, companies and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or company which may have paid or be liable to pay such fare to the contrary notwithstanding."

This express authority to shift the burden of the tax on gross receipts, it is claimed under the rule of *inclusio unius*, justifies the implication that the power to shift did not exist as to taxes imposed by other portions of the act of 1862, to which the proviso did not apply.

In passing it is worthy of remark that by the act of March 3,

1863, 12 Stat. 713, it was enacted (sec. 10) that on and after the 1st day of April, 1863, "any person or persons, firms, companies or corporations, carrying on an express business shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to pay a duty of two per centum on the gross amount of all the receipts of such express business, and shall be subject to the same provisions, rules, and penalties as are prescribed in section 80 of the act to which this is an amendment." In other words, when in 1863 the stamp tax relating to express companies was abrogated and a tax on gross receipts substituted therefor, the express companies were authorized to add the result of the gross receipt tax to their charges, any law or contract to the contrary. But the implication deduced from the authority conferred by the statute of 1862 to shift the burden of the tax on gross receipts levied on railroads, etc., by an increase of charges, is unsound. Indeed, the proviso in question, when properly construed, gives rise to an inference contrary to the one sought to be drawn from it.

The tax imposed under the section in question was not in form a stamp tax, but on gross receipts, and the proviso referred to may, from abundance of caution, have been inserted to leave no room for the assumption that a tax thereby imposed was a direct tax and not subject to be shifted. Besides, the whole context manifests the purpose not to declare a rule in violation of public policy as to particular corporations, but to enable such corporations to possess the power to shift the tax by increasing its charges, even although contracts or restrictions previously imposed might otherwise prevent.

The right to shift by an increase of rates within what is reasonable can only be held to be illegal upon the assumption that public policy forbids it. If such be taken to have been the principle of public policy embodied in the act of 1862, that act must be held to have repudiated, by the proviso to section 80, the very public policy by the light of which it is contended the act must be interpreted. If there was a rule of public policy giving rise to the assumption that stamp taxes relating to express companies could not be shifted, it becomes impossible in reason to understand why, when the taxation was changed

by the act of 1863 from a stamp tax to one on gross receipts, the express companies should have been brought within the proviso to section 80 of the act of 1862. Clearly, if the rule of public policy which is relied on existed it would have been as cogently applicable to the one form of tax as to the other.

In the case of the *State Freight Tax*, 15 Wall. 232, the court was called upon to notice a state law conferring a right to charge over by an increase of rates the sum of tax imposed. In considering the subject (pp. 273, 274) it was said:

"The provision is as follows: 'Corporations whose lines of improvement are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.' Evidently this contemplates a liability for the tax beyond that of the company required to pay into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority."

Other contentions as to the construction of the act based upon various other provisions have been pressed with great earnestness, but we deem it unnecessary to consider them, as the foregoing considerations dispose of the case. It follows that the court below erred in holding that by the act of Congress the express company was forbidden from shifting the burden of the stamp tax by an increase of rates which were not in themselves unreasonable.

Counsel for Parties.

The judgment below rendered must, therefore, be reversed, and the case be remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

Mr. Justice Harlan and Mr. Justice McKenna dissenting.

We are of opinion that the act of Congress imposed upon the Express Company the duty not only of affixing at its own expence the required stamp upon any receipt issued by it to a shipper, but of cancelling such stamp — thus giving to the shipper a receipt that could, when necessary, be used as evidence. Whether the company, having issued a receipt duly stamped and cancelled, could increase its charges against the shipper for the purpose, whether avowed or not, of meeting this additional expense, is not, in our opinion, a Federal question, and upon that point this court need not express an opinion.

CRAWFORD *v.* HUBBELL.

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

No. 248. Argued November 8, 9, 1899. — Decided April 16, 1900.

The matter embraced in the questions submitted to this court has been considered, and was passed on in the opinion in *American Express Co.* v. *Michigan*, *ante*, p. 404, which is followed in this case.

The case is stated in the opinion.

Mr. Frederick R. Kellogg and *Mr. Allan L. McDermott* for appellant. *Mr. James B. Dill* was on their brief.

Mr. Charles Steele and *Mr. Charles B. Alexander* for appellee. *Mr. William D. Guthrie* and *Mr. Theodore S. Beecher* were on their brief.

Mr. Justice White delivered the opinion of the court.

The certificate and the questions which arise from it are as follows:

"This cause came before this court on February 2, 1899, upon an appeal taken by the complainant to review a decree of the Circuit Court, Southern District of New York, sitting in equity. Such decree dismissed the bill. As to a question of law arising upon said appeal this court desires the instruction of the Supreme Court for its proper decision.

"*Statement of Facts.*

"This suit is for an injunction to restrain the express company from refusing to accept express packages from complainant for transportation, except upon the condition that complainant either pay for or provide the war revenue stamp required to be affixed to each receipt in addition to its usual and ordinary charges for transportation as the same existed on and for a long time prior to July 1, 1898. The defendant company since July 1, 1898, has fixed rates of compensation which it offers to accept for services rendered by it, whereby, in addition to the amount of its charges as the same existed on and for a long time prior to July 1, 1898, it requires the shipper either to provide or pay for the cost of the stamp on the bill of lading or receipt required to be issued by the act of Congress of June 13, 1898, known as the 'War Revenue Act.' It has made known these charges to shippers, and particularly to complainant, and refuses to accept packages for transportation except upon payment thereof. The pleadings are annexed to this certificate.

"*Questions certified.*

"Upon the facts set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

"(1) Does the War Revenue Act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods ac-

cepted by the carrier for transportation, or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

"(2) If the War Revenue Act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest, or other evidence of receipt, from relieving itself of the expense of affixing and cancelling the stamp required to be attached to such bill of lading, manifest, or other evidence of receipt?

"In accordance with the provisions of section 6 of the act of March 3, 1891, establishing Courts of Appeal, etc., the foregoing questions of law are by the Circuit Court of Appeals hereby certified to the Supreme Court."

The subject to which the certificate relates and the matter embraced in the questions submitted has been considered, and was passed on in an opinion this day announced in the case of the *American Express Company* v. *Fred. A. Maynard, Attorney General of the State of Michigan ex rel. George F. Moore et al.*, No. 220 of the docket of this term.

For the reasons given in the opinion in the case just referred to it is unnecessary to answer the first question submitted, and a negative answer to the second question is required.

And it is so ordered.

DOHERTY *v.* NORTHERN PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 121. Argued January 26, 29, 1900. — Decided April 16, 1900.

The eastern terminus of the Northern Pacific Railroad, which was constructed under the powers conferred upon that Railroad Company by the act of July 2, 1864, c. 217, 13 Stat. 365, was at Ashland in Wisconsin, and that company acquired a right of way over public lands in Wisconsin, including the land in question in this case.

Statement of the Case.

In the Superior Court of Douglas County, Wisconsin, in November, 1896, Andrew Doherty filed a petition asking for the appointment of commissioners to appraise certain real estate taken by the Northern Pacific Railway Company for a portion of its line passing through property alleged to belong to the petitioner.

The petition alleged that Doherty was and had been since November 8, 1882, the owner in fee simple of the north one half of the southwest quarter of section 4, township 47, range 11 west, in Douglas County, Wisconsin; that the Northern Pacific Railroad Company was a corporation duly authorized by the laws of the United States to construct and maintain a line of railway from a point on Lake Superior, in the States of Wisconsin or Minnesota, to some point on Puget Sound, in the State of Washington; that some time during the year 1883 the said company had unlawfully laid its railroad track upon a portion of petitioner's land, and had unlawfully entered upon and appropriated the same, without the consent or authority of petitioner, and had been in possession thereof ever since until about August 31, 1896; that on or about the last mentioned date all the property, effects, rights and franchises of the Northern Pacific Railroad Company had been transferred and sold to and purchased by the Northern Pacific Railway Company, and said railroad has ever since been operated and owned by the said the Northern Pacific Railway Company, which the petition alleged to be a domestic corporation, duly authorized by its charter and the laws of the State of Wisconsin to maintain and operate the line of railway before mentioned; that neither the said Northern Pacific Railroad Company, nor its successor, the Northern Pacific Railway Company, has acquired title to said land, or made any attempt to acquire title thereto by purchase, eminent domain or otherwise. The petition further alleged that the value of the land so taken and the damages occasioned by the taking thereof were less than five million dollars and more than one hundred thousand dollars. Wherefore an order was prayed that commissioners be appointed to ascertain and appraise the compensation to be made, etc.

Statement of the Case.

To this petition the Northern Pacific Railway Company made answer asserting title by virtue of the grant of right of way by section 2 of the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, and of the purchase of the interest of the last named company, etc.

The essential facts in the case were settled by a stipulation in writing, substantially as follows:

"On July 2, 1864, the land in question was public land of the United States. On November 8, 1882, the petitioner Doherty made a homestead entry thereof, and thereafter complied with the homestead laws and received a patent from the United States purporting to convey the lands February 6, 1890. In December, 1885, the Northern Pacific Railroad Company took possession of the strip in controversy and constructed a railroad upon it, and remained in possession, operating the railroad, until August 31, 1896, when all the property, rights and franchises of said railroad company were sold to the appellant, the Northern Pacific Railway Company, a Wisconsin corporation, which is duly organized to operate said railroad, and has occupied said strip for railroad purposes. The Northern Pacific Railroad Company, of which the appellant is the successor in interest, was organized by and obtained its rights under an act of Congress approved July 2, 1864, 13 Stat. 365, c. 217, entitled An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route. By the first section of this act a corporation created thereby was authorized to lay out and construct a continuous railroad and telegraph line, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly upon the most eligible route as shall be determined by said company within the United States and north of the forty-fifth degree of latitude to some point on Puget's Sound. By the second and third sections of the same act the right of way through the public land of the United States was granted to said railroad company, its successors and assigns, for the construction of the line, and it was also provided that if its route should be found to be upon the same general line as the route of another railroad which

owned a previous land grant from the United States, the amount of said previous land grant should be deducted from the amount granted by this act, provided that the railroad owning the previous grant might assign its interest to the Northern Pacific Railroad Company, or might consolidate, confederate and associate with said company upon the terms named in the first section of the act. The lands granted to the Northern Pacific Railroad Company by the act amounted to ten alternate sections per mile on each side of the line within the States and twenty alternate sections in the Territories, with a ten-mile indemnity limit, and by resolution of Congress, May 31, 1870, an additional indemnity belt ten miles in width was created on each side of the line. This act was accepted by the company within the time required by law. The act also required the company to procure legislative consent of the States through which it was to run before its construction, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent, the Minnesota act providing that if the eastern terminus of the road should be located east of the eastern boundary of Minnesota, then that the company should construct or cause to be constructed a railroad from its main line to the navigable waters of Lake Superior at some point within the State of Minnesota.

"In 1870 the company located its general route from the mouth of the Montreal River in Wisconsin, across Wisconsin and Minnesota to a point on the Red River of the North near Fargo, and transmitted a map showing this location August 13, 1870, to the Secretary of the Interior. This map showed the proposed general route to commence at the mouth of the Montreal River, thence a little south of west upon a direct line to a point directly south of and about six miles distant from the south end of Chequamegen Bay; thence a little north of west upon a direct line crossing the state boundary between Wisconsin and Minnesota, at or near the point where the St. Louis River becomes such boundary. Upon receipt of this map the Secretary of the Interior transmitted it to the Land Commissioner, with instructions to withdraw from sale, homestead and preëmption all odd-numbered sections of land within twenty

miles of the line within both States. This order was complied with by the Land Commissioner by directions given to the district land officers at Bayfield, Wisconsin. Such withdrawals were made and the price of the even-numbered sections was raised to $2.50 per acre, and thereafter large quantities of such land were sold by the Government at the rate of $2.50 per acre. In 1882 a map of definite location of said railroad from a point upon the St. Paul and Duluth Railroad, now called Thomson Junction, eastward to a point in section 15, township 47, north of range 2 west, in the State of Wisconsin, was prepared and approved by the directors and certified and forwarded to the Secretary of the Interior. The line of definite location laid down on this map followed substantially the line of general location upon the prior map, but it turned to the north and touched Superior, and also Ashland, and stopped some ten miles west of the mouth of the Montreal River. Upon receipt of this map of definite location the Land Commissioner, by direction of the Secretary of the Interior, adjusted the land grant in accordance with it, and prepared diagrams showing the limits of the grant and indemnity belts, and transmitted such diagrams to the district land officers with the proper directions as to the withdrawal of lands, which were complied with.

"August 2, 1884, the directors of the Northern Pacific Railroad Company adopted a resolution fixing the eastern terminus of the railroad at the city of Ashland, which resolution was duly certified and transmitted to the Commissioner of the General Land Office, December 3, 1884. Thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, with instructions to adjust the grant on this basis. The point so fixed is on the line of definite location of July 6, 1882, but about twelve miles west of the east end of that line. The Northern Pacific Railroad Company constructed a continuous line of railroad from the city of Ashland to Puget's Sound, in all respects in accordance with its act of incorporation, and the whole line has been duly accepted by the President of the United States, as provided in that act. That portion of the road extending east from Thomson Junction was

constructed upon the line of definite location shown in the map of 1882, and was so constructed during the years 1881, 1882, 1883 and 1884.

"The first section extended from Thomson Junction to Superior, and was examined and reported favorably upon by commissioners in 1882, and the recommendations were approved by the President, September 16, 1882; the second section, extending from Superior to the Brule River, was constructed in the latter part of 1883, and crossed the land in question here, and was approved in like manner January 31, 1884; the third section extended from the Brule River to Ashland, and was approved in like manner February 18, 1885. It appears further that, March 6, 1865, one Josiah Perham, then the president of the Northern Pacific Railroad Company, transmitted to the office of the Land Commissioner a map purporting to show the proposed general route of the Northern Pacific Railroad. Upon this map there appeared two lines from a point in the present State of North Dakota eastward, one terminating upon Lake Superior at or near Duluth, and the other extending into Wisconsin some distance south of Lake Superior, and terminating at the mouth of the Montreal River, this last named line being apparently partially obliterated by a wavy red line. This map was accompanied by a letter from Perham, stating that it shows the general line of the Northern Pacific Railroad from a point on Lake Superior in Wisconsin to a point on Puget's Sound. The Secretary of the Interior transmitted this map to the Land Commissioner, suggesting the withdrawal of the lands along the line, but the Land Commissioner soon afterward transmitted a letter to the Secretary of the Interior recommending that the map be rejected, for the reason that the same did not comply with the rules of the land department, which recommendation was approved by the Secretary. There is nothing to explain the apparent alteration of this map nor to show when it was made, and it is not shown that the directors of the company ever authorized the making or filing of the map, but it appears that the president of the company had no power to make or file it.

"By act approved May 5, 1864. c. 79, 13 Stat. 64, Congress granted ten sections of land per mile to the State of Minnesota

to aid in the construction of a railroad from St. Paul to Lake Superior. In the same year the legislature of Minnesota conferred this grant upon the Lake Superior and Mississippi Railroad Company, a Minnesota corporation, and afterwards known as the St. Paul and Duluth Railroad Company. On January 1, 1872, this company had constructed and was operating a railroad from St. Paul to Duluth, by way of Thomson Junction, which is upon the St. Louis River, and is the point from which the Northern Pacific Railroad Company started to build its line westward. On the last-named date the Northern Pacific Railroad Company purchased a one half interest in that part of this road, extending from Thomson Junction to Duluth, for the sum of $500,000, and received a deed therefor. On the same day the two companies made a written agreement providing for the operation of trains and the maintaining of the road. On May 1, 1872, the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company made a further agreement, by which the lines of the Lake Superior and Mississippi Railroad were leased to the Northern Pacific Railroad for an annual rental, the land grant of the Lake Superior and Mississippi Railroad being expressly excepted from the operation of the lease. Pursuant to this lease the Northern Pacific Railroad Company operated the entire railroad thus leased, from May 1, 1872, until February 1, 1874, when it surrendered the lines leased and relinquished all its interest under the lease, but surrendered no rights under the deed. On the 12th of May, 1874, the Northern Pacific Railroad Company and the Lake Superior and Mississippi Company made an agreement for the operation of the line from Thomson Junction to Duluth.

"It further appears that, by act approved May 5, 1864, c. 80, 13 Stat. 66, the United States granted lands to the State of Wisconsin to aid in the construction of a railroad from Bayfield to Superior, but no road was constructed under this grant."

The Superior Court of Douglas County sustained the petition and appointed commissioners as prayed for. An appeal was taken to the Supreme Court of Wisconsin, which court, on June 23, 1898, reversed the order of the Superior Court, and remanded the cause to that court with directions to dismiss the

petition. *Northern Pacific Railway* v. *Doherty*, 100 Wisconsin, 39.

Thereupon the cause was brought here by a writ of error allowed by the Chief Justice of the Supreme Court of Wisconsin.

Mr. C. W. Russell, for the United States.

Mr. M. S. Bright for Doherty submitted on his brief.

Mr. James B. Kerr and *Mr. C. W. Bunn* for the Northern Pacific Railway Company.

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

It is conceded that Doherty, the plaintiff in error, owns the southwest quarter of section 4, township 47 north, of range 11 west, in Douglas County, Wisconsin, having made a homestead entry thereof November 8, 1882, and obtained a patent therefor February 6, 1890.

The Northern Pacific Railway Company, the defendant in error, claims a right of way four hundred feet in width over and across this quarter section, and has constructed and is operating its railroad thereon. It is not claimed that this right of way was acquired by purchase or condemnation, but it is claimed by virtue of the terms of the act of Congress, approved July 2, 1864, c. 217, 13 Stat. 365, incorporating the Northern Pacific Railroad Company, and granting to it, among other rights and privileges, a right of way through the public lands of the United States. This act authorized the corporation, thereby created, to construct a railroad "beginning at a point on Lake Superior in the State of Minnesota or Wisconsin" westward to "some point on Puget's Sound," and the controlling question in this case is whether the eastern terminus of the railroad constructed under the act is at Duluth, Minnesota, or at Ashland, Wisconsin. If at Duluth, then the company acquired no right of way over any public land in Wisconsin; but if at Ashland, then it did acquire a right of way over public lands in Wisconsin, including the land in question.

It is conceded that on August 2, 1884, the directors of the Northern Pacific Railroad Company adopted a resolution fixing the eastern terminus of the railroad at Ashland; that this resolution was transmitted to the Commissioner of the General Land Office; that thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, Wisconsin, with instructions to adjust the grant on this basis; that a continuous line of railroad from Ashland to Puget's Sound in all respects in accordance with the act of incorporation, and as depicted upon its map of definite location has been constructed, and has been accepted as such by the President of the United States. Such concessions would seem to warrant a conclusion that the defendant in error is entitled, as matter of right, to maintain and operate its road upon a right of way over the land in dispute, and we are led to inquire why it is that such a conclusion is disputed.

And, first, it is claimed by the plaintiff in error that the Northern Pacific Railroad Company definitely located its eastern terminus at Duluth, January 1, 1872, when it purchased one half of the track and right of way of the Lake Superior and Mississippi Railroad Company from Thomson Junction to Duluth, and made a contract for operation of the line in common.

In reply to this claim the company denies that, by purchasing an interest in the line from Thomson Junction to Duluth, it was ever intended by the company to make Duluth the eastern terminus, or that the arrangement with the Lake Superior and Mississippi Railroad operated, as a matter of law, to fix and determine Duluth as the eastern terminus; and attention is called to the fact that it is provided in the act of July 2, 1864, that before the Northern Pacific Railroad Company could commence the construction of its road it should obtain the consent of the legislature of any State through which any portion of its line might pass. Such consent was obtained from the States of Wisconsin and Minnesota; and in the act of the latter State, granting consent, it was in terms provided "that should the company elect to make the eastern terminus of said line east of the eastern boundary of the State of Minnesota, then, and in

that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose, the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line in the State of Minnesota."

Evidently it was not intended by the legislature of Minnesota by this enactment to compel the railroad company to make its eastern terminus within the limits of that State. Indeed, the act recognizes the right of the company to elect to make its eastern terminus east of the limits of Minnesota.

It was, then, in compliance with the condition imposed by Minnesota, namely, that in case the railroad company elected to make its eastern terminus in Wisconsin, that the arrangement was made whereby the line from Thomson Junction on the main line to Duluth became, as to one half thereof, the property of the Northern Pacific Railroad Company.

We agree with the Supreme Court of Wisconsin in so regarding this transaction, and also in its holding that the arrangement between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company did not constitute a consolidation of the companies in any legal sense, so as to make the short line between Thomson Junction and Duluth a part of the trunk line contemplated by Congress.

When, in August, 1870, the company located its proposed general route, and when its map of such location was approved by the Secretary of the Interior, showing its eastern terminus to be in Wisconsin, it became obligatory on the company to comply with the condition imposed, in that event, to construct a branch line to Lake Superior within the limits of Minnesota, and hence the agreement with the Lake Superior and Mississippi Railroad Company.

It is next contended by the plaintiff in error that, even if Duluth is not to be regarded as the eastern terminus of the company's road, yet that when afterwards, in constructing its road eastward from Thomson Junction, the company's road reached the city of Superior, the latter thereby became the

point on Lake Superior which was to be regarded as the eastern terminus; that the city of Superior was the first point at which the Northern Pacific Railroad Company connected with Lake Superior by its own road, and it thereby became the initial point contemplated by the granting act.

In connection with this proposition it is necessary to take notice of certain legislation of the State of Wisconsin.

By an act approved April 10, 1865, the legislature of that State gave its consent, unconditionally, to the Northern Pacific Railroad Company to build and maintain its road within the state limits. Stats. 1865, c. 465.

On March 25, 1872, the legislature passed an amending act, whereby the consent previously given to the Northern Pacific Railroad Company to construct and operate its road in the State of Wisconsin was made subject to certain conditions, among which were that the company should build and operate a line of railroad running from the junction of the said main line of the Northern Pacific Railroad Company with the Lake Superior and Minnesota Railroad to the bay of Superior, and should build and maintain at the latter point docks and piers suitable for the transfer of passengers and freight between the railroad and lake-going craft; and that until such connecting road and docks were constructed, it should not be lawful for the company to construct or maintain any other railroad in Wisconsin. Stat. 1872, c. 139.

To comply with this legislation it was necessary for the company to alter the line of its road as defined by its map of general route, so that the same might touch the lake at the bay of Superior. But it does not follow that thereby the company abandoned its right to itself select the point of its eastern terminus. This and the similar legislation of Minnesota were not intended or regarded as taking away from the company its rights and powers under the act of Congress. They only imposed, whether lawfully or otherwise, certain conditions respecting branch line connections which the legislatures deemed desirable for local advantage.

Some reliance is placed upon two decisions of the Secretary of the Interior — the first rendered November 13, 1895, and

reported in volume 21, Land Decisions, 412; the second, rendered August 27, 1896, and reported in volume 23, Land Decisions, 204.

Those decisions were made by the Secretary in disposing of a list of indemnity selections filed by the Northern Pacific Railway Company, based on losses of lands within the place limits lying east of the city of Superior. The opinion of the Secretary was that because the company was empowered to locate and construct a line of railroad from a point on Lake Superior to some point on Puget's Sound, it had authority to touch the lake at only one point, and that notwithstanding it filed a map of definite location from Thomson Junction to Ashland, the fact that the line so located and constructed touched the lake at the city of Superior precluded the company from extending its line eastward from that point. In his later decision the Secretary concluded that the transaction between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company was, in legal effect, a consolidation of the two corporations, and that, therefore, the eastern terminus of the Northern Pacific Railroad was definitely fixed at Duluth.

We do not care to repeat the considerations already advanced going to show that, in our opinion, the right of the railroad company, under the act of July 2, 1864, to select its eastern terminus at a point on Lake Superior in the State of Minnesota or Wisconsin, was not intentionally, or by operation of law, ended or determined by the company's compliance with the conditions sought to be imposed by the legislation of Minnesota and Wisconsin. The views of the Supreme Court of Wisconsin on this subject may be properly quoted: "On March 6, 1865, one Josiah Perham, then president of the Northern Pacific Railroad Company, filed with the Secretary of the Interior a map showing a proposed route of the proposed railroad. On this map appear two lines from a point in North Dakota to Lake Superior, one ending at Duluth and one at the mouth of the Montreal River. The latter line is partially obliterated by a wavy red line through its whole length. It appears affirmatively that the president had no authority to make or file this

map, and that the directors never authorized it; and further, that on June 22, 1865, the map was rejected by the Land Commissioner and by the Secretary of the Interior because it did not comply with the rules and regulations of the land department. No further action was ever taken upon it, and it seems too plain to require argument that it can cut no figure in the case. All the subsequent maps made and filed by the corporation, as well as its recorded acts, show the clear intention to make the eastern terminus of the road in Wisconsin. In 1870 a map of general route was filed, showing the eastern terminus to be at the mouth of the Montreal River; upon receipt of which the odd-numbered sections of land within twenty miles of the line were withdrawn from sale, homestead and preemption entry in the States of Minnesota and Wisconsin, and the price of land in the even-numbered sections was raised to $2.50 per acre, and large quantities sold by the United States at that price. In 1882 a map of definite location of the line from Thomson Junction eastward to a point in section 15, township 47, range 2 west of the fourth P. M., was filed in the land office at Washington. This line passed through Ashland and terminated a few miles east of that city. This map was approved, and the land grant adjusted in accordance therewith by the department. In August, 1884, the board of directors of the company, by formal resolution, fixed the eastern terminus of the road at Ashland, and a certified copy of the resolution was filed in the General Land Office in December, 1884, whereupon the Land Commissioner made a diagram showing the eastern terminus so fixed, and adjusted the grant in accordance therewith.

"The portion of the road extending eastward from Thomson Junction to Ashland was constructed in the years 1881, 1882, 1883 and 1884, and was examined in three sections by commissioners appointed by the President of the United States, as provided by the act of incorporation. The commissioners reported favorably upon all of these sections, and their recommendations were approved by the President, the last approval being dated February 6, 1885.

"All of these deliberate acts of the department and executive

officers are brushed aside by Commissioner Smith on the ground that the terminus of the road had been unalterably fixed at Duluth by the action of the Northern Pacific Railroad Company in 1872. As we do not agree with the Commissioner's premise we cannot agree with his conclusion, and therefore hold that the terminus of the road is at Ashland, and hence that the railroad company had a right of way across the petitioner's land by virtue of the provisions of the act of incorporation." *Northern Pacific Railway Company* v. *Doherty*, 100 Wisconsin, 39.

In a bill filed in the Circuit Court of the United States for the District of Minnesota by the United States against the Northern Pacific Railroad Company, the Northern Pacific Railway Company and others, it was sought to have cancelled and annulled a patent granted by the United States, on April 22, 1895, to the Northern Pacific Railroad Company, for lot 5 of section 29, township 54 north, of range 13 west, in the county of St. Louis and State of Minnesota, a tract of land situated more than ten miles east of Duluth, which the bill averred to be the eastern terminus or eastern initial point of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864. The bill alleged that the patent had been granted through inadvertence and mistake, and under an "erroneous impression and mistaken belief that said tract of land was lying and being within the limits of the aforesaid grant to the Northern Pacific Railroad Company."

The case was so proceeded in, on bill, answer and an agreed statement of facts, that on February 20, 1899, the bill of complainant was dismissed for want of equity; and this decree was, on appeal to the Circuit Court of Appeals for the Eighth Circuit, on July 10, 1899, by that court affirmed. *United States* v. *Northern Pac. R. Co.*, 95 Fed. Rep. 864.

The controversy in that case involved the same questions as those we have been considering in the present case of Doherty, and the conclusions reached were that the land department committed no error of law when it held that the Northern Pacific Railroad Company had authority under its charter to locate its eastern terminus at Ashland, and made no mistake of fact when it found that the Northern Pacific Railroad Company

had actually selected Ashland as its eastern terminus. The facts and reasoning relied on by the respective parties were, in the main, the same with those that were relied on in the case in the Supreme Court of Wisconsin, now under review in this court.

The judgment of the Supreme Court of Wisconsin is

Affirmed.

MR. JUSTICE MCKENNA did not take part in the decision of the case.

UNITED STATES *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 408. Argued January 26, 29, 1900. — Decided April 16, 1900.

The important questions of fact and law are substantially the same in this case and in *Doherty* v. *Northern Pacific Railway Company*, *ante*, 421, and that case is followed in this in regard to the questions common to the two cases.

The obvious purpose of this suit was, to have the question of the proper terminus of the company's road determined; and if that terminus was found to be at Ashland, then the complainant would not be entitled to any relief.

Under the act of July 2, 1864, non-completion of the railroad within the time limited did not operate as a forfeiture.

As the bill, in this case, does not allege that it is brought under authority of Congress, for the purpose of enforcing a forfeiture, and does not allege any other legislative act, looking to such an intention, this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained.

As the evidence and conceded facts failed to show any mistake, fraud or error, in fact or in law, in the action of the land department in accepting the location of the eastern terminus made by the company, and in issuing the patent in question, the bill was properly dismissed.

Opinion of the Court.

In July, 1898, the United States, by the Attorney General, filed in the Circuit Court of the United States for the District of Minnesota a bill of complaint against the Northern Pacific Railroad Company and others. The object of the suit was to procure the cancellation and annulment of a certain patent granted to the Northern Pacific Railroad Company by the United States on April 22, 1895, for a tract of land lying and being more than ten miles east of Duluth, in the State of Minnesota, and which patent was alleged by the bill to have been inadvertently and mistakenly issued. The case was disposed of on bill, answer and a stipulation of facts. The Circuit Court dismissed the case for want of equity, and the cause was taken on appeal to the Circuit Court of Appeals for the Eighth Circuit, where the decree of the Circuit Court was, on July 10, 1899, affirmed. An appeal was thereupon allowed to this court.

This cause was heard in this court in connection with that of *Andrew Doherty* v. *The Northern Pacific Railway Company*, *ante*, 421. That case came here on a writ of error to the Supreme Court of the State of Wisconsin. The present one is on appeal from the Circuit Court of Appeals for the Eighth Circuit.

Mr. C. W. Russell for the United States.

Mr. James B. Kerr and *Mr. C. W. Bunn* for the Northern Pacific Railway Company.

Mr. M. S. Bright for Doherty submitted on his brief.

Mr. Justice Shiras delivered the opinion of the court.

The important questions of fact and of law were substantially the same in the two cases, and so were the reasoning and conclusions of the respective courts below. In a judgment just entered by this court, the judgment of the Supreme Court of Wisconsin was affirmed, for reasons given in the opinion, a reference to which is deemed to be a sufficient disposition of the questions common to the two cases.

But in the present case there has been raised and argued a proposition not considered in the Supreme Court of Wisconsin, and which is entitled to our attention. Briefly stated, it is that, even if it be conceded that the eastern terminus of the Northern Pacific Railroad Company was lawfully fixed at Ashland, Wisconsin, yet that the land grant of the company had lapsed before any map of the definite location of the railroad east of Duluth, Minnesota, had been filed in the land department; that the company could not lawfully extend the construction of its railroad, so as to entitle it to land under its land grant, after the time limited by act of Congress for the completion of the railroad had fully expired; and that, consequently, the patent to the land described in the bill, being land east of Duluth, was granted mistakenly and improperly.

This contention is based on the language of section 8 of the incorporating act, which is as follows: "That each and every grant, right and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence work upon 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 whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-six." The time of completion was subsequently extended to July 4, 1880. 14 Stat. 355; 15 Stat. 255.

It is always safe, in approaching a question of this kind, to have regard to the pleadings in the case. Otherwise there is danger that the court and counsel may be drawn into discussions outside of the case actually presented.

On inspection, it appears that the case made by the bill is, that the eastern terminus of the Northern Pacific Railroad became, was and now is at the city of Duluth, State of Minnesota; that the land in question being part and parcel of the public lands of the United States, is more than ten miles east of the said eastern terminus, and not, therefore, within the limits of the grant to said company; that the patent granted to the said company on April 22, 1895, was issued "through

mistake and inadvertence, and under the erroneous impression and mistaken belief that said tract of land was within the limits of the said grant to the Northern Pacific Railroad Company;" and the relief prayed for is that said tract of land be restored to the complainant; that the defendant be required to reconvey all of said tract of land; and that said patent issued by the ministerial officers of the government, so far as the tract of land described in the bill is concerned, be cancelled and annulled; and for such other and further relief as may be just and equitable.

It is true that, in the narrative part of the bill, the eighth section of the incorporating act is quoted, and also there is set forth the several transactions whereby it is alleged Duluth became established as the eastern terminus of the company's road, but there is no intimation that it was the purpose of the bill to have a forfeiture of the company's rights and property judicially ascertained and declared. Indeed, the obvious purpose of the suit was to have the question of the proper terminus of the company's road determined; and it seems a fair deduction from the averments and prayers of the bill that, if that terminus was found to be at Ashland, then the complainant would not be entitled to any relief.

It is argued on behalf of the Government that, even if the bill did not point to a forfeiture as part of the proof that the land had been mistakenly patented, yet that as the defendants, in their answer, had set up, as part of their defence, that the road had been "duly," and "in all respects," constructed in accordance with the law, thereby entitling them to the land in dispute, the issue was thereby widened so as to include the question of forfeiture. We think the Court of Appeals properly disposed of this argument when it said: "This is nothing but a suit to avoid a patent to a single tract of land on the sole ground that the land department erroneously found the eastern terminus of the road to be at Ashland when it was at Duluth. No forfeiture of any of the rights and privileges of the company on account of the delay in the construction of its railroad has been prayed, no issue of forfeiture has been tendered or made by the pleadings, and that question is not here for consideration. It is a

general rule that questions that are not within the issues presented by the pleadings may not be determined by the courts, much less may so important a question as the forfeiture of the rights of a corporation to thousands of miles of railroad and thousands of acres of land under a Congressional grant. Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of presenting it."

Again, it is contended that when a statutory grant contains on the face of the law a provision that each and every grant, right and privilege are upon condition that the road shall be completed within a certain time, and that time expires without performance of the condition, all future proceedings of the company, even if acquiesced in and approved by executive officers of the Government, in disregard of the forfeiture, are unauthorized, *ultra vires* and forbidden.

In other words, if we understand the position, it is claimed that under section 8 of the act of July 2, 1864, non-completion of the railroad within the time limited of itself operates as a forfeiture; the grant immediately reverts to the Government; and courts must so hold on the simple statement of the fact of non-compliance within the limit. We do not understand this to be a correct statement of the law. In *Schulenberg* v. *Harriman*, 21 Wall. 44, this court was called upon to consider the legal import of such a provision in the act of Congress of June 3, 1856, granting public lands to the State of Wisconsin to aid in the construction of railroads in said State. After providing that the lands should be sold, from time to time, as the construction of the railroad progressed, until the road was completed, it was enacted that "if said road is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

No part of the road having been built at the expiration of the period limited in the grant, it was claimed that the lands reverted to the United States. It was held by the Circuit Court of the United States for the District of Minnesota that such lands did not *ipso facto* revert to the United States by

mere failure to build the road within the period prescribed by Congress, and that to effect a forfeiture some act on the part of the government evincing an intention to take advantage of such failure was essential; and, on error, that ruling was affirmed by this court, and the following statement of the law was made by Mr. Justice Field in giving the opinion of the court:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as said by this court in a late case, (*United States* v. *Repentigny*, 5 Wall. 286,) 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'

"In the present case no action has been taken either by legislative or judicial proceedings to enforce a forfeiture of the estate granted by the act of Congress. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In July, 1866, Congress granted unto the California and Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the

grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: "That in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the land." *Schulenberg* v. *Harriman*, 21 Wall. 44; *Van Wyck* v. *Knevals*, 106 U. S. 360, are then cited, and likewise *St. Louis, &c., Railroad Co.* v. *McGee*, 115 U. S. 743, where it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity."

As the bill in this case does not allege that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such an intention, it is plain, under the authorities cited, that this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained. This being so, and that terminus having been found to be at Ashland, it follows that the courts below committed no error in dismissing the bill of complaint.

This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department, in recognizing the rights of the railroad company as continuing in full force after the expira-

tion of the time named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within a time fixed, when the work is subsequently completed and accepted, would apply to a case like the present. Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed.

As the evidence and conceded facts failed to show any mistake, fraud or error, in fact or in law, in the action of the land department in accepting the location of the eastern terminus made by the company, and in issuing the patent in question, the bill was properly dismissed, and the decree of the Circuit Court of Appeals is

Affirmed.

Mr. Justice McKenna did not take part in the decision of the case.

CARTER *v.* TEXAS.

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

No. 193. Submitted March 16, 1900. — Decided April 16, 1900.

Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. And when a defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the

constitution of the grand jury upon this ground may be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar.

The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State.

A person of the African race was indicted, in an inferior court of a State, for a murder committed since the impanelling of the grand jury; and, before pleading in bar, presented and read to the court a motion to quash, duly and distinctly alleging that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment; and, as was stated in his bill of exceptions allowed by the judge, thereupon offered to introduce witnesses to prove that allegation, but the court refused to hear any evidence upon the subject, and, without investigating whether the allegation was true or false, overruled the motion, and the defendant excepted. After conviction and sentence, he appealed to the highest court of the State in which a decision in the case could be had. That court affirmed the judgment, upon the assumption that the defendant had introduced no evidence in support of the motion to quash. *Held*, that this assumption was plainly disproved by the statements in the bill of exceptions; and that the judgment of affirmance denied to the defendant a right duly set up and claimed by him under the Constitution and laws of the United States, and must therefore be reversed by this court on writ of error.

The case is stated in the opinion of the court.

Mr. Wilford H. Smith and *Mr. E. M. Hewlett* for plaintiff in error.

Mr. T. S. Smith for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

At November term, 1897, of the criminal district court, held at the city of Galveston for the county of Galveston and State of Texas, the grand jury, on November 26, 1897, returned an indictment against Seth Carter for the murder on November 24, 1897, of Bertha Brantley, both being of the negro race.

The record states that at March term, 1898, when the case was called for trial, the defendant, in open court, and before he

had been arraigned, or had pleaded to the indictment, presented and read to the court a motion to quash the indictment.

The motion to quash was signed and sworn to by the defendant, and was in these words: "And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners, appointed to select the grand jury which found and presented said indictment, selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury; but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color; and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify."

The record further shows that the court overruled the motion, and to that ruling the defendant excepted in open court; that the defendant was then arraigned and pleaded not guilty, and was tried and convicted by a jury, and adjudged guilty by the court, of murder in the first degree; and that a bill of exceptions was tendered by him, and was by the presiding judge approved, allowed and ordered to be made part of the record, which stated that, "after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in

support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted."

The defendant appealed to the Court of Criminal Appeals of the State of Texas, (being the highest court of the State in which a decision in the case could be had,) which affirmed the judgment, and denied a motion for a rehearing. The opinions delivered by that court upon affirming the judgment, and upon denying the motion for a rehearing, are set out in the record, and are reported in 39 Texas Crim. 345. The defendant sued out this writ of error.

The Code of Criminal Procedure of the State of Texas contains the following provisions:

"ART. 397. Any person, before the grand jury have been impanelled, may challenge the array of jurors, or any person presented as a grand juror; and in no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall, upon his request, be brought into court to make such challenge."

"ART. 559. A motion to set aside an indictment" "shall be based on one or more of the following causes, and no other: 1. That it appears by the records of the court that the indictment was not found by at least nine grand jurors." "2. That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same."

"ART. 561. The only special pleas which can be heard for the defendant are: 1. That he has been before convicted legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offence. 2. That he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular."

The Court of Criminal Appeals, in its first opinion affirming the judgment of the trial court, disposed of the objection to the grand jury by holding that, by the very terms of article 559, "the fact that people of African descent were not drawn by the

commissioners to serve as jurors upon the grand jury is not a ground for setting aside an indictment;" and that the appellant had not undertaken to bring himself within the purview of article 397, as to which the court said: "If there were any objections to the grand jury, or any member of it, they should have been exercised by challenge, either to the array or to a particular member of said body. The question of challenge to the array or to a particular juror is not suggested, nor is it shown that he was debarred this right. It is too late, after indictment found, to question the manner of impanelling a grand jury." 39 Texas Crim. 348, 349.

In the opinion delivered on denying the motion for a rehearing, the court substantially abandoned as untenable the positions taken in its first opinion; and admitted that "in this particular case no opportunity was afforded appellant to challenge the array, because the grand jury which returned the bill against him had been impanelled prior to the commission of this offence," and consequently that a motion to quash the indictment, made after his arrest under it, and before his arraignment, was a proper and timely mode of presenting a fundamental objection under the Constitution and laws of the United States, although no such objection was mentioned in the statutes of the State. And the reasons assigned for denying the rehearing were that "the motion to quash was based simply on the affidavit of appellant," and "the question was presented to the court without any evidence whatever in support of it;" that "in this case the motion to quash was not predicated on the record, but involved extraneous matters, and before the court would be authorized to act, there must be some proof of the allegations contained in the motion;" that "the motion was but a mere tender of the issue, unaccompanied by any supporting testimony;" that "it names no witness or person by whom it was proposed to prove the allegations of the motion;" and that "the bare recitation" (in the bill of exceptions) "that the court refused to hear evidence in support of said motion is without meaning, because in fact no testimony was tendered by appellant." 39 Tex. Crim. 354–357.

The rules of law which must govern this case are clearly established by previous decisions of this court.

Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370, 397; *Gibson* v. *Mississippi*, 162 U. S. 565.

When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar. *United States* v. *Gale*, 109 U. S. 65, 67.

The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the State, must be supported by evidence on the part of the defendant. *Smith* v. *Mississippi*, 162 U. S. 592, 601; *Williams* v. *Mississippi*, 170 U. S. 213.

But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State. *Neal* v. *Delaware*, 103 U. S. 370, 396, 397; *Mitchell* v. *Clark*, 110 U. S. 633, 645; *Boyd* v. *Thayer*, 143 U. S. 135, 180.

In the case at bar, as may be inferred from the dates appearing in the record, and as is distinctly stated in the opinion delivered by the court below on denying a rehearing, the grand jury had been impanelled before the commission of the offence for which the defendant was indicted. He therefore never had any opportunity to challenge the array of the grand jury, and was entitled to present the objection on which he relied by motion to quash.

The defendant's motion to quash the indictment was presented to the court before he had been arraigned, or had pleaded to

the indictment. The motion, besides stating that the defendant was of the African race, fully and specifically alleged, with almost the precision of a plea in abatement, that the jury commissioners appointed to select the grand jury selected no persons of African descent to serve on the grand jury, but on the contrary excluded from the list all such persons because of their race and color; that the grand jury was composed exclusively of persons of the white race, while all persons of the African race, although constituting about one fourth of the registered voters in the county, and although otherwise well qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and had been so excluded from serving on any jury in that court for a great many years; and that this was a discrimination against the defendant, and a denial to him of the equal protection of the laws, and of his civil rights guaranteed to him by the Constitution and laws of the United States. And the motion concluded with the statement, "All of which the defendant is ready to verify."

The bill of exceptions tendered by the defendant, and allowed by the presiding judge, and made part of the record by his order, explicitly states that "after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted."

It thus clearly appears by the record that the defendant, having duly and distinctly alleged, in his motion to quash, that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment, asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain that allegation; and that the court refused to hear any evidence upon the subject, and overruled the motion, without investigating whether the allegation was true or false.

The defendant having offered to introduce witnesses to prove

the allegations in the motion to quash, and the court having declined to hear any evidence upon the subject, it is quite clear that the omission of the bill of exceptions to give the names of the witnesses whom the defendant proposed or intended to call, or to state their testimony in detail, cannot deprive the defendant of the benefit of his exception to the refusal of the court to hear any evidence whatever. And the assumption, in the final opinion of the state court, that no evidence was tendered by the defendant in support of the allegations in the motion to quash, is plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court.

The necessary conclusion is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States; and therefore

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

GREAT SOUTHERN FIRE PROOF HOTEL COMPANY *v.* JONES.

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

No. 210. Argued March 21, 22, 1900. — Decided April 9, 1900.

On writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

A limited partnership, doing business under a firm name, and organized under the act of the General Assembly of Pennsylvania approved June 2, 1874, entitled "An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances," is not a corporation within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purposes of

the litigation, to be one by or against citizens of the State creating the corporation. It is not sufficient that the association may be described as a *quasi* corporation or as a "new artificial person." The rule does not embrace a new artificial person that is not a corporation.

Under the circumstances disclosed by the record the Circuit Court should allow an amendment of the pleadings upon the subject of the citizenship of the parties, and the case should proceed to a final hearing on the merits in the event the pleadings as amended show a case within the jurisdiction of the court.

THE case is stated in the opinion of the court.

Mr. John E. Sater and *Mr. D. F. Pugh* for petitioner.

Mr. Talfourd P. Linn and *Mr. Louis G. Addison* for respondents.

MR. JUSTICE HARLAN delivered the opinion of the court.

The bill in this suit, commenced in the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, describes the plaintiffs Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., as "members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association, organized under an act of the General Assembly of Pennsylvania, approved June 23d [2d], 1874, entitled 'An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,'" and who "have their office and principal place of business in the city of Pittsburg," and which association is "a citizen of the State of Pennsylvania." Penn. Laws, 1874, p. 271.

The defendant first named in the bill is the Great Southern Fire Proof Hotel Company, a corporation of the State of Ohio; and some of the defendants are corporations and citizens of States other than the State of Pennsylvania.

The remaining defendants are thus described in the bill:

"Taylor, Beall & Company is a partnership doing business in

the city of Columbus and State of Ohio, the individual partners thereof being William D. Taylor, James P. Beall and William J. Keever."

"Sturgeon, Ford & Company is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being unknown to your orators."

"Meacham & Wright is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being Floras D. Meacham and Frank S. Wright."

"Sosman & Landis is a partnership of Chicago, Illinois, doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators."

"Dundon & Bergin is a partnership doing business in the city of Columbus, State of Ohio, the individual partners thereof being Thomas J. Dundon and Matthew J. Bergin."

"H. C. Johnson & Company is a partnership doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators."

"Schoedinger, Fearn & Company is a partnership doing business in the State of Ohio, the individual partners thereof being F. O. Schoedinger, W. A. Fearn and J. R. Dickson."

"L. Hiltgartner & Sons is a partnership doing business in the city of Columbus, State of Ohio, the names of the individual partners thereof being unknown to your orators."

The nature of the case made by the bill is as follows:

By written agreement between Jones & Laughlins, Limited, and W. J. McClain, dated December 13, 1894, the former agreed, upon certain terms, to furnish structural steel for use in the erection of the Great Southern Hotel at Columbus, for the construction of which McClain had previously contracted with the Great Southern Fire Proof Hotel Company. Under the above contract Jones & Laughlins, Limited, shipped and furnished to McClain structural steel of the value of $43,296.74. All of that sum was paid by McClain except $11,410.02, which was due to the plaintiffs with interest from January 28, 1896.

On the 11th day of August, 1896, McClain executed a deed of assignment for the benefit of his creditors. And on the 21st day of April, 1896, within four months after the above mate-

rials were delivered to McClain, Jones & Laughlins, Limited, filed with the recorder of Franklin County, Ohio, an affidavit containing an itemized statement of the amount and value of such materials. The object of the filing was to conform to the provisions of sections 3184 (as amended April 13, 1894, 91 Ohio Laws, 135) and 3185 of the Revised Statutes of Ohio, both sections relating to mechanics' liens, and thereby obtain, in behalf of Jones & Laughlins, Limited, for the amount due them, a lien upon the hotel and the opera house connected with it, as well as upon the land on which they stood.

After stating that the defendants each claim to have some interest in the property in question as lienholders or otherwise, the exact nature and extent of which was unknown to the plaintiff, the relief asked was: 1. That the defendants be required to answer and fully set forth their respective interests in the property, and failing to do so that they be barred from asserting any claim thereto. 2. That a receiver be appointed to collect rents. 3. That the plaintiff's demand be declared a valid and subsisting lien on the property. 4. That all the liens be marshalled, the premises sold, and the proceeds distributed.

The Great Southern Fire Proof Hotel Company demurred generally to the bill as insufficient.

The defendants Sosman & Landis filed their answer and cross-bill, claiming a lien upon the property for a balance due under a contract made between them and McClain pursuant to which they furnished scenery, stage work and fixtures for the improvements contemplated by the contract between McClain and the Hotel Company. To that cross-bill a demurrer was also filed.

The cause was heard in the Circuit Court upon the demurrers, the only question argued being the constitutionality of the Ohio statute of April 13, 1894. That court sustained the demurrers and dismissed the bill and cross-bill upon the ground that the provisions of the mechanic's lien law of Ohio, under which the plaintiffs and cross-plaintiffs proceeded, were unconstitutional. 79 Fed. Rep. 477.

Upon appeal to the Circuit Court of Appeals the decree of

the Circuit Court was reversed — the former court holding that the statute of Ohio in question was not void. 58 U. S. App. 397. The Hotel Company then applied for and obtained this writ of certiorari.

The bill rests the jurisdiction of the Circuit Court upon the ground of the diverse citizenship of the parties. But was the case as presented by the record one of which the Circuit Court of the United States could take cognizance by reason of diversity of citizenship? When this question was suggested at the argument counsel responded that no objection had been urged to the jurisdiction of that court. But the failure of parties to urge objections of that character cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit. In *Mansfield &c., Railway Co.* v. *Swan*, 111 U. S. 379, 382, the court, after observing that the jurisdiction of a Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record, *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283; *Robertson* v. *Cease*, 97 U. S. 646, said: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he invoked. This case was cited with approval by Chief

Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112." These rules have been recognized and applied in numerous cases.[1]

We are of opinion that the plaintiff as a limited partnership association was not entitled to invoke the jurisdiction of the Circuit Court. It was not alleged to be, nor could it have alleged that it was, a corporation in virtue of the statute of Pennsylvania under which, according to the averments of the bill, it was organized. In *Lafayette Ins. Co.* v. *French*, 18 How. 404, 405, which was an action brought by citizens of Ohio in the Circuit Court of the United States for the District of Indiana, the declaration described the defendant as the "Lafayette Insurance Company, a citizen of the State of Indiana." This court said: "This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation; or if it be such, by the law of what State it was created. The averment that the company is a citizen of the State of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed." The case of *Chapman* v. *Barney*, 129 U. S. 677, 682, is decisive of the present question. That was an action in the Circuit Court of the United States by the United States Express Company. This court said: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen

[1] *Hancock* v. *Holbrook*, 112 U. S. 229, 231; *Thayer* v. *Life Asso.*, 112 U. S. 717, 720; *Ayers* v. *Watson*, 113 U. S. 594, 598; *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225, 226; *Metcalf* v. *Watertown*, 128 U. S. 586, 587; *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Chapman* v. *Barney*, 129 U. S. 677, 681; *Stevens* v. *Nichols*, 130 U. S. 230; *Graves* v. *Corbin*, 132 U. S. 571, 590; *Parker* v. *Ormsby*, 141 U. S. 81, 83; *Martin* v. *B. & O. R. R. Co.*, 151 U. S. 673, 689; *Mattingly* v. *N. W. Va. R. R. Co.*, 158 U. S. 53, 57; *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 98.

of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership. And although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court. The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some State other than Illinois. *Grace* v. *American Central Ins. Co.*, *supra*, and authorities there cited. For these reasons we are of opinion that the record does not show a case of which the Circuit Court could take jurisdiction."

The case of *Express Co.* v. *Kountze Bros.*, 8 Wall. 342, 351, to which attention is called by a supplementary brief, does not announce a different rule. The declaration in that case, singularly enough, described the defendant company as a "foreign corporation, formed under and created by the laws of the State of New York." Looking at the allegations of the pleadings, and there being no evidence to the contrary, this court held that the averment as to the citizenship of the defendant was sufficient, observing: "It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation formed under and created by the laws of the State of New York. The obvious meaning of this allegation is that the defendant is a citizen of the State of New York."

It has been suggested that the plaintiffs are entitled to sue, and may be sued, by their association name. 1 Brightly's Purdon's Digest, Pa. (12th ed.), 1088, Title Joint Stock Companies, § 16. But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its cor-

porate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation. *Louisville, Cincinnati & Charleston Railroad Co.* v. *Letson*, 2 How. 497; *Ohio & Miss. R. R. Co.* v. *Wheeler*, 1 Black, 286; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 120. The rule that for purposes of jurisdiction and within the meaning of the clause of the Constitution extending the judicial powers of the United States to controversies between citizens of different States, a corporation was to be deemed a citizen of the State creating it, has been so long recognized and applied that it is not now to be questioned. No such rule however has been applied to partnership associations although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a Circuit Court of the United States as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association.

Nor can we accede to the suggestion that this question of jurisdiction is affected by the clause of the Constitution of Pennsylvania providing that the term "corporations," as used in article XVI of that instrument, "shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships." Const. Pa. art. XVI, § 13. The only effect of that clause is to place the joint stock companies or associations referred to under the restrictions imposed by that article upon corporations; and not to invest them with all the attributes of corporations.

We have not been referred to any case in the Supreme Court of Pennsylvania which distinctly places limited partnership associations, created under the statutes of that State, on the basis of corporations. "Such an association," that court said in *Coal Co.* v. *Rogers*, 108 Penn. St. 147, 150, "is not technically a corporation, yet it has many of the characteristics of one," and "it may not be improper to call such an association a *quasi* corporation." In *Hill* v. *Stetler*, 127 Penn. St. 145, 161, referring to the act of June 2, 1874, the court said that it provided for the

creation of "a new artificial person to be called a joint stock association, having some of the characteristics of a partnership and some of a corporation."

In *Carter* v. *Producers' Oil Co., Ltd.*, 182 Penn. St. 551, 573, 574, which involved the validity of a rule adopted by a limited partnership association organized under the Pennsylvania statute of June 2, 1874, and its supplements, and which rule prohibited any person who acquired the capital stock of a member from exercising the privileges of a member, unless he was elected as such, the court said: "We cannot assent to the plaintiff's claim that the defendant company is a corporation and restricted, in the adoption of by-laws, rules and regulations for its government, to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is, nevertheless, a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the power with which the statutes have invested it."

That a limited partnership association created under the Pennsylvania statute may be described as a "*quasi* corporation," having some of the characteristics of a corporation, or as a "new artificial person," is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.

We have not overlooked the case of *Andrews Bros. Co.* v. *Youngstown Coke Co.*, 58 U. S. App. 444, in which the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton, held that limited partnership associations organized under the Pennsylvania statute were corporations within the jurisdictional requirement of diverse citizenship. For the reasons stated, we are unable to concur in the view taken by that court.

We therefore adjudge that as the bill does not make a case arising under the Constitution and laws of the United States, it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit.

Opinion of the Court.

Another question as to jurisdiction arises on the record. The citizenship of the members of the several partnerships that are named as defendants does not appear from the pleadings or otherwise. An allegation as to the State in which those firms were doing business is not sufficient to show the citizenship of the individual partners. The relief sought is the marshalling of all the lien debts on the hotel and the opera house of the Great Southern Fire Proof Hotel Company, the sale of the property, and the distribution of the proceeds among the parties according to their respective rights. As no allusion was made to this matter at the argument before us, we do not now express any opinion upon the question whether the citizenship of the individuals composing the defendant partnerships doing business in Ohio is material to the jurisdiction of the Circuit Court. We leave that to be determined by the court below, if an application be made to amend the pleadings as to the citizenship of the parties.

Without considering the merits of the case, we are constrained to reverse the judgments of the Circuit Court of Appeals and of the Circuit Court, and remand the cause for further proceedings consistent with this opinion. Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties. If the amendment shows a case within the jurisdiction of the Circuit Court, the parties should be permitted to proceed to a final hearing; otherwise, the bill should be dismissed at the plaintiffs' costs without prejudice to another suit in a court of competent jurisdiction.

Reversed.

BOSKE *v.* COMINGORE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Submitted January 8, 1900. — Decided April 9, 1900.

A United States Collector of Internal Revenue was adjudged by a court of limited jurisdiction in Kentucky to be in contempt because he refused, while giving his deposition in a case pending in the state court, to file copies of certain reports made by distillers, and which reports were in his custody as a subordinate officer of the Treasury Department. He based his refusal upon a regulation of that Department which provided: "All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose." This regulation was made by the Secretary of the Treasury under the authority conferred upon him by section 161 of the Revised Statutes of the United States, which authorized that officer, as the head of an Executive Department of the Government, "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." The Collector having been arrested under the order of the state authorities, sued out a writ of *habeas corpus* before the District Court of the United States for the Kentucky District. *Held:*

(1) That the case was properly brought directly from the District Court to this court as one involving the construction or application of the Constitution of the United States.

(2) As the petitioner was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the Department to which he belonged, it was proper for the District Court to consider the questions raised by the writ of *habeas corpus* and to discharge the petitioner if held in violation of the Constitution and laws of the United States.

(3) The regulation adopted by the Secretary of the Treasury was authorized by section 161 of the Revised Statutes, and that section was consistent with the Constitution of the United States. To invest the Secretary with authority to prescribe regulations not incon-

sistent with law for the conduct of the business of his Department and to provide for the custody, use and preservation of the records, papers and property appertaining to it, was a means appropriate and plainly adapted to the successful administration of the affairs of his Department; and it was competent for him to forbid his subordinates to allow the use of official papers in their custody except for the purpose of aiding the collection of the revenues of the United States.

(4) In determining whether the regulation in question was valid, the court proceeded upon the ground that it was not to be deemed invalid unless it was plainly and palpably against law.

THE case is stated in the opinion of the court.

Mr. John G. Carlisle, *Mr. Henry M. Winslow* and *Mr. William S. Taylor* for appellant.

Mr. Assistant Attorney General Boyd for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from a final order of the District Court of the United States for the District of Kentucky discharging appellee, United States Internal Revenue Collector for the Sixth Collection District in Kentucky, from the custody of the appellant as Sheriff of Kenton County in that Commonwealth.

The discharge was upon the ground that the imprisonment and detention of the appellee were in violation of the Constitution and laws of the United States. That ruling presents the only question to be considered.

Under date of April 15, 1898, the Commissioners of Internal Revenue, with the approval of the Secretary of the Treasury promulgated certain regulations for the government of collectors of internal revenue, as follows:

"All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax

records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to *subpœnas duces tecum* or otherwise. Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted. As to any other records than those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a state court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of the court upon the Secretary of the Treasury requesting the same. Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy."

These Treasury regulations being in force, a proceeding was

instituted in the County Court of Carroll County, Kentucky — a court of limited jurisdiction — in the name of the Commonwealth against Elias Block & Sons, for the purpose of ascertaining the amount and value of a large amount of whisky which, it was alleged, the defendants had in their bonded warehouses for a named period, but had not listed for taxation, and of enforcing the assessment and payment of state and county taxes thereon. Ky. Stat. § 4241.

In the progress of that proceeding the Commonwealth of Kentucky, represented by the Auditor's agent, took the deposition of Comingore, Collector of Internal Revenue. In answer to questions propounded to him, the Collector stated that Block & Sons, owners of a distillery, made monthly reports to his office of liquors manufactured by them and deposited in the bonded warehouses on the distillery premises from 1887 on; that the defendants made application from time to time for permission to withdraw liquors from bond; and that such reports, commencing October 1, 1885, and ending July 1, 1897, were on the files of his office, but not under his control except as Collector. He was then asked to file copies of those reports and make them part of his deposition. This he declined to do, "under section 3167 of the Revised Statutes of the United States and the rulings of the Department." That section reads: "§ 3167. If any collector or deputy collector, or any inspector or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine of not exceeding one thousand dollars, or to be imprisoned for not exceeding one year, or to both, at the discretion of the court, and shall be dismissed from office, and be forever thereafter incapable of holding any office under the Government." Being asked what rulings of the Department he referred to other than section 3167 of the Revised Statutes, he said: "The Department does not permit the giving out of anything contained in internal revenue returns or documents by a collector, storekeeper or any other officer of a collection district

for purposes other than those which the statutes of the United States contemplate." That ruling he said was made by the Secretary of the Treasury through the Commissioner of Internal Revenue.

In consequence of the refusal of the collector to file and make part of his deposition copies of the above reports of the defendants, the notary public before whom his deposition was taken adjudged him to be in contempt and ordered him to pay to the Commonwealth a fine of five dollars and to be confined in the county jail for six hours or until he was willing to furnish the copies called for or permit access to the records of his office in order that information might be obtained to be used as evidence in the above case.

The matter having been reported by the notary public to the Carroll County Court, as required by section 538 of the Kentucky Civil Code of Practice, that court made the following order:

"It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the Collector of Internal Revenue for the Sixth District of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 14th day of September, 1889, 1890, 1891, 1893, 1894, 1895, 1896 and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made or permit the plaintiff, its agent or attorneys, to make true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as Collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and

for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Kentucky. It is further adjudged that the action of the notary public, Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton County, Kentucky, and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows: Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond. Also with the following request: Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll County on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, 1894, 1895 and 1896."

This action of the County Court having been brought to the attention of the Collector, he still refused to give the copies called for or to allow access to or inspection of the records of his office for the purposes indicated by the questions propounded to him. He was thereupon again held by the notary public to be in contempt, and, the petition states, that officer adjudged that "the Commonwealth of Kentucky recover of your petitioner the sum of five dollars as a fine, and that he be taken by the sheriff or some constable of Kenton County and confined in the jail of said county for the space of six hours or until he shall signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as Collec-

tor of Internal Revenue of the United States for the Sixth District of Kentucky or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of *The Commonwealth of Kentucky* v. *Block et al.*, in said county court," etc.

Having been taken into custody by the Sheriff under this order, the Collector sued out a writ of *habeas corpus* and was discharged from custody by the order of the United States District Court for the Kentucky District.

1. In the brief of the Assistant Attorney General some doubt is expressed whether we can take cognizance of this case upon appeal from the District Court. Prior to the passage of the act of March 3, 1891, establishing the Circuit Court of Appeals, an appeal from the final judgment of a District Court on an application for a writ of *habeas corpus* by or on behalf of one alleged to be restrained of his liberty in violation of the Constitution or any law of the United States went first to the Circuit Court. Rev. Stat. § 763. But by the above act of 1891 it was provided that appeals or writs of error may be taken from the District Courts or from the Circuit Courts direct to this court in certain cases, among others, "in any case that involves the construction or application of the Constitution of the United States." 26 Stat. 826, 828, c. 517, § 5. The present case belongs to that class. The appellee, who was discharged upon *habeas corpus*, invoked the protection of the Constitution against his being restrained of his liberty by the appellant acting under an order of commitment issued by an inferior state court; and the judgment of the District Court proceeded upon the ground that the proceedings against him were inconsistent with the laws of the United States and with the regulations of the Treasury Department legally prescribed under those laws. Throughout, the contention of the appellant has been that the Constitution forbade the giving of the force of law to those regulations adopted by merely executive officers. We think the case is properly here on appeal as one involving the construction and application of the Constitution of the United States.

2. Of the power of the District Court to discharge the appel-

lee if he was held in custody in violation of the Constitution of the United States, no doubt can be entertained. It is true that in *Ex parte Royall*, 117 U. S. 241, 251, it was said that although a court of the United States had power to discharge one held in custody by state authorities in violation of the Constitution of the United States, it was not bound to interpose immediately upon application being made for the writ, but should exercise the discretion with which it was invested "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." Hence, the general rule that the courts of the United States should not interfere by *habeas corpus* with the custody by state authorities of one claiming to be held in violation of the Constitution or laws of the United States, until after final action by the state courts in the case in which such custody exists. *Ex parte Royall*, above cited; *New York* v. *Eno*, 155 U. S. 89, and authorities there cited; *Whitten* v. *Tomlinson*, 160 U. S. 231, and authorities there cited. But to this general rule there are exceptions which are thus indicated in *Ex parte Royall*: "When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority."

The present case was one of urgency, in that the appellee was

an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the Department to which he belonged. The District Court therefore did not err in determining the question of constitutional law raised by the application for a writ of *habeas corpus*, and rendering final judgment.

3. We come then to inquire whether the imprisonment of the appellee was in violation of the Constitution or laws of the United States. This question was fully examined in the elaborate and able opinion of Judge Evans of the District Court. 96 Fed. Rep. 552.

The commitment of the appellee was because of a refusal to file with his deposition copies of certain reports made to him by Block & Sons, distillers, of liquors manufactured by them and deposited in the bonded warehouses on the distillery premises during a specified period. Manifestly, he could not have filed the copies called for without violating regulations formally promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. If these regulations were such as the Secretary could legally prescribe, then, it must be conceded, the state authorities were without jurisdiction to compel the Collector to violate them.

The Commissioner of Internal Revenue is an officer in the Department of the Treasury. Rev. Stat. § 319. And the Secretary of the Treasury, as the head of an Executive Department of the Government, was authorized "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." Rev. Stat. § 161.

Now, the reports or copies of reports in the possession of the Collector—for not producing copies of which he was adjudged to be imprisoned—were records and papers appertaining to the business of the Treasury Department and belonging to the United States. The Secretary was authorized by statute to

make regulations, not inconsistent with law, for the custody, use and preservation of such records, papers and property. The Constitution gives Congress power to make all laws necessary and proper for carrying into execution the powers vested by that instrument in the Government of the United States or in any Department or officer thereof. Const. Art. 1, § 8. That power was exerted by Congress when it authorized the Secretary of the Treasury to provide by regulations not inconsistent with law for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it. The regulations in question may not have been absolutely or indispensably necessary to accomplish the objects indicated by the statute. But that is not the test to be applied when we are determining whether an act of Congress transcends the powers conferred upon it by the Constitution. Congress has a large discretion as to the means to be employed in the execution of a power conferred upon it, and is not restricted to "those alone without which the power would be nugatory;" for, "all means which are appropriate, which are plainly adapted" to the end authorized to be attained, "which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415, 421, 423. In the more recent case of *Logan* v. *United States*, 144 U. S. 263, 283, 293, this court, referring to the above constitutional provision, said that "in the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution." Again: "Every right created by, arising under or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in

the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

Can it be said that to invest the Secretary of the Treasury with authority to prescribe regulations not inconsistent with law for the conduct of the business of his Department, and to provide for the custody, use and preservation of the records, papers and property appertaining to it, was not a means appropriate and plainly adapted to the successful administration of the affairs of that Department? Manifestly not. The bare statement of the proposition suggests this conclusion, and extended argument to support it is unnecessary.

This brings us to the question whether it was inconsistent with law for the Secretary to adopt a regulation declaring that all records in the offices of collectors of internal revenue, or any of their deputies, are in their custody and control "for purposes relating to the collection of the revenues of the United States only," and that collectors "have no control of them, and no discretion with regard to permitting the use of them for any other purpose."

There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law, unless it be that the records and papers in the office of a collector of internal revenue are at all times open of right to inspection and examination by the public, despite the wishes of the Department. That cannot be admitted. The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue

laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded. Besides, great confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates. At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress. In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.

The judgment of the District Court is

Affirmed.

ADAMS *v.* COWEN.

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

No. 113 of October Term, 1898. Argued January 10, 11, 1900.—Decided April 16, 1900.

Thomas W. Means died in 1890, leaving a large estate, and a will made some ten years before his death, containing, among other provisions, the following: "Item 4. I give, devise and bequeath all the residue and remainder of my estate, personal, real and mixed, wherever situated or located, of which I shall die possessed, to be equally divided among my four children, John Means, William Means, Mary A. Adams, and Margaret A. Means, and my grandson, Thomas M. Culbertson (son and sole heir of my deceased daughter Sarah Jane Culbertson) who shall be living at the time of my decease, and the issue of any child now living, and of said grandson, who may then have deceased, such issue taking the share to which such child or grandson would be entitled if living. But said share given, devised and bequeathed to said grandson or his issue is to be held in trust as hereinafter provided, and to be subject to the provisions hereinafter contained as to said grandson's share. "Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision, herein made for said children, and the provision for said grandson, to be a provision for them respectively, in addition to said advances made and that may hereafter be made, and that in the division, distribution and settlement of my said estate, said advances made and that may hereafter be made, be treated not as advances, but as gifts not in any manner to be accounted for by my said children and grandson, or any of them or the issue of any of them." He was in the habit of advancing money to his children, the amounts advanced to each individually being entered against him in the father's books. At the date of the will the several amounts so advanced were as follows: John, $79,214.36; William, $58,409.54; Mrs. Adams, $51,207.48; Margaret, $39,120.78; Mrs. Culbertson, $29,609.82. Subsequently, in 1898, William becoming involved, the amount advanced to him was largely increased in manner as set forth in the statement of the case and opinion of the court. After the death of the father a claim was made that the money thus paid out for William was to be held to be a part of his share of his father's estate. *Held*:

(1) That in the absence of some absolute and controlling rule to the contrary, the intentions of a testator, as deduced from the language of the will, construed in the light of the circumstances surrounding

Statement of the Case.

him at the date of its execution, always control as to the disposition of the estate;

(2) That the testator believed that after he had done in his lifetime what, in his judgment, his children severally required, there would be an abundance of his estate left for distribution, and intended that all dealings between himself and each of his children should be wiped out, and that what was left after having discharged to each his paternal obligation should be distributed equally.

After the probate of his father's will, William gave to the administrators of the estate with the will annexed, an acknowledgment of the receipt from them of $136,035.75 in his own notes to his father as part of his distributive share of his father's estate. At the time when this was done he was in straitened circumstances, was broken in spirit and was wavering in his purposes. *Held*, that while a man in the full possession of his faculties and under no duress may give away his property, and equity will not recall the gift, yet it looks with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the situation of the beneficiary, and has obtained from him, even for only the benefit of other beneficiaries, large property without consideration, it will refuse to uphold the transaction thus accomplished; and that the conclusions of the Circuit Court of Appeals in this case must be sustained, and its decree affirmed.

On November 16, 1891, the respondents, trustees for the wife and children of William Means, filed their bill in the Circuit Court of the United States for the District of Kentucky against the petitioners as administrators (with the will annexed) of Thomas W. Means, deceased, and John Means, a son of said Thomas W. Means. The case passed to hearing in that court upon pleadings and proofs, and resulted in a decree, on July 31, 1895, in favor of the defendants, dismissing the bill. From such dismissal the plaintiffs appealed to the Circuit Court of Appeals for the Sixth Circuit, which court, on February 8, 1897, reversed the decree of dismissal, and entered a decree in favor of the plaintiffs. 47 U. S. App. 439–676. On May 24, 1897, a petition was filed in this court for a certiorari, which was allowed, and on December 6, 1897, the certiorari and return were duly filed. At the October term, 1898, of this court, after argument and on May 22, 1899, the decree of the Circuit Court of Appeals was affirmed by a divided court. Thereafter upon petition a rehearing was ordered, and the case was argued at the present term before a full bench.

Statement of the Case.

The facts are these: Thomas W. Means, a resident of Ashland, Kentucky, died there on June 8, 1890, leaving an estate consisting chiefly of personal property, which was appraised (including the notes of his son, William Means, for $136,035.75) at $752,302.44. He left four children, John Means, William Means, Margaret A. Means and Mary A. Adams, and one grandson, Thomas M. Culbertson, the only child of a deceased daughter. Some ten years prior to his death, and on July 20, 1880, he made a will, in which, after provisions for the payment of his debts, funeral expenses and expenses of administration, were these two items:

"Item 4. I give, devise and bequeath all the residue and remainder of my estate, personal, real and mixed, wherever situated or located, of which I shall die possessed, to be equally divided among my four children, John Means, William Means, Mary A. Adams, and Margaret A. Means, and my grandson, Thomas M. Culbertson (son and sole heir of my deceased daughter Sarah Jane Culbertson) who shall be living at the time of my decease, and the issue of any child now living, and of said grandson, who may then have deceased, such issue taking the share to which such child or grandson would be entitled if living. But said share given, devised and bequeathed to said grandson or his issue is to be held in trust as hereinafter provided, and to be subject to the provisions hereinafter contained as to said grandson's share.

"Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision, herein made for said children, and the provision for said grandson, to be a provision for them respectively, in addition to said advances made and that may hereafter be made, and that in the division, distribution and settlement of my said estate, said advances made and that may hereafter be made, be treated not as advances, but as gifts not in any manner to be accounted for by my said children and grandson, or any of them or the issue of any of them."

Statement of the Case.

Thomas W. Means was a prosperous iron manufacturer, who had, as stated, accumulated in his lifetime a large estate. For many years he had been in the habit of letting his children have money. This he had been doing for at least twenty-five years before the making of the will. This money was not given to them in equal sums at regular or irregular intervals. In other words, he was not making a partial, and equal distribution of his estate in advance of his death, but the money was paid to or for one or another of his children as occasion seemed to call for it. Accounts were entered with each of these children in his books, and the money thus paid to or for them was charged against them in these accounts, so that upon the face of the books they stood as debtors to him for the amounts so charged. The amounts thus charged were sometimes large. The accounts were often reduced by money or property returned to the father. So the father dealt separately with each child, letting him or her have money whenever in his judgment the interest of the child called for it. He was helping them in their business, paying their debts and otherwise using his large properties for their benefit. At the same time the accounts were kept in his books in such a way as to indicate that he retained a claim against each child for the balance shown on such account. He made memoranda on his books, such as this at the head of John's account: "This account and the accounts of William Means and Mary A. Adams are not to be charged with interest when final settlement is made, or at any time. Thomas W. Means." With that as the relation between himself and children, Thomas W. Means made the will containing the two items above quoted. He was then seventy-seven years old. At the date of the will the accounts showed the following debtor balances:

John	$79,214 36
William	58,409 54
Mrs. Adams	51,207 48
Margaret	39,120 78
Mrs. Culbertson	29,609 82

In 1888 a bank in Cincinnati, of which William was president, failed, a failure which brought financial ruin to William. To

relieve him from the embarrassment and dangers which threatened by reason of such failure, a large sum of money was paid out by Thomas W. Means for William's benefit. The question presented in this case is whether the money thus paid out is to be held a part of William's share of his father's estate, or whether it is to be deducted from the estate and the division made of the balance between the five legatees.

Mr. Lawrence Maxwell, Jr., for petitioners. *Mr. Julius L. Anderson* and *Mr. John F. Hager* were on his brief.

Mr. John J. Glidden and *Mr. Judson Harmon* for Cowen. *Mr. H. P. Whitaker* and *Mr. John Little* were on their brief.

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

The primary question is upon the construction of the fifth item of the will of Thomas W. Means. If there had been no such item of course all sums due from the children and grandchild to the father and grandfather would be part of the property of his estate and to be counted in determining the sum to be divided among the five in accordance with item four. But item five evidently contemplated that some amounts were to be deducted from the gross sum of the decedent's property before a division was to be made. What were those deductions? What did the testator intend should be deducted? For, in the absence of some absolute and controlling rule of law to the contrary, the intentions of a testator, as deduced from the language of the will, construed in the light of the circumstances surrounding him at the date of its execution, always control as to the disposition of the estate. Without entering into any discussion we make these quotations from prior decisions of this court. In *Smith* v. *Bell*, 6 Pet. 68, it was said by Chief Justice Marshall:

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. 1 Doug. 322; 1 W. Bl. 672. 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.' 2 Bl. Com. 499. These intentions are to be collected from his words and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. . . . No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. . . . Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon the words in one will has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; it should never be carried so far as to defeat the plain intent; if that intent may be carried into execution without violating the rules of law. It has been said truly, (3 Wils. 141,) 'that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'"

And in *Blake* v. *Hawkins*, 98 U. S. 315, 324, Mr. Justice Strong used these words:

"It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition

of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended."

See also *Clark* v. *Boorman's Executors*, 18 Wall. 493; *Colton* v. *Colton*, 127 U. S. 300; *Lee* v. *Simpson*, 134 U. S. 572.

In the light of these decisions we turn to inquire what was the intention of the testator? Suppose that on the next day after making this will he had died, upon what basis would the distribution of his estate have been made? Obviously by first cancelling all the gifts and advances made to his children, and then distributing the balance equally between the five. For he declares that the equal provision made by item four shall be in addition to his advances, "and that in the division, distribution and settlement of my said estate said advances . . . be treated not as advances, but as gifts not in any manner to be accounted for by my said children and grandson, or any of them, or the issue of any of them." Language could not be more clear. Nothing could express the intent of the testator more forcibly than these words. Whatever he had done in the way of letting his children and grandson have money was to be taken as a matter of gift, for which none of the recipients was to account, and only his estate, less such gifts and advances, was to be equally distributed between the legatees named. And this intent, which is so clearly disclosed, in respect to what he had already done, is equally clear in respect to what he might do thereafter. He says that he "may make further advances to them respectively, or to some of them," and declares that in the division, distribution and settlement of his estate "said advances . . . that may hereafter be made, be treated, not as advances, but as gifts." In other words, as he had used some of his property in the past again and again to help his children, he saw that it was likely in the future he might do the same thing, and declared not only that every dollar he had let them have in the past, but also every dollar that he might let them have in the future should be taken, "not as advances, but as gifts." Not only that, but that such gifts should not be accounted for in any manner

by any of the recipients, and that only the balance of his estate, after all these personal gifts were cancelled, should be distributed equally among the legatees. As in the past he had freely used his estate for the benefit of his children, so he announced his intention to deal as freely with it in the future, and to use any part of it in any way that he might deem best for the interests of any one of his children, and declared that such help given, or that might be given in the future, should not be made the basis of any accounting between his legatees. He knew he had a large estate, and that, whatever he might do with a fraction of it, there would be an abundance left for each of them — enough to place them beyond the reach of want. He had the large and generous paternal feeling; that feeling which prompts the parent to care as best he can during his lifetime for each of his children according to their respective wants, and he did not mean that anything he did for one child should be challenged by another. He doubtless recalled, as every parent does, that during infancy and childhood one child had called for more attention and care, more hours of toil and watch, than another. He realized that as they had grown to manhood and womanhood, and entered into their various places in life, there had been different calls for pecuniary assistance, and that doubtless there would be differences in the future. He knew that he had responded to every need of each child in its early days, was trying in the later days of manhood and womanhood to make like responses, and felt that while life should be prolonged to him he would be under the same pressure of affection to each. He believed that after he had done in his lifetime what in his judgment they severally required there would be an abundance of his estate left for distribution, and intended that all dealings between himself and each of his children should be wiped out — there should be a *tabula rasa* — and that what was left (and it would be a large estate) after having discharged to each one his paternal obligation, the untouched estate should be distributed equally. We do not see how that purpose and thought of his could be expressed more clearly and forcibly than it was done in the fifth item of the will, and it would be a sad commentary on the wisdom of the law if that purpose was not recognized and enforced.

It is said that there is an expressed limitation on this generous purpose in that he describes the advances already made as "charged to them respectively on my books," and that as to further advances they "may be charged on my books to their respective accounts," and that in order that any subsequent advances should come within the scope of this provision they should be formally charged on his books "to their respective accounts." We cannot believe that the generous purposes of the father were intended to be limited by the action of a bookkeeper. In the full possession of his faculties and watchful over his books he knew what entries had been made, and that they told the full story of his advances to his children, and so, not unnaturally, he referred to those books as evidence of those advances, but as to future advances he says only that they "may be charged on my books," and surely he did not make the possibilities of such entries the measure of his generosity. He was 77 years of age when this will was made. He could not foresee the length of days which might be allotted to him nor the possible failure of any of his faculties—and indeed before his death there was a failure of eyesight, and possibly, towards the last, of his mental powers. Of course, when he made this will he knew the possibility of these things, and it is inconsistent with the whole spirit of the will to suppose that he meant that his generosity should be determined and measured by the fidelity or forgetfulness of a mere clerk. No man acting in a spirit of generous affection ever contemplates that a stranger shall measure the scope and reach of such affection. It is a matter personal to himself, the beginning and ending of which, the scope and limits of which, he and he only is to determine.

With this understanding of the scope and purpose of this clause in the will, we pass to a consideration of what took place in respect to the advances for the benefit of his son William. At that time the father was feeling the weaknesses of old age, his eyesight was failing, and he had called his son John to act as his agent in the care of his estate. News of the disaster to the bank and the effect of its failure on the welfare of his son William came to the father, and John went to Cincinnati to investigate, came back and reported the situation as he had

found it; told his father of the personal loans made to William by the bank, and that they were secured by collateral. We quote his testimony as to the conversation with his father:

"Q. 832. What communication did you have with your father upon your return to Ashland?

"A. I told him of William's debt to the bank—individual debt—and what it would probably amount to, and that friends here advised it was for William's interest that that debt, individual debt, should be paid. I told him that the securities which William had turned over to the bank as security on the debt would some of them probably be sacrificed at a sale here—that I thought we had better pay the debt.

"Q. 833. What did he say?

"A. He said that he was satisfied to do whatever I thought was best.

"Q. 834. What else did he say about the matter other than to say to you that he was satisfied to do whatever you thought was best?

"A. Well, I think I have answered it. I cannot repeat the conversation between us any more than give the general result of it."

On the faith of this conversation John returned to Cincinnati, and having raised the needed money, paid off William's obligations to the bank and took up the collateral, whose face value was largely in excess of the indebtedness. That the collateral when properly utilized, as it apparently was, did not pay the amount of William's indebtedness to the bank, is immaterial, nor is it material that William gave a note for the amount of this advance, as well as other notes afterwards for like advances, and that such notes were entered on the books of the father in the account of "bills receivable." It appears that this payment was not made at the request of William, but made upon consultation between the father and his son and agent, John, and made probably with the expectation that the collateral, if properly used, would pay the amount of the indebtedness.

And here it becomes important to consider the relations of John Means to his father. As the father grew old and his faculties began to fail he naturally called his oldest son John into his service, and John acted during the last years of his father's life as his agent, and it was really at John's suggestion

that the money was advanced for the benefit of William. But in calling John to his service as agent and caretaker of his property there is nothing to indicate that the father meant that the son should do anything to prevent the full carrying out of the purpose expressed in his will. He had no express authority, and indeed no implied authority to alter that instrument in which had long been recorded the settled determination of the father. So that whatever he may have done in caring for the property as the agent of his father during his lifetime is not to be taken, unless there are other circumstances to indicate the fact, as showing an intent on the part of the father to change in any way the scope and effect of the will.

And indeed it is but simple justice to John Means to say that from the evidence we are satisfied that there was no thought or intent on his part to change or limit his father's will. He did not intend by any strategy or device to thwart his father's purpose of kindness to any of his children, nor did he pursue the course he did in respect to this advance with the idea that he could satisfy his father's desire to help William and at the same time place the act of help outside the reach of item five of the will, and thus advance the pecuniary interest of himself and the other legatees not thus helped by his father. Very likely he was uncertain as to the construction which would be placed upon item five; possibly thought that even if it meant exactly that which we are clear it does mean, there might be an impropriety at his father's age and feebleness in his advancing so much money for the benefit of a single child, and in order that the transaction, in case of his death before that of his father, might be clearly disclosed, took notes from William and entered them on his father's books under the head of "bills receivable." It appears from some of the testimony that there was also a thought of protecting William's share in the estate which by the death of the father might soon come to him, from attacks of creditors, and it may also be that partly on that account William executed the notes which were received for these moneys. At any rate, the correspondence between the brothers at the time of these transactions indicates that they were friendly, and that John was willingly doing that which he thought the

father desired in using a portion of the father's estate in helping William out of his troubles. But whatever John or William may have purposed or thought, the evidence does not indicate that the father intended that this help extended to William should stand in any different attitude to that which he had theretofore extended to others of his children, or meant that this advance should not come within the scope of the provisions in item five; and that is the fundamental question in the case. It is the father's estate which is being distributed, and it is the duty of the courts to see that it is distributed according to his expressed intention.

The testimony in this case is voluminous, and there are many facts and circumstances disclosed in it throwing light on the questions which we have considered. We have deemed it unnecessary to refer to them in view of the very full and satisfactory opinion filed by the Circuit Court of Appeals, in which these facts and circumstances are recited and considered at length, and which in the main meets our approval.

One further question remains for consideration: The father died June 8, 1890. The will was duly probated, and administrators with the will annexed were appointed and qualified. On October 16, 1890, William Means executed and delivered to these administrators the following receipt:

"Ashland, Ky., *October* 16, 1890.

"Received of Thomas M. Adams and E. C. Means, administrators with the will annexed of the estate of Thomas W. Means, deceased, the sum of one hundred and thirty-six thousand and thirty-five and 75-100 dollars, being a part of my distributable share as legatee under said will applied by them as ordered by me upon the following notes and claims owed by me to the estate of said decedent, and payable to his order, viz:"

[Here follows description of ten notes, with balance due on each, aggregating $136,035.75.]

"This receipt is given in pursuance of settlement made October 6, 1890.

"William Means.

"Attest: John F. Hager.
"A. E. Lampton."

Opinion of the Court.

The validity of this receipt or release was challenged by the respondents, (plaintiffs in the Circuit Court,) who claimed title to that portion of the estate of Thomas W. Means passing under the will to William Means by virtue of the following proceedings: At the May term, 1891, of the Common Pleas Court of the county of Greene, State of Ohio, a decree was entered in a cause then pending in said court between William Means on the one side and on the other Martha E. C. Means, his wife, and their children, Gertrude E. Means and Pearl E. Means and Patti Means, a minor, by her next friend, her mother, which, after finding that in the lifetime of Thomas W. Means, for a good and valuable consideration, William Means made an agreement with his wife and children whereby he settled upon them, through trustees, for their maintenance and support, his interest in expectancy in the estate of his father, Thomas W. Means, transferred all such interest to the plaintiffs as trustees. This decree having been entered after personal service upon William Means, of course binds him both by its findings and order. How far the findings in such decree as to the agreement and the time at which it was made may affect the action of the administrators is a matter discussed in the briefs, but which we deem it unnecessary to consider.

Neither do we stop to consider the charge of fraudulent conduct on the part of the administrators, for independently of those considerations we are of opinion that equity will not enforce this receipt or release. It was a surrender by William Means, without any consideration, of practically his whole interest in his father's estate, amounting to between $100,000 and $200,000. The administrators were acting in a fiduciary capacity. Their obligations to each of the beneficiaries were equal. Their duty was to dispose of the property placed in their hands according to the expressed will of the testator, and they were not at liberty to act in the interests of one legatee as against those of another. If they were doubtful as to the meaning of any clause in the will they should have applied to the court for its construction and direction. If they chose to act upon their own interpretation of its meaning they should have so acted, and not sought to conclude any of the legatees by a contract

binding him to accept their interpretation. As shown by papers introduced in evidence, signed by William Means, they proceeded with more than promptness and with great activity and energy to secure this and other releases. Obviously William Means was in such a condition as to require that they who were in fact trustees of his interests should seek to protect instead of destroying them. We think the evidence justifies that which was said by the Court of Appeals in its opinion:

"William had lost all his property, and was in very straitened circumstances. Since his downfall he has been broken in spirit and wavering in his purposes. He seems at times to have been impressed that the administrators had a moral, if not a legal, claim upon him, that he should yield up his legacy to the estate, and this claim was pressed and insisted upon by the administrators. That they had no such legal claim upon him, we have already determined. His brother and sisters all being in affluent circumstances, and his own family in needy circumstances, that he should have voluntarily given up the whole of this large sum, with no mistake in regard to what his legal rights were, it is difficult to believe. It amounted simply to a gift to the administrators for the benefit of the other legatees, whose only claim rested on the bounty of the testator. Courts of equity view such transactions with distrust, and if the circumstances indicate that the trustee has dealt with the beneficiary unjustly, will not hesitate to set them aside. The absence of any adequate consideration in itself raises a presumption of unfairness, which the trustee is bound to repel."

While a man in the full possession of his faculties and under no duress may give away his property, and equity will not recall the gift, yet it looks with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the situation of the beneficiary, and has obtained from him, even for only the benefit of other beneficiaries, large property without consideration, it will refuse to uphold the transaction thus accomplished. *Taylor* v. *Taylor*, 8 How. 183; *Comstock* v. *Herron*, 6 U. S. App. 626–637, and cases cited; 1 Story's Eq. Jur. secs. 307, 308; 2 Pomeroy's Eq. Jur. secs. 951, 958, 1088. So, without considering

the debatable questions presented in respect to this receipt or release, we are of opinion that the Circuit Court of Appeals was right in refusing to uphold it.

There is nothing else in the case that seems to us to call for consideration. We find no error in the conclusions of the Circuit Court of Appeals, and its decree is

Affirmed.

Dissenting: MR. JUSTICE HARLAN, MR. JUSTICE GRAY, MR. JUSTICE BROWN and MR. JUSTICE WHITE.

MAST, FOOS & CO. *v.* STOVER MANUFACTURING COMPANY.

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

No. 149. Argued February 1, 2, 1900. — Decided April 23, 1900.

There is no obligation on the part of courts in patent causes to follow the prior adjudications of other courts of coördinate jurisdiction, particularly if new testimony be introduced varying the issue presented to the prior court. Comity is not a rule of law, but one of practice, convenience and expediency. It requires of no court to abdicate its individual judgment, and is applicable only where, in its own mind, there may be a doubt as to the soundness of its views.

Patent No. 433,531, granted to Mast, Foos & Company upon the application of Samuel W. Martin, for an improvement in windmills was anticipated by prior devices, and is invalid. Under the state of the art it required no invention to adapt to a windmill the combination of an internal toothed spur wheel with an external toothed pinion, for the purpose of converting a revolving into a reciprocating motion.

Where a case is carried by appeal to the Circuit Court of Appeals from an order granting a temporary injunction, it is within the power of that court to dismiss the bill, if there be nothing in the affidavits tending to throw doubt upon the existence or date of the anticipating devices, and, giving them their proper effect, they establish the invalidity of the patent.

THIS was a writ of certiorari to review a decree of the Circuit Court of Appeals dismissing a bill in equity brought for

the infringement of a patent, and appealed to that court from an order of the Circuit Court for the Northern District of Illinois, granting a preliminary injunction. The bill was filed by the petitioner, Mast, Foos & Company, an Ohio corporation, and was founded upon letters patent No. 433,531, granted to the petitioner, upon the application of one Samuel W. Martin, for an improvement in windmills.

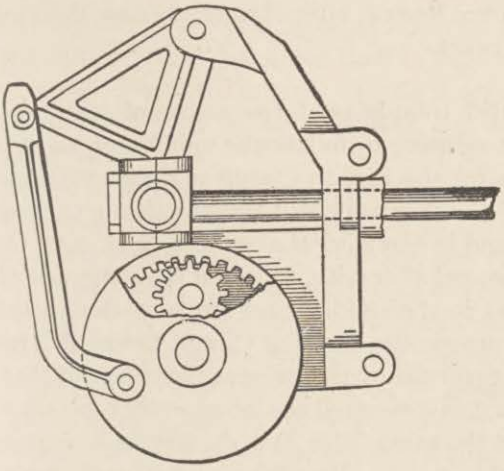
In his specification the patentee states that the "invention consists, essentially, of an improved back gear organization involving an external toothed pinion, and an internal toothed spur gear, the pinion being mounted on the wheel shaft, and the gear having formed on or connected with it the wrist pin, to which the operating pitman is attached, whereby the speed of the main shaft as applied to the wrist pin and pitman is reduced, and whereby, also, all pounding and lost motion is prevented as the pitman connection passes over the center and changes from a pushing to a pulling action. This object is accomplished by the fact that a plurality of the pinion teeth are always engaged with the internal spur gear, resulting in giving a perfectly uniform and smooth and noiseless reciprocating motion to the actuating rod, thereby prolonging the life of the machine by saving it from constant jarring and preventing wear and tear."

* * * * * * * *

"The freedom of the organization from lost motion and sudden jerks as the wrist pin passes over the center renders the operation of the pump smooth and regular. This increases the effectiveness of the pump and prevents undue wear and tear."

The following diagram illustrates the patented combination:

Counsel for Parties.



Petitioner sought a recovery only upon the first claim:

"1. The combination, with a windmill driving shaft and a pinion thereon, of an internal toothed spur wheel mounted adjacent to the said shaft and meshing with said pinion, a pitman connected with the spur wheel, and an actuating rod connected with the pitman."

Almost immediately upon filing the bill motion was made for a preliminary injunction, which was granted, largely upon the authority of an opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of *Mast, Foos & Co.* v. *The Dempster Mill Manufacturing Co.*, 82 Fed. Rep. 327. An appeal was taken from that order to the Circuit Court of Appeals, which not only reversed the order for the injunction, but dismissed the bill. 85 Fed. Rep. 782; 60 U. S. App. 325.

Whereupon petitioner applied for and was granted a writ of certiorari from this court.

Mr. H. A. Toulmin and *Mr. Lysander Hill* for Mast, Foos & Co.

Mr. Charles K. Offield and *Mr. Charles C. Linthicum* for the Stover Manufacturing Company. *Mr. Loren L. Morrison* was on their brief.

Opinion of the Court.

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

1. Plaintiff complains of the action of the Circuit Court of Appeals in refusing to follow the opinion of the Circuit Court of Appeals for the Eighth Circuit in a case of this same plaintiff against the Dempster Mill Manufacturing Company, 49 U. S. App. 508, and in reversing the order of the Circuit Court, which, upon the ground of comity, followed the judgment of that court with respect to the validity and scope of the patent. Its contention is, practically, that the Circuit Court of Appeals should have been governed by the prior adjudication of that court, and, so far at least as concerned the interlocutory motion, should have accorded it the same force and dignity as is accorded to judgments of this court. Premising that these considerations can have no application in this court — whose duty it is to review the judgments of all inferior courts, and in case of conflict to decide between them — we think the plaintiff overstates somewhat the claims of comity.

Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the

law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other coördinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts.

The obligation to follow the decisions of other courts in patent cases of course increases in proportion to the number of courts which have passed upon the question, and the concordance of opinion may have been so general as to become a controlling authority. So, too, if a prior adjudication has followed a final hearing upon pleadings and proofs, especially after a protracted litigation, greater weight should be given to it than if it were made upon a motion for a preliminary injunction. These are substantially the views embodied in a number of well-considered cases in the Circuit Courts and Circuit Courts of Appeals. *Macbeth* v. *Gillinder*, 54 Fed. Rep. 169; *Electric Manufacturing Co.* v. *Edison Electric Light Co.*, 61 Fed. Rep. 834; *S. C.*, 18 U. S. App. 637; *Edison Electric Light Co.* v. *Beacon Vacuum Pump & Electrical Co.*, 54 Fed. Rep. 678, and cases cited; *Beach* v. *Hobbs*, 82 Fed. Rep. 916; *S. C.*, 63 U. S. App. 626; see, also, *Newall* v. *Wilson*, 2 De Gex, M. & G. 282.

Comity, however, has no application to questions not considered by the prior court, or, in patent cases, to alleged anticipating devices which were not laid before that court. As to such the action of the court is purely original, though the fact that such anticipating devices were not called to the attention of the prior court is likely to open them to suspicion. It is scarcely necessary to say, however, that when the case reaches this court we should not reverse the action of the court below if we thought it correct upon the merits, though we were of opinion it had not given sufficient weight to the doctrine of comity.

2. The principal mechanism of an ordinary pumping windmill is directed to the conversion of the rapid rotation of the wind wheel into the perpendicular reciprocating movement of an ordinary pumping shaft. This is accomplished in much the same way that the revolution of a water wheel is made to operate an upright saw, namely, by means of a pitman—of different

forms, but always with the object of converting one motion into another. In doing this the revolving wheel, during one half of a complete revolution, pulls, and during the other half pushes, upon the pitman. This change from a pulling to a pushing motion is accompanied, as the pitman rod passes over the center of motion, by a pounding, which not only produces a peculiar noise, but a strain upon the mechanism, resulting in frequent breakages. These poundings naturally increase in force as the mechanism becomes worn, and are sometimes heavy enough to strip the cogs from the wheels. Before the Martin patent the device usually employed was a small external toothed wheel or pinion mounted upon the shaft of the wind wheel, the cogs of which interlaced with the teeth or cogs of a large spur wheel, also externally toothed, and revolving at a greatly reduced speed, to which the pitman bar was attached. As both wheels were fitted with teeth on the outer edge of the rim, the consequence was that as each wheel presented its convexity to the other, but one or two teeth of either wheel engaged with the corresponding teeth of its fellow, and fractures of the teeth were frequent. There was also a tendency of the two wheels to draw apart. Martin obviated this by providing the large or spur wheel with teeth fitted on the inner side of the rim, whereby the concavity of the rim was opposed to the convexity of the pinion, and a greater number of teeth on each wheel engaged with the corresponding teeth of the other, and the strain occasioned by the change of motion was greatly reduced. That the invention was a useful and popular one is shown by the fact that it went into immediate use, and over three thousand windmills containing the combination are said to have been manufactured and sold since 1890.

Prior to Martin's patent, windmills of this class had been driven by externally toothed spur wheels, interlacing with externally toothed pinions, and hence were subject to the pounding motion which proved so destructive to the mechanism, and which it was the object of the Martin patent to obviate. The defence to this case is largely based upon the fact that the prior art had shown a large number of instances of spur wheels, provided with teeth on the inner side of the rim, operated by ex-

ternal toothed pinions. They are shown to have existed as early as 1841, in a patent to Perry Davis, No. 2215, for an improvement in windmills, in which cogs fixed upon the inner periphery of the rim, interlaced with an external toothed pinion, although for a different purpose of keeping the wheel in the wind. They are shown in several other patents for windmills, and also in a large number of other patents for harvesters, hay tedders, churns, mowing and sewing machines, and other mechanical movements for the conversion of motion. It would appear from the opinion and dissenting opinion in the case against the Dempster Mill Manufacturing Company, 49 U. S. App. 508, and from the opinion of the Circuit Court of Appeals in this case, that, while the combination of an external toothed pinion and internal toothed spur wheel was common in other mechanisms, the only windmill patent in that case offered as an anticipation of Martin's was one granted to Edward Williams, September 19, 1876, No. 182,394, which showed a pitman actuated by two eccentric external toothed gear wheels; and that the majority of the court was of opinion that the transfer of the Martin device to windmills for the purpose named in the patent involved invention within the cases of the *Western Electric Co.* v. *La Rue*, 139 U. S. 601; *Crane* v. *Price*, Webster's Pat. Cases, 393, and *Potts* v. *Creager*, 155 U. S. 597. In the present case, however, not only are there a large number of patents shown containing this combination, but several in which the combination is used for different purposes in the construction of windmills: For instance, in patent No. 254,527, to George H. Andrews; in patent No. 500,340, to S. W. Martin; in patent No. 271,635, to William H. and Clifford A. Holcombe; in patent No. 273,226, to Peter T. Coffield; in patent No. 317,731, to Coleman & Turner; and in patent No. 346,674, to Henry G. Newell, in all of which the system is employed for different purposes in connection with windmills—generally to keep the wheel in the direction of the wind.

It is admitted that in none of the instances in which an internal toothed wheel is employed in windmills in connection with an external toothed wheel, is the combination used for the purpose specified in the Martin patent of converting the revolv-

ing motion of the wind wheel shaft into the perpendicular motion of the pump shaft, though what is known as the Perkins' mill presents the closest analogy. This mill is shown, by indisputable proof, to have been manufactured at Mishawaka, Indiana, as early as 1885, and to have been sold in considerable numbers. It does not appear to have been a pumping mill; and the upright shaft, instead of having the reciprocating perpendicular movement of a pumping shaft, revolved, and furnished, by means of a bevelled gear at the lower end of the shaft, a revolving motion to a horizontal shaft used for various purposes upon farms. A large internal toothed wheel was placed on the outer ends of the arms of the spider to which the wind wheel arms were bolted, the internal gearing of which wheel engaged with a small gear wheel or pinion placed on an independent shaft, at the other end of which shaft a bevelled pinion was placed, interlacing with a corresponding bevel on the upper end of the upright revolving shaft. As there was no conversion or change of motion, the strain was uniform, and there was no interruption of a continuous motion or a pounding to be provided against. This is undoubtedly a different use from that to which the Martin combination was put; but the question is, whether there is not such an analogy between the several uses in which this combination was employed as to remove its adoption, in the use employed by Martin, from the domain of invention.

The case, then, reduces itself to this: The Martin combination had previously been used in a large number of mechanical contrivances for the purpose of converting a rotary into a reciprocating motion, as is notably shown in patent No. 421,533, to John Wenzin, for a reciprocating gearing; in patent No. 399,492, to Edward Burke, for a means of converting motion; in patent No. 89,217, to E. R. Hall, for a wood sawyer; in reissue patent No. 2746, to Christopher Hodgkins, for a sewing machine; in patent to Krum and Brokaw, for harvesters, and in what is known as Filer & Stowell Company's lath bolter, a sketch of which is given in the record. The combination had also been used in windmills, but not for the purpose of converting rotary into reciprocating motion, although in the Perkins mill it was

used in connection with the shaft of the wind wheel to transfer power from a horizontal to an upright rotating shaft, which, at its lower end, transferred its own motion by a bevelled gearing to another horizontal shaft. The combination of two externally toothed wheels had also been used in windmills for the purpose of converting rotary into reciprocating motion.

Having all these various devices before him, and whatever the facts may have been, he is chargeable with a knowledge of all preëxisting devices, did it involve an exercise of the inventive faculty to employ this same combination in a windmill for the purpose of converting a rotary into a reciprocating motion? We are of opinion that it did not. The main advantage derived from it arose from the engagement of a large number of teeth in each wheel. This peculiarity, however, inured to the advantage of every machine in which the combination was used for the purpose of converting motion, although the jar produced by the change of motion may not have been sufficient to endanger a small machine. So, too, a reduction of speed is involved wherever the cogs of a small wheel engage with the cogs of a large one. Martin, therefore, discovered no new function; and he created no new situation, except in the limited sense that he first applied an internal gearing to the old Mast-Foos mill, which was practically identical with the Martin patent, except in the use of an internal gearing. He invented no new device; he used it for no new purpose; he applied it to no new machine. All he did was to apply it to a new purpose in a machine where it had not before been used *for that purpose.* The result may have added to the efficiency and popularity of the earlier device, although to what extent is open to very considerable doubt. In our opinion this transfer does not rise to the dignity of invention. We repeat what we said in *Potts* v. *Creager*, 155 U. S. 597, 608, "If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use." The line between invention and mechanical skill is often an exceedingly difficult one to draw; but in view of the state of the art as heretofore shown, we cannot say that the application of this old device to a use which was only new

in the particular machine to which it was applied, was anything more than would have been suggested to an intelligent mechanic, who had before him the patents to which we have called attention. While it is entirely true that the fact that this change had not occurred to any mechanic familiar with windmills is evidence of something more than mechanical skill in the person who did discover it, it is probable that no one of these was fully aware of the state of the art and the prior devices; but, as before stated, in determining the question of invention, we must presume the patentee was fully informed of everything which preceded him, whether such were the actual fact or not. There is no doubt the patent laws sometimes fail to do justice to an individual who may, with the light he had before him, have exhibited inventive talent of a high order, and yet be denied a patent by reason of antecedent devices which actually existed, but not to his knowledge, and are only revealed after a careful search in the Patent Office. But the statute (sec. 4886) is inexorable. It denies the patent, if the device were known or used by others in this country before his invention. Congress having created the monopoly, may put such limitations upon it as it pleases.

The case in the Eighth Circuit was evidently decided upon a wholly incomplete showing on the part of the defendant.

3. One of the principal questions pressed upon our attention related to the power of the Court of Appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.

This question is not necessarily concluded by *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, since in that case the interlocutory injunction was granted after answer and replication filed, a full hearing had upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.

Does this doctrine apply to a case where a temporary injunction is granted *pendente lite* upon affidavits and immediately upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed. Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity causes. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giving them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the court should not only overrule the order for the injunction, but dismiss the bill. *Gardt* v. *Brown*, 113 Illinois, 475. This practice was approved by the Chief Justice in a case where the bill disclosed no ground of equitable cognizance, in *Green* v. *Mills*, 25 U. S. App. 383, and by the Circuit Court of Appeals for the Sixth Circuit in *Knoxville* v. *Africa*, 47 U. S. App. 74, where the question involved was one of law and was fully presented to the court. The power was properly exercised in this case.

There was no error in the action of the Circuit Court of Appeals, and its decree is

Affirmed.

CARTER *v.* ROBERTS.

APPEAL FROM AND ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 570. Submitted April 9, 1900. — Decided April 23, 1900.

Captain Carter, of the corps of engineers, in the army of the United States, was duly and regularly tried before a legally convened court martial, was found guilty of the charges made against him, and was sentenced to dismissal; to be fined; to be imprisoned; and to publication of crime and punishment; and the sentence was duly approved and confirmed. On a motion in his behalf the United States Circuit Court for the Second Circuit issued a writ of *habeas corpus*, to inquire into the matter, which resulted in the dismissal of the writ, and the remanding of Carter to custody. He took an appeal to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment below, and this court denied an application for a writ of certiorari to review that judgment. An appeal and writ of error was allowed on the same day by a Judge of the Circuit Court to this Court. *Held*, That the appeal and writ of error could not be maintained, as they fall directly within the ruling in *Robinson* v. *Caldwell*, 165 U. S. 359, where it was held that the judiciary act of March 3, 1891, does not give a defeated party in a Circuit Court the right to have his case finally determined both in this court and in the Circuit Court of Appeals on independent appeals.

When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

THESE were motions to dismiss or affirm. The case is stated in the opinion of the court.

Mr. Solicitor General for the motions.

Mr. Abraham J. Rose and *Mr. Benjamin F. Tracy* opposing.

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

Opinion of the Court.

Carter was a captain of the United States Army, assigned to the corps of engineers. He was arraigned and tried before a court martial in Savannah, Georgia, convened according to law, upon certain charges and specifications; found guilty; sentenced to dismissal; to suffer a fine; to be imprisoned; and to publication of crime and punishment. This sentence was approved by the Secretary of War and confirmed by the President of the United States, September 29, 1899, and the Secretary of War took the necessary action for the execution of the sentence. October 2, 1899, Carter obtained from the Circuit Court of the United States for the Southern District of New York a writ of *habeas corpus*, directed to the military authority having him in custody, for his production before the court, together with the time and cause of his detention. He was accordingly produced, and due return made, setting up that he was lawfully held in custody by authority of General Orders No. 172, of September 29, 1899. During the pendency of the *habeas corpus* proceedings the fine imposed was paid. The Circuit Court dismissed the writ, and Carter was remanded to custody. 97 Fed. Rep. 496.

From this final order, as appears from the records of this court, and is conceded, petitioner prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit. The case having been there heard, that court, on January 24, 1900, entered judgment affirming the judgment of the Circuit Court, with costs. On February 5, 1900, an application for the writ of certiorari to the Circuit Court of Appeals was made to this court, which, on February 26, 1900, was denied. 176 U. S. 684.

On the same day an appeal from the final order of the Circuit Court directly to this court was allowed by a Judge of the Circuit Court, as also a writ of error.

The eighth section of Art. I of the Constitution provides that the Congress shall have power "to make rules for the government and regulation of the land and naval forces," and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War. Rev. Stat. § 1342. Every officer, before he enters on the duties of his

office, subscribes to these articles, and places himself within the power of courts martial to pass on any offence which he may have committed in contravention of them. Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

The ground for an appeal directly to this court is said in the briefs to be that the case involved the construction or application of the Constitution, in that by the sentence petitioner was twice punished for the same offence. But if the statutes authorized the penalties in question to be inflicted in one and the same proceeding as punishment for the offences charged, then there was no double punishment. And, as this was a case arising in the land forces, it is hardly to be conceded that the suggested constitutional objection was raised below as such by the bare averment in the petition that petitioner, having suffered the punishment of dismissal and of publication, his "imprisonment is without authority of law," and "his further punishment and detention," and "the carrying out of said sentence, is contrary to law and the provisions of the Constitution of the United States, and is illegal."

The Circuit Court stated the questions thus: "The contention of the relator is that, conceding that the court martial had jurisdiction of the person of the accused and of the offences charged, and conceding, further, the regularity of its proceedings, and the propriety of its findings, it was without power to impose the four separate punishments of dismissal, fine, imprisonment and degradation (special publication of sentence), although it might have imposed either one of them. When application was made for the writ, it appeared that the first punishment (dismissal from the service of the United States) and the fourth (publication of sentence) had been carried out; and the relator contended that, having thus paid a penalty which the court had power to inflict, he could not be held to submit to another pen-

alty, which the court had no power to add to the one already by it selected. Since the return was made the relator has also paid the fine, and, although that fact does not appear upon the face of the original papers, it has been discussed in the briefs of both sides, and is now embodied in a stipulation, thus completing the case.

"If the relator's premises be sound, viz., that punishments have been imposed in the aggregate, when the statute authorized their imposition only in the alternative, his conclusion is supported by high authority. *Ex parte Lange*, 18 Wall. 163. In that case it was held that when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, and the judgment of the court thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offence is at an end. The important question in the case, therefore, is whether under the statutes of the United States, the court martial had the power, under its findings, to impose a sentence inflicting these four penalties." And the court, after considering that question at length, held that the court martial had such power.

We need not discuss, however, whether a direct appeal could have been taken in the first instance, as we are of opinion that, even if so, the present appeal cannot be maintained. It falls directly within the ruling in *Robinson* v. *Caldwell*, 165 U. S. 359. It was there held that the judiciary act of March 3, 1891, does not give a defeated party in a Circuit Court the right to have his case finally determined both in this court and in the Circuit Court of Appeals on independent appeals. That case was heard in the Circuit Court of the United States for the District of Idaho upon its merits, which included the consideration of questions involving the construction of a treaty and the validity of an act of Congress. Judgment passed for plaintiff, and defendant was allowed a direct appeal to this court. Pending this, defendant had also prosecuted an appeal to the Circuit Court of Appeals, and the case was there again heard and determined. 29 U. S. App. 468. When subsequently the appeal to this court was heard, it was dismissed, because we held that

we could not properly retain cognizance thereof in face of the fact that the case had been adjudicated by the Court of Appeals, whose judgment remained undisturbed.

Pullman's Palace Car Company v. *Central Transportation Company*, 171 U. S. 138, is not to the contrary. The Pullman Company had taken an appeal directly from the Circuit Court to this court, on the theory that the case involved the construction or application of the Constitution, and had also taken an appeal to the Circuit Court of Appeals for the Third Circuit. The Circuit Court of Appeals overruled a motion to dismiss, but postponed further argument until the appeal to this court was disposed of. 39 U. S. App. 307. A motion to dismiss was also made in this court, whereupon an application was made for a writ of certiorari to the Circuit Court of Appeals, and, by reason of the circumstances, was granted, and the record returned by virtue of that writ. And we proceeded to dispose of the case on the merits without passing on the question, which had become immaterial, whether the direct appeal could have been maintained or not.

The case before us presents no such features. It has been regularly heard and gone to judgment in the Circuit Court of Appeals, and an application duly made to this court for certiorari has been denied. These prior proceedings cannot be ignored and the cause brought here as if they had not been had.

When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. *Holt* v. *Indiana Manufacturing Company*, 46 U. S. App. 717; 176 U. S. 68; *United States* v. *Jahn*, 155 U. S. 109; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Benjamin* v. *New Orleans*, 169 U. S. 161. But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

Appeal and writ of error dismissed.

TENNESSEE *v.* VIRGINIA.

ORIGINAL.

No. 11, original. Submitted April 17, 1900.—Decided April 30, 1900.

A decree is entered, ordering the appointment of commissioners to ascertain, re-trace, re-mark and reëstablish the boundary line between the States of Virginia and Tennessee, as established by the decree of this court in *Virginia* v. *Tennessee*, 148 U. S. 503, but without authority to run or establish any other or new line.

On the 16th day of April, 1900, the State of Tennessee, having obtained leave so to do, filed its bill of complaint against the State of Virginia, setting forth the result of the suit of *Virginia* v. *Tennessee*, 148 U. S. 503, establishing the boundary line between the two States; that a subsequent attempt made to have the line run according to the decree in that suit had failed because the power of the court over the original cause had ceased with the expiration of October Term, 1893, *Virginia* v. *Tennessee*, 158 U. S. 267; and asking that the State of Virginia be made a party defendant, and be required to answer the bill, and that, upon the hearing a decree be entered, ordering a re-running of the boundary line as declared in *Virginia* v. *Tennessee*, 148 U. S. 503–528.

On the same 16th day of April, the State of Virginia appeared and filed an answer in which it said that it fully accepted the adjudication of this court in *Virginia* v. *Tennessee*, 148 U. S. 503, that the true boundary line between the two States was the compromise line of 1803, commonly called the diamond line, and believed that that line should be ascertained, re-located and re-marked by suitable and enduring monuments and concurred so far in the prayer of the State of Tennessee that this court should appoint commissioners, residents of neither Tennessee nor Virginia, to perform the work of re-locating, re-tracing and re-marking that compromise line. On the 17th day of the same April the parties entered into the following stipulation:

Counsel for Parties.

"It is agreed by the parties to this cause as a basis for decree:

"1. That the true boundary line between the States of Virginia and Tennessee is the compromise line established by proceedings had by the two States in 1801–1803, which was actually run and located at that time and marked with five chops in the shape of a diamond, and commonly called the diamond line, and running from White Top Mountain to Cumberland Gap.

"2. That said line has in some parts of it, if not along its entire course, become so far obscured and uncertain as to embarrass the administration of the state and Federal laws and produce confusion as to rights of property and conflict and litigation between the citizens of the two States and to necessitate its ascertainment, re-running and re-marking.

"3. That a decree be passed at once by this court providing for the ascertainment, re-tracing and re-marking of said line.

"4. That the names W. C. Hodgkins, A. H. Buchanan and J. B. Baylor are suggested and agreed upon as satisfactory commissioners to be appointed by this court to ascertain, re-trace and re-mark said line.

"5. That the record and opinion of the supreme court of Virginia in the case of *Miller* v. *Wills* shall not be considered as any part of the pleadings in this cause, and need not therefore be printed.

"6. That whatever costs may be required to be borne by the said States shall be equally borne and divided between them.

"April 17, 1900.

"The State of Tennessee,
"By G. W. Pickle, *Att'y Gen'l.*
"The State of Virginia,
"By A. J. Montague,
"*Attorney General.*"

On the same 17th day of April the cause was submitted to the court by the respective counsel.

Mr. G. W. Pickle, Attorney General of the State of Tennessee, for Tennessee.

Mr. A. J. Montague, Attorney General of the State of Virginia, for Virginia.

MR. CHIEF JUSTICE FULLER announced that the court ordered the following decree to be entered:

This cause coming on to be heard on the original bill filed herein by the State of Tennessee against the State of Virginia, the answer thereto by the State of Virginia, the reply to said answer by the State of Tennessee, and the stipulations filed herein by counsel for the respective parties; and the pleadings and stipulations having been duly considered, and the decree of this court entered on the third day of April, A. D. 1893, at the October term, 1892, in a certain original cause in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant, and the record of said cause, having been examined:

It is, thereupon, this thirtieth day of April, 1900, ordered, adjudged and decreed that the boundary line established between the States of Virginia and Tennessee by the compact of 1803, between the said States, is the real, certain and true boundary between the said States, which boundary line was actually run and located under proceedings had by the two States in 1801–1803, was then marked with five chops in the shape of a diamond, was commonly known as the diamond line, and ran from White Top Mountain to Cumberland Gap.

And it appearing further to the court that the said boundary line has become so far obscured by lapse of time or loss of monuments as to justify and necessitate its reëstablishment and remarking under the direction of this court, it is, therefore, further ordered, adjudged and decreed that William C. Hodgkins of the State of Massachusetts; James B. Baylor of the State of Virginia; and Andrew H. Buchanan of the State of Tennessee be and they are hereby appointed commissioners to ascertain, retrace, re-mark and reëstablish said boundary line, but without authority to run or establish any other or new line.

And it is further ordered that before entering upon the discharge of their duties, each of the said commissioners shall be duly sworn to perform faithfully, impartially, without prejudice or bias, the duties herein imposed, said oath to be taken before the clerk of this court, or before either of the clerks of the Circuit Court of the United States for the States of Massachusetts,

Virginia or Tennessee, and returned with their report; that said commissioners may arrange for their organization, their meetings, and the particular manner of the performance of their duties; and are authorized to adopt all ordinary and legitimate methods for the ascertainment of the true location of said boundary line, including the taking of evidence; but in the event evidence is taken, the parties shall be notified and permitted to be present and examine and cross-examine the witnesses, and the rules of law as to admissibility and competency shall be observed; and all evidence taken by the commissioners, and all exceptions thereto, and action thereon, shall be preserved and certified, and returned with their report.

And when the true location of said boundary line is ascertained, said commissioners shall cause such marks and monuments of a durable nature to be so placed on and along said line as to perpetuate it, and enable the citizens of each State, and others, to find it with reasonable diligence.

It is further ordered that the clerk of this court at once forward to the chief magistrate of each of said states, and to each of the commissioners designated by this decree, a copy of the decree duly authenticated, and that the commissioners proceed with all convenient speed to discharge their duty in ascertaining, retracing, re-marking and reëstablishing said line, as herein directed, and make their report thereof and of their proceedings in the premises to this court, on or before the first day of the next term thereof, together with a complete bill of costs and charges annexed.

And it is further ordered that, should vacancies occur in said board of commissioners, while the court is not in session, the Chief Justice is hereby authorized and empowered to appoint other commissioners, to supply the same, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all costs of this proceeding, including remuneration not exceeding ten dollars per day for each commissioner, and the other costs incident to the ascertaining, re-tracing, re-marking and reëstablishing said line, shall be paid by the States of Tennessee and Virginia equally.

Ordered accordingly.

SHOSHONE MINING COMPANY *v.* RUTTER.

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

No. 208. Argued March 21, 1900. — Decided April 30, 1900.

A suit brought in support of an adverse claim under Rev. Stat. §§ 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties.

Blackburn v. *Portland Gold Mining Co.*, 175 U. S. 571, reëxamined and affirmed to this point.

Although suits like the present one may sometimes so present questions arising under the Constitution or laws of the United States that a Federal court will have jurisdiction, yet the mere fact that a suit is an adverse suit, authorized by the statutes of Congress, is not, in and of itself, sufficient to vest jurisdiction in the Federal courts.

THE case is stated in the opinion.

Mr. W. B. Heyburn for appellant. *Mr. Lyttleton Price* was on his brief.

Mr. Curtis H. Lindley for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

In *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, decided January 8, 1900, we held that a suit brought in support of an adverse claim under sections 2325 and 2326 of the Revised Statutes was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties. In this case the same question is again presented, and has been elaborately argued by counsel against the opinion we then announced. Its importance, as well as the great ability with which it was argued by counsel for appellee, have induced a careful reëxamination of the question. While it may be con-

ceded that the matter is not free from doubt, nevertheless our reëxamination has not led us to change our former views. We deem it unnecessary to restate all the reasons given in the opinion then delivered, and yet some matters may appropriately be noticed.

By the Constitution (art. 3, sec. 2) the judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States" and to controversies "between citizens of different States." By article 4, s. 3, cl. 2, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under these clauses Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of Congress, but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several States. It has provided that the Federal courts shall have exclusive jurisdiction of admiralty and patent litigation, and jurisdiction concurrent with the state courts of suits arising under the Constitution or laws of the United States. Rev. Stat. § 629; 25 Stat. 433, c. 866.

When in section 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions as an "adverse suit," it simply declared that the adverse claimant should commence proceedings "in a court of competent jurisdiction." It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of

the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts. In that view, if the adverse suit were between citizens of different States, and the value of the thing in controversy exceeded $2000, then by virtue of the general provisions of the statutes the Federal courts might take jurisdiction, or, if the suit was one arising under the Constitution or the laws of the United States, and the amount in controversy was over $2000, then also the Federal courts might take jurisdiction. Conversely, it would be true that if the amount in controversy was not in excess of $2000, or if the parties were not citizens of different States, and the suit was not one arising under the Constitution or laws of the United States, the Federal courts could not take jurisdiction.

In the present case diverse citizenship does not exist. Jurisdiction must, therefore, depend upon the question whether the suit is one arising under the Constitution or laws of the United States.

We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws. As said by Mr. Chief Justice Waite, in *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 203:

"The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States."

The adverse suit (Rev. Stat. sec. 2326) is "to determine the question of the right of possession." That right may or may

not involve the construction or effect of the Constitution or a law or treaty of the United States. By sections 2319, 2324 and 2332, Revised Statutes, it is expressly provided that this right of possession may be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States;" or "by the statute of limitations for mining claims of the State or Territory where the same may be situated." So that in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.

The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law. Section 2 of article I of the Constitution provides that the electors in each State of members of the House of Representatives "shall have the qualifications requisite for electors of the most numerous branch of the state legislature," but this does not make the statutes and constitutional provisions of the various States in reference to the qualifications of electors parts of the Constitution or laws of the United States.

On August 8, 1890, Congress enacted (26 Stat. 313, c. 728) that intoxicating liquors transported into any State or Territory "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," etc., and in *In re Rahrer*, 140 U. S. 545, 561, this court said:

"Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws."

In *Miller's Executors* v. *Swann*, 150 U. S. 132, 136, it appeared that the State of Alabama had passed an act containing this provision: "The said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the acts of Congress granting the same," and it was held:

"The question is not what rights passed to the State under

the acts of Congress, but what authority the railroad company had under the statute of the State. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the land department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

Inasmuch, therefore, as the "adverse suit" to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States.

As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Pacific Railroad Removal Cases*, 115 U. S. 1. The argument of Chief Justice Marshall in support of this was, briefly, that a corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do

any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under the law of Congress. But that argument is not pertinent here. The right of the contestants in an adverse suit, as we have seen, does not always call for any construction of an act of Congress. It may depend solely on local rules or customs or state statutes, and in that case does not involve a dispute or controversy "which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." "In most actions concerning mining claims, the parties agree as to the proper rule of construction to be applied to the mining laws, and the controversies are usually limited to questions of fact relating to the compliance with these laws. In such cases the Federal courts have no original jurisdiction, unless there is a diversity of citizenship; but in cases arising under section twenty-three hundred and twenty-six of the Revised Statutes, the *authority* for the action is found in the legislation of Congress. Without this authority the action for the purposes avowed by the statute could not be maintained." 2 Lindley on Mines, sec. 748. A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.

Again, it is said that this adverse suit is one step in the administration of the laws of the United States in respect to mineral lands, and therefore it must be presumed that Congress intended that such step should rightfully be taken in one of the courts of the United States. This suggestion was open to the

consideration of Congress when it was determining where the adverse suit should be brought, but that it did not consider it vital is evident from the conceded fact that unless the amount in controversy is over $2000, no jurisdiction attaches to the Federal court. In other words, Congress did not deem the matter of the jurisdiction of those courts so essential a part of the administration of the land laws of the United States as to vest in them jurisdiction of all such controversies, but left a large if not a major portion of them to be determined in the state courts. It evidently contemplated the fact that a controversy about a right of possession might as appropriately be decided in a state as in a Federal court, and, not prescribing in which court it should be litigated, left the matter to be determined by the ordinary rules in respect to the jurisdiction of the Federal courts.

Counsel also calls our attention to the difference in the procedure in the disposal of agricultural and mineral lands. With respect to the former all proceedings are carried on in the Land Department, and it is only after the legal title has passed by patent that inquiry is permissible in the courts, while in respect to the latter the aid of the courts is invoked before the issue of a patent and in order to determine to some extent the right thereto. Noticing this distinction he also notes the fact that a contest in respect to the validity of a patent for agricultural lands can be litigated in the Federal courts, and hence draws the inference that a contest preliminary to a patent for mineral lands, and involving the right thereto, must also be one which can be litigated in the same courts. But we think the true inference from this difference of procedure is to the contrary, because, in respect to agricultural lands, it is settled that all questions of fact are determined by the Land Department, and that after the issue of a patent only questions of law are open for consideration in the courts, and as the laws of Congress alone determine the matter of the disposal of the public lands it follows that the questions of law which are thus open for consideration are those arising under the acts of Congress. While on the other hand, as we have heretofore shown, in these adverse suits preliminary to a patent of mineral lands not merely ques-

tions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. The scope of the inquiry which is permissible in the two cases emphasizes the fact that in the latter case the controversy may be one not arising under the Constitution or laws of Congress.

Again, it is said that Congress has in these cases prescribed a specific rule of limitation which is ordinarily different from that obtaining under state statutes in respect to actions for the recovery of possession; that it has authorized decrees in peculiar form, some partly for and partly against each of the different parties, and also some adversely to both. Act of March 3, 1881, c. 140, 21 Stat. 505; *Richmond Mining Co.* v. *Rose*, 114 U. S. 576, 585; *Perego* v. *Dodge*, 163 U. S. 160, 167. But incidental matters such as these are not decisive, especially as confessedly the statute leaves the jurisdiction over those cases in which the matter in controversy does not exceed $2000 in value in the state Courts. This fact shows conclusively that Congress was not intending to carve out a new jurisdiction for the Federal courts, and also that it did not doubt that the state courts would carry into effect its enactments in reference to limitations and procedure.

And, finally, it is said that Congress cannot confer any jurisdiction on the state courts, that they may decline to entertain these adverse suits, and that Congress cannot compel them to do so. But here again we are met with the fact that Congress has left all controversies in respect to right of possession not exceeding $2000 in value to the state courts. It evidently proceeded upon the supposition (which is a rightful one) that, as by the express terms of the Constitution, article 6, clause 2, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding," no courts, national or state, would decline to carry into effect the acts of Congress. Whether if a state court should refuse to act under these statutes the matter is one which could be corrected by error in this court, is immaterial.

If it shall appear that state courts decline to entertain such jurisdiction, and that it cannot be enforced upon them, Congress may further legislate. Evidently, thus far in these cases, as in many others, there has been no reason to suppose that any state court would decline to enforce the laws of the United States or to carry into effect their provisions. And as was well said by Mr. Justice Miller, in *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286, 299:

"The purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the Land Department in determining which of these claimants shall have the patent, the final evidence of title, from the government."

If every adverse suit could be taken into the Federal courts, obviously in some of the larger Western States the litigation would not be "before some judicial tribunal located in the neighborhood where the property is," for in them the Federal courts are often held only in the capital or chief city of the State, and at a great distance from certain parts of the mining regions therein.

So, we conclude, as we did in the prior case, that, although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts.

It appears that there were two cases in the Circuit Court of Idaho, that they were there consolidated for trial, and the consolidated case taken on appeal to the Circuit Court of Appeals. Of the two original cases, No. 81, on the docket of the Circuit Court, was commenced by the appellees in that court. The other, No. 103, was commenced by the appellant in the district court of the first judicial district of the State of Idaho in and

for Shoshone County, and by the appellees removed to the Federal court. The matters involved in the two cases were similar, and hence the consolidation. Under these circumstances, and in view of the conclusion to which we have arrived, the order will be that

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit is reversed, and the case remanded to the Circuit Court, Northern Division, District of Idaho, with instructions to reverse its decree and enter a decree dismissing Case No. 81, *and an order remanding Case No.* 102 *to the state court.*

MR. JUSTICE MCKENNA dissented.

MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 198. Argued and submitted March 16, 1900. — Decided April 30, 1900.

A state statute required all regular passenger trains to stop a sufficient length of time at county seats to receive and let off passengers with safety. It appearing that the defendant company furnished four regular passenger trains per day each way, which were sufficient to accommodate all the local and through business, and that all such trains stopped at county seats, the act was held to be invalid as applied to an express train intended only for through passengers from St. Louis to New York.

While railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, they have the legal right, after all these local conditions have been met, to adopt special provisions for through traffic, and legislative interference therewith is an infringement upon the clause of the Constitution which requires that commerce between the States shall be free and unobstructed.

Statement of the Case.

THIS was a petition for a writ of mandamus filed in the Circuit Court for the county of Montgomery, by the State's attorney for that county, to compel the defendant railway company, which for several years past has operated, and is now operating, a railroad from St. Louis, Missouri, through the county of Montgomery and the city of Hillsboro, the county seat of such county, to Indianapolis, Indiana, to stop a regular passenger train, designated as the "Knickerbocker Special," at the city of Hillsboro, a sufficient length of time to receive and let off passengers with safety.

The petition was based upon section 26, of an act of the General Assembly of Illinois, entitled "An act in relation to fences and operating railroads," approved March 31, 1874, which reads as follows:

"Every railroad corporation shall cause its passenger trains to stop upon its (their) arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety."

The answer of the railroad company averred that the company furnished four regular passenger trains each way a day, passing through and stopping at Hillsboro, and that they amply accommodated the travel, and afforded every reasonable facility to such city; that the Knickerbocker Special was a train especially devoted to carrying interstate transportation between the city of St. Louis and the city of New York; that the travel between these cities had grown to such an extent that it had become necessary to put on a through fast train, which connected with other similar trains on the Lake Shore and New York Central roads, and that it was necessary to put on this train because the trains theretofore run, none of which had ever been taken off, could not, by reason of stopping at Hillsboro and other similar stations, make the time necessary for eastern connections, or carry passengers from St. Louis to New York within the time which the demands of business and inter-

state traffic required; that the Knickerbocker Special is not a regular passenger train for carrying passengers from one point to another in the State of Illinois, such traffic being amply provided for by other trains, and that the Knickerbocker Special is used exclusively for interstate traffic from and to points without the State of Illinois; that it is not subject to regulation by the statute of Illinois providing that all trains shall stop at all county seats, and that to subject it to the statutes of the various States through which it passes, requiring it to stop at county seats, would wholly destroy the usefulness of the train, and would impede and obstruct interstate commerce, and that obedience to the statute in question would require it to abandon the train.

A demurrer to this answer was sustained, and the defendant electing to stand upon it as a full defence to the petition, a final judgment was rendered and a peremptory writ of mandamus awarded against the defendant. On appeal to the Supreme Court of the State this judgment was affirmed. Whereupon the railway company sued out a writ of error from this court.

Mr. John T. Dye for plaintiff in error. *Mr. George F. McNulty* was on his brief.

Mr. E. C. Akin, *Mr. C. A. Hill* and *Mr. B. D. Monroe* for defendant in error, submitted on their brief.

Mr. Justice Brown delivered the opinion of the court.

Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employés, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities, *Smith* v. *Alabama*, 124 U. S. 465; requiring such engineers to be examined from time to time with respect to their ability to distinguish colors, *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96; requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State, *Western Union Tel. Co.* v. *James*, 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington* v. *Georgia*, 163 U. S. 299; requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations, *Railway Company* v. *Fuller*, 17 Wall. 560; forbidding the consolidation of parallel or competing lines of railway, *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677; regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto, *N. Y., N. H. &c. Railroad Co.* v. *New York*, 165 U. S. 628; providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made, *Chicago, Milwaukee &c. Railway* v. *Solan*, 169 U. S. 133; and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent, *Richmond & Allegheny Railroad* v. *Patterson Tobacco Co.*, 169 U. S. 311. In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce.

But for the reason that these laws were considered unreasonable and to unnecessarily hamper commerce between the States, we have felt ourselves constrained in a large number of cases to express our disapproval of such as provided for taxing di-

rectly or indirectly the carrying on or the profits of interstate commerce. We have also held to be invalid a statute of Louisiana requiring those engaged in interstate commerce to give all persons upon public conveyances equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, *Hall* v. *De Cuir*, 95 U. S. 485; another regulating the charges of railway companies for passengers or freight between places in different States, *Wabash St. Louis &c. Railway* v. *Illinois*, 118 U. S. 557; another requiring telegraph companies to deliver dispatches by messenger to the persons to whom the same are addressed, so far as they attempted to regulate the delivery of such dispatches at places situated in another State, *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347; and still another forbidding common carriers from bringing intoxicating liquors into the State without being furnished with a certificate that the consignee was authorized to sell intoxicating liquors in the county, *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465.

Several acts *in pari materia* with the one under consideration have been before this court, and have been approved or disapproved as they have seemed reasonable or unreasonable, or bore more or less heavily upon the power of railways to regulate their trains in the respective and sometimes conflicting interests of local and through traffic. In the earliest of these cases, *Illinois Central Railroad* v. *Illinois*, 163 U. S. 142, the very statute of Illinois under consideration in this case, as construed and applied by the Supreme Court of that State, was held to be an unreasonable restriction upon interstate traffic, in requiring a fast mail train from Chicago to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of its interstate passengers and United States mail, by turning aside from its direct route and running to a station (Cairo) three and one half miles away from a point on that route, and back again to the same point, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for whom the railroad company furnished other and ample accommodation. Said Mr. Justice Gray: "The State may doubt-

less compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

Upon the contrary, in *Gladson* v. *Minnesota*, 166 U. S. 427, a state statute requiring every railroad to stop all its regular passenger trains running wholly within the State at its stations in all county seats long enough to take on and discharge passengers with safety, was held to be a reasonable exercise of the police power of the State, even as applied to a train connecting with a train of the same company running into another State, and carrying some interstate passengers as well as the mail. The case was distinguished from that of the *Illinois Central Railroad* v. *Illinois*, in the fact that the train in question ran wholly within the State of Minnesota, and could have stopped at the county seats without deviating from its course; and that the statute of Minnesota expressly provided that the act should not apply to through trains entering the State from any other State, or to transcontinental trains of any railroad. Speaking of police regulations for the government of railroads while operating roads within the jurisdiction of the State, it was said that "they are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States." The railroad in this case was treated as a purely domestic corporation, notwithstanding it connected, as most railroads do, with railroads in other States.

In the most recent case upon this subject, *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S. 285, a statute of Ohio providing that every railroad company should cause three of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village contain-

ing over three thousand inhabitants, for a time sufficient to receive and let off passengers, was held to be, in the absence of legislation by Congress upon the subject, consistent with the Constitution of the United States, when applied to trains engaged in interstate commerce through the State of Ohio. In delivering the opinion of the court, Mr. Justice Harlan observed: "The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing three thousand inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is three minutes. Certainly, the State of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the State between points outside of its territory. . . . It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who wished to pass through the State without stopping." This case is readily distinguishable from the one under consideration in the fact that the statute of Ohio required only that three regular passenger trains should stop at every station containing three thousand inhabitants, leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the loophole which the statute of Illinois has effectually closed.

Opinion of the Court.

The question broadly presented in this case is this: Whether a state statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question?

The demurrer to the answer admits that the railway company furnishes a sufficient number of regular passenger trains, (four each way a day,) to accommodate all the local and through business along the line of the road, and that all of such trains stop at Hillsboro; that none of such trains have been taken off, and all of which ran prior to the putting on of the Knickerbocker Special still run and still stop at Hillsboro, and that they furnish ample and sufficient accommodation to all persons desiring to travel to and from that place; that the Knickerbocker Special was put on in response to an urgent demand on the part of the through travelling public from St. Louis to New York and that it was necessary, as the passenger trains theretofore used could not, by reason of stopping at way stations, make the time required for eastern connections, and if compelled to stop at county seats the company will be compelled to abandon the train to the great damage of the travelling public and to the railway company.

It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the *Lake Shore case*, railways are bound to provide primarily and ade-

quately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths or the excellence of their tables would insure them such share, if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.

With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the States shall be free and unobstructed.

While the statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall* v. *DeCuir*, 95 U. S. 485, that "while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. . . . If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own

passengers and regulate the transportation of its own freight regardless of the interests of others." The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion. *Railroad Commission Cases*, 116 U. S. 307, 334.

We are of opinion that the act in question is a direct burden upon interstate commerce, and the judgment of the Supreme Court of the State of Illinois must therefore be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE BREWER and MR. JUSTICE SHIRAS concurring:

We concur in this judgment on the proposition that the act of the legislature of Illinois whether reasonable or unreasonable, wise or foolish, is, as applied to the facts of this case, an attempt by the State to directly regulate interstate commerce, and as such attempt, is beyond the power of the State.

DE LAMAR'S NEVADA GOLD MINING COMPANY *v.* NESBITT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 152. Argued March 1, 1900. — Decided April 30, 1900.

The fact that in a state court plaintiff and defendant make adverse claims to a mining location under the mining laws of the United States (Rev. Stat. § 2325), does not of itself present a federal question within the meaning of Rev. Stat. § 709.

Statement of the Case.

Where the plaintiff based his right to recover upon an act of Congress suspending the forfeiture of mining claims for failure to do the required amount of work, and the decision of the court was in favor of the right claimed by him under this statute, the defendant is not entitled to a writ of error from this court to review such finding.

This was a suit begun in the District Court for the Fourth Judicial District of Nevada by Nesbitt as part owner of the Fraction mine, against one William Davidson, the alleged locator of the Sleeper mining claim, covering the same ground as the Fraction mine, to quiet plaintiff's title and that of his co-tenants to the Fraction mine, and to recover a money judgment against the defendant.

The complaint alleged that the plaintiff and his coöwners were tenants in common, and since May 15, 1892, had been in possession of the Fraction mining claim, pursuant to the laws of the United States, and that the defendant also claimed a right to possession upon the alleged location of a certain mining claim called by him the Sleeper mine; that such location was made subsequent to the location of the Fraction mine, and that the plaintiff had protested in the land office at Carson City against the issuance of a patent to the defendant.

The answer denied the ownership and possession of the plaintiff of the Fraction mine, and alleged as a defence the invalidity of the proceedings under which Nesbitt and his co-tenants had acquired the titles of the original locators to the Fraction mine.

The case came on for trial before the court without a jury, and resulted in a judgment for the plaintiff, whereby it was decreed that the title of plaintiff and his co-tenants to the Fraction mine be quieted, and the claim of the defendant to that portion of the Sleeper mine embraced within the boundary lines of the Fraction mine, be rejected; with a further decree for the recovery of certain incidental fees and costs. Upon motion for a new trial, it was ordered that De Lamar's Nevada Gold Mining Company be substituted as defendant in the place of Davidson, deceased, and that the motion for a new trial be overruled. Defendant appealed to the Supreme Court of the State, which affirmed the judgment. 52 Pac. Rep. 609. Whereupon it sued out a writ of error from this court.

Mr. Jackson H. Ralston and *Mr. William M. Stewart* for plaintiff in error.

Mr. Walter A. Johnston and *Mr. George S. Sawyer* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Defendant, known as De Lamar's Nevada Gold Mining Company, (hereinafter referred to as the mining company,) claims title to the property in question through an application filed by Davidson in the land office at Carson City, in pursuance of Rev. Stat. § 2325, for a patent to the Sleeper mine, against the issue which patent plaintiff Nesbitt filed an adverse claim as to so much of the Sleeper mine as was embraced within the boundaries of the Fraction mine.

Plaintiff Nesbitt took title to the Fraction mine through a location made May 12, 1892, by W. De Beque, H. Stevens and A. Borth, who, it appeared, performed all the acts required to make a valid location. Plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title and interest of De Beque and Stevens to this mine through certain judgments recovered in a justice's court against De Beque and Stevens, upon which executions had been issued, and a sale made to the Nesbitt brothers of their interests in the Fraction mine. This left the Nesbitts and Borth the owners of that mine as tenants in common. The court held these judgments to be void, but admissible for the purpose of showing or tending to show color of title and adverse possession in the Nesbitts and Borth. It further appeared that the Nesbitts and Borth did assessment work in each of the years 1895, 1896 and 1897 to the full amount required by law, (§ 2324;) that no work was done in either of the years 1893 and 1894, but that the Nesbitt brothers, in December of each of said years, had a notice recorded in the county recorder's office, where the original notice of the location of the Fraction mine was filed, declaring their intention in good faith to hold and work the mine. Meantime, however, the Sleeper mine was located January 1, 1895, the boundaries of which took in the Fraction mine.

The Supreme Court held the vital question to be whether the notices which the Nesbitt brothers caused to be recorded of their intention to hold and work the mine had the legal effect of saving it from being subject to a relocation by Davidson. Revised Statutes, § 2324, provides that until a patent has been issued upon a mining claim previously located, "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year," and that "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." But, owing probably to the stress of the financial panic then prevailing, Congress passed on November 3, 1893, an act, 28 Stat. 6, c. 12, providing that the requirements of section 2324 be suspended for that year, "so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for the non-performance of the annual assessment for the year 1893," provided a notice of an intention to hold and work the claim be filed in the proper office. This act was extended to the year 1894 by a subsequent statute. Act of July 18, 1894, c. 142, 28 Stat. 114. Plaintiff relied upon these statutes, and the court held that, the Nesbitt brothers and Borth having had the notice required by the statutes recorded, under an agreement between themselves recognizing each other as coöwners and tenants in common, and under the honest belief of all three that the Nesbitt brothers had legally acquired all the interest of De Beque and Stevens by virtue of the sale made under these judgments, the mine had not been forfeited, and was not subject to relocation when the location of the Sleeper mine was made, and therefore that the location of such mine was invalid, so far as it covered the Fraction mining claim.

From this summary of the pleadings and findings of the court, it is clear that the defendant set up no right, title, privilege or immunity under a statute of the United States, the decision of which was adverse to it in that particular. The mere fact that the mining company claimed title under a location made by Davidson under the general mining laws of the United States,

Rev. Stat. § 2325, was not in itself sufficient to raise a Federal question, since no dispute arose as to the legality of such location, except so far as it covered ground previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court something more must appear than that the parties claim title under an act of Congress.

The subject is fully discussed and the prior authorities cited in the recent case of *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, which was also a contest between rival claimants of a mine under sections 2325 and 2326. It was held that the provision in section 2326 for the trial of adverse claims to a mining patent "by a court of competent jurisdiction," did not in itself vest jurisdiction in the Federal courts, although, of course, jurisdiction would be sustained, if the requirements of amount and diverse citizenship existed; and that the judgment of the Supreme Court of the State in such case could not be reviewed in this court simply because the parties were claiming rights under a Federal statute. A like ruling was made in the still later case of *Florida Central & Peninsular Railroad* v. *Bell*, 176 U. S. 321. See also *California Powder Works* v. *Davis*, 151 U. S. 389.

If the law were otherwise, then every land case wherein one of the parties claimed title, either immediately or remotely through a patent of the United States, would present a Federal question; and as most of the land titles in the Western States of this country are traceable back to a right under the laws of the United States, every such case might be held reviewable by this court on writ of error. This position, of course, is untenable. If the fact that the plaintiff takes title directly or indirectly from the United States be insufficient to create a case "arising under the Constitution or laws of the United States" within the meaning of the jurisdictional act of 1888, much less does it make one of a "title, right, privilege or immunity" claimed under a statute of the United States, an adverse decision of which by the highest court of a State entitles the injured party under Rev. Stat. sec. 709 to a writ of error from this court. To raise a Federal question the right must be one claimed

under a particular statute of the United States, the validity, construction or applicability of which was made the subject of dispute in the state court; and the decision upon such statute must have been adverse to the plaintiff in error. No Federal question was presented by the pleadings in the case, and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which the Nesbitt brothers had acquired the interest of De Beque and Stevens in the Fraction mine.

There was undoubtedly a Federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of, and not against, the right claimed under the statute, and of this construction the plaintiff in error is in no position to take advantage, as it made no claim under those statutes. This subject was considered in the case of *Missouri* v. *Andriano*, 138 U. S. 496, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the state constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his foreign birth, but claimed that, under Rev. Stat. sec. 2172, he became a citizen by the naturalization of his father. The decision of the court was in his favor, and it was held that the *relator* had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of *his* right to a writ of error. It was said that the right or privilege must be personal to the plaintiff in error, and that he was not entitled to a review, where the right or privilege was asserted by the other party, and the decision was in favor of that party and adverse to himself. It is manifest that the object of section 709 was not to give a right of review wherever the validity of an act of

Syllabus.

Congress was drawn in question, but to prevent States from frittering away the authority of the Federal government by limiting too closely the construction of Federal statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed. To the same effect are *Dower* v. *Richards*, 151 U. S. 658, 666; *Sayward* v. *Denny*, 158 U. S. 180; *Jersey City & Bergen Railroad* v. *Morgan*, 160 U. S. 288; *Rae* v. *Homestead Loan & Guaranty Co.*, 176 U. S. 121; *Abbott* v. *Tacoma Bank*, 175 U. S. 409.

Except so far as the case under consideration required a construction of the above-mentioned acts of Congress suspending the forfeiture of mining claims, the questions were purely of a local nature, and not subject to review in this court.

There is no Federal question presented by the record in this case, and it must therefore be

Dismissed.

Mr. Justice McKenna dissented.

JOHN BAD ELK *v.* UNITED STATES.

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

No. 350. Submitted February 26, 1900. — Decided April 30, 1900.

Three policemen in South Dakota attempted, under verbal orders, to arrest another policeman for an alleged violation of law, when no charge had been formally made against him, and no warrant had issued for his arrest. Those attempting to make the arrest carried arms, and when he refused to go, they tried to oblige him to do so by force. He fired and killed one of them. He was arrested, tried for murder and convicted. The court charged the jury: "The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I

charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. . . . In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had gone beyond the force necessary to arrest the defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest." *Held*, that the court clearly erred in charging that the policemen had the right to arrest the plaintiff in error and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it.

At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if, in the course of that resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had had the right to arrest, to manslaughter.

The case is stated in the opinion.

Mr. Thomas B. McMartin and *Mr. S. B. Van Buskirk* for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

Mr. Justice Peckham delivered the opinion of the court.

The plaintiff in error was convicted in April, 1899, in the Circuit Court of the United States, in South Dakota, of the murder on March 13, 1899, of John Kills Back at the Pine Ridge Indian Reservation in South Dakota, and sentenced to be hanged. The case is brought here on writ of error to the Circuit Court.

Both the deceased and the plaintiff in error were Indians and policemen, residing on the reservation at the time of the killing.

Upon the trial it appeared that the plaintiff in error, on March 8, 1899, while out of doors, fired a couple of shots from

his gun at or near the place where he resided. Soon after the firing, one Captain Gleason, (who stated that he was what is called an "additional farmer" on the same reservation,) having heard the shots, and meeting the plaintiff in error, asked him if he had done that shooting, and he said that he had; that "he had shot into the air for fun;" to which Gleason responded by saying to him, "Come around to the office in a little while, and we will talk the matter over." Thereupon they separated. As he did not come to the office, Gleason, after waiting several days, gave verbal orders to three of the Indian policemen to go and arrest plaintiff in error at his mother's house near by, and take him to the agency, some twenty-five miles distant. No reason for making the arrest was given, nor any charge made against him. The policemen (one of whom was the deceased) went to the house where the plaintiff in error was stopping, and came back and reported to Gleason that he was not there, and they were then ordered to return and wait for him and to arrest him. They returned to the house, but came back again and reported that the plaintiff in error said that he would go with them to the agency in the morning; that it was too late to go with them that night. Gleason then told them to watch him and see that he did not go away, and in the morning to take him to the Pine Ridge Agency.

The policemen then again went back to the house where plaintiff in error was staying and met him coming towards his mother's place. He went into the house, and one of their number followed him; found him smoking, and told him that they had come to take him to the agency at Pine Ridge. Plaintiff in error refused to go, and the policeman went outside. Another of them then went into the house, and in a few minutes both he and the plaintiff in error came out, and the latter saddled his horse and went over to the house of a friend, and they followed him. It was getting dark when he came back to his mother's house, still followed by them, and while following the plaintiff in error to his house on this last occasion they were joined by others, so that when he went into the house there were four or five men standing about it. In a short

time the plaintiff in error came out, and asked of those outside, "What are you here bothering me for?" The deceased said: "Cousin, you are a policeman, and know what the rules and orders are." To which plaintiff in error replied: "Yes; I know what the rules and orders are, but I told you I would go with you to Pine Ridge in the morning." Then, according to the evidence for the prosecution, the plaintiff in error, without further provocation, shot the deceased, who died within a few minutes.

The policemen had their arms with them when they went up to where the plaintiff in error was at the time the shooting was done.

This is substantially the case made by the prosecution.

There is an entire absence of any evidence of a complaint having been made before any magistrate or officer charging an offence against the plaintiff in error, and there is no proof that he had been guilty of any criminal offence, or that he had even violated any rule or regulation for the government of the Indians on the reservation, or that any warrant had been issued for his arrest. On the contrary, Gleason swears that his orders to arrest plaintiff in error were not in writing, but given orally. Indeed, it does not appear that Gleason had any authority even to entertain a complaint or to issue a warrant in any event.

The plaintiff in error testified in his own behalf, and said that during the day he had been looking after the schools along the creek near the station; that that was his duty as a policeman; that he arrived at his mother's house about half past four in the afternoon, and soon afterwards an Indian named High Eagle came into the house, staid a minute or two, but did not speak, then went out doors, and Lone Bear came in, and said that he was directed to take the plaintiff in error to Pine Ridge to Major Clapp. To which the plaintiff replied: "All right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder's, and get another horse." Lone Bear said all right. Then the plaintiff in error started for his brother's, and when he got there found that the horses were out on the range, and when they came in his brother promised to bring one of them down to him. (In this he was corroborated by his

brother, who testified that he brought the horse over about dark.) On his way back to his mother's the plaintiff in error stopped at a friend's and got a Winchester rifle for the purpose, as he said, of shooting prairie chickens. When he went back to his mother's he was there but a short time when the deceased and two or three others came to his house to arrest him, and the plaintiff in error went out, and according to his testimony the following was what occurred: "I asked John Kills Back and High Eagle what they were there bothering me all the while for. John Kills Back said: 'You are a policeman, and know what the rules are.' I said: 'Yes; I know what the rules are, but I told you that I would go to Pine Ridge Agency in the morning.' Then the deceased moved a little forward, and put his hand around as if to reach for his gun. I saw the gun and shot; then I shot twice more, and John Kills Back and High Eagle ran off. John Kills Back fell after he had gone a short distance. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time I shot." This was in substance all the evidence.

Counsel for plaintiff in error asked the court to charge as follows:

"From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

The court denied the request, and counsel excepted.

The court charged the jury, among other things, as follows:

"The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him.

* * * * * * * *

"In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgotten his duties as an officer and had gone beyond the force necessary to arrest defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest."

This charge was duly excepted to.

We think the court clearly erred in charging that the policeman had the right to arrest the plaintiff in error, and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it.

The evidence as to the facts immediately preceding the killing was contradictory; the prosecution showing a killing when no active effort was at that very moment made to arrest, and the defendant showing an intended arrest and a determination to take him at that time at all events, and a move made by the deceased towards him with his pistol in sight and a seeming intention to use it against the defendant for the purpose of overcoming all resistance. Under these circumstances the error of the charge was material and prejudicial.

At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if in the course of that resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had had the right to arrest, to manslaughter. What would be murder, if the officer had the right to arrest, might be reduced to manslaughter by the very fact that he had no such right. So an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence. 1 Arch. Crim. Pr.

& Pl. 7th Am. ed. 103, note (1); also page 861 and following pages; 2 Hawk. P. C. 129, sec. 8; 3 Russell on Crimes, 6th ed. 83, 84, 97; 1 Chitty's Crim. L. star page 15; 1 East P. C. c. 5, page 328; *Derecourt* v. *Corbishley*, 5 E. & B. 188; *Fox* v. *Gaunt*, 3 B. & Ad. 798; *Reg.* v. *Chapman*, 12 Cox's Crim. Cas. 4; *Rafferty* v. *The People*, 69 Ill. 111; *S. C.* on a subsequent writ, 72 Ill. 37. If the officer have no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest. 1 East, *supra*.

We do not find any statute of the United States or of the State of South Dakota giving any right to these men to arrest an individual without a warrant on a charge of misdemeanor not committed in their presence. Marshals and their deputies have in each State, by virtue of section 788, Revised Statutes of the United States, the same powers in executing the laws of the United States as sheriffs and their deputies in such State may have by law in executing the laws thereof. This certainly does not give any power to an officer at the Pine Ridge Agency to arrest a person without warrant, even though charged with the commission of a misdemeanor. These policemen were not marshals nor deputies of marshals, and the statutes have no application to them.

By section 1014 of the Revised Statutes, the officers of the United States named therein, and certain state officers, may, agreeably to the usual mode of process against offenders in such State, order the arrest of an offender for any crime or offence committed against the United States. This section has no application.

Referring to the laws of South Dakota, we find no authority for making such an arrest without warrant. The law upon the subject of arrests in that State is contained in the Compiled Laws of South Dakota, 1887, section 7139 and the following sections, and it will be seen that the common law is therein substantially enacted. The sections referred to are set out in the margin.[1]

[1] SEC. 7139. An arrest may be either—

1. By a peace officer, under a warrant;

No rule or regulation for the government of Indians upon a reservation has been cited, nor have we found any, which prohibits the firing of a gun there, "for fun," nor do we find any law, rule or regulation which authorizes an arrest, without war-

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2. By a peace officer, without a warrant; or,

3. By a private person.

SEC. 7141. If the offence charged is a felony, the arrest may be made on any day and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant.

SEC. 7144. The officer must inform the defendant that he acts under the authority of the warrant, and must also show the warrant if required.

SEC. 7145. If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

SEC. 7148. A peace officer may, without a warrant, arrest a person—

1. For a public offence committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made upon reasonable cause of the commission of a felony by the party arrested.

SEC. 7150. He may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that the felony had not been committed.

SEC. 7151. When arresting a person without a warrant, the officer must inform him of his authority and the cause of the arrest, except when he is in the actual commission of a public offence, or is pursued immediately after an escape.

SEC. 7153. When a public offence is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

SEC. 7154. A private person may arrest another—

1. For a public offence committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

SEC. 7155. He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the offence, or when he is arrested on pursuit immediately after its commission.

rant, of an Indian not charged even with the commission of a misdemeanor, nor does it anywhere appear that Gleason had authority to issue a warrant for an alleged violation of the rules or regulations.

It is plain from this review of the subject that the charge of the court below, that the policemen had the right to arrest this plaintiff in error, without warrant, and that, in order to accomplish such arrest, they had the right to show and use their pistols so far as was necessary for that purpose, and that the plaintiff in error had no right to resist such arrest, was erroneous. That it was a material error, it seems to us, is equally plain. It placed the transaction in a false light before the jury, and denied to the plaintiff in error those rights which he clearly had. The occasion of the trouble originated in Gleason's orders to arrest him, and in the announced intention on the part of the policemen, which they endeavored to accomplish, to arrest the plaintiff in error that night and take him to the agency, and all that followed that announcement ought to be viewed in the light of such proclaimed intention. And yet the charge presented the plaintiff in error to the jury as one having no right to make any resistance to an arrest by these officers, although he had been guilty of no offence, and it gave the jury to understand that the officers, in making the attempt, had the right to use all necessary force to overcome any and all opposition that might be made to the arrest, even to the extent of killing the individual whom they desired to take into their custody. Instead of saying that plaintiff in error had the right to use such force as was absolutely necessary to resist an attempted illegal arrest, the jury were informed that the policemen had the right to use all necessary force to arrest him, and that he had no right to resist. He, of course, had no right to unnecessarily injure, much less to kill, his assailant; but where the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no such right.* What might be murder in the first

case might be nothing more than manslaughter in the other, or the facts might show that no offence had been committed.

The plaintiff in error was undoubtedly prejudiced by this error in the charge, and the judgment of the court below must therefore be

Reversed, and the case remanded with instructions to grant a new trial.

APACHE COUNTY *v.* BARTH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 181. Submitted March 13, 1900. — Decided April 30, 1900.

In an action at common law to recover from a municipal organization upon a warranty issued by it, when the defendant denies the execution of it, and sets up that it is a forgery, the plaintiff, in order to be entitled to put the instrument in evidence, and thereby make a *prima facie* case, would be compelled to prove its execution.

The Revised Statutes of Arizona of 1887, provide: "735. (Sec. 87.) Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit — . . . 8. A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe, that such instrument was not executed by the decedent or by his authority." *Held*, That when the defendant did not verify his answer in a case provided for therein, the note or warrant or other paper sued on was admitted as genuine, but when an answer denying that fact was verified, the plaintiff must prove it as he would have to do at common law in a case where the genuineness of the paper was put at issue by the pleadings.

In September, 1891, Jacob Barth commenced an action in one of the district courts of the Territory of Arizona against the board of supervisors of Apache County, in that Territory, to recover upon certain warrants which he alleged had been issued

by that county during the year 1884, and of which he claimed to be the owner. Barth soon thereafter died, leaving a will, which was proved in February, 1892, and by order of the court in March, 1896, the action was revived in the name of Julia Barth, the appellee, who was the executrix named in the will. She filed in March, 1896, by leave of court, an amended complaint containing forty counts upon as many different warrants, which she alleged had been issued by the board of supervisors of the county, on account of debts due from the county, and of which warrants she was the owner, and that the county owed her thereon an amount exceeding seven thousand dollars, for which sum she duly demanded judgment with interest. A copy of each warrant was annexed to the complaint and formed part thereof.

The defendant filed an unverified amended answer to this amended complaint, (which answer was subsequently verified,) and among other things denied that any of the warrants sued on had ever been issued or been directed to be issued by the board of supervisors of the county or by the authority of that board, but on the contrary defendant alleged that the pretended warrants sued on were, and each of them was, falsely made and forged, and that they were, and each of them was, a forgery, and that they were so falsely made and forged with a fraudulent intent to defraud the county of Apache. The defendant prayed judgment that plaintiff take nothing by her action, and for costs and for general relief.

Other defences were set up, among which was the statute of limitations.

The case came on for trial before the court, a jury trial having been waived, and the court having decided it, signed a statement of the facts found by it, in which it was stated that evidence had been introduced upon the trial, both oral and documentary, and upon the admission of the plaintiff the court found that the figures on eleven of the warrants (duly described and identified) had been altered and changed after they had been issued, and that such alterations and changes vitiated and rendered null and void those warrants as against the defendant, and that they were not valid claims against the county. The

court then made a general finding that all of the other warrants sued on were valid and subsisting legal claims against the county, and that plaintiff was entitled to recover upon each warrant the amount named therein, which, with interest, amounted to about the sum of fourteen thousand dollars, and for that sum judgment was directed to be entered, which was subsequently done. There was no further or special finding made by the trial court.

From this judgment an appeal was taken by the county to the Supreme Court of the Territory of Arizona, where it was affirmed.

The Supreme Court at the time of affirming the judgment made and signed by its Chief Justice a statement of facts in the case as follows:

"The Supreme Court takes the facts as found by the district court on the trial in that court and as shown by the record, and makes them the statement of the facts in this cause.

"This court finds that the district court did not commit error in finding against the plea of limitation set up by appellant.

"The court further finds that the district court did not commit error in granting and rendering judgment in favor of appellee on the warrants sued on and against appellant, notwithstanding the verified answer of appellant. The Supreme Court further finds that the district court did not commit error in refusing to render judgment for appellant on the verified answer of appellant, notwithstanding appellee did not introduce any evidence to establish the genuineness of said warrants for which appellee asked judgment, because the court finds that the warrants were verity of themselves, and the verified answer only put appellant in position in court to prove the facts set up in her answer, and did not put appellee on proof of their genuineness; hence the Supreme Court finds as a conclusion that the judgment of the district court should be affirmed. Judgment of affirmation and confirmation is therefore ordered and directed.

"This June 11th, 1898."

The county has appealed to this court from the judgment of the Supreme Court of the Territory.

Mr. J. F. Wilson for appellant.

Mr. Reuben Hatch for appellee.

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

The statute approved April 7, 1874, c. 80, entitled "An act concerning the practice in territorial courts, and appeals therefrom," 18 Stat. 27, by the second section provides:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed, or may hereafter prescribe: *Provided*, That 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 the Supreme Court, together with the transcript of the proceedings and judgment or decree," etc.

The legislature of the Territory passed an act March 18, 1897, No. 71 providing as follows:

"Sec. 1. Whenever an appeal or writ of error is taken from any district or circuit court of this Territory to the Supreme Court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and thereupon it shall become and be a part of the record in such case.

* * * * * * * *

"Sec. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the Supreme Court without any bill of exceptions or other assignment of errors as herein provided."

This last act was passed subsequently to the trial of this action, but immediately after the filing of findings herein, and pursuant to its provisions, the reporter's notes of trial, with his certificate, were returned upon appeal, and are contained in this record.

This act could give us no jurisdiction to review an objection to evidence taken upon the trial, if no exception were taken, for the act of Congress of 1874, above cited, provides for a review in this court only when the decisions of the court were excepted to, and our jurisdiction is regulated by that act. *Grayson* v. *Lynch*, 163 U. S. 468, 474.

Upon a review of a judgment in a case not tried by jury and taken by appeal from the Supreme Court of a Territory, this court is by statute restricted to an inquiry, whether the findings of fact made by the court below support its judgment, and to a review of exceptions duly taken to rulings on admission or rejection of evidence. *Grayson* v. *Lynch*, 163 U. S. 468; *Bear Lake &c.* v. *Garland*, 164 U. S. 1, 18; *Harrison* v. *Perea*, 168 U. S. 311, 323; *Young* v. *Amy*, 171 U. S. 171, 183.

There is no bill of exceptions in the record, and there is nothing to show that any exception was taken on the trial to the admission or rejection of evidence. Counsel for appellee, therefore, urges that the only inquiry before this court is, whether the facts found by the trial court authorize the judgment which was entered, and he claims that upon those findings there can be no question that the judgment entered is right. This does not give the full and proper force to the additional finding of facts by the Supreme Court to which it is entitled. Although in that finding it is said that, "The Supreme Court takes the facts as found by the district court on the trial in that court, and as shown by the record, and makes them the statement of the facts in this cause," yet a perusal of the statement made by the Supreme Court renders it plain that such court found other facts in addition to those adopted from the district court, and those facts found by it should be regarded in the decision of this case.

What we regard as additional facts in the statement of the Supreme Court are regarded by counsel for the appellee as con-

clusions of law only, and he contends that we are confined to the general findings of fact made by the district court and adopted by the Supreme Court, and that upon those facts the appellee is clearly entitled to judgment. We cannot acquiesce in the correctness of the claim so made.

The Supreme Court in its statement finds a conclusion of law, viz: That the court below did not err in granting judgment for appellee; and this conclusion is immediately followed by the declaration "notwithstanding the verified answer of the appellant," which latter is a statement of fact. In addition to the fact thus stated, and in continuation of its statement, the court "further finds that the district court did not commit error in refusing to render judgment for appellant on the verified answer of appellant, notwithstanding appellee did not introduce any evidence to establish the genuineness of said warrants for which appellee asked judgment, because the court finds that the warrants were verity of themselves, and the verified answer only put appellant in position in court to prove the facts set up in her answer and did not put appellee on proof of their genuineness; hence the Supreme Court finds as a conclusion that the judgment of the district court should be affirmed."

We do not think that all of this can be called a conclusion of law only and not a finding of any fact. It is too technical a treatment of this statement to limit the finding of facts wholly to those set forth in the finding of the district court.

If we were not, in this particular, limited to the findings of the court, and could look at the notes of the stenographer taken on the trial and attached to the record by virtue of the territorial act referred to, we should there find that defendant was granted leave to verify its answer before the plaintiff rested her case, and that the answer was then verified and the plaintiff given opportunity to put in such evidence as she chose after such verification was made and before she closed her case. She did not avail herself of the leave, and the case rests only upon the production of the warrants, with the words indorsed thereon: "Not paid for want of funds; Presented Dec. 31, 1884. D. Baca, Treasurer, A. Ruiz, Deputy. Sol. Barth;" also the word "Forgery" marked in red ink across the faces of the warrants.

No proof whatever was given as to the genuineness of these signatures.

The finding of the Supreme Court shows that its decision was not placed upon the ground that the answer was verified after the plaintiff had rested; nor was its finding put on any ground of waiver. We must, therefore, take the fact that the answer was verified in ample time to call upon the plaintiff to prove the affirmative of the issues presented by the pleading.

Coming to an examination of the case in the light of these facts, we see that this was an action brought upon certain county warrants fully described in the amended complaint, and it was therein alleged that they were issued under the direction and authority of the board of supervisors of the county, signed by the chairman, and countersigned by the clerk of the board. The answer denied the fact that the warrants were issued by the authority or direction of the board, and alleged that they were forged warrants, and that the county was not liable thereon. Irrespective of any statute in regard to pleading, an issue was thus joined which raised the question of the genuineness of the signatures subscribed to these warrants; in other words, the question of their execution was put in issue, which would make it necessary for the plaintiff to prove that fact before they could be admitted in evidence. We are aware of no exception to this rule which would permit the introduction of alleged county warrants such as these, without any proof whatever of their execution. They do not prove themselves. The mere production of a piece of paper upon which is written or printed a promise to pay upon the part of a county, and upon which certain signatures appear, without the slightest proof of the genuineness of such signatures, does not entitle such paper to be admitted in evidence.

It is stated that it has been held by the courts generally that county and state warrants, signed by the proper officers, are *prima facie* binding and legal; that those officers will be presumed to have done their duty, and that such warrants make a *prima facie* cause of action, and that impeachment must come from the defendant. 1 Dillon's Municipal Corporations, 3d ed.

sec. 502. This may very well be in regard to those warrants when, as above stated, they have been, in fact, signed by the proper officers, and very probably the presumption may then be made that those officers who are proved to have signed the warrants have done their duty; but we are aware of no case where it has been held, in the absence of a statute to that effect, that the mere production of a paper upon which is written or printed an obligation of a county, bearing certain names thereon, can be put in evidence without the slightest proof that the signatures on the paper were those of the persons they purport to be. No such case has been called to our attention, and we think there is no principle upon which such a holding could stand.

The cases referred to by counsel simply hold the burden of proof shifted, after there has been proof of the execution of the warrants; that such proof makes out a *prima facie* case against the county. Such are the cases of *Commissioners &c.* v. *Day*, 19 Indiana, 450, and *Commissioners of Leavenworth County* v. *Keller*, 6 Kansas, 510. In both those cases the warrants were proved to have been signed by the proper authorities of the county before they were admitted in evidence, and it was said in the Indiana case, upon these facts, that "the officer, in the discharge of his general powers, will be presumed to have done his duty, in drawing the warrant or order, till the contrary appears; and, hence, such order makes a *prima facie* cause of action," citing *Hamilton* v. *The Newcastle & Danville Railway*, 9 Indiana, 359. And in the Kansas case it appeared that the county board audited and allowed the bill of claimant, and that a county warrant was drawn in his favor for the amount due, and signed by the chairman of the board, and it was held that upon those facts an action might be maintained on the warrant, but that it was liable to be defeated by showing that the tribunal which issued it had no authority to make the allowance on which the warrant was issued. In other words, that proof being given of the signature of the proper officer, the warrant was admissible in evidence and constituted a *prima facie* case against the county, and any

facts going to show that no cause of action existed rested upon the defendant to prove.

In *Grayson* v. *Latham*, 84 Alabama, 546, 549, 550, two county warrants were sued on which were alleged and purported to have been issued by the commissioners of the county of Pickens and signed by the probate judge. In delivering the opinion of the court, Stone, Chief Justice, said:

"The warrants declared on, issued and signed by the judge of probate, *as they were shown to have been*, *prima facie*, imported a liability on the county. . . . Upon the question we have been discussing, the plaintiff made a *prima facie* case when he produced *and proved* his warrants, showed that they had been registered, proved that, in the receipt and disbursement of county funds, the time had arrived for their payment, according to their place on the registry, and that payment has been demanded and refused; or, if payment was not shown to have been demanded, by proving that demand would have been unnecessary. Making this *prima facie* case, if made, the burden would then be shifted to the defendants to overturn the presumption of liability."

Another case relied upon to sustain the ruling of the courts below is that of *Wall* v. *County of Monroe*, 103 U. S. 74. That case does not show that the warrants were proved by their mere production; on the contrary, it appears that the warrants were drawn by the clerk of the county upon the treasurer in favor of one Frank Gallagher, and transferred by him to the plaintiff. Their execution was alleged and proved, and the question decided had no relevancy to the matter here under discussion.

No case cited by counsel shows that there is anything peculiar to a paper in the form of a county warrant which proves itself upon mere production.

It is clear, then, that at common law, in an action upon such an instrument, and upon a pleading denying the execution thereof by the defendant, and setting up its forgery, the plaintiff in order to be entitled to put the instrument in evidence, and thereby to make a *prima facie* case, would be compelled to prove its execution. The question is, what difference the statute of Arizona makes in this rule.

The Revised Statutes of Arizona, 1887, provide:

"735. (Sec. 87.) Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit —

* * * * * * * * *

"8. A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority."

The answer in this case did deny the execution on behalf of the county of these warrants, and alleged that they were forgeries made to defraud it. The affidavit of verification was made by the clerk of the board of supervisors, who swore that the facts stated in the answer, as defences to the various causes of action declared on, were true, and that the warrants sued on were not genuine. The statute does not require that the affidavit should contain a denial of the execution of the instrument on which suit is brought. It requires that any answer which contains a denial of the execution of an instrument shall be verified, and the verification in this case is not open to the objection of insufficiency urged by the appellee.

We have then the fact as stated by the Supreme Court of the Territory, that this answer was verified, and that the appellee did not introduce any evidence to establish the genuineness of the warrants sued on, and as a conclusion of law from those facts the court held the plaintiff entitled to judgment on the ground that the verified answer did not put the plaintiff to proof of the genuineness of the warrants.

It seems plain to us that the court did not give that force to the verification of the answer which it was entitled to, and that by reason of such verification the defendant was not only put in position to prove the facts set up in the answer, but the plain-

tiff in the action was thereby compelled to prove the execution of the warrants by the proper officers of the county.

Statutes similar to this have been passed in other States, and it has been held in Colorado, in *Lothrop* v. *Roberts*, 16 Colorado, 250, 254, that an answer denying the execution of a note, under oath, made it necessary for the plaintiff to give proof of its execution before the note was properly admissible in evidence.

In *Horn* v. *Water Company*, 13 California, 62, under a somewhat similar statute, where the answer was a general denial, without verification, the genuineness and due execution of the note sued on were regarded as admitted.

To the same effect is *Corcoran* v. *Doll*, 32 California, 82, 88, where it was stated that the action being upon a note and the complaint containing a copy, and the answer not verified, the due execution of the note was admitted.

In *Shepherd* v. *Royce*, 71 Ill. App. 321, under a similar statute, it was held that the effect of the verification of the plea setting up the forgery of a note sued on, was to cast upon appellant the burden of proving the execution of the note as at common law, citing *Wallace* v. *Wallace*, 8 Ill. App. 69.

The Michigan courts have decided in the same way upon the same kind of a statute. *Ortmann* v. *Merchants' Bank*, 41 Mich. 482; *The New York Iron Mine* v. *The Citizens' Bank*, 44 Mich. 344.

We have no doubt that the effect of the statute of Arizona is that when the defendant does not verify his answer in a case provided for therein, the note or warrant or other paper sued on is admitted as genuine, but when the answer denying that fact is verified, the plaintiff must prove it as he would have had to do at common law in a case where the genuineness of the paper was put at issue by the pleadings.

Upon the facts found by the district judge and accepted by the Supreme Court of the Territory in this case, and upon the additional facts found by that court, we are of opinion that the judgment entered under its direction is erroneous, and not warranted by those facts, and therefore it is reversed, and the case remanded with directions to grant a new trial, and it is so ordered.

DAGGS *v.* PHŒNIX NATIONAL BANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 138. Submitted January 30, 1900. — Decided April 30, 1900.

In the provision in Rev. Stat. § 5197 that when no rate of interest "is fixed by the laws of the State, or Territory, or District" in which a bank is situated it "may take, receive, reserve or charge a rate not exceeding seven per cent," the words "fixed by the laws" must be construed to mean "allowed by the laws."

THIS cause embraces three suits brought by the Phœnix National Bank against A. J. and R. E. Daggs, defendants in error. They were respectively numbered 2554, 2555 and 2556, and were consolidated by stipulations of the parties.

They were brought to recover on three promissory notes, aggregating the sum of $9741.73, signed by A. J. Daggs, one of the appellants. Each note was dated November 1, 1894, and payable on or before one year from date, with interest at the rate of ten per cent per annum. Also, to foreclose certain mortgages executed to secure the notes—one executed by R. E. Daggs on the 28th of November, 1894, on certain real estate in Maricopa County, Arizona, and on four water rights of the Consolidated Canal Company, represented by certificates; two executed by A. J. Daggs on same day, on certain other real estate situate in the same county.

The answers were substantially the same in all of the cases. They admitted the making of the notes and mortgages, but alleged that the interest charge was usurious, and in violation of sections 5197 and 5198 of the Revised Statutes of the United States.

As a counter-claim it was alleged that the plaintiff (appellee) was indebted to the defendant (appellant) upon a certain promissory note, executed by W. A. Daggs and P. P. Daggs, as copartners and as individuals, and delivered to Thomas Armstrong, Jr., and assigned by him to the plaintiff in blank, and by the latter, on the 28th of November, 1894, for a valuable

consideration, to the defendant, A. J. Daggs, at which time the makers were, and ever since have been, notoriously insolvent, all of which the plaintiff knew.

The note was as follows, marked "Exhibit A," and made part of the counter-claim:

"No. 1340. Due Sept. 1st.

"$5000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

"On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix National Bank, at their office in Phœnix, Arizona, five thousand dollars ($5000) in United States gold coin, with interest at the rate of 1 and ¼ per cent per month, until paid. In case of legal proceedings hereon, we or either of us agree to pay 10 per cent of amount due hereon as attorney's fees.

"W. A. and P. P. DAGGS.

"Secured by chattel mortgage of even date herewith.

"W. A. DAGGS.

"P. P. DAGGS."

It was also alleged that no part of the note was paid, and that there was due thereon the sum of $7076.91. And judgment was prayed for the amount and interest.

For another defence, it was alleged that at the time of the execution of the three promissory notes sued on, the plaintiff (appellee) and the defendant, A. J. Daggs, entered into a contract in writing (a copy of which is attached to the answer, marked "Exhibit B") wherein the plaintiff as part of the consideration for the said three notes, sold and assigned and expressly stipulated that the three notes should be received in payment for all its rights, title and interest in and to that certain right in action, wherein Hugh McCrum was plaintiff and W. A. and P. A. Daggs were defendants, and plaintiff was intervenor, over that certain five thousand dollar note marked "Exhibit A" herein, and the mortgage securing the same.

That at said time the makers of said note were actually insolvent, which plaintiff knew, and it was agreed that plaintiff

should carry on the said litigation in its name until the cause of action should be determined and settled, and pay all costs accruing prior to November 1, 1894, and the defendant to pay those accruing thereafter. And it was alleged that the defendant paid out large sums of money in the prosecution of said suit, to wit, $45.65, as transcript fee from the court below, and $500 as costs, and expended work and labor of the reasonable value of $500, and has performed all the conditions of said contract, but that plaintiff (appellant) has failed to perform the conditions on its part to the damage of defendant in the sum $10,122.55.

For another defence, it was alleged that the defendant pledged certain water stock in the Tempe Irrigating Canal as security for said promissory notes, which was reasonably worth $4000, and that the plaintiff (appellee) has converted it to its own use, to defendant's damage in the sum of $4000, wherefore defendant prayed that he be relieved from the payment of interest on said notes, for his expenditures in said suit; the amount of said five thousand dollar note for four thousand dollars value of the water stock pledged, and for two thousand dollars damages.

In case No. 2555 the defendants filed a plea in abatement on account of the pendency of case No. 2554, and a like plea in case No. 2556. The pleas were overruled.

And in case No. 2555 A. J. Daggs moved for judgment upon his counter-claim on the ground that it was confessed, because no reply was made to it.

A similar motion was made in case No. 2556.

Testimony was taken and judgment was entered for the plaintiff, the Phœnix National Bank, against the defendant, A. J. Daggs, for the principal of the three notes and interest, and decreeing a foreclosure of the mortgages and the sale of the property mortgaged. A motion for a new trial was made and denied. On writ of error to the Supreme Court of the Territory the judgment was affirmed, (53 P. 201,) and an appeal was then taken to this court.

In passing on the case the Supreme Court of the Territory said:

"At the outset we are compelled to call attention to the

omission of counsel to comply with the statute and the rules of this court on the subject of assignments of error.

"These are imperative and must be observed. It is not our business to search the record if perchance we may find reversible error. It is our duty to examine into such alleged errors and only such as are distinctly pointed out in the record. The assignments made by plaintiffs in error in their brief are, for the most part, so general in character and so wanting in definiteness that they cannot be considered. Although defective as assignments, we have, by liberal construction, found that two of them present questions for our review.

"The first of these reads as follows:

"'The court erred in not giving judgment for plaintiffs in error on their pleas in bar of the recovery of any interest for the reason that the contract with the national bank for ten per cent interest is *ultra vires*.'

* * * * * * * *

"The second assignment of error made by plaintiffs in error, reads: 'The court erred in overruling the plaintiffs in error motion for judgment on the pleadings for the reason that there was no reply to plaintiffs in error verified counter-claim.'"

No statement of facts in the nature of a special verdict being certified with the record, the plaintiffs in error moved for and obtained from this court a certiorari to supply the defect, and in response thereto a statement of facts, which had been made by the Supreme Court of the Territory was certified to this court, in which was recited Act No. 71 of the Territory, regulating appeals and writs of error to the Supreme Court, the judgment of foreclosure and sale, the assignments of error of appellants, and concluded as follows:

"Under the assignments of error thus made and presented in the record this court could and did make no determination of the facts of the case, except such as appeared in the pleadings and judgment, for the reason that such of the assignments as were sufficient in form to raise any question presented none for our consideration which necessitated the further finding of facts in the case. We are unable to determine from the record presented in this court, in the absence of a bill of exceptions

and a statement of facts, what the facts were which were put in evidence on the trial in the court below, further than as they are shown by the transcript of the reporter's notes, and from such review of the record the judgment of the district court was affirmed as follows:

"'In the Supreme Court of the Territory of Arizona.

"'R. E. Daggs and A. J. Daggs, Plaintiffs in Error,
vs.
Phœnix National Bank, a Corporation, Defendants in Error.

"'This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the district court herein be, and the same is hereby, affirmed.

"'It is further ordered and adjudged that the defendant in error herein do have and recover of and from the plaintiffs in error, R. E. Daggs and A. J. Daggs, as principals, and R. F. Doll, W. M. Billups, and the London Company, as sureties, on cost bond its costs in this court, taxed at forty-three and $\frac{10}{100}$ ($43.10) dollars.'

"By the court:

"Webster Street, *C. J.*
"Richard E. Sloan, *A. J.*
"Fletcher M. Doan, *C. J.*
"Geo. R. Davis, *A. J.*"

Asserting that the statement did not embody a finding of fact according to law, plaintiffs in error moved for a rule to show cause why a mandamus should not issue, commanding the Supreme Court of the Territory to make and certify a statement of the facts in the nature of a special verdict, and also the rulings of the district court on the admission and rejection of evidence excepted to.

Plaintiffs in error submitted with the motion a statement which they claimed the record justified.

The motion was denied January 29, 1900.

Mr. A. J. Daggs for appellants.

Mr. Aldis B. Browne and *Mr. Alexander Britton* for appellee.

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

We are confined by the record to the points passed on by the Supreme Court of the Territory, to wit, the defence of usury, and the motion for judgment on the counter-claim.

(1.) By section 5197 of the Revised Statutes of the United States a national bank may charge on any note interest at the rate allowed by the laws of the State or Territory where it is situated. It is further provided, however, that if no rate is fixed by such laws the bank may not charge a greater rate than 7 per cent, and if a greater rate be knowingly charged, the entire interest agreed to be paid shall be forfeited. (Sec. 5198.)

The laws of the Territory are as follows:

"2161. Sec. 1. When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent per annum on all moneys after they become due on any bond, bill, promissory note or other instrument in writing, or any judgment recovered in any court in this Territory, for money lent, for money due on any settlement of accounts from the day on which the balance is ascertained and for money received for the use of another."

"2162. Sec. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and whch shall be specified in the judgment."

The contention of appellant is that the rate of interest is not *fixed* by the laws of the Territory. It permits the parties to do so, but does not do so itself. In other words, it is urged that the rate is fixed by permission of the laws, and not by the laws, and upon this distinction a power which every person and every bank in the Territory has, it is contended, the national banks do not have.

We cannot accept this as a correct interpretation of either the spirit or the words of the national banking act. By that act, certainly no discrimination was intended against national banks, and that the interpretation contended for would seriously embarrass their business is manifest.

We said in *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, that national banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with state banks."

The language of the Revised Statutes is that national banks "may take, receive, reserve and charge on any loan . . . upon any note . . . interest *allowed* by the laws of the State, Territory or district" where located, "and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be *allowed* for associations organized or existing in any such State under this title." The italics are ours.

The meaning of these provisions is unmistakable. A national bank may charge interest at the rate *allowed* by the laws of the State or Territory where it is located; and equality is carefully secured with local banks.

The clear meaning and purpose of these provisions remove the ambiguity of those which follow, if there is any ambiguity. "Where no rate is *fixed* by the laws of the State or Territory or district, the bank may take, secure, reserve or charge a rate not exceeding seven per centum. . . ." "*Fixed by the laws*" must be construed to mean "*allowed by the laws*," not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. *Tiffany* v. *National Bank of Missouri*, *supra*.

It is urged, however that *National Bank* v. *Johnson*, 104 U. S. 271, is in conflict with these views.

In that case the defendant, a national bank doing business in

the State of New York, discounted for the plaintiff in the case, at the rate of twelve per cent per annum, commercial paper and promissory notes, amounting to $158,003. The interest which the bank knowingly charged amounted to $6564.88, an excess of $2735.36 beyond the rate allowed by the general laws of the State. Judgment was rendered for twice the amount of the interest, which was affirmed by this court upon the statute of the State, which established the rate of interest for the loan or forbearance of money at seven per cent.

Meeting the arguments of counsel upon a supposed difference between loans and discounts, and usurious and non-usurious contracts under the laws of the State in the transactions of natural persons, the learned justice, who delivered the opinion of the court, made some remarks which seemed to imply that a rate allowed by a state law was not a rate fixed by a state law. The remarks, however, were not necessary to the decision, and cannot be considered as expressing the judgment of the court.

(2.) The counter-claims of plaintiffs in error present these facts:

The making of the five thousand dollar note by W. A. and P. P. Daggs, and its delivery to Thomas Armstrong, Jr.; its assignment by the latter to the Phœnix National Bank, (appellee,) and by the bank, in writing, for a valuable consideration to the defendant, A. J. Daggs (one of the appellants); the insolvency of the makers, W. A. and P. P. Daggs, and the non-payment of the note or any part of it.

To the counter-claim there was a demurrer for insufficiency, and a denial of each and every one of its allegations. The denial was not verified. The Supreme Court of the Territory, considering an error assigned on the overruling of appellants' motion for judgment on the counter-claim, held it insufficient because it did not allege that due diligence to collect the note had been exercised, as required by the statute of the Territory, or that any effort had been made to collect the same.

By this ruling it is urged that the court assumed that the counter-claim was based on the rights of a surety instead of upon the direct obligation of the Phœnix Bank, as assignor of the Armstrong note on account of Armstrong's insolvency. Articles 122, 1226 and 788 of the Arizona Statutes.

Assuming without deciding that appellants are correct in their construction of the Arizona statutes, and assuming that the answer to the counter-claim did not put in issue the making of the Armstrong note, and its assignment to plaintiff in error, nevertheless the answer to the counter-claim did put in issue the other facts alleged, to wit, the insolvency of the makers of the note and its non-payment.

But it is said that the contract marked "Exhibit B" shows the insolvency. It certainly does not. It recites the transfer of the Armstrong note to A. J. Daggs, and that it is secured by a mortgage on 3500 sheep; that the note is in litigation between the Phœnix Bank and Hugh McCrum of San Francisco as assignee of D. A. Abrams as assignee of the Bank of Tempe, "to establish and determine the priorities of rights under mortgages between said litigants hereinbefore mentioned, which said cause of action and rights of the Phœnix National Bank, under its first mortgage in said litigation described, is also hereby sold, assigned, transferred and set over unto A. J. Daggs for the above nine thousand seven hundred and forty-one and $\frac{73}{100}$ dollars ($9741.73). It is further agreed that the aforesaid cause of action described shall be continued in the name of the Phœnix National Bank until the said case is determined and settled; but it is further agreed that from this date, November 1, 1894, A. J. Daggs shall pay the costs that shall hereafter accrue in the said case."

This contract standing alone establishes nothing definite, and appreciating this the appellants attempt to explain it by a resort to what they allege to be the testimony in the case. It is said that "they (W. A. and P. P. Daggs) could not pay their notes, three suits in court foreclosing three mortgages, each seeking priority, hanging to them like mill stones, grinding them to dust. Appellee had lost its reputed first mortgage in the district court and appealed. It then sold this note and litigation; the contract shows, and agreed to stand up and carry the suit on in its name. The case was tried in the Supreme Court of Arizona, and held adversely to the appellee in appellants' suit against the makers of the five thousand dollar note. The appellee then fell down and refused to let its name be used any farther to carry on

the suit, refused to sign the bond, and would have nothing more to do with the suit. . . . Appellant then demanded payment of the five thousand dollar note, and was refused. Appellant spent over $500 in money and $500 in services prosecuting the makers of the $5000 note; followed it to the Supreme Court of Arizona, and would have gone further, but appellee refused to let its name be used and he was compelled to stop. Appellant then demanded credit for the $5000 note."

Those facts, however, are not a part of the counter-claim and it is hardly necessary to say cannot be considered in passing on a motion for judgment based on a confession of the allegations of the counter-claim.

Nor can it be said that such facts should have been found by the lower court, because, as we have seen, under the statement of the case as considered by that court, the questions for decision was the sufficiency of the averments of the counter-claim as a defence.

We repeat, therefore, that we are confined to the propositions we have stated above and discussed, and as there was no prejudicial error in the ruling of the Supreme Court of the Territory on them, its judgment is

Affirmed.

LOS ANGELES *v.* LOS ANGELES CITY WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 148. Submitted March 15, 1900. — Decided April 30, 1900.

July 22, 1868, Los Angeles City leased to Griffin and others for a named sum its water works for a term of 30 years and granted them the right to lay pipes in the street, and to take the water from the Los Angeles River at a point above the dam then existing, and to sell and distribute it to the inhabitants of the city, reserving the right to regulate the water rates, provided that they should not be reduced to less than those then charged

Statement of the Case.

by the lessees. The lessees agreed to pay a fixed rental, to erect hydrants and furnish water for public uses without charge, and at the expiration of the term to return the works to the city in good order and condition, reasonable wear and damage excepted. This contract was procured for the purpose of transferring it to a corporation to be formed, which was done. Subsequently the limits of the city were extended as stated by the court, and the expenses of the corporation were increased accordingly. The city subsequently established water rates below those named in the contract, and the company collected the new rates, without in any other way acquiescing in the change. This suit was brought by the company to enforce the original contract. *Held*,

(1) That the power to regulate rates was an existent power, not granted by the contract, but reserved from it with a single limitation, the limitation that it should not be exercised to reduce rates below what was then charged, and that undoubtedly there was a contractual element, but that it was not in granting the power of regulation, but in the limitation upon it.

(2) That the city of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted.

(3) By acquiescing in the regulations of rates ever since 1880 the company is not estopped from claiming equitable relief and is guilty of no laches.

This suit involves the constitutionality of an ordinance of the city of Los Angeles, adopted February 23, 1897, fixing the water rates to be charged and collected by the Los Angeles City Water Company for the year ending June 30, 1898.

It is claimed that the ordinance impairs the obligation of the contract made with the grantors of the company on the 20th of July, 1868.

The facts were stipulated, and are substantially as follows:

On the 22d of July, 1868, the city of Los Angeles entered into a contract with John S. Griffin, P. Beaudry and Solomon Lazard, whereby it leased its water works to the said persons and their assignees for a term of thirty years, with the right to lay pipes in the streets of the city, and to sell and distribute the water for domestic purposes to the inhabitants of the city;

also with the right to take water from the Los Angeles River at a point at or above the present dam, to be selected within sixty days of the date of the contract. It was provided that no more than ten inches of water should be taken from the river without the previous consent of the mayor and common council.

The city bound itself not to make any other lease, sale, contract, grant or franchise to any person, corporation or company for the sale or delivery of water to the inhabitants of the city for domestic purposes during the continuance of the contract.

And it was provided "that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by the said parties of the second part, or their assignees, provided that they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part for water; . . ."

The said persons agreed to pay the city a rental of fifteen hundred dollars for the water works; to lay down in the streets of the city twelve miles of iron pipes of sufficient capacity to supply the inhabitants with water for domestic purposes; to extend the pipes as fast as the citizens would agree to take sufficient water to pay ten per cent upon the cost of such extension; to erect one hydrant, as protection against fire, at one corner of each crossing of streets where pipes were or might be laid; to erect an ornamental fountain on the public plaza at a cost not exceeding $1000; to construct and erect, within two years, such reservoirs, machinery, ditches and flumes as would secure the inhabitants with a constant supply of water for domestic purposes; to furnish water free of charge for the public school houses, hospitals and jails; to keep in repair all of said improvements, at the cost and expense of the parties of the second part, for said term of thirty years, and to return said water works to said party of the first part at the expiration of said term, in good order and condition, reasonable wear and damage of the elements excepted, upon payment to said parties of the value of the aforesaid improvements, to be ascertained as provided for in the contract; to give a bond in the sum of twenty thousand dollars for the performance of said contract, and to pay all state and county taxes assessed upon the water works during the period of thirty years.

And as the Circuit Court found, 88 Fed. Rep. 720, 723:

"Griffin, Beaudry and Lazard applied for and procured said contract on behalf and for the benefit of themselves and other persons, with the intention of forming a corporation to carry out said contract, and afterwards, about the middle or latter part of August, 1868, themselves and said other persons being the incorporators, organized, under the laws of the State of California, the Los Angeles City Water Company, for the purpose of supplying the inhabitants of said city with water for domestic purposes, etc., under the terms of said contract; and assigned all their rights and franchises under said contract to said company by a written instrument dated June the 12th, 1869, and recorded in the office of the recorder of said county of Los Angeles, June the 15th, 1869.

"On April the 2d, 1870, the legislature of California passed an act hereinafter set forth, in terms ratifying and confirming said contract.

"Griffin, Beaudry and Lazard did nothing personally in carrying out said contract or constructing or maintaining said water works, but said company, after it had organized, took possession of said water works, and has performed all of the above-mentioned obligations of said contract, except the one providing for the return of the water works at expiration of lease, and, in such performance, has laid 320 miles of pipe, erected over 500 hydrants for protection against fire, and constructed six reservoirs, with an aggregate capacity of nearly sixty-six millions of gallons, and is now, as it has been at all times since the contract was made, furnishing the city of Los Angeles with water for the extinguishment of fires and for the public schools, hospitals and jails in said city free of charge. The aforesaid extensions of the water works were rendered necessary by the growth of said city, whose population in 1868 was between 5000 and 6000, and is now about 103,000.

"During the whole of the year 1868 the territorial limits of the city of Los Angeles were as follows: Four square leagues in a square form, the centre of which was the centre of the old pueblo plaza.

"About 1872 the limits were extended 420 yards south of

the former south boundary, and within the past three years, and prior to July, 1897, the limits were further extended so as to take in between ten and fifteen square miles of additional adjoining territory. Immediately after the extension of the said limits, the Los Angeles City Water Company began to extend its pipes over the said addition to the city as the same was settled up and improved, and ever since has been and is now furnishing water to the people in said district added to the original territory of the city, and, upon the demands of the city council, erected fire hydrants within the said additional territory and furnished water free of charge, and has in all respects continued to lay pipes, erect fire hydrants, and furnished the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it, and so with the more recent extensions of the city limits, to wit, those made within the last three years, the company has also extended its pipes in portions of those limits and furnished water in the same way.

"The quantity of water required to supply the domestic wants of the people of said city is one inch of water, measured under a four-inch pressure, to every one hundred inhabitants. To meet the increased demands upon it for water under said contract said company has, among other things, purchased the system known as the Beaudry system of water works, and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles River, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring Water Company, the same mentioned in paragraph 10 of the complaint.

"In the growth of the city its settlement extended to localities of higher elevation than those occupied by its inhabitants at the time of said contract, and the point originally selected for the diversion of the water of the Los Angeles River for supplying the city and its inhabitants, as in said contract provided, was so located in said river that it was impracticable to

there maintain dams and diversion works that would not occasionally be swept away or rendered useless by floods, and the surface water of the river after severe storms became muddy and unfit for supplying the inhabitants with water for domestic uses, and in the year 1889 the Crystal Springs Land and Water Company made excavations in the places referred to in the bill of complaint and laid the pipes therein as alleged, and the water that has been used by the Los Angeles City Water Company for supplying the city with water, as provided in said contract, has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles River in order to supply said inhabitants, which diversions have been at or near the place where the said underground pipes are laid, and that by these means the water can be delivered to the higher elevations, and the underground waters, as to quality and amount, are thus protected against the influences of floods.

"The Los Angeles City Water Company ever since its incorporation has taken more than ten inches of water, measured under a four-inch pressure, from the Los Angeles River, and the amount taken has increased with the increase of the population of the city and the demands of the municipality itself for water for extinguishing fires and the other public purposes referred to in the said contract, and the amount has increased until now it requires from 1000 to 1500 inches of water, measured under a four-inch pressure, for such purposes, and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from 1000 to 1500 inches under a four-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnish from 650 to 690 inches, measured under a four-inch pressure.

"The city of Los Angeles had always had flowing in the Los Angeles River, at the point from which said Los Angeles City Water Company has always diverted water from said river, a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and

municipal uses, and has never objected, up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses, and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses.

"On October the 19th, 1896, the city council of the city of Los Angeles adopted a resolution requiring the Los Angeles City Water Company to pay to the city of Los Angeles an amount of money equal to forty per cent of the gross rates received by said company from the consumers of water as rental for all water taken by said company from the Los Angeles River, and before the 21st day of October, 1896, to attorn to the city of Los Angeles, as tenant of said city, for all of the water so taken from said river, and to agree to pay said rental to said city, and in case of failure to attorn and agree to pay said rental, to refrain from diverting, taking or interfering with any of the water mentioned in said resolution (except ten inches) after the 20th day of October, 1896.

"On October the 19th, 1896, the city attorney, in writing, notified the Los Angeles City Water Company and the Crystal Springs Land and Water Company of said resolution, and demanded compliance therewith, delivering a copy of said resolution to each of said companies. Neither of them ever attorned to said city for said water or any part thereof, or ever agreed to pay any rental for the same. After the passage of said resolution and ever since said notification, up to the present time, the Los Angeles City Water Company has continually taken from the Los Angeles River, at a point above the northern boundary of said city, for the purposes of distribution and selling the same in said city, a quantity of water varying from 400 to 1000 inches, measured under a four-inch pressure.

"On the 19th day of April, 1870, the common council of the city of Los Angeles accepted, and the mayor approved, the following report:

"'To the honorable the mayor and common council of the city of Los Angeles and the Los Angeles City Water Company:

"'The undersigned commissioners, duly appointed on behalf

of your honorable bodies to adjust, fix and establish the rates and charges of the Los Angeles City Water Company, (a corporation duly incorporated under the laws of the State of California for the purpose of supplying the inhabitants of Los Angeles City with pure, fresh water), respectfully report that they have established water rates and charges for domestic purposes, taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows, to wit.'

"Then follow the rates agreed upon.

"The commissioners referred to in said report had been previously selected, two by the city and two by the Los Angeles City Water Company.

"In June, 1871, the city council, on a report of a committee constituted similarly to the one above mentioned, established the same rates as those established in April, 1870.

"On the 13th of August, 1874, a committee, constituted in the same manner and for the same purposes as the committee already mentioned, reported that they had established water rates and charges for domestic purposes, taking as a guide, as near as possible, the charges and rates for domestic and other reasonable objects and purposes charged in July, 1868. The report was adopted and a committee appointed in conjunction with the city attorney to draft an ordinance embodying the rates fixed in said report, and thereafter, on August the 20th, 1874, an ordinance so drawn was adopted by the council of said city, and the rates established by said ordinance were the same as those established in 1870 and 1871.

"Since and including the year 1880 the city council of the city of Los Angeles has in February of each year passed an ordinance fixing the rates to be charged by all corporations and persons within said city supplying water to the inhabitants thereof, to be in force for one year from and including July the 1st, which rates have been less than the rates charged in 1870, as contained in the ordinance hereinbefore mentioned, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles, and no more; but in

the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July the 1st, 1896, and ending June 30, 1897, at less than they had ever been fixed before, and a suit was then brought by the complainants herein in this court against the city of Los Angeles to set aside the said ordinance; and in February of the year 1897 the city of Los Angeles passed the ordinance which is assailed in this suit, making a still further reduction in the rates.

"The action of the Los Angeles City Water Cempany in collecting the rates fixed by said several ordinances constitutes the only acquiescence (if it be an acquiescence) in the action of said council.

"If the rates established in 1870 were collected for the year beginning July the 1st, 1897, and ending June the 30th, 1898, the revenues received by the Los Angeles City Water Company from said rates would be more than fifty thousand dollars in excess of the amount which would be received under the rates named in the ordinance of February, 1897.

"In January, 1882, the Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the preceding year; protesting at the same time against the establishment of any rates less than those which were in force at the date of the lease hereinbefore mentioned, to wit, July the 22d, 1868.

"In January, 1883, said company again furnished said council with a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, and also an itemized statement of the expenditures made for supplying water during the year preceding, but expressly denying any legal right on the part of the council to demand said statement or to fix any rates less than those which were in force in July, 1868.

"Similar statements, accompanied by similar protests, were made annually thereafter up to and including the year 1889, and since that time unverified statements or reports showing its receipts and expenditures have been made by said company to the city council each year.

"Article XIV of the present constitution of California, adopted in 1879, is as follows:

"'ARTICLE XIV.

"'*Water and Water Rights.*

"'SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: Provided, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town, where the same are collected, for the public use.

"'SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and the manner prescribed by law.'

"To carry out these provisions of the constitution, the legislature of California passed an act entitled 'An act to enable

the board of supervisors, town council, board of aldermen,' etc., which was approved March the 7th, 1881. (Statutes of California 1881, page 54.)

"In the year 1888 the electors of the city of Los Angeles, pursuant to provisions of the constitution of said State authorizing them so to do, adopted a charter for said city, which charter was, under the provisions of said constitution, submitted to the legislature of said State for its approval, ratification and adoption, and the said charter was, on the 31st day of January, 1889, adopted by said legislature, and thereupon became and ever since has been the charter of the said city of Los Angeles, and by the said charter it is provided, in section 193 as follows:

"'The rates of compensation for use of water to be collected by any person, company or corporation in said city shall be fixed annually by ordinance and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory processes to compel action at the suit of any party interested.'

"The ordinance of 1897 now sought to be annulled was passed pursuant to the foregoing constitutional and statutory provisions."

A decree was entered for complainants, (appellees,) adjudging that that part of the contract entered into between the city of Los Angeles and Griffin, Beaudry and Lazard, in so far as said contract provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid, and that the ordinance of February 23, 1897, reduced the water rates below those so charged, and "impaired the obligation of such contract, and said ordinance is null and void; and it is further ordered, adjudged and decreed that the said ordinance be, and the same is, hereby vacated and set aside and held for naught."

From the judgment this appeal is taken.

The assignments of error present the contentions discussed in the opinion.

Mr. S. O. Houghton and *Mr. Walter F. Haas* for appellants.

Mr. Stephen M. White and *Mr. John Garber* for appellees.

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

The Circuit Court decided that the provision of the contract executed by the city and Griffin, Beandry and Lazard constituted a contract, and the ordinance of the city regulating the rates of appellees impaired it. Against this conclusion the appellant contends: (1) The contract only purports to bind the city in its corporate capacity—the city as landlord and owner, and not as a governmental agent of the State. (2) The city did not have power to bind the State; (3) the provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract; (4) the act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void; (5) the water company has no power under its charter to collect water rates except as prescribed by the constitution and statutes of the State; (6) by acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief, and is guilty of laches; (7) the water rates established by the ordinance are not shown to be lower than those charged in 1868, or, if lower, that the revenue of the company is reduced; (8) if the ordinance is invalid, it is void on its face, and there is, therefore, no cloud on the company's title; (9) the company violated the contract by taking water from the Los Angeles River, and, therefore, is not entitled to specific performance.

We will consider these contentions in their order.

1. The contract only purports to bind the city in its corporate capacity—the city as landlord and owner, and not as governmental agent, of the State.

The argument to support the contention, succinctly stated, is that the right to regulate rates came from the contract, not from the law. In other words, it was reserved from the contract and was a virtual granting back by the lessees of the proprietary

right, which would have otherwise passed by the lease, leaving, however, all municipal powers intact.

The provision of the contract is as follows: "Always provided, that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

The municipal powers of the city provided in the act of incorporation, among others, were: "To make by-laws or ordinances, . . . to make regulations to prevent and extinguish fires, . . . to provide for supplying the city with water."

It is not denied that the city had power to regulate rates. Indeed, it is insisted that it was so constantly its duty that it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right, made by appellants, would have been idle to observe. To have limited the right of regulation to the city in one capacity, and left it unrestrained in the other, would have been useless, and such intention cannot be attributed to the parties. We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it. Whether the limitation was and is valid is another consideration.

2. The city did not have the power to bind the State.

This contention as expressed is very comprehensive, and seems to deny the competency of the State to give the city the power to bind it. We do not, however, understand counsel as so contending, nor could they. *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1; see also *People* v. *Stephens*, 62 Cal. 209. We understand the argument to be that the power, if not expressly given, will not be presumed unless necessarily or fairly implied in or incident to other powers expressly given—not

simply convenient, but indispensable to them. In other words, the rule of strict construction is invoked against the grant of such power to the city.

The rule is familiar. It has often been announced by this court, and quite lately in *Citizens' Street Railway* v. *District Railway*, 171 U. S. 48.

The effect of the rule in the case at bar we are not required to determine if the act of April 2, 1870, c. 437, Stats. 1869–70, 635, ratifying the contract is valid.

It reads as follows:

"An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles.

"The people of the State of California, represented in senate and assembly, do enact as follows:

"SECTION 1. The following acts, contracts and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los Angeles City Water Works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beandry and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868;) and also the ordinance confirmatory of the same, passed July the twenty-second (22d), eighteen hundred and sixty-eight, which contract and ordinance are recorded in the office of the county recorder of Los Angeles County, in book one of miscellaneous records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431;) (here follows certain other ordinances and deeds not affecting the contract in question.)"

Appellants assert that the act violates the following provision of the constitution of the State:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

At the time of the passage of the act of 1870, the contract of 1868 had been assigned to the water company, and the facts show that it was applied for and procured on behalf of Griffin,

Beandry and Lazard, and other persons, with the intention of forming a corporation to execute its provisions, and for such purpose they and other persons organized under the laws of the State the Los Angeles City Water Company, the appellee. It is hence argued that the act of 1870 confers franchises on the company by a special act instead of by a general law, and thereby infringes the constitutional provision, and against the existence of such power in the legislature the following cases are cited: *Low* v. *City of Marysville*, 5 Cal. 214; *San Francisco* v. *Spring Valley Water Works*, 48 Cal. 493; *Orville & Virginia Railroad Co.* v. *Plumas County*, 37 Cal. 354; *Spring Valley Water Works* v. *Bryant*, 52 Cal. 132; *San Francisco* v. *Spring Valley Water Works*, 53 Cal. 608; *San Francisco* v. *Spring Valley Water Works*, 48 Cal. 493.

Of these cases, only *Low* v. *City of Marysville* and *Orville & Virginia Railroad Co.* v. *Plumas County* were decided before the passage of the act of 1870.

It was held in *Low* v. *City of Marysville* that the legislature was prohibited from conferring upon a municipal corporation powers other than governmental by a special act. Chief Justice Murray said: " . . . for as it would have been a violation of the constitution to create a corporation by special act, for any other than municipal purposes, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, it would be doing, by two acts, that which the legislature could only do by one; and corporations for almost every purpose might be created by special act by first incorporating the stockholders as a municipal body."

But in *California State Telegraph Co.* v. *Alta Telegraph Co.*, 22 Cal. 398, decided at July term, 1863, a contrary doctrine was announced. It was held that the legislature could grant exclusive franchises and privileges to persons or corporations; that if granted to a person they could be assigned to a corporation, and that a corporation could receive from the legislature a direct grant of special privileges and franchises. The case necessarily involved all of those propositions.

The right and privilege passed on were granted by an act of

the legislature, and consisted of the exclusive right to O. E. Allen and Clark Burnham to construct and put in operation a telegraph line from San Francisco to the city of Marysville. They assigned the right to the California State Telegraph Company. The court said: "The case presents the following questions for our adjudication: 1st, is the act of May 3, 1852, granting certain exclusive privileges to Allen and Burnham, constitutional? 2d, have the plaintiffs the power or right to purchase, hold and enjoy these exclusive privileges?"

Both propositions were answered in the affirmative. Of the second the court said:

"The next and most important question is whether the plaintiff, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had power to sell and convey, for the act specially makes the grant to them or 'their assigns,' thus clearly making the privileges assignable. But it is urged that the clause in the constitution which prohibits the legislature from creating a private corporation by special act equally prohibits them from conferring any powers or privileges of a corporate character by special law; and that all the powers and privileges which a corporation can exercise or hold must be derived from a general law, applicable alike to all corporations.

"It is clear that the constitution prohibits the legislature from 'creating' corporations by special act, except for municipal purposes; and it is equally clear that this prohibition extends only to their 'creation.' There is nothing in the language used which either directly or impliedly prohibits the legislature from directly granting to a corporation, already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises, which may have been granted to others. To give the constitution any such effect we would be compelled to interpolate terms not used, and which cannot be implied without a perversion of the language employed. To give it such a construction we would have to make it read thus: 'Corporations may be formed, *and other franchises*

and special privileges granted, under general laws, but shall not be created *or granted* by special act, except for municipal purposes.' If such had been the meaning intended by the framers of the constitution, they could have easily expressed it in apt words. The language used by them is clear, and they well knew that it included but one of a numerous class of franchises, the subjects of legislative grant, and that a regulation of one could not by any reasonable implication be extended to others not mentioned."

And the learned justice who delivered the opinion of the court concluded the discussion by saying: "I hold, then, that the plaintiffs, as a corporation, were capable of receiving a grant of these special privileges directly from the legislature, and of purchasing them from the grantees."

There was an implied recognition of the same doctrine in *Spring Valley Water Works* v. *San Francisco*, 22 Cal. 434.

But it is urged by appellants that *Orville & Virginia Railroad Co.* v. *Plumas County*, (decided in April, 1868,) held "that the legislature could not authorize the county to grant special privileges to a private corporation, and this was confirmed in *Waterloo Turnpike Co.* v. *Cole*, 51 Cal. 384, (decided in 1876)." The latter case we may disregard, as it was decided subsequently to the act of 1870. The former case did not decide as contended, nor was the point involved in it. The action was mandamus to compel the county to subscribe to the capital stock of the railroad company under an act of the legislature directing the supervisors of the county to meet at a designated day and take and subscribe to the capital stock of the railroad company.

The defence was not want of power in the legislature to direct the subscription — not want of power in the company to receive it because it was a corporation, but want of power to receive because it was not a corporation. Against this it was urged that the act of the legislature recognized the company as a corporation. To the contention the court replied: "But it is claimed that the existence of the corporation is recognized by the act requiring the county to subscribe to the stock of the company. Admitting such to be the case, that will not overcome the difficulty, for a corporation of this character cannot

be created by legislative recognition; the constitution (art. IV, sec. 31,) prohibiting the creation of corporations, except for municipal purposes, otherwise than by general laws."

It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the State that the constitution of the State permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions. *Rowan et al.* v. *Runnels*, 5 How. 134; *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Chicago* v. *Sheldon*, 9 Wall. 50; *Olcott* v. *The Supervisors*, 16 Wall. 678; *McCullough* v. *Virginia*, 172 U. S. 102. Nor by the new constitution of 1879. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64.

The subsequent decisions of the Supreme Court of the State have not been uniform. *San Francisco* v. *Spring Valley Water Works* unqualifiedly overruled *California State Telegraph Co.* v. *Alta Telegraph Co.*, but *People* v. *Stanford*, 77 Cal. 360, restored its doctrine to the extent, at least, of holding that the constitutional provision that "corporations may be formed by general laws, but shall not be created by special act," only prohibits the creation of corporations and conferring powers upon them by legislative enactment, and does not prohibit "the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer them." See also *San Luis Water Co.* v. *Estrada*, 117 Cal. 168.

There are expressions in the latter case which, it is urged, notwithstanding the modification by it and by *People* v. *Stanford* of the doctrine of *San Francisco* v. *Spring Valley Water Works*, make that doctrine applicable to the case at bar. The San Luis Water Company was a corporation, and was formed for the purpose of furnishing the town of San Luis Obispo and the inhabitants thereof with pure fresh water.

By an act of the legislature, entitled "An act to provide for the introduction of good and pure water into the town of San Luis Obispo," approved March 28, 1872, a franchise was granted for that purpose to M. A. Benrimo, C. W. Dana and W. W. Hays. The San Luis Water Company claimed to be the assignee of the franchise. The assignment was attacked on the ground that it was invalid under the constitution of the State. The court said: "The precise point made is, that the power to supply a city with water cannot be conferred directly or indirectly upon a private corporation by special act."

And further: "The grant to Benrimo and his associates was also to their assigns. There can be no doubt but that they might, by the terms of the grant, sell or assign the franchise. It seems to me too plain to require argument that the purchase by the plaintiff was strictly and directly within its powers and contributed necessarily and directly to its objects and purposes." But the learned commissioner who delivered the opinion also said: "If any connection could be traced between the plaintiff and the passage of the special act of 1872, or it appeared that the act was obtained for the purpose of evading the constitutional inhibition, I could see how the case of *San Francisco* v. *Spring Valley Water Works*, *supra*, might apply. But, in view of the facts in this case, I cannot regard the article of the constitution mentioned or the case last cited as having any application here." But this is not a decision that the case would apply. And if it is a concession of strength in the argument it is not a concession of conclusive strength.

We are not concerned, however, to reconcile the cases decided since 1870, and we have only mentioned them to present fully the contention of appellants. The cases prior to that time, as we have seen, made the obligation of the contract of 1868, and determined the power of the legislature to ratify it. And there seems to have been no question of this power. Besides legislative recognition, besides recognition by many acts of the city, the contract has received judicial recognition. Taxation upon the property acquired to execute it has been sustained. *Los Angeles* v. *Los Angeles Water Works Co.*, 49 Cal. 638. It was interpreted, and under its provisions the company denied com-

pensation for water used in sprinkling the streets of the city. *Los Angeles Water Co.* v. *Los Angeles*, 55 Cal. 176. An ordinance was declared void imposing a license upon the company for doing business in the city. *Los Angeles* v. *Los Angeles Water Co.*, 61 Cal. 65. Its right to take more than ten inches of water from the river was sustained in *Los Angeles* v. *Los Angeles Water Co.*, 124 Cal. 368.

The case in 61 Cal. 65, was heard in department and in banc, and the contract received careful consideration. The judgment of the trial court was for the water company, and department 2 of the Supreme Court, affirming it, said:

"The court was correct in its judgment. The plaintiff had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and it could not change its contract in the manner proposed. The privileges granted by the lease and the ordinance of 1868 were already vested in the defendant as strongly as they could be by a license under the ordinance of 1879. A license is a grant of permission or authority. The defendant already had permission and authority granted by ordinance and ratified by the legislature. The city cannot, during the term of the lease, of its own motion, increase the amount to be paid for the privileges granted.

"It is hardly necessary to say that the point made by the appellant, that neither the city nor the legislature can grant or alienate any of the rights of sovereignty, has no application to this case."

The court in banc, through its Chief Justice, approved this language, and after quoting cases, said:

"The authorities of the city of Los Angeles by a contract (the validity of which has not been challenged by either party) and for certain valuable considerations therein expressed, granted to the defendant's assignors the privilege of supplying the city of Los Angeles and the inhabitants thereof with fresh water for domestic purposes, with the right to receive the rents and profits thereof to their own use;" and after citing cases to show that the exaction of the license would impair the obligation of the contract, concluded as follows:

"The principles enunciated in the foregoing cases are emi-

nently sound and just, and are directly applicable to the case we are now considering. The city of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims the privilege of introducing, distributing and selling water to the inhabitants of that city on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted."

3. The provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract. 4. The act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void. 5. The water company has no power under its charter to collect water rates except as prescribed by the constitution and statutes of the State.

These contentions are dependent upon the same reasoning as the preceding one, and do not require a separate discussion.

6. By acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief and is guilty of laches.

There was no such acquiescence as estopped the water company from contesting the ordinance of the city. The facts are that in 1880 the city passed an ordinance to be in effect one year, establishing water rates, and passed one every year thereafter, including 1897, when the one in controversy was passed. The rates established by the ordinances were less than those adopted in 1870, and the latter are claimed to have been not higher than the rates charged in 1868. The company collected the rates established by the ordinances, except those established in 1896 and 1897. A suit was brought by the company to set aside the ordinance of 1896, and that of 1897 is assailed in the case at bar. These ordinances fixed the rates at less than they had been fixed before. The company has also every year since 1882 filed a statement with the city council, showing the names of the consumers of water, the rates paid and the expenditures made for supplying water for the preceding year. The company

always protested against the right of the city to demand statements, and claimed to make them solely for its information. The company also in 1882 protested against the power of the city to fix rates on any other basis that that of the contract of 1868. The city therefore cannot claim to have been deceived by the action of the company in collecting the rates established prior to 1896. They were less, it is stipulated, than those of 1870, but how much less we are not informed. It is true we are not informed how much less those fixed in 1896 and 1897 are than those of the prior years. They are less, "less than they had ever been fixed before," is the stipulation; and they will, according to the stipulation, produce more then fifty thousand dollars less revenue than those of 1870.

Acquiescence in a regulation which, all things considered, may not have been injurious, does not preclude a contest of that which is injurious. It must be remembered that the contract did not forbid all regulation, but only regulation beyond a certain limit. There was no concession of a power to go beyond that limit, but constant protest against it; and when its exercise did go beyond that limit, producing injury not balanced by other considerations, the right to restrain it would naturally be, and we think, could legally be, exerted. As we have said, there was no concealment, no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel or of laches. Appellants, however, assert there was, and claim that the acquiescence of the water company was induced by the fear that the city would prevent the unlimited use of the river water—a use beyond the ten inches claimed to be allowed by the contract, and a use against other and proprietary rights of the city. Of the latter the record does not enable us to form a judgment. Of the former the Supreme Court of the State (124 Cal. *supra*) has decided against the contention of the city. We approve the decision and hereafter quote its language. The appellants' inference, therefore, is without the support of anything in the record.

7. The water rates established by the ordinance are not shown to be lower than those charged in 1868, or, if lower, that the revenue of the company is reduced.

To sustain this contention it is claimed by appellants that there is no testimony in the record to show that the rates established in 1897 were lower than those charged in 1868. Appellants say:

"The only thing which complainants rely on to establish this fact is the recital in the report of a committee of the council appointed in 1870 for the purpose of agreeing with the water company upon a schedule of water rates to be charged, in which it stated (by the joint committee) 'that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868. That your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows.'"

It is urged this is not a statement that the rates fixed in 1870 were equal to those of 1868; indeed, that they may have been higher. And it is also urged there is a distinction made between rates for domestic purposes and rates for "other reasonable objects and purposes," which may mean not domestic purposes, and as to these it does not appear upon what they were based.

We are not disposed to dwell long on these claims. It is incredible that the city should have demanded statements from the company yearly; have passed ordinances yearly, and provoked and endured an expensive litigation to establish rates higher than or the same as those which already existed. If statements and ordinances were necessary in fulfilment of the duty of the city under the constitution of the State, neither controversy or litigation was necessary, nor would either have ensued.

It is urged under this head that it is not shown that the income of the water company is less under the rates fixed by the city than under those of 1868. The showing would be irrelevant. The contract concerns rates, not income, and the power of the city over them under the contract.

8. If the ordinance is invalid, it is void on its face, and there is, therefore, no cloud on the company's title.

The contention is that "if the contract of 1868 is valid, and the ordinance of 1897 reduces the income of the company below

that which it should receive, the ordinance is void on its face as being in conflict with the Federal Constitution, and is no cloud on complainants' title."

It is hence deduced that the water company has adequate legal remedies, and cannot resort to an equitable one.

We concur with the learned trial judge that the ordinance is not void on its face. As said by him—

"In the case at bar, however, the ordinance upon its face is valid, 88 Fed. Rep. 747, 748, and its invalidity appears only when considered in connection with the contract of July the 22d, 1868, and evidence showing what the water rates were at that date. While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July the 22d, 1868, are not embodied in said act, I am not sure that said provisions are matters of judicial knowledge, although such seems to be the ruling of the court, (one of the justices dissenting,) in *Brady* v. *Page*, 59 Cal. 52. Conceding, however, that the court will take judicial notice of all the provisions of said contract, still the one in question simply provides that water rates shall not be reduced below the rates then charged, without indicating what those rates were, and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case."

And further —

"The defendants must either submit to the terms of the ordinance, or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting, without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, so far from being adequate

to the exigencies of the situation, are, as complainants, in their brief, forcibly put it, mere mockeries of a remedy."

9. The company violated the contract by taking water from the Los Angeles River, and, therefore, is not entitled to specific performance.

In reply to this contention we may adopt the language of the Supreme Court of the State of California, used on behalf of the court by Mr. Justice McFarland, in *Los Angeles* v. *Los Angeles City Water Company*, 124 Cal. 377.

The contract of 1868 and the right of the water company to take water from the river was considered and decided. The learned justice said:

"Before considering the main questions in the case, it is proper here to notice a preliminary point made by the city, and somewhat insisted on, to wit: That the only quantity of the water of the Los Angeles River to which the water company is entitled under the contract is ten inches under a four-inch pressure. This contention cannot be maintained. The words of the contract on this subject are simply that the company shall not take from the river 'more than ten inches of water without the previous consent' of the city; there is nothing in the contract about 'four-inch pressure,' nor is there any intimation as to what the parties meant by 'ten inches' of water. But, looking at the context and the subject matter of the contract, it is quite evident that the parties did not mean only ten inches under a four-inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times ten inches under a four-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city; and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for thirty years from a flow of ten inches under a four-inch pressure would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of ten inches under a four-inch pressure; soon after the execu-

tion of the contract the company was using three hundred inches under a four-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from three hundred to seven hundred inches so measured. Therefore, whatever (if anything) was meant by the simple words 'ten inches,' the contract was immediately, and has been continuously, construed by the action of the parties as meaning more than ten inches measured under a four-inch pressure. There is no pretence that the city ever objected to the use of this water by the water company until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than ten inches from the river. It is difficult to imagine how this ordinance was passed seriously; for if the water company had been prevented from taking from the river at that time more than ten inches of water under a four-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company, for nearly thirty years, to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract."

The learned justice then quoted and approved the following remarks of the Circuit Court in the case at bar:

"'If it be conceded, as claimed by defendants, (which, however, I do not decide,) that the provision of the contract, limiting the quantity of the water to be taken from the river without previous consent of the city, is sufficiently certain for enforcement, or, more specially, that said quantity is ten inches measured under a four-inch pressure, still the consent of the city to the taking of a larger quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent.' The court cites as authorities to the point: *Rhodes* v. *Otis*, 33 Ala. 600; 73 Am. Dec. 439; *Woodbury* v. *Parshley*, 7 N. H. 237; 26 Am. Dec. 739; *Lacy* v. *Arnett*, 33 Pa. St.

169; *Russell* v. *Hubbard*, 59 Ill. 339; *Beall* v. *Marietta &c. Mill Co.*, 45 Ga. 33; *Veghte* v. *Raritan Water Power Co.*, 19 N. J. Eq. 153; *Wilmington &c. R. R. Co.* v. *Battle*, 66 N. C. 546; *Flickinger* v. *Shaw*, 87 Cal. 126; 22 Am. St. Rep. 234; *Grimshaw* v. *Belcher*, 88 Cal. 217; 22 Am. St. Rep. 298; *Smith* v. *Green*, 109 Cal. 228, all of which sustain the point."

Decree affirmed.

ERB *v.* MORASCH.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 249. Submitted April 18, 1900. — Decided May 14, 1900.

All questions arising under the constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the state courts.

It is the duty of a receiver appointed by a Federal court to take charge of a railroad, to operate it according to the laws of the State in which it is situated, and he is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing.

A city, when authorized by the legislature, may regulate the speed of trains within its limits, and this extends to interstate trains in the absence of congressional action on the subject.

The Interstate Transit Railway is a railway connecting Kansas City, Missouri, with Kansas City, Kansas, and the exception of its trains from the general provision in the city ordinance respecting the speed of trains in the city was an exception entirely within the power of the legislature to make.

THE case is stated in the opinion.

Mr. B. P. Waggener and *Mr. Albert H. Horton*, for plaintiff in error.

Mr. George B. Watson for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

While in their briefs many matters are discussed with full-

ness and elaboration by counsel for plaintiff in error we are of opinion that those of a Federal nature involved in this record are few in number and practically determined by previous decisions of this court. Of course, all questions arising under the constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the state courts. *Turner* v. *Wilkes County Commissioners*, 173 U. S. 461; *Brown* v. *New Jersey*, 175 U. S. 172, and cases cited in opinion.

In September, 1888, the city council of Kansas City passed an ordinance regulating the running of railroad trains through that city. Sections 2 and 8 are the only ones material to the present controversy. They are as follows:

"SEC. 2. It shall be unlawful for any such engineer, conductor or other persons having a railway engine or train of cars in charge to permit the same to be run along any track in said city at a greater speed than six miles an hour."

"SEC. 8. The provisions of this ordinance shall not apply to the Interstate Rapid Transit Railway Company, excepting with reference to funeral or other processions."

Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated. Act of August 13, 1888, c. 866, § 2; 25 Stat. 433, 436; *United States* v. *Harris*, *ante*, 305.

Second, that he is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing. *McNulta* v. *Lockridge*, 141 U. S. 327; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593.

Third, that a city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. *Railroad Company* v. *Richmond*, 96 U. S. 521; *Cleveland &c. Railway Co.* v *Illinois*, *ante*, 514. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the State until at least Congress shall take action in the matter.

And, fourth, the sections quoted of the ordinance are not in

conflict with those provisions of the first section of the Fourteenth Amendment to the Constitution, which restrain a State from denying the equal protection of the laws. This last proposition seems to be the only matter requiring anything more than a declaration of the law and a citation of decided cases.

The contention here is that the exception of the Interstate Transit Railway Company from the provision in reference to the speed of its trains creates a classification which is arbitrary and without any reasonable basis, and, therefore, operates to deny the equal protection of the laws. *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150. If there were nothing in the record beyond the mere words of the ordinance we are of opinion that that contention could not be sustained, because it is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts crossing or along streets constantly travelled upon by foot passengers and vehicles, while others may pass through remote parts of the city where there is little travel and little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced and where it is not in fact fenced, while another may pass through parts which permit of the fencing of the tracks and where its tracks are in fact fenced. Under those circumstances a difference of regulation as to the matter of speed would be perfectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains.

But in this case we are not left to any mere matter of presumption. The testimony discloses that the Interstate Rapid Transit Railroad is simply a street railroad connecting the cities of Kansas City, Missouri, and Kansas City, Kansas, operated at the time of the passage of the ordinance by steam power, but

with that power used only in dummy engines, and, at the time of the accident involved in this case, by electricity. It is true that there is testimony that at or near the place where the accident happened parties thought the operation of the street railroad was more dangerous than the operation of the railroad of which the plaintiff in error was receiver, but the validity of such an ordinance is not determinable by individual judgments. It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and that existing it is for the city council to determine whether separate regulations shall be applied to the two. It is not strange that one witness differs from another in respect to the comparative danger of the two roads. One jury might also disagree with another in respect to the same matter. But neither witness nor jury determine the validity of state or municipal legislation. Given the fact of a difference it is a part of the legislative power to determine what difference there shall be in the prescribed regulations. We see nothing else in this case calling for notice, and the judgment of the Supreme Court of Kansas is

Affirmed.

L'HOTE *v.* NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 204. Argued March 20, 1900. — Decided May 14, 1900.

The ordinance of the city of New Orleans set forth at length below in the statement of the case, prescribing limits in that city outside of which no woman of lewd character shall dwell, does not operate to deprive persons owning or occupying property in or adjacent to the prescribed limits, whether occupied as a residence or for other purposes, of any rights secured by the Constitution of the United States, and they cannot prevent its enforcement on the ground that by it their rights under the Federal Constitution are invaded.

Until there is some invasion of Congressional power or of private rights

secured by the Constitution of the United States, the action of a State in such respect is beyond question in the Federal courts.

The settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character.

By ordinance No. 13,032, council series, approved January 29, 1897, it was ordained by the Common Council of the city of New Orleans:

"That from the first of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situated without the following limits: South side of Custom House street from Basin to Robertson street, east side of Robertson street from Custom House to St. Louis street, south side of St. Louis street from Robertson to Basin street. Provided, That no lewd woman shall be permitted to occupy a house, room or closet on St. Louis street. Provided further, That nothing herein shall be so construed as to authorize any lewd woman to occupy a house, room or closet in any portion of the city. § 2. That it shall be unlawful for any person or persons, whether agent or owner, to rent, lease or hire any house, building or room to any woman or girl notoriously abandoned to lewdness or for immoral purposes outside the limits specified in section 1 of this ordinance. § 3. That public prostitutes or notoriously lewd and abandoned women are forbidden to stand upon the sidewalks in front of or near the premises they may occupy, or at the alleyway, door or gate of such premises, or to occupy the steps thereof, or to accost, call or stop any person passing by, or to walk up and down the sidewalks, or to stroll about the city streets indecently attired, or in other respects so to behave in public as to occasion scandal, or disturb and offend the peace and good morals of the people. § 4. That it shall not be lawful for any lewd women to frequent any cabaret or coffee house or bar room and to drink therein. § 5. That it shall be unlawful for any party or parties to establish or carry on a house of prostitution or assignation without the limits specified in section — of this ordinance. § 6. That wherever a house of prostitution or assignation within or without the limits established by this ordinance may become dangerous

to public morals, either from the manner in which it is conducted or the character of the neighborhood in which it is situated, the mayor may, on such facts coming to his knowledge, order the occupants of such house, building or room to remove therefrom within a delay of five days, by service of notice on such occupants in person, or by posting the notice on the door of the house, building or room, to remove therefrom within a delay of five days, and upon such occupants failing to do so, each shall be punished as provided in section — of this ordinance. § 7. That in the event that the occupants of such house, building or room referred to in section 6 do not remove therefrom after the infliction of the penalty, the mayor is authorized to close the same and to place a policeman at the door of such premises to warn away all such parties who shall undertake to enter. § 8. That any person or persons who shall violate the provisions of this ordinance, or who shall disturb the tranquillity of the neighborhood or commit a breach of the peace, shall be punished by the recorder having jurisdiction, for the first offence by a fine not exceeding $5.00, and in default of payment by imprisonment not exceeding ten days, for the second offence by a fine not exceeding $10.00, and in default of payment by imprisonment not exceeding twenty days, and for any subsequent offence by a fine not exceeding $25.00, and in default of payment by imprisonment not exceeding thirty days. § 9. That each day any person or persons shall continue to violate the provisions of this ordinance shall constitute a separate offence. § 10. That on and from the day this ordinance takes effect all ordinances in conflict therewith be and the same are hereby repealed, provided that nothing herein contained shall affect ordinance 12,456, C. S., relative to prostitutes in the fifth district."

By ordinance No. 13,485, council series of the city of New Orleans, approved July 7, 1897, it was ordained: "That section 1, of ordinance 13,032, C. S., be and the same is hereby amended as follows from and after the 1st of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situate without the following limits,

viz.: 1. From the south side of Custom House street to the north side of St. Louis street, and from the lower or wood side of North Basin street to the lower or wood side of Robertson street. 2. And from the upper side of Perdido street to the lower side of Gravier street, and from the river side of Franklin street to the lower or wood side of Locust street, provided that nothing herein shall be so construed as to authorize any lewd woman to occupy a house, room or closet in any portion of the city. Be it further ordained, That section 1, of ordinance 13,032, C. S., as amended above, be and the same is hereby reënacted."

The above ordinance being in force, the plaintiff in error George L'Hote, a resident, citizen and taxpayer of New Orleans, brought this action in the Civil District Court for the parish of Orleans against the city of New Orleans, its mayor and superintendent of police, on behalf of himself and all other persons similarly situated who might intervene and bear their proportion of costs and expenses. The object of the suit was to obtain a decree enjoining and prohibiting the defendants from in any manner enforcing ordinance No. 13,032 as amended by section 1 of ordinance No. 13,485.

The bill alleged that the plaintiff was the owner of property situated in the square bounded by St. Louis, Franklin, Treme and Toulouse streets in the second district of the city of New Orleans, and resided with his wife and children in that square at No. 522 Treme street; that the chief and principal way of approach to his residence, and for ingress and egress thereto, was in, through and from St. Louis street; that the locality in which he resided was at the commencement of the action and had always been used for private residences, schools, groceries and other mercantile establishments; that the people residing in that locality were then and had always been moral, virtuous, sober, law abiding and peaceable; that the locality referred to was not then and never had been dedicated to immoral purposes or used for dwelling places and as the refuge of public prostitutes, lewd and abandoned women and the necessary attendants thereof, drunkards, idle, vicious and disorderly persons, who gather around them to gratify their depraved appetites, and

who were regarded as dangerous to the peace and welfare of the community, their presence at any place being always a just cause of alarm and apprehension;

That the above ordinances were unconstitutional, illegal, unreasonable and oppressive, and would if executed work irreparable injury, wrong and damage to the plaintiff;

That the council in enacting those ordinances pretended to have acted under and by virtue of the power conferred upon them in section 15 of act No. 45, approved July 7, 1896, "to regulate the police of houses of prostitution and assignation and to close such houses in certain limits, and shall have the power to exclude the same, and to authorize the mayor and police to close said places;" and

That the enforcement of those ordinances in the manner provided for violated the provisions both of the Constitution of the United States and of the State, and would deprive the plaintiff of his property without due process of law, and amount to a taking or damaging of such property for public purposes without just and adequate compensation being first paid.

The bill further alleged that "the introduction of public prostitutes, women notoriously abandoned to lewdness, in said locality, authorizing them to occupy, inhabit, live and sleep in houses and rooms situated therein, will materially lessen and depreciate the value of your petitioner's property, render his dwelling and the dwelling of his neighbors similarly situated unfit for the occupancy of private families, destroy the morals, peace and good order of the neighborhood, drive out and turn away the law abiding, virtuous citizens and their families from said locality, and dedicate the same to public and private nuisances *per se*, contrary to law and good morals;"

That "the common council of the city of New Orleans had previously designated the limits within which prostitutes and women notoriously abandoned to lewdness should inhabit and live, and had thereby exhausted whatever power was vested in them by legislature of the State and were without legal right to alter, change or modify the same to the injury, detriment and damage of your petitioner and others residing in said locality, which said council have attempted to include within said

limits; that, having so exhausted the authority conferred upon them by the legislature, the said council was without power to capriciously change the limits previously established by them; that the avocations plied by public prostitutes and women notoriously abandoned to lewdness are *contra bonos mores*, and the said common council of the city of New Orleans have no right, power or authority to legalize the same and to permit such persons to reside in the said vicinity in which your petitioner and others dwell with their families;"

That "there was no good and sufficient reason for the enactment of said ordinance or the changing of the limits previously existing and established;"

That "said council, in enacting said ordinance No. 13,485, council series, eliminated and excluded a large area of the city which had been previously dedicated to the occupancy of lewd and abandoned women, to the detriment and injury of petitioner, by changing said limits so as to include St. Louis street in his locality;"

That the execution of the ordinances would render plaintiff's dwelling house and those of his neighbors unfit and unsuitable for the occupancy of their families, wives and children, and wholly valueless for the purposes for which they were constructed and had theretofore been used; and

That the plaintiff and others similarly situated would be compelled, if the ordinances were executed, to abandon and remove from their dwellings at great trouble, expense and annoyance, and that the enforcement of the ordinance would oppress, injure and seriously damage and incommode the plaintiff and all others similarly situated.

The plaintiff also averred that the ordinances if executed would deprive him and others similarly situated of the equal protection of the laws and be in violation equally of the Constitution and laws of the United States and of the State; that under the laws and ordinances of the city as they existed, he and all others similarly situated in the locality had the right to cause houses of prostitution and assignation to be suppressed as nuisances and the inmates arrested and forced to vacate and remove therefrom, and of that right the plaintiff had theretofore availed him-

self; and that the ordinances if executed would legalize such nuisance and take away the rights of citizens theretofore existing and vested in plaintiff and others residing in that locality.

After alleging that the enforcement of the ordinance would work irreparable damage and injury to him in the depreciation in value of his property, because it would cease to be a fit and proper place for the dwelling house of himself, his wife and children, and necessitate their abandonment of the same and removal from the locality, he prayed that the ordinances might be declared null and void.

The writ of injunction as prayed was directed to be issued.

The city of New Orleans, its Mayor and Superintendent of Police, pleaded that the court was without jurisdiction *ratione materiae.*

Bernardo Gonzales Carbajal intervened by petition, and after alleging that he was the owner of certain improved property within the limits prescribed by the above ordinances, reiterated all the allegations of the petition of L'Hote so far as they related to his property, and averred that the enforcement of the ordinances would work great and irreparable injury to him and depreciate his property by rendering it unfit and unsuitable for dwelling houses. He united in the prayer that the ordinances be declared null and void.

The Church Extension Society of the Methodist Episcopal Church, a corporation chartered and organized under the laws of Pennsylvania, also intervened, and alleged that it was the owner of buildings and improvements within the above district which were used and occupied for church purposes; that a religious congregation known as the Union Chapel of the Methodist Episcopal Church assembled and worshiped therein on each and every Sabbath and on Tuesday and Friday evenings, as well as on other stated occasions; that besides the religious services conducted in that church a Sunday school was organized and established which was attended by 170 children, who received religious instruction and teaching, and that the membership of that congregation consisted of about 300 persons, while those worshiping in the church numbered about six hundred persons.

The society reiterated all the allegations of the plaintiff's petition and alleged that if the ordinances were enforced the value of its property would be destroyed and the same would be unfit for the purposes for which it was erected and was now being used, enjoyed and occupied; that the threats to enforce the ordinances had already caused a portion of the congregation attending the church to cease from attending therein; that encouraged by the action of the city council of New Orleans in passing the ordinances a number of lewd and abandoned women had already taken up their abode and habitation in the vicinity of the church and were plying their vocation as prostitutes; and that a number of houses were then in progress of erection and construction which were intended to be used and kept as brothels and houses of prostitution, and other places had been leased and let for the purpose of carrying on liquor saloons and concert halls, for the purpose and with the intention of changing the hitherto respectable character of that neighborhood into a resort for vice and the establishment of nuisances *mala in se*.

After averring that the above ordinances were in violation of the Constitution of the United States and the constitution and laws of Louisiana, and that the city council had no right to destroy the value of the intervenor's property and render the neighborhood in which the same was located the resort of lewd and abandoned women, it united in the prayer of the plaintiff's petition that those ordinances be declared null and void.

The exceptions filed by the defendants to the petitions of the plaintiff and the intervenors having been overruled, the city of New Orleans and its Chief of Police filed an answer averring that the ordinances in question were legal and that their enforcement would be a lawful exercise of the power conferred upon the city, and especially a valid exercise of the power conferred upon it by act No. 45 of 1896.

The Civil District Court rendered judgment in favor of the plaintiff, but in favor of the city against the intervenors. From that judgment suspensive appeals were allowed and prosecuted by the city as well as by the Church Extension Society.

By the final judgment of the Supreme Court of Louisiana the

judgment of the Civil District Court in favor of the plaintiff was reversed, and the injunction obtained by him was dissolved and his suit dismissed, while the judgment dismissing the intervening petitions and dissolving the injunction granted on behalf of the intervenors was affirmed. 51 La. Ann. 93.

Mr. E. Howard McCaleb for plaintiffs in error.

Mr. James J. McLoughlin for defendant in error. *Mr. Samuel L. Gilmore* and *Mr. Branch K. Miller* were on his brief.

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

The question presented in this case is whether an ordinance of the city of New Orleans prescribing limits in that city, outside of which no woman of lewd character shall dwell, operates to deprive these plaintiffs in error of any right secured by the Constitution of the United States. It is well, in the first place, to look at the negative side and see what is not involved. No woman of that character is challenging its validity; there is no complaint by her that she is deprived of any personal rights, either as to the control of her life or the selection of an abiding place. She is not saying that she is denied the right to select a home where she may desire, or that her personal conduct is in any way interfered with. In brief, the persons named in the ordinance, and against whom its provisions are directed, do not question its validity.

In the second place, no person owning buildings outside of the prescribed limits is complaining that he is deprived of a possible tenant by virtue of the ordinance, or saying that the abridgment of her freedom of domicile operates to cut down the amount of his rents.

In the third place, it will be perceived that the ordinance does not attempt to give to persons of such character license to carry on their business in any way they see fit, or, indeed, to carry it on at all, or to conduct themselves in such a manner as to disturb the public peace within the prescribed limits. Clauses 3

and 4 of the first section of the ordinance are clearly designed to restrain any public manifestation of the vocation which these persons pursue and to keep so far as possible unseen from public gaze the character of their lives, while clauses 6, 7, 8 and 9 provide means for enforcing order and preventing disturbances of the peace.

The question, therefore, is simply whether one who may own or occupy property in or adjacent to the prescribed limits, whether occupied as a residence or for other purposes, can prevent the enforcement of such an ordinance on the ground that by it his rights under the Federal Constitution are invaded.

In this respect we premise by saying that one of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites and passions. The management of these vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where from the very density of population the things which minister to vice tend to increase and multiply. It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the States, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the States in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of Congressional power or of private rights secured by the Constitution of the United States, the action of the States in this respect is beyond question in the courts of the nation. In *Barbier* v. *Connolly*, 113 U. S. 27, 31, it was said:

"But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people."

See also *Railroad Company* v. *Husen*, 95 U. S. 465; *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Patterson* v. *Kentucky*,

97 U. S. 501; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Plumley* v. *Massachusetts*, 155 U. S. 461, and cases in the opinion.

Obviously, the regulation of houses of ill fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state and Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature.

Now, this ordinance neither prohibits absolutely nor gives entire freedom to the vocation of these women. It attempts to confine their domicile, their lives, to certain territorial limits. Upon what ground shall it be adjudged that such restriction is unjustifiable; that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to the matter of territory? May that not be one of the wisest and safest methods of dealing with the problem? At any rate, can the power to so regulate be denied? But given the power to limit the vocation of these persons to certain localities, and no one can question the legality of the location. The power to prescribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries. We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration, and cannot become the basis of judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative

body is unable to protect all, must it be denied the power to protect any?

It is said that this operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error, but a similar result would follow if other limits were prescribed, and therefore the power to prescribe limits could never be exercised, because, whatever the limits, it might operate to the pecuniary disadvantage of some property holders.

The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character.

Among the cases in which this question has been presented may be noticed *Fertilizing Company* v. *Hyde Park*, *supra*, and *Mugler* v. *Kansas*, 123 U. S. 623. In the first of these cases an act of the General Assembly of the State of Illinois had authorized the fertilizing company to establish a plant for the purpose of converting dead animals into an agricultural fertilizer. In pursuance of this authority the company had built its factory outside the then limits of the city of Chicago and in a territory adjacent to which there was no population. As the years rolled by population gathered around the factory, and the character of the work carried on was such as to make it a nuisance to the neighborhood. The village of Hyde Park, which had grown up around the works of the company, passed an ordinance to suppress these works, and a bill was filed in the state court to restrain the enforcement of that ordinance. The Supreme Court of the State held the ordinance valid, and on error to this court that judgment was affirmed. Although there was a charter right to maintain these works, and although when established they were located in a territory in which there was no population, yet when population had gathered around them the police power of the State was held sufficient to stop their existence, and that without compensation to the owner. The pecuniary injury which directly resulted to the company from the stoppage of its works was held no bar to the police power of the State. In the other case Mugler had established a brewery in Kansas, when such an institution was authorized by the laws of the

State. The buildings and machinery were of little value except for the purpose of manufacturing beer. Yet when Kansas, in the exercise of its police power, determined that the manufacture of beer should cease, it was ruled by this court that the pecuniary loss to Mugler did not justify any restraint of the legislative acts prohibiting the manufacture of beer. Each individual holds his property subject to the ordinary and reasonable exercise of the police power, and the fact that its exercise may in a particular case work pecuniary injury was adjudged insufficient to stay the legislative action. It is true those cases involved pecuniary injury to the persons whose action was prohibited, but it cannot be that the police power of a State can be stayed because it works injury to one person, and not stayed if it works injury to another.

In 1 Dillon Mun. Corp. 4th ed. sec. 141, the rule is thus stated:

"Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally."

The learned author, in these and accompanying sentences, is discussing the rule when legislative action operates directly upon the property of the complainant and where injuries al-

leged to result are the direct consequence of legislative action. If under such circumstances the individual has no cause of action, *a fortiori* must the same be true when the injuries are not direct but consequential, when his property is not directly touched by the legislative action but is affected in only an incidental and consequential way. Here the ordinance in no manner touched the property of the plaintiffs. It subjected that property to no burden, it cast no duty or restraint upon it, and only in an indirect way can it be said that its pecuniary value was affected by this ordinance. Who can say in advance that in proximity to their property any houses of the character indicated will be established, or that any persons of loose character will find near by a home? They may go to the other end of the named district. All that can be said is that by narrowing the limits within which such houses and people must be, the greater the probability of their near location. Even if any such establishment should be located in proximity, there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance. Under these circumstances we are of the opinion that the ordinance in question is not one of which the plaintiffs in error can complain. The judgment of the Supreme Court of Louisiana is therefore

Affirmed.

WILLIAMS *v.* WINGO.

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

No. 222. Argued April 11, 12, 1900. — Decided May 14, 1900.

The act of the legislature of Virginia of March 5, 1840, providing that "it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one half mile, in a direct line, of any other ferry legally established over the same watercourse," was one of general legislation, and subject to repeal by the general assembly, and did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit.

By the statutes of Virginia authority was given to the county courts of the several counties to license ferries. By an act passed March 5, 1840, (Acts Assembly, 1839–1840, p. 58, c. 72,) carried, with simply verbal changes, into chap. 64 of the Code of Virginia of 1873 as sec. 23, and subsequently into chap. 62 of the Code of 1887 as sec. 1386, it was provided:

"Be it enacted by the General Assembly, That it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one half mile, in a direct line, of any other ferry legally established over the same watercourse."

In 1880 the county court of Giles County gave to the plaintiff in error a license to maintain a ferry across New River. On March 5, 1894, the general assembly of Virginia passed the following act (Acts Assembly, 1893–1894, p. 789, c. 692):

"Be it enacted by the General Assembly of Virginia, That it shall be lawful for the county court of Giles County to establish a ferry at a point on New River, in said county, at a point around Egglestons Springs depot and between Egglestons Springs and Egglestons depot, on the New River branch of the Norfolk and Western Railroad, Giles County, Virginia. Said court in establishing said ferry shall be bound by sections thirteen hundred and seventy-five, thirteen hundred and seventy-six, thirteen hun-

dred and seventy-seven, thirteen hundred and seventy-eight, thirteen hundred and seventy-nine, thirteen hundred and eighty, thirteen hundred and eighty-one, thirteen hundred and eighty-two, thirteen hundred and eighty-three, thirteen hundred and eighty-four and thirteen hundred and eighty-five of the Code of Virginia; but section thirteen hundred and eighty-six of said code, so far as the distance of one half a mile is concerned, shall not apply to the establishment of said ferry at said place."

Under this act a license was given to the defendant in error to establish a ferry within less than half a mile of the ferry established by the plaintiff in error under his prior license. The rightfulness of this action was sustained by the circuit court of Giles County, and subsequently by the Supreme Court of Appeals of the State of Virginia, and to review such decision this writ of error was brought.

Mr. W. J. Henson for plaintiff in error.

Mr. Samuel W. Williams for defendant in error.

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

The contention of the plaintiff in error is that, under the laws of the State of Virginia in force at the time of such action, the license granted by the county court to him to establish a ferry created a contract between him and the State to the effect that no other ferry should be established within half a mile; and that the act of 1894 and the subsequent proceedings of the county court of Giles County impaired the obligation of that contract, and, therefore, were repugnant to section 10 of article 1 of the Constitution of the United States.

This is an obvious error. The act of 1840 was one of general legislation, and subject to repeal by the general assembly. No rights could be created under that statute beyond its terms, and by it no restraint was placed upon legislative action. When the general assembly gave to the county courts power to license ferries it by that act in effect forbade them to establish a second

ferry within half a mile of one already established, but that bound only the county court. It did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute. *Fanning* v. *Gregoire*, 16 How. 524, is in point and decisive. In that case the plaintiff was by an act of the Iowa territorial legislature given authority to establish a ferry across the Mississippi River at the then town of Dubuque, and the act also provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town. The city of Dubuque was thereafter incorporated, and under its general corporate powers entered into a contract with the defendant to run a steam ferryboat across the river. The plaintiff thereupon filed a bill to restrain the defendant from so doing. It was held that the bill could not be maintained, this court saying (pp. 533, 534):

"Although the county court and county commissioners were prohibited from granting another license to Dubuque, yet this prohibition did not apply to the legislature; and as it had the power to authorize another ferry, the general authority to the council to 'license and establish ferries across the Mississippi River at the city,' enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done. . . . The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication."

This case was cited with approval in *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287, in which this very statute of Virginia of 1840 was under consideration, and it was said (p. 292):

"Here the prohibition of the act of 1840 was only upon the county courts, and that in no way affected the legislative power of the State."

The case of *The Binghamton Bridge*, 3 Wall. 51, is not inconsistent. There an act of the legislature, authorizing the one bridge, contained a proviso "that it should not be lawful for

any person or persons to erect a bridge within a distance of two miles." That provision was held a part of the contract between the State and the bridge company, Mr. Justice Davis, speaking for a majority of the court, saying (p. 81):

"As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, 'that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles,' *is*, that the legislature *will not make it lawful* by licensing any person or association of persons to do it."

In the case at bar the only effect of the act of 1840, while in force, was, as we have said, to tie the hands of the county court. It operated in no manner as a restraint upon the legislature or as a contract upon its part that the State would not act whenever in its judgment it perceived the necessity for an additional ferry. The fact that in this case the special authority was given to the county court is immaterial. A general act forbidding county courts to license additional ferries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second. The judgment of the Supreme Court of Appeals of Virginia was correct, and it is

Affirmed.

CHAMBERLIN *v.* BROWNING.

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

No. 251. Argued April 19, 1900. — Decided May 14, 1900.

The substantial relief sought in this case against the attaching creditors and the matter in dispute was the defeat of distinct and separate claims of each attaching creditor, so far as it affected the real estate owned by Scott, and as no defendant was asserting a claim which aggregated the amount required to confer jurisdiction upon this court, the case is dismissed for want of jurisdiction.

JOHN D. SCOTT executed in the District of Columbia, on April 24, 1896, a deed of voluntary assignment for the benefit of his creditors, embracing in a schedule of his assets, among other property, a life estate in certain land situated in Montgomery County, Maryland. Horatio Browning qualified as assignee under the deed of assignment.

Various steps were taken under the assignment, but prior as well as subsequent to the recording of the deed in Montgomery County, Maryland, certain creditors of Scott, all but one of whom resided in the District of Columbia, seized the real estate referred to under attachment process issued in Maryland. The attachment proceedings went to judgment, whereupon one of the judgment creditors filed a bill in the Maryland court to declare that the interest of Scott in said real estate was in fee simple and not merely a life estate. In this latter suit a decree was entered sustaining the claim of the creditors, and proceedings were then taken by the several creditors to enforce their judgment claims against said real estate.

The appellants, as creditors of Scott, thereupon filed their bill in the Supreme Court of the District of Columbia against Scott, Browning, the assignee and the various creditors who had instituted the attachment proceedings in Maryland. In substance, the bill set out the various facts hereinbefore recited, charged

that the attaching creditors had actual and constructive notice of the deed of assignment, and had participated in the proceedings thereunder, and were without lawful right to enforce their attachment claims against the real estate referred to, and thus to secure a preference over the other creditors who had elected to take the benefit of the deed of assignment. The sums sought to be recovered by each of the attaching creditors in the proceedings in Maryland were enumerated in the bill, and in no instance did the claim or claims of any of said creditors aggregate more than $3500. Various allegations were also contained in the bill with respect to mismanagement by Browning in the execution of his trust as assignee. Part of the specific relief prayed in the bill was the removal of Browning as assignee, a stating of his accounts, discovery by Scott of further assets and the execution by him of a deed in fee simple of the Maryland property. As to the attaching creditors, the following relief was prayed:

"Six. That the attaching creditors be restrained, pending this action, from in any manner proceeding to enforce their said attachments on judgments of condemnation against said Maryland land, and from doing any act or thing to hinder, delay or interfere with the control or management of the estate abroad for the equal benefit of all said Scott's creditors, and from in any way seeking to secure to themselves any greater benefit or interest out of said estate and effects than shall represent their '*pro rata*' share under said assignment, and that on final hearing such injunction be made perpetual.

"Seven. Or, if this cannot be done, that the attaching creditors be directed to bring into court any moneys realized from said land, and that the same be treated as assets passing by said deed of assignment, and distributed among the creditors as therein directed."

Each of the defendants who are appellees in this court demurred to the bill. From an order overruling the demurrers an appeal was allowed by the Court of Appeals of the District of Columbia. That court reversed the order made by the lower court and remanded the cause, with directions to sustain the demurrers and dismiss the bill as to the appellees Keane, Mid-

dleton, the Central National Bank of Washington, Edward O. Whitford, and the partnership of Browning and Middleton, and for further proceedings not inconsistent with the opinion of the court. Thereafter the Supreme Court of the District, upon consideration of the mandate of the Court of Appeals, entered a decree sustaining the demurrers and dismissing the bill of complaint as to the defendants named in the mandate of the Court of Appeals. From this decree the case was again taken to the Court of Appeals, and that court affirmed said decree. This appeal was then taken.

Mr. O. B. Hallam for appellants.

Mr. Arthur Peter and *Mr. A. A. Birney* for appellees. *Mr. James S. Edwards* was on their brief.

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

Along with an argument upon the merits, counsel for the appellees have presented a motion to dismiss this appeal as to all the appellees, because of the absence of any controversy involving the requisite jurisdictional amount. This motion we find to be well taken.

The decree appealed from affected only the defendants, who, as attaching creditors, had prosecuted actions in the Maryland court upon their claims against their debtor, Scott, and had by ancillary proceedings subjected real estate owned by their debtor to the satisfaction of the judgments obtained in the actions referred to.

Recovery of land or its value was not the relief sought by the bill below against the attaching creditors, for said creditors did not hold or assert title to the land. The value of the land, therefore, was clearly not the subject matter of dispute between the complainants and the said attaching creditors. The relief prayed against the latter was the enjoining of the enforcement against real estate in Maryland of the judgments obtained by the appellees, or the bringing into court of any

moneys realized from said land by virtue of the proceedings. But the appellees, as attaching creditors, were not jointly asserting their claims against Scott or his property, nor were they claiming under a common right. Their claims and the judgments based thereon were separate and distinct, the one from the other, and in no case did the amount of the judgments obtained by either of the appellees equal $5000. The case presented is clearly within the principle of the decision in *Gibson* v. *Schufeldt*, 122 U. S. 27, and cases there cited. The *Gibson case* was a suit brought by general creditors to set aside as fraudulent a conveyance in trust for the benefit of preferred creditors. The decree set aside the conveyance as fraudulent so far only as it affected the rights of the plaintiffs. But one of such general creditors held a claim, amounting to $5000. A motion to dismiss the appeal as to all other plaintiffs was sustained, the court holding that the sole matter in dispute between the defendants and each plaintiff was as to the amount which the latter should recover, and that the motion to dismiss the appeal of the defendants as to all the plaintiffs, except the one whose debt exceeded the jurisdictional amount, should be granted. Had the appellants recovered against the appellees the amount collected by the latter upon their judgments, it is clear that the amount in dispute for the purpose of determining jurisdiction would be the amount of recovery assessed against each defendant separately. *Henderson* v. *Wadsworth*, 115 U. S. 264; *Friend* v. *Wise*, 111 U. S. 797. As stated in the *Henderson case*, neither co-defendant nor co-plaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal. If, therefore, the appellees could not, if recovery had been had against them, unite their separate interests for the purposes of an appeal, the appellants cannot do so for the purpose of asserting the existence of appellate jurisdiction in this court.

In the case at bar, we repeat, in effect, the substantial relief sought against the attaching creditors, and the matter in dispute between them, was the defeat of the distinct and separate claims of each attaching creditor so far as it respected the real

estate owned by Scott, and, as already shown, no defendant was asserting claims which aggregated the amount required to confer jurisdiction upon this court.

Dismissed for want of jurisdiction.

HOWARD *v.* DE CORDOVA.

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

No. 246. Argued and submitted April 17, 1900.—Decided May 14, 1900.

Following *Cooper* v. *Newell*, 173 U. S. 555, it is held that the judgment of the Texas court which is attacked in this case may be the subject of collateral attack in the courts of the United States, sitting in the same territory in a suit between citizens of Louisiana and citizens of Texas.

By c. 95, §§ 13, 14 of the Laws of Texas of 1847 and 1848, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residence is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In the state court the affidavit was therefore jurisdictional in its character, and its verity was directly assailed by the averments of the present bill, which were admitted by the demurrer.

By their original bill the complainants, alleging themselves to be citizens of the State of Louisiana, complained against P. De Cordova, a citizen of the State of Texas, residing in Travis County, W. R. Boyd, F. E. Hill, Charles Robertson, J. M. Parker and George W. McAdams, citizens of Texas and residents of Freestone County, and against Joseph Smolenski, as to whom it was merely alleged he "is not an inhabitant of or found within this district." The grounds for relief which it is necessary to notice for the purposes of the questions before us, averred in the original bill and an amendment thereto, were as follows: That the complainants were the sole legal heirs of J. W. Zacharie, their deceased father, who during his lifetime was a citizen and resident of the State of Louisiana; that their said deceased ancestor owned a tract of eleven leagues of land

situated in Freestone and Anderson Counties, Texas, which had been granted to Manuel Riondo, by the states of Coahuila and Texas; that on the 26th of February, 1852, their said father made a contract with Jacob and Phineas De Cordova, by which the two last named persons agreed to have the grant above mentioned properly placed upon the records, to endeavor to effect compromises with certain parties holding claims by junior locations covering some of the land in the grant; that by the agreement in question all expenses except the taxes were to be paid by the two Cordovas, and in consideration of their services they were to receive one third of the receipts derived from the sale of all the land which might be covered by the compromises to be effected as aforesaid. It was alleged that in pursuance of the contract the two De Cordovas made various compromises with persons claiming under junior grants, and that the land thus embraced, the exact amount of which was not alleged, although it probably equaled ten thousand acres, was sold, and they received their share of the proceeds resulting from the sale. It was charged that in 1860 Jacob De Cordova acknowledged in writing that a full settlement had been made with him by Zacharie for all the lands as to which compromises had been made, and he therefore declared that all and every right which had vested in him by the contract in question had been liquidated and settled. It was then averred that on the 9th of November, 1895, Phineas De Cordova, with the object of defrauding complainants of their right and title to the land aforesaid, filed in the district court of Freestone County, Texas, a suit in partition, in which he falsely alleged himself to be the owner of an undivided one sixth of the land situated in the Riondo grant; that this suit was brought against the unknown heirs of J. W. Zacharie, deceased, and against Joseph Smolenski, whose residence was also in said suit alleged to be unknown. At the time this suit was thus brought by De Cordova it was averred that both he and Boyd, the attorney who represented De Cordova in the suit, knew who were the heirs of J. W. Zacharie and where they resided, but that in order to defraud and to avoid notice to them of the suit, and to obtain summons by publication as required by the law of Texas, an affidavit was

made by William R. Boyd, the attorney, that the heirs of Zacharie and their residences were unknown; that, predicated upon this affidavit, the order for publication was given by the court; that instead of publishing the notice at the county seat, it was inserted in a newspaper in a remote portion of the county, and that the complainants had no knowledge whatever of the suit until long after its termination; that in this suit for partition an attorney was subsequently appointed to represent the unknown and absent defendants; that the law of the State of Texas required that a statement of facts should be made by the judge, but that one was prepared by Boyd, representing De Cordova, and the attorney who had been appointed to represent the absent defendants, which had for its effect to produce upon the mind of the court the impression that under the contract aforesaid, made between the Cordovas and Zacharie, the Cordovas were entitled as owners to one third of the eleven leagues of land; that being misled to that conclusion, after proceedings as required in partition suits, a decree of partition was entered. The complaint as amended made other charges of fraud and deception which it is unnecessary to recapitulate. As to the other defendants to the bill, except Smolenski, it was averred that they had acquired with full notice of the fraud, which it was charged had been operated upon the Zacharie heirs by the partition suit as aforesaid, portions of the land in question. Smolenski was made a party to the bill because of the following averments: After the adjustment alleged to have been made between Zacharie and De Cordova, it was stated that Zacharie had sold all the land in August, 1865, to Smolenski for the price of $15,000, evidenced by his notes as follows: One for $3000 dated May 1, 1866, and twelve notes of $1000 each, payable yearly thereafter, with eight per cent interest per annum from May 1, 1866; that in the deed to Smolenski it was stipulated that a vendor's lien should be retained on the land to secure the payment of the notes, and it was provided that if any of the said notes should remain unpaid for six months after maturity, the vendor should have *ipso facto* the right to cancel and annul the sale and reënter and take possession of said lands. It was then averred that none of the notes given by Smolenski

had ever been paid, although past due for twenty or thirty years.

The prayer of the bill was that the proceedings in partition and the decree directing the same, be adjudged to be fraudulent and void; that the sales made to the other defendants be also declared fraudulent and void, and that the deed made by Zacharie to Smolenski to be set aside and cancelled, and the cloud thereby "cast on your orators' title to said land be removed."

To the bill and the amendment thereto the defendants demurred on the following grounds:

"First. It appeared from the face of plaintiffs' amended bill that the bill seeks to set aside, cancel and annul the judgment of the district court of Freestone County, State of Texas, and this court has no jurisdiction or power to cancel, set aside or annul the judgment of the state court, said court having jurisdiction both over the subject-matter and of the persons in said suit, said suit being a partition suit and the proceeding one *in rem*.

"Second. The amended bill shows upon its face that the object of the bill is to obtain a new trial in this court in cause No. 1960, tried and determined in the district court of Freestone County, Texas, as shown by the exhibits to the bill, under and in accordance with article 1375 of the Revised Statutes of Texas.

"That this proceeding is but a continuation of said suit, and this court has no jurisdiction of the same, but the district court of Freestone County, Texas, alone has jurisdiction of the same.

"Third. That the judgment of the district court of Freestone County, Texas, is valid and binding upon all of the parties to this suit, and this court has no jurisdiction, power or authority to review or to cancel and annul the same for the pretended fraud, as set out in plaintiffs' bill, or for any other cause therein stated."

After hearing, the court sustained the demurrer and dismissed the suit "for want of jurisdiction of the subject-matter in controversy," and the correctness of its action in so doing is the question which arises on this appeal.

Opinion of the Court.

Mr. F. C. Zacharie for appellants.

Mr. R. H. Ward and *Mr. Ashby S. James* for appellees, submitted on their brief.

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

That the court erred in sustaining the demurrer and dismissing the suit for want of jurisdiction over the subject-matter of the controversy, has been in effect conclusively settled by this court in a case decided since the action of the court below was taken. *Cooper* v. *Newell*, 173 U. S. 555. In that case suit had been brought in a court of the State of Texas in the ordinary form of trespass, to try title by Peter McGrael against Stewart Newell, the defendant. It was alleged in the suit that the plaintiff was a resident of Texas, and that the defendant was also a resident and citizen of that State. An answer was filed in the cause by an attorney at law in the name of the defendant, and the suit proceeded to judgment. The controversy decided in *Cooper* v. *Newell* thus arose: Newell filed his bill in the Circuit Court of the United States in and for the Eastern District of Texas, in the ordinary form of trespass, to try title to recover the land to which the suit of *McGrael* v. *Newell* had related. He charged that the defendants claimed title under the judgment rendered in that suit, but that they had no title because he, Newell, had never resided in the State of Texas; had not authorized any attorney to appear for him in the suit, and that, therefore, the proceedings in *McGrael* v. *Newell* were as to him *res inter alios acta*, and wholly void. The controversy turned on whether Newell could be heard in the Circuit Court of the United States to attack the judgment of the state court, it being contended that the fact that Newell was represented by an attorney at law, who appeared and filed an answer in his name, was conclusively established by the judgment, which could not be assailed collaterally in a court of the United States, however much it might be subject to direct attack for fraud in the courts of the State of Texas. The contention was

not maintained, it being decided that as the charges went to the jurisdiction of the state court such question of jurisdiction could be examined in the courts of the United States whenever the judgment of the state court was presented as a muniment of title. The alleged facts in the case before us bring it directly within this ruling. By chapter 95, sections 13 and 14, Laws of Texas 1847 and 1848, page 129, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residences, is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character; and its verity was directly assailed by the averments of the present bill which were admitted by the demurrer. Besides this decisive consideration, the proceedings in the state court, whatever may have been their efficacy as a defence to the charges of fraud contained in the bill, as to which we express no opinion, were not adequate to defeat the jurisdiction of the Circuit Court of the United States. In other words, they address themselves not to the jurisdiction of the court, but to the merits of the cause. *Huntington* v. *Laidley*, 176 U. S. 668.

Whilst the demurrer which the court below maintained was predicated solely on the fact that there was a want of jurisdiction because of the proceedings had in the state court, which the bill assailed for want of jurisdiction and fraud, we have observed that the citizenship of Smolenski is not averred in the bill. This defect was curable by amendment, and it was not only within the power but the duty of the court, on its attention being called to the fact, to have allowed such an amendment to be made. It follows that

The judgment must be reversed and the cause be remanded for further proceedings in conformity with this opinion, and it is so ordered.

CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY *v.* THIEBAUD.

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

No. 259. Argued April 24, 1900. — Decided May 14, 1900.

SAME *v.* SAME.

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

No. 271. Submitted April 24, 1900.—Decided May 14, 1900.

A record showing an instruction by the Circuit Court directing a jury that the plaintiff is entitled to recover in his action under a state law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, does not disclose a case in which it is claimed that the law of a State is in contravention of the Constitution of the United States, within the meaning of section 5, of the act of March 3, 1891, where the record of the Circuit Court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the Circuit Court.

The act of March 3, 1891, does not contemplate several separate appeals or writs of error, on the merits in the same case and at the same time to or from two appellate courts, and the record in No. 271 falls within this rule.

THE certificate in No. 259 reads as follows:

"This was an action brought by Benj. F. Thiebaud, a citizen of Indiana, as administrator of Chris. Sweetman, deceased, appointed by the Circuit Court of Fayette County, Indiana, against the C., H. and D. R. R. Co., a corporation and citizen of Ohio, to recover damages for the wrongful death of said Chris. Sweetman, who, while employed as a locomotive engineer by said company, on an engine drawing its pay car, was, without

fault on his part, killed in a collision between his engine and that of a freight train. The collision was caused by the negligence of the conductor and engineer of the freight train. The court charged the jury, among other things, that inasmuch as the deceased had been killed through the negligence of fellow-servants, the defendant would probably not be liable at common law, but that it was liable for the negligence charged and admitted under the act of the general assembly of Indiana, approved March 4, 1893, entitled 'An act regulating the liability of railroad and other corporations, except municipal, for personal injuries to persons employed by them,' etc. Laws of Indiana, 1893, p. 294; Rev. Stat. Ind. secs. 7083–7087. Upon which act the plaintiff relied for recovery; to which charge the defendant excepted.

"The record does not show upon what ground said exception was taken and does not show that said exception was upon the ground that the statute contravenes the Constitution of the United States, or that the constitutionality of the statute was otherwise raised or considered or decided by the Circuit Court. The statute is not mentioned in any of the pleadings. The record shows other exceptions taken, duly assigned for error, which do not raise any constitutional question, and which may require the reversal of the judgment of the Circuit Court without reference to any constitutional question.

"The jury rendered a verdict in favor of the plaintiff, and judgment was entered thereon.

"Thereafter the defendant brought the case, by writ of error, to this court, and assigned for error:

"1. That the court erred in charging the jury that the defendant was liable under the act of the general assembly of Indiana, approved March 4, 1893.

"2. That said act is in contravention of the Fourteenth Amendment of the Constitution of the United States.

"3. That said act is in contravention of the constitution of the State of Indiana and especially of article 11, section 23, of article 4, sections 19 and 23 thereof.

"4. That the court erred in overruling the defendant's motion to dismiss the action for want of jurisdiction.

Statement of the Case.

"5. That the court erred in refusing to permit the defendant to put the following question to the witness, Charles M. Cist: 'Where were those personal effects at the time you made your application?'

"6. That the court erred in ruling out and excluding the testimony offered by the defendant to show that plaintiff's administration was not based upon any personal estate in Fayette County, Indiana, other than the claim sued on.

"Thereupon the defendant in error moved in this court to dismiss the case for want of jurisdiction, on the ground that it is a case in which it is claimed that the statute of a State is in contravention of the Constitution of the United States, and that, therefore, under section 5 of the act of Congress approved March 3, 1891, (26 Stat. 826,) the writ of error should be taken from the Supreme Court of the United States and not from this court.

"The court is in doubt whether the case is within the provisions of said section of the act of Congress, and, therefore, upon the foregoing statement of facts it is ordered that the following questions be certified to the Supreme Court of the United States for its instructions:

"1. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a State is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?

"2. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a State is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to such constitutional question?

"3. Does a record showing an instruction by the Circuit Court directing a jury that the plaintiff is entitled to recover in his action under a state law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed that the

law of a State is in contravention of the Constitution of the United States, within the meaning of section 5 of the act of March 3, 1891, where the record of the Circuit Court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the Circuit Court?

"4. If it be considered that such record in the Circuit Court does not disclose a case in which a law of a State is claimed to be in contravention of the Constitution of the United States, but such claim is made, so far as the record shows, for the first time in the Circuit Court of Appeals by assignment of error, and is insisted upon at the bar, has the Circuit Court of Appeals jurisdiction in error to hear and determine the constitutional question raised by such claim?"

No. 271 is a writ of error to the Circuit Court of the United States for the Southern District of Ohio to review the judgment referred to in the certificate. In the petition for the writ, defendant set forth that "having duly prosecuted the writ of error heretofore allowed by the court to the United States Circuit Court of Appeals for the Sixth Circuit, the plaintiff in this case, being the defendant in error, filed a motion in said Circuit Court of Appeals to dismiss said writ of error upon the ground that the same should have been taken to the Supreme Court of the United States instead of to the United States Circuit Court of Appeals, and that said Circuit Court of Appeals was therefore without jurisdiction upon said writ of error. Said Circuit Court of Appeals, being in doubt whether it has jurisdiction, has certified certain questions to the Supreme Court of the United States. In view of said proceedings, the defendant, being now in doubt as to whether said writ of error to the United States Circuit Court of Appeals was properly allowed, but without prejudice to said proceeding in error, if it shall hereafter be determined that the same was properly taken, and that the Circuit Court of Appeals has jurisdiction thereof, now prays for a writ

of error to the Supreme Court of the United States, and assigns for error:" [Here followed the assignment of errors.]

Thereupon the Circuit Court entered this order:

"This cause came on to be heard upon the defendant's petition for the allowance of a writ of error to the Supreme Court of the United States; on consideration whereof, and it being known to the court that the facts stated in said petition with reference to the writ of error formerly allowed to the Circuit Court of the United States for the Sixth Circuit are true, and it being doubtful whether a writ of error should be taken to the Supreme Court of the United States or to the United States Circuit Court of Appeals, said petition is now granted and a writ of error, as prayed, is allowed to the Supreme Court of the United States."

The cases came on to be heard and were argued and submitted together.

Mr. Lawrence Maxwell, Jr., for plaintiff in error in Nos. 259 and 271.

Mr. Harlan Cleveland and *Mr. Charles M. Cist* for defendant in error in No. 259. *Mr. Edgar W. Cist* was on their brief.

Mr. Harlan Cleveland, *Mr. Charles M. Cist* and *Mr. Edgar W. Cist* for defendant in error in No. 271.

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

When our jurisdiction is invoked under section 5 of the judiciary act of March 3, 1891, c. 517, on the ground that the case falls within the fourth, fifth or sixth of the classes of cases therein enumerated, it must appear that a title, right, privilege or immunity was claimed under the Constitution, and a definite issue in respect to the possession of the right must be distinctly deducible from the record; or that the constitutionality of the particular law or the validity or construction of the particular treaty was necessarily and directly drawn in question; or that the constitution or law of a State was distinctly claimed to be

in contravention of the Constitution of the United States; and it is not sufficient that the point is raised in the assignment of errors. *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430; *Miller* v. *Cornwall Railroad*, 168 U. S. 131.

The certificate shows that no question as to the constitutionality of the statute of Indiana, relied on by the plaintiff below, was raised or considered or decided in the Circuit Court, but that the objection made its appearance for the first time in the assignment of errors in the Circuit Court of Appeals.

In *Carter* v. *Roberts*, *ante*, p. 496, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction; or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance. But when the Circuit Court of Appeals has acted on the whole case, its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891. *Robinson* v. *Caldwell*, 165 U. S. 359; *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68; *United States* v. *Jahn*, 155 U. S. 109; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Benjamin* v. *New Orleans*, 169 U. S. 161.

The third question propounded in the certificate must be answered in the negative, and we do not deem it necessary to answer the others.

The writ of error in No. 271 was brought while the case was pending in the Circuit Court of Appeals on writ of error from that court. The whole case was open on each writ for review on the merits.

In *Columbus Construction Company* v. *Crane Company*, 174 U. S. 600, it was laid down that the act of March 3, 1891, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to or from two appellate courts; and as the record disclosed in that case that two writs of error to the judgment of the Circuit Court

were pending, one in the Circuit Court of Appeals and the other and subsequent writ in this court, the latter was dismissed. The writ of error in No. 271 falls within this rule.

The third question propounded in No. 259 *is answered in the negative.*

The writ of error in No. 271 *is dismissed.*

MR. JUSTICE HARLAN and MR. JUSTICE WHITE were not present at the argument and took no part in the decision.

LEOVY v. UNITED STATES.

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

No. 238. Argued April 12, 16, 1900.—Decided May 14, 1900.

Subject to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana had, under the act of March 2, 1849, c. 87, and the other statutes referred to in the opinion of the court, full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within its limits.

The dam constructed by the plaintiff in error at Red Pass was constructed under the police power of the State, and within the terms and purpose of the grant by Congress.

The decision of the jury, to whom it had been left to determine whether the plaintiff in error was guilty, that the pass was in fact navigable, is not binding upon this court.

The term navigable waters of the United States has reference to commerce of a substantial and permanent character to be conducted thereon.

The defendant below was entitled to the instruction asked for, but refused, that the jury should be satisfied from the evidence that Red Pass was, at the time it was closed, substantially useful to some purpose of interstate commerce, as alleged in the indictment.

Upon the record now before the court it is held that Red Pass, in the condition it was when the dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested; that upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal.

Statement of the Case.

At the April term of the Circuit Court of the United States for the Eastern District of Louisiana an indictment was found, charging Augustus F. Leovy and Robert S. Leovy, both of the parish of Plaquemines, State of Louisiana, with, on the 16th of November, 1895, unlawfully, wilfully, knowingly and without permission of the Secretary of War, building and causing to be built a dam in and across a certain navigable stream of the United States known as Red Pass, and outside of any established harbor lines, which said Red Pass flows in the Gulf of Mexico from a certain navigable stream of the United States, known as the Jump, which said Jump is an outlet of the Mississippi River into the Gulf of Mexico; that said dam has been continued by the defendants since the same was built, and still remains in and across said Red Pass, whereby the navigation of and commerce over and through Red Pass was then and there, and has been ever since, impaired and obstructed; they, the said defendants, well knowing the said Red Pass to be a navigable stream of the United States, in respect of which the United States then and there had jurisdiction, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

The defendants entered a plea of not guilty; and the cause was tried before the district judge, and a jury. The trial resulted, June 6, 1891, in a verdict of not guilty as to Augustus F. Leovy, and of guilty as to Robert S. Leovy; whereupon it was adjudged that said Robert S. Leovy pay a fine of two hundred dollars and costs of prosecution.

Several bills of exception on behalf of Robert S. Leovy were seasonably presented, and signed and allowed by the trial judge, who, likewise, on June 16, 1898, allowed a writ of error, and the cause was taken to the United States Circuit Court of Appeals, for the Fifth District, which court, on February 28, 1899, affirmed the judgment of the Circuit Court.

The case was then brought to this court on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Victor Leovy for Leovy. *Mr. Henry J. Leovy* and *Mr. Alexander Porter Morse* were on his brief.

Mr. George Hines Gorman for the United States.

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

On March 2, 1849, the Congress of the United States by an act of that date, c. 87, entitled "An act to aid the State of Louisiana in draining the swamp land therein," enacted: "That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State." 9 Stat. 352.

Similar grants have been made by Congress to other States within whose boundaries were undrained swamp and overflowed lands belonging to the United States. Act of September 28, 1850, c. 84; 9 Stat. 519. This legislation declares a public policy on the part of the government to aid the States in reclaiming swamp and overflowed lands, unfit for cultivation in their natural state, and is a recognition of the right and duty of the respective States, in consideration of such grants, to make and maintain the necessary improvements.

By the act of September 13, 1890, c. 907, 26 Stat. 436, 454, it is provided:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead,

haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

The tenth section of the same act provided as follows:

"Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5000 or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

In the river and harbor act of July 13, 1892, c. 158, 27 Stat. 88, 110, section 7 of the act of 1890 was amended and reënacted so as to read as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may

be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river of navigable waters of the United States under any act of the legislative assembly of any State until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of a breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War. *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

Subject, then, to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana has full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits. The pivotal question in the present case is whether Red Pass is a navigable water of the United States in such a sense that a dam erected therein for the purpose, and with the effect, of reclaiming overflowed lands and rendering them fit for cultivation, could be constructed without the previous authorization of the Secretary of War, it being admitted that no such authority was ever applied for or procured.

Evidence was tendered, on behalf of the defendants, tending to show that the dam in question was built by Robert S. Leovy,

who was the syndic or official of the contiguous ward, in pursuance of a resolution of the police jury of the parish of Plaquemines, dated July 1, 1890, directing such syndic to have Red Pass closed, and also tending to show an approval and ratification of the work by the levee board of the district and by the police jury at a meeting held February 8, 1898, and a direction to the attorney of the board to take such steps as should be necessary to prevent said Red Pass from being reopened. Some of these offers were rejected by the trial court, and exceptions were taken by the defendants. It is evident, however, that the court rejected the offers only because it was the opinion of the court that such evidence was immaterial, inasmuch as if Red Pass was not a navigable water of the United States, within the meaning of the statutes, the defendants would be entitled to a verdict of not guilty, regardless of the action of the police jury and of the levee board; and if Red Pass was such a navigable stream, the action of the state or parish authorities, unauthorized by the Secretary of War, would not avail the defendants. Indeed, the trial judge, in his charge, instructed the jury, as if the evidence had been admitted, in the following terms:

"I charge you that the police jury of the parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because, in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States without the previous authorization of the Secretary of War. Therefore, as it is not contended, in this case, that there was any authority from the Secretary, but on the contrary there is proof tending to show there was no such authority, then it results that it is no defence for Mr. Robert S. Leovy to show his pretended or alleged authority from the police jury of the parish of Plaquemines. The police jury could not legally have dammed it, and therefore Mr. Leovy could not."

We think, therefore, that we are warranted in regarding the dam in question as constructed under the police power of the State, and within the terms and purpose of the grant by Congress. There was evidence tending to show the character of

the country affected by floods from Red Pass — that it was swamp land and sea marsh from the Mississippi River to the Gulf. The testimony, enclosed in the record, of Shoenberger, president of the police jury and of the levee board; of Lewis, of the state board of engineers; of Wilkinson, ex-president of levee board, and of De Armas, showed that the closing of this pass has resulted in the redemption of large tracts of land, greatly increasing their value; that the property in the fifth ward, before Red Pass and Spanish Pass were closed, was valued at $5000, and at this time it is valued at $100,000; and that if those passes are kept closed for five years more it will be three times as much; and that, if this pass be opened again, by the removal of the dam, the orange property will be ruined.

It is conceded that Red Pass is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi River. This crevasse seems to have been formed some time before the grant by the United States to Louisiana, and the fact that by this and similar breaks through the banks of the river large tracts of land were rendered worthless, was, it may be assumed, well known to Congress, and was, indeed, the actuating cause of the grant.

As respects navigation through Red Pass, there was some evidence, on the part of the government, that small luggers or yawls, chiefly used by fishermen to carry oysters to and from their beds, sometimes went through this pass; but it was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it.

The evidence on the part of the defendants showed that for many years these crevasses or passes have been steadily growing shallower and narrower, and that at the time of closing Red Pass few of the smallest craft attempted to pass through it, and that the so-called mouth, or end of Red Pass next the Gulf, had closed up and become a mere marsh. The trifling use that was made of that pass was restricted to the river end of the crevasse.

We cannot accept the contention of the government's counsel

that, because the jury was left to determine whether the pass was in fact navigable, and found the defendant guilty, the decision of the jury is binding upon the appellate court. We have a right to consider under what instructions and definitions, given by the trial court, the jury found their verdict.

Before we examine the charge of the court, we shall briefly review some of the cases from which may be derived a definition of "navigable waters of the United States," within the meaning of the statutes under which this indictment was brought.

In the case of *Boylan* v. *Shaffer*, 13 La. Ann. 131, it was said by the Supreme Court of the State of Louisiana:

"Were the mere fact that steamboats or flatboats had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression on the banks of the Mississippi would then become a navigable stream, and should be opened for the benefit of rafts and boats and the convenience of a few persons, to the total destruction of the planting interests on the banks of the river. It is well known that the State has, for a number of years, been closing the small bayous making out of the principal rivers and bayous, and thus redeeming large and valuable tracts of land."

In the case of *Egan* v. *Hart*, 45 La. Ann. 1358, there was considered the right of the board of state engineers of the State of Louisiana to build a dam across an alleged stream, designated as Bayou Pierre. It was alleged that it was a purely private undertaking which the board of state engineers was not authorized to do at public expense, and that the dam would obstruct the navigation of Bayou Pierre, and would therefore violate the statute of Congress which forbade the construction of any bridge or other works over or in any navigable waters of the United States, unless approved by the Secretary of War. The trial judge, as to the contention that Bayou Pierre was a navigable stream, said:

"From Grande Ecore, where Bayou Pierre enters Red River, to a point some miles below its junction with Torre's Bayou, a stream flowing out of the river, Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question it has never been navigated, and is

unnavigable. Between these two points it is nothing but a high-water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch would be if it were dug deep and wide enough and kept supplied with a sufficiency of water."

And accordingly it was found by the trial court that Bayou Pierre was not a navigable water of the United States. Its judgment was affirmed by the Supreme Court of Louisiana, and the case was brought to this court and the judgment of the court below affirmed. *Egan* v. *Hart*, 165 U. S. 188.

In *Lake Shore & Michigan Southern Railway* v. *Ohio*, 165 U. S. 365, a judgment of the Supreme Court of Ohio, affirming a judgment of a trial court, whereby the defendant, an Ohio corporation, was directed to absolutely remove a bridge or modify its structure over the Ashtabula River, a stream wholly within the State of Ohio, was brought to and affirmed by this court. The case was thus stated in the opinion delivered by Mr. Justice White:

"Both the pleadings and the errors here assigned deny the jurisdiction of the State of Ohio or of its courts to control the subject-matter of the controversy, on the theory that the determination of whether the defendant possessed the right to erect the bridge and to continue it, although constructed without authority, is a Federal and not a state question. This contention is predicated on the act of Congress of September 19, 1890, (26 Stat. 423).

"The contention is that the statute in question manifests the purpose of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams, although they be situated wholly within their territory. That full power resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined." *Wilson* v. *Blackbird Creek*, 2 Pet. 245; *Withers* v. *Buckly*, 20 How. 84; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205;

Willamette Bridge Co. v. *Hatch*, 125 U. S. 1; *Shively* v. *Bowlby*, 152 U. S. 33, and cases there cited.

"Indeed the argument at bar does not assail the rule settled in the foregoing cases, but asserts that as the power which it recognizes as existing in the States is predicated solely upon the failure of Congress to assert its paramount authority, therefore the rule no longer obtains, since the act of 1890, relied on, substantially amounts to an express assumption by Congress of entire control over all and every navigable stream, whether or not situated wholly within a State."

After quoting the language of the statute, the opinion proceeded:

"On the face of this statute, it is obvious that it does not support the claim based upon it. Conceding, without deciding, that the words 'water-ways of the United States,' therein used, apply to all navigable waters, even though they be wholly situated within a State, and passing, also without deciding, the contention that Congress can lawfully delegate to the Secretary of War all its power to authorize structures of any kind over navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. . . . It follows, therefore, that even conceding, *arguendo*, that the words 'navigable waters,' as used in the act, were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce."

In the case of *The Daniel Ball*, 10 Wall. 557, the following definition of the term "navigable waters" was expressed:

"Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tidewater, and some of them are navigable for great distances by large vessels which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their

navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In the case of *The Montello*, 20 Wall. 430, 441, the following language was used:

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river."

In *Withers* v. *Buckley*, 20 How. 84, this court said:

"The act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property."

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having those objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains." *Barbier* v. *Connolly*, 113 U. S. 27.

It is a safe inference from these and other cases to the same effect which might be cited, that the term, "Navigable waters of the United States," has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express "power to regulate commerce with foreign nations, and among the several States and with the Indian tribes;" and with reference to which the observation was made by Chief Justice Marshall, that "it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons* v. *Ogden*, 9 Wheat. 1, 194.

While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of "navigable waters of the United States," or to define what traffic shall constitute "commerce among the States," so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.

The trial judge instructed the jury as follows:

"What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called in contradistinction to waters which arise and come to an end within the boundaries of the State. . . . But, if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United

States. . . . If it was navigable, and connected with waters that permitted a journey to another State, then it is a navigable water of the United States." And again: "But the fact I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if, from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi River."

If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one State, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the States, and would subject the officers and agents of a State, engaged in constructing levees, to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.

We also think that these instructions are open to the further

criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi River on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture." 21 Pick. 344.

We have read the testimony offered on behalf of the United States to show the kind and extent of the navigation of the Red Pass, and there is no view we can take of it that warranted the jury in finding that interstate commerce was ever transacted thereon. A few fishermen testified that they occasionally went through this pass with small vessels, carrying oysters for planting, and one or two cargoes of willows and timber were spoken of. None of these witnesses pretended to have carried produce or oysters out of the State. Nor can it be contended that the Red Pass, at the time the dam was built, was open to the Gulf. It was shown that the Gulf end of the pass had closed up, so that to get to the sea it was necessary to go out of Red Pass into Tiger Pass, Tontine Pass, and Grand Pass, which are open to the Gulf. And, accordingly, the trial judge instructed the jury that it was not necessary, in order to find Red Pass to be a navigable water of the United States, that they should find that it was navigable out to the Gulf; that it was sufficient if boats could reach the Mississippi River.

We think the defendant was entitled to the instruction asked for, but refused, that the jury should be satisfied from the evidence that Red Pass was at the time it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce. The instruction actually given was as follows:

"If Tontine Pass and Red Pass are available for commerce and navigation by means of luggers and oyster boats for the purpose of useful commerce, it would be a navigable stream; and if you find that it connected with other waters over which

a continuous journey could be made to other States, then it would be a navigable water of the United States.

"I repeat to you that, under my view of the case, all you have to decide is whether Red Pass was a navigable water of the United States, and as you decide that the case will go, because it is conceded that Mr. Leovy dammed it."

It is plain, therefore, that the attention of the jury was not directed at all to the question of any existing interstate commerce, and that the learned judge was of opinion, and so ruled, that the physical possibility of passing by a boat out of Red Pass into the Mississippi River constituted the pass a navigable water of the United States.

The court refused to give the following instruction:

"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi River from its natural channel, the result of which was to overflow a large portion of Plaquemines Parish, to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the police jury of the parish of Plaquemines, had a right to close it."

Perhaps this instruction ought to have been qualified or accompanied by a prayer that the acts of Congress, relied on by the government, were not applicable to the case suggested in the instruction asked for. But we think, in the circumstances disclosed by the evidence, the instruction should have been given, at least as so qualified.

The Circuit Court of Appeals, in dealing with the error assigned for the refusal of the trial judge to so charge, said:

"There is no legitimate evidence in the record tending to show that the police jury of the parish of Plaquemines ordered Red Pass closed for the purpose of 'affecting or promoting the peace, morals, education, health or good order of the people;' but the case does show that the pass was ordered closed, and was closed, for the sole purpose of reclaiming swamp lands. Under the power to regulate commerce, Congress having forbidden the closing of any navigable river without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits

of the State, can be closed under the exercise of the police power of the State for any purpose whatever, but where the purpose is only the reclamation of swamp lands, there is no doubt the police power of the State must give way to the authority of Congress."

We think that the trial court might well take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances. The defendant was not deprived of the defence that the act which he was charged with was performed in order to promote the health of the community, by the fact, if fact it was, that the order under which he acted did not say anything about the subject of health, but simply authorized the erection of the dam, so as to exclude the overflow from the river.

Nor are we disposed to concur in the doubt expressed whether any navigable water wholly within the limits of a State can be closed under the exercise of the police power for any purpose whatever. Such a doubt might be justified if there was express legislation of the United States forbidding the act proposed. But, as we have seen, in the present case the reclamation of swamp and overflowed lands was not only not forbidden, but was recognized as the duty of the State, in consideration of the grant of the public lands. And, for the reasons already given, we do not construe the acts of Congress under which this indictment was brought as intended to apply to the case of a stream of the history and character disclosed in this record. Hence, the state authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned.

It can scarcely be contended that if, by a sudden breach of the banks of the Mississippi River in the lowlands of Louisiana, a stream of water across agricultural lands was created, endangering the health and welfare of the inhabitants, the case

would be within the meaning and operation of the acts of Congress relied on in this case. It may be that in such a case, if the State declines to act or, rather, permits such a stream to become a highway of commerce among the States, the Federal control over it might attach. Thus Grand Pass, of which Red Pass is a branch, might, in view of the volume of its water and of the nature and amount of the commerce carried on it, be held to be a navigable water of the United States. However that may be, our conclusion, upon the record now before us, is that Red Pass, in the condition it was at the time when this dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested, that, upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal.

It is claimed by the counsel for the plaintiff in error that the act of July 13, 1892, so far amended and repealed the act of September 19, 1890, that the penal section of the latter was repealed, and that hence, as no penalty is provided in the act of 1892, the indictment and conviction of the plaintiff in error was without authority of law. It is also contended that the policy of Congress, in respect to the authority of the Secretary of War in the matter of obstruction to navigation, has been greatly changed and modified by the act of March 3, 1899. Fifty-fifth Cong. Session 3, Ch. 425, sec. 9, p. 1151.

It is also suggested that whatever may be the powers of Congress, over streams wholly within the State, they cannot be legitimately enforced by criminal prosecution of officers and agents of the State for acts done under state authority, but that, in such cases, the proper remedy would be found in bills in equity.

But in the view we take of the case in hand, we are not called upon to express any opinion on such questions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court, with directions to award a new trial.

KNAPP, STOUT & CO. COMPANY *v.* McCAFFREY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 263. Submitted April 24, 1900.—Decided May 14, 1900.

A bill in equity in a state court to foreclose a common law lien upon a raft for towage services, is not an invasion of the exclusive admiralty jurisdiction of the District Courts, but is a proceeding to enforce a common law remedy and within the saving clause of section 563 of a remedy which the common law is competent to give.

THIS was a bill in equity filed in the Circuit Court for the county of Mercer, Illinois, by the defendant in error, John McCaffrey, against the Knapp, Stout & Co. Company, (hereinafter called the Knapp Company,) and the Schulenburg & Boeckler Lumber Company, (hereinafter called the Schulenburg Company,) and its assignees, to enforce a lien for towage upon a half raft of lumber then lying at Boston Bay, in Mercer County.

The suit arose from a contract made April 6, 1893, by McCaffrey with the Schulenburg Company, in which, after reciting that McCaffrey had purchased of this company three steam tow boats for the sum of $17,500, it was agreed that McCaffrey was to tow all the rafted lumber such company would furnish him at or below their mill at Stillwater, Minnesota, to St. Louis, and deliver the same there to the company in quantities not exceeding one half a raft at a time, for which service he was to be paid $1.12\frac{1}{2}$ per thousand feet, board measure, for the lumber contained in the raft. The other provisions of the contract, of which there were many, were not material to the present controversy. After towing a number of rafts for the company, the charges for which remained unpaid, one of McCaffrey's steamers, known as the Robert Dodds, left Stillwater, October 13, 1894, with raft No. 10 of that year. The river being low and navigation difficult, McCaffrey was instructed to divide the raft, to bring one half to St. Louis, and to lay up the other half in some safe harbor. In compliance with these instruc-

Counsel for Parties.

tions McCaffrey divided the raft on October 20 at Boston Bay harbor in Mercer County, leaving one half there, while the other half was towed to St. Louis and delivered to the lumber company on November 2. The company paid the clerk of the boat $1250 without directions as to its application, and McCaffrey applied it on the amount due him for the towage of other rafts. The steamer returned to Boston Bay the morning of November 4, and laid up outside the raft for the winter.

On the next day, November 5, the Schulenburg Company sold the half raft in Boston Bay to the Knapp Company for $15,000, part in cash and the remainder in a note due in four months, which was paid at maturity. A bill of sale was given for the lumber, and a letter written to the watchman in charge of the raft informing him of the sale. On November 9 the Schulenburg Company made a voluntary assignment in St. Louis for the benefit of creditors. McCaffrey, hearing of the assignment, offered both companies to tow the half raft to St. Louis under his contract, but the Knapp Company informed him that they did not wish him to do so, saying that they did their own towing; whereupon McCaffrey, claiming to be still in possession of the half raft and believing that the company was about to take it from him by force, filed this bill to foreclose his lien for towage. The Knapp Company gave a bond for the amount of the claim and took the raft away.

The case came on for hearing in the Circuit Court upon pleadings and proofs, and resulted in a decree dismissing the bill without prejudice. McCaffrey appealed to the appellate court, which reversed the decree of the Circuit Court, and remanded the cause with directions to enter a decree for the sum of $3643.17, with interest thereon. The Knapp Company appealed to the Supreme Court of the State, which affirmed the judgment of the appellate court, (178 Ill. 107); whereupon defendant sued out a writ of error from this court.

Mr. Charles P. Wise for plaintiff in error.

Mr. Charles E. Kremer and *Mr. Guy C. Scott* for defendant in error.

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

Defendants set up in their answers and insisted, both before the appellate court and the Supreme Court of Illinois, that, if plaintiff had any lien upon the raft at all for his towage services, it was a maritime lien, enforceable only in the District Court of the United States as a court of admiralty. This is the only Federal question presented in the case.

By article three, section two, of the Constitution, the judicial power of the general government is declared to extend to "all cases of maritime and admiralty jurisdiction;" and, by section nine of the original judiciary act of September 24, 1789, c. 20, 1 Stat. 73, 76, it was enacted "that the District Courts shall have, exclusively of the courts of the several States, . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This language is substantially repeated in subdivision eight of Rev. Stat. § 563, wherein it is expressly stated that "such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the Circuit Courts."

The scope of the admiralty jurisdiction under these clauses was considered in a number of cases, arising not long after the District Courts were established, notably so in that of *De Lovio* v. *Boit*, 2 Gall. 398, wherein Mr. Justice Story brought his great learning to bear upon an exhaustive examination of all the prior authorities upon the subject both in England and in America.

But the exclusive character of that jurisdiction was never called to the attention of this court until 1866, when the States had begun to enact statutes giving liens upon vessels for causes of action cognizable in admiralty, and authorizing suits *in rem* in the state courts for their enforcement. The validity of these laws had been expressly adjudicated in a number of cases in Ohio, Alabama and California. The earliest case arising in this court was that of *The Moses Taylor*, 4 Wall. 411, in which was considered a statute of California creating a lien for the breach

of any contract for the transportation of persons or property, and also providing that actions for such demands might be brought directly against the vessel. The act further provided that the complaint should designate the vessel by name; that the summons should be served upon the master, or person in charge, the vessel attached, and, in case of judgment recovered by the plaintiff, sold by the sheriff. An action having been brought by a passenger before a justice of the peace of the city of San Francisco for failure to furnish him with proper and necessary food, water and berths, the defence was interposed that the cause of action was one of which the courts of admiralty had exclusive jurisdiction. The case finally reached this court, where the defence was sustained, the court holding that the contract for the transportation of the plaintiff was a maritime contract; that the action against the steamer by name, authorized by the statute of California, was a proceeding in the nature and with the incidents of a suit in admiralty. Upon this point Mr. Justice Field observed: "The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold." The court also held that the statute of California to the extent to which it authorized actions *in rem* against vessels for causes of action cognizable in admiralty, invested her courts with admiralty jurisdiction, and to that extent was void.

At the same term arose the case of *The Hine* v. *Trevor*, 4 Wall. 555, in which a statute of Iowa giving a lien for injuries to persons or property, and providing a remedy *in rem* against the vessel, was held to be obnoxious to the exclusive jurisdiction

of the Federal courts. Speaking of the common law remedy, saved by the statute, Mr. Justice Miller observed: "But the remedy pursued in the Iowa courts in the case before us, is in no sense a common law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without proceeding against the owners or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the Western States." The same principle was applied in the case of *The Belfast*, 7 Wall. 624, to a statute of Alabama under which contracts of affreightment were authorized to be enforced *in rem* in the state courts by proceedings the same in form as those used in the courts of admiralty. This was also held to be unconstitutional.

The principle of these cases was restated in *The Lottawanna*, 21 Wall. 558, 579, although the question settled by that case was that materialmen furnishing repairs and supplies to a vessel in her home port do not acquire thereby a lien upon the vessel by the general maritime law. To the same effect is *The J. E. Rumbell*, 148 U. S. 1, in which a lien by a state law for such repairs and supplies was given precedence of a prior mortgage. Finally, in the case of *The Glide*, 167 U. S. 606, it was held that the enforcement of such a lien upon a vessel, created by a statute of Massachusetts, for repairs and supplies in her home port, for which a remedy *in personam* may be had in admiralty, was exclusively within the admiralty jurisdiction of the courts of the United States, and that the statute of Massachusetts, to the extent that it provided for a proceeding *in rem*, and for a sale of the vessel, was unconstitutional and void. See also *Moran* v. *Sturges*, 154 U. S. 256.

The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings

in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the State. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction, *The Jefferson*, (*People's Ferry Co.* v. *Beers*,) 20 How. 393; *The Capitol*, (*Roach* v. *Chapman*,) 22 How. 129, we held in *Edwards* v. *Elliott*, 21 Wall. 532, that, in respect to such contracts, it was competent for the States to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem*. The same principle was applied in *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, to a statute of Illinois giving a lien upon a vessel for damage done to a building abutting on the water, upon the ground that the court had previously held that there was no jurisdiction in admiralty for damage done by a ship to a structure affixed to the land. *The Plymouth*, 3 Wall. 20; *Ex parte Phœnix Ins. Co.*, 118 U. S. 610. There was really another sound reason for the decision in the fact that the suit was *in personam*, with an attachment given upon the property of the defendant, which, as we shall see hereafter, is quite a different case from a proceeding *in rem*.

To establish the proposition that the proceeding in this case was an invasion of the exclusive jurisdiction of the admiralty courts defendants are bound to show, first, that the contract to tow a raft is a maritime contract; second, that the proceeding taken was a suit *in rem* within the cases above cited, and not within the exception of a common law remedy, which section 563 was never designed to forestall.

The first of these conditions may be readily admitted. That a contract to tow another vessel is a maritime contract is too clear for argument, and there is no distinction in principle between a vessel and a raft. Whether the performance of such a contract gives rise to a lien upon the raft for the towage bill admits of more doubt; indeed, the authorities, as to how far a raft is within the jurisdiction of admiralty, are in hopeless con-

fusion, but for the purposes of this case we may admit that such lien exists. But, if existing, it would not oust or supplant the common law lien dependent upon possession.

The real question is whether the proceeding taken is within the exception "of saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." It was certainly not a common law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common law *remedy;* and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as "the means employed to enforce a right, or redress an injury." While, as stated by him, remedies for non-fulfillment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent—a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action.

Some of the cases already cited recognize the distinction between a common law action and a common law remedy. Thus in *The Moses Taylor*, 4 Wall. 411, 431, it is said of the saving clause of the judiciary act: "It is not a remedy in the common law courts which is saved, but a common law remedy." To same effect is *Moran* v. *Sturges*, 154 U. S. 256, 276.

In the case under consideration the remedy chosen by the plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are

paid, is too clear for argument. We know of no reason why this principle is not applicable to property towed as well as to property carried. While the duties of a tug to its tow are not the duties of a common carrier, it would seem that his remedy for his charges is the same, provided that the property towed be of a nature admitting of the retention of possession by the owner of the tug. But whatever might be our own opinion upon the subject, the Supreme Court of Illinois, having held that under the laws of that State the plaintiff had a possessory lien upon this raft, that such lien extended to so much of the raft as was retained in his possession, for the entire bill, and that under the facts of this case plaintiff did have possession of the half raft until he surrendered it under order of the court for its release upon bond given, we should defer to the opinion of that court in these particulars, as they are local questions dependent upon the law of the particular State.

Whether a bill in equity will lie to enforce a possessory lien may admit of some doubt, and the authorities are by no means harmonious. That a person having a lien upon chattels has no right himself to sell such chattels in the discharge of his lien, is well settled. *Doane* v. *Russell*, 3 Gray, 382; *Jones* v *Pearle*, 1 Strange, 557; *Lickbarrow* v. *Mason*, 6 East, 21; *Briggs* v. *Boston and Lowell Railroad*, 6 Allen, 246; *Indianapolis & St. Louis Railroad* v. *Herndon*, 81 Ill. 143; *Hunt* v. *Haskell*, 24 Me. 339; and in the case of the *Thames Iron Works &c. Co.* v. *Patent Derrick Co.*, 1 J. & H. 93, it was held by Vice Chancellor Wood that ship builders, having a lien upon the ship built by them according to the contract for the purchase money, could not enforce their lien by sale. But in some jurisdictions, and notably so in Illinois, it is held that liens for the enforcement of which there is no special statutory provision, are enforceable in equity. *Black* v. *Brennan*, 5 Dana, 310; *Charter* v. *Stevens*, 3 Denio, 33; *Dupuy* v. *Gibson*, 36 Ill. 197; *Cushman* v. *Hayes*, 46 Ill. 145; *Cairo & Vincennes Railroad* v. *Fackney*, 78 Ill. 116; *Barchard* v. *Kohn*, 157 Ill. 579. Such being the practice in Illinois, we recognize it as expressive of the local law. There were circumstances in this case which appealed with peculiar force to the discretion of a court of equity. The

defendant disputed McCaffrey's lien and right of possession to the raft, and announced its intention of towing it to St. Louis itself. It was in a position where it might have been taken away by a superior force, unless the plaintiff incurred the expense of employing a gang of men to watch it. Under such circumstances it was not only natural but just that he should have applied to a court of equity for relief in the enforcement of his common law remedy.

We have held in several cases that analogous proceedings were no infringement upon the exclusive admiralty jurisdiction of the Federal courts. Thus, in *Leon* v. *Galceran*, 11 Wall. 185, three sailors brought suits in a state court against the owner of a schooner to recover their wages, and had the schooner, which was subject to a lien or privilege in their favor, according to the laws of Louisiana, similar in some respects to the principles of the maritime law, sequestered by the sheriff of the parish. The writ was levied upon the schooner, which was afterwards released upon a forthcoming bond. This was held to be an ordinary suit *in personam* with an auxiliary attachment of the property of the defendant, and no infringement upon the admiralty jurisdiction. Said Mr. Justice Clifford: "They brought their suits in the state courts against the owner of the schooner, as they had a right to do, and, having obtained judgment against the defendant, they might levy their execution upon any property belonging to him, not exempted from taxes or execution, which was situated in that jurisdiction."

In *Steamboat Co.* v. *Chase*, 16 Wall. 522, a steamboat owned by the company ran over a sail boat containing the plaintiff's intestate, and killed him. His administrator brought suit against the company in a state court of Rhode Island, under an act making common carriers responsible for deaths occasioned by their negligence, and providing that the damages be recovered in an action on the case. Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common law remedy. The contention was

held to be unsound. So, also, in *Schoonmaker* v. *Gilmore*, 102 U. S. 118, it was held that courts of admiralty had no exclusive jurisdiction of suits *in personam* growing out of collisions.

In the case already cited of *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, a petition was filed by the elevator company against the owner of a tugboat for injuries done by the jib boom of a schooner in tow of the tug to the wall of plaintiff's warehouse. The petition prayed for a writ of attachment against the defendant, commanding the sheriff to attach the tug, summon the defendant to appear, and for a decree subjecting the tug to a lien for such damages. The statute under which the proceedings were instituted gave a lien for all damages arising from injuries done to persons or property by such water craft. It was held that the damage having been done upon the land, there was no jurisdiction in admiralty, and that the suit was *in personam* with an attachment as security, the attachment being based upon a lien given by the state statute. Said the court: "There being no lien on the tug by the maritime law for the injury on land inflicted in this case, the State could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce." It would seem that even if the suit had been *in rem* against the vessel, it would have been sustained, as the injury was not one for which an action would have lain in admiralty.

In the case under consideration the suit was clearly one *in personam* to enforce a common law remedy. It was no more a suit *in rem* than the ordinary foreclosure of a mortgage. The bill prayed for process against the several defendants; that they be required to answer the bill; that plaintiff be decreed to have a first lien upon the raft for the amount due him; that the defendants be decreed to pay such amount; that in default of such payment the raft be sold to satisfy the same; and, that in case of such sale, the purchaser have an absolute title, free from all equity of redemption and all claims of the defendants, and that they be debarred, etc. This is the ordinary prayer of a foreclosure bill. The decree of the appellate court reversed that of the Circuit Court, and directed a recovery of a specified

amount. It resembles a decree *in rem* only in the fact that the property covered by the lien was ordered to be sold. Such sale, however, would pass the property subject to prior liens, while a sale *in rem* in admiralty is a complete divestiture of such liens, and carries a free and unincumbered title to the property, the holders of such liens being remitted to the funds in the registry which are substituted for the vessel. *The Helena*, 4 Rob. Ad. 3.

The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (sec. 563) of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction.

The decree of the Supreme Court of Illinois is, therefore,

Affirmed.

BRYAR *v.* CAMPBELL.

APPEAL FROM THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 227. Argued April 12, 1900. — Decided May 14, 1900.

Plaintiff's intestate, a married woman, filed a bill in the District Court of the United States against her husband's assignee in bankruptcy and the purchaser of a lot of land at the assignee's sale, setting forth her equitable claim to the property, and praying that the purchaser be required to convey to her. A decree was entered in her favor and an appeal taken to the Circuit Court by Campbell, the purchaser. Plaintiff did not press the appeal, but began a new action in ejectment in a state court against the defendant, Campbell, who set up a new title in himself and recovered a judgment. Thereupon, and sixteen years after the decree in her favor in the District Court, plaintiff moved to dismiss the appeal to the Circuit Court. This motion was denied. Thereupon she set up the decree in her favor, although it had not been pleaded by either party in the state court. *Held:*

(1) That the plaintiff having abandoned her suit in the District Court, it was too late to move to dismiss the appeal;

(2) That the decree not having been pleaded in the state court could not now be resuscitated;

(3) That the judgment of the state court was *res adjudicata* of all the issues between the parties, and that the decrees of the Circuit Court and Circuit Court of Appeals reversing the decree of the District Court and dismissing plaintiff's bill should be affirmed.

THIS was a suit in equity instituted in the District Court for the Western District of Pennsylvania, April 30, 1877, by Jane Bryar against James Bryar, her husband, and Robert Arthurs, his assignee in bankruptcy, to enjoin the latter from partitioning or offering for sale an undivided half of seven acres of land in the city of Pittsburgh, for which, as she alleged, a conveyance had been made by mistake to her husband, though she had paid the purchase money with her own individual funds. Notwithstanding the pendency of this bill the assignee proceeded to sell the land at assignee's sale to the defendant Thomas Campbell, subject to the two mortgages hereinafter mentioned. On August 15, 1878, Campbell was permitted to intervene and de-

fend the bill, the bill being amended by a new prayer that the defendants make, execute and deliver to the plaintiff a deed for the property in question.

The case was heard upon pleadings and proofs, and on June 26, 1879, a decree was rendered in favor of the plaintiff, declaring her to be the equitable owner of the land in suit; that defendant Campbell was chargeable with notice of her rights, and was bound to convey according to the prayer of the bill. An appeal was immediately taken by Arthurs and Campbell to the Circuit Court, where the case was docketed August 30, 1879. Here the case rested, without further action, for sixteen years, and until December 20, 1895.

Meantime, however, and in February, 1880, Jane Bryar and her husband in her right, began an action of ejectment in the Court of Common Pleas of Allegheny County against Thomas Campbell, John W. Beckett and William B. Rodgers, for the land in controversy, which resulted, May 19, 1881, in a verdict for the defendants, and a writ of error from the Supreme Court of Pennsylvania, which, on November 14, 1881, affirmed the judgment of the Court of Common Pleas. 30 Pitts. Legal Jour. 12.

Nothing further appears to have been done until December 30, 1895, when Mrs. Bryar moved the Circuit Court for the Western District of Pennsylvania for an order declaring the appeal of Thomas Campbell from the decree of the District Court, deserted, upon the ground that the appellants had failed to bring up the record from the District Court, to pay the entry costs, or to prosecute their appeal to the next term of the Circuit Court. Campbell filed an answer to this motion, setting up his purchase of the land at assignee's sale, and stating that he had not prosecuted his appeal because he had purchased a mortgage made by James Bryar to Edward R. James, upon which mortgage the property had been sold to his attorney, William B. Rodgers, who had conveyed to him; that he went into possession of the land; that the petitioner and her husband had brought the action of ejectment against him above referred to, and a verdict had been rendered in favor of the defendants; that he believed the result of the ejectment case made it unnecessary

for any further proceedings upon the appeal, and that he and his vendees had ever since been in undisputed possession of the land. The motion to dismiss the bill, or rather to declare the appeal deserted, was denied, and the death of the plaintiff Jane Bryar being suggested, it was ordered that her heirs at law, the appellants, be substituted as plaintiffs.

The appeal subsequently went to a hearing in the Circuit Court upon the former testimony, and new testimony put in by Campbell in support of his answer, and resulted in a reversal of the District Court, and a dismissal of the bill. Plaintiffs appealed to the Circuit Court of Appeals, which affirmed the decree of the Circuit Court, 62 U. S. App. 435, whereupon plaintiffs appealed to this court.

Mr. Edward Campbell and *Mr. Lowrie C. Barton* for appellants.

Mr. W. B. Rodgers for appellee.

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

Plaintiffs ask for a reversal of this decree upon the grounds, first, that the appeal from the District Court to the Circuit Court in bankruptcy was not claimed and notice given to the clerk of the District Court within the time prescribed by the rules; and, second, because it affirmed the decree of the Circuit Court upon its merits.

1. If there be anything in the defence that the appeal from the District Court to the Circuit Court in the bankruptcy proceedings was not taken within the time prescribed by law, it comes too late. It is true that Rev. Stat. sec. 4981, declares that "no appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision ap-

pealed from." It appears that the decree of the District Court was entered June 26, 1879, and that a petition for an appeal was addressed to the judge of the Circuit Court, the jurat to which was dated June 28, and on June 30 a bond for costs on appeal was filed. The appeal, however, to the Circuit Court was not allowed and filed until July 16, twenty days after the decree of the District Court, and it does not appear that any notice was given to the clerk of the District Court, or to the defeated party, as required by section 4981; but it further appears that the petition for appeal, the allowance thereof, a copy of the docket entries and a bond for costs were filed in the Circuit Court, August 30, 1879. Here the matter rested until December 20, 1895, when Mrs. Bryar, the prevailing party, moved the Circuit Court, not to dismiss the appeal for the reason that it was not taken in time, but, stating that it had been "duly allowed," to obtain an order declaring it deserted, for the reason that the appellants had failed to bring up the record from the District Court, pay the entry costs or prosecute their appeal. This was apparently treated as a motion to dismiss, and was denied. After a lapse of sixteen years it is now too late to ask this court to hold that the appeal should have been dismissed for a reason which does not seem to have been called to the attention of the Circuit Court, when the original motion was made to declare the appeal deserted. If the plaintiffs in that case had intended to insist upon their rights under the decree, they should either have moved to dismiss the appeal within a reasonable time, or pressed it to a hearing in the Circuit Court, instead of abandoning it and bringing a new suit upon the same cause of action in the state court.

2. The case upon the merits depends upon the effect to be given to the judgment in favor of Campbell in the ejectment suit brought by Mrs. Bryar in the state court. Mrs. Bryar appears, for some unexplained reason, to have abandoned her original suit in the District Court, notwithstanding the decree in her favor, and to have elected to begin an action in ejectment in the state court. To this action Campbell appears to have set up a new defence, which had accrued since the decree in the District Court, arising upon two mortgages executed in

1874 by James Bryar, namely, one to Thomas McClintock for $3000, the other to E. R. James for $2000, which mortgages were, in 1878, foreclosed and judgment entered. In the opinion of the Supreme Court of the State it is stated that William R. Rodgers, one of the defendants in the ejectment action, as the attorney for Campbell, purchased the judgments obtained upon the mortgages, issued execution, sold the seven acres at sheriff's sale, and bought the same for $50. A deed was made by the sheriff to Rodgers, who gave a memorandum to Campbell, stating that he would convey to any one Campbell might wish, when requested so to do. It was not disputed that Rodgers bought and held in trust for Campbell whatever title he obtained by the sheriff's deed.

Upon this state of facts the court held that the mortgages were valid liens, and the fact that the mortgagees were entirely unaffected by any notice of the secret equity of Mrs. Bryar being undisputed, it necessarily followed that, whether Campbell had notice or not, he stood in their shoes when he purchased the title derived from them. "It is contended, however, that Campbell having bought at the assignee's sale, subject to these mortgages, was bound to pay them off, and when he did so they were extinguished. But unless he expressly or by necessary implication agreed to pay them, he was not bound to do so, and had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them." It will be seen from this that Campbell did not rely upon his purchase at the assignee's sale, as to which the District Court seems to have held that he had notice of Mrs. Bryar's equity in the premises, but upon the purchase of the rights of the mortgagees, who appear to have taken the mortgages, supposing the property to belong to James Bryar, in whose name it stood upon the record.

We are advised of no substantial reason why the judgment of the state court does not operate as *res judicata* in this case. The original suit in the District Court was begun by Mrs. Bryar, one of the original plaintiffs in the ejectment suit, for the purpose of compelling the defendant Thomas Campbell to convey to her as the equitable owner thereof the premises now in dis-

pute. The ejectment suit was begun by her and her husband, in her right, upon the same title against three defendants, one of whom was Campbell, to obtain possession of the same property. The action was brought by Mrs. Bryar upon her equitable title, a procedure allowable in the courts of Pennsylvania, where an equitable ejectment is the full equivalent of and substitute for a bill in equity. *Peterman* v. *Huling*, 31 Penn. St. 432; *Winpenny* v. *Winpenny*, 92 Penn. St. 440. Such procedure, though not authorized by the practice of the Federal courts, will be respected when the question arises upon the effect to be given the judgment. *Miles* v. *Duryee*, 7 Cranch, 481; *Miles* v. *Caldwell*, 2 Wall. 36; *Faber* v. *Hovey*, 117 Mass. 107. While it appears from the opinion of the Supreme Court of the State that the decree of the District Court was called to its attention, it was not set up as a bar to the ejectment in the state court for the obvious reason that Mrs. Bryar had abandoned it by bringing suit in the state court, and there was no object in pleading it, while Campbell did not plead it because it was adverse to him. It would seem, too, that under the practice in Pennsylvania a decree cannot be used as *res judicata* pending an appeal to a higher court. *Souter* v. *Baymore*, 7 Penn. St. 415. He could not even plead the pendency of the former suit. *Smith* v. *Lathrop*, 44 Penn. St. 326; *Stanton* v. *Embrey*, 93 U. S. 548, 554.

It is now contended that the existence of this prior decree ousted the jurisdiction of the state court. Indeed the only object of Mrs. Bryar in endeavoring to have the appeal dismissed seems to have been to reinstate the original decree in her favor more effectually, and to insist that it was a final disposition of the matters in controversy between herself and Campbell. The question is whether, having abandoned the original decree for a new action in the state court in which she was defeated, her heirs can now claim that the original decree in the District Court, though not set up as a bar by either party, and notwithstanding the appeal, can be resuscitated after a lapse of sixteen years for the purpose of defeating the action of the state court. To state this proposition is to answer it. The state court was at liberty to proceed to dispose of the case upon

the issues made by the parties, and as neither party saw fit to set up the former decree as a bar to the action, the state court was not bound to notice it. It did not affect in any way the jurisdiction of that court. In addition to this, however, Campbell relied upon a wholly different defence from that set up by him in the former suit, and one which had accrued to him after the decree in that court was rendered. Whether the decree, if properly pleaded, would have operated as a bar it is unnecessary to determine. As the same issues are presented here as were presented in the state court, it is entirely clear that they cannot be relitigated.

The judgment of the state court was conclusive upon these issues, and the decree of the Circuit Court of Appeals to that effect was correct, and it is

Affirmed.

THE CARLOS F. ROSES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 243. Argued January 12, 1900. — Decided May 14, 1900.

The Carlos F. Roses, a Spanish vessel, owned at Barcelona, Spain, sailed from that port for Montevideo, Uraguay, with a cargo which was discharged there and a cargo of jerked beef and garlic taken on board for Havana, for which she sailed March 16, 1898. On May 17, while proceeding to Havana, she was captured by a vessel of the United States and sent to Key West, where she was libelled. A British company doing business in London, laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Montevideo, and had received bills of lading covering the shipments. The vessel was condemned as enemy's property, but the proceeds of the cargo, which had been ordered to be sold as perishable property, was ordered to be paid to the claimants. *Held*,

(1) That as the vessel was an enemy vessel, the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary ;

(2) That on the face of the papers given in evidence, it must be presumed

that when these goods were delivered to the vessel, they became the property of the consignors named in the invoices;

(3) That the British company got the legal title to the goods and the right of possession only if such were the intention of the parties, and that that intention was open to explanation, although the persons holding the papers might have innocently paid value for them;

(4) That in prize courts it is necessary for the claimants to show the absence of anything to impeach the transaction, and at least to disclose fully all the surrounding circumstances, and that the claimants had failed to do so;

(5) That the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties;

(6) That in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt and the assignment as a cover to an enemy interest.

The Carlos F. Roses was a Spanish bark of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses Valenti, a citizen of Barcelona. Her last voyage began at Barcelona, whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo consisting of jerked beef and garlic to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama Channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York and sent to Key West in charge of a prize crew. The bark and her cargo were duly libelled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken *in preparatorio*. Kleinwort Sons and Company of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and belief. In this it was alleged that

Statement of the Case.

Kleinwort Sons and Company were merchants in London; that the members of the firm were subjects of the United Kingdom of Great Britain and Ireland; that in February and March, 1898, the bark, being then in Montevideo, bound on a voyage to Havana, took on board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau and Company, merchants of Montevideo, to be transported to the port of Havana, and there to be delivered to the order of the shippers according to the condition of certain bills of lading issued therefor by the bark to Pla Gibernau and Company; that the members of the firm of Gibernau and Company were citizens of the Argentine Republic; that the bark left Montevideo on March 16, and proceeded on her voyage to Havana, until May 17, when, being at a point in the Bahama Channel off Martinique, she was captured by the United States cruiser New York, without resistance on her part, and sent into Key West as prize of war. That after the shipment of the cargo in Montevideo claimants made advances to the shippers and owners of the cargo in the sum of £6297, British sterling, to wit, £2714 item thereof, upon the security of said lot of 110,256 kilos of jerked beef and 19,980 strings of garlic, and £3583 item thereof, upon the security of said lot of 165,384 kilos of jerked beef; that at the time of making said advances and in consideration thereof, bills of lading covering the shipments were delivered to claimants duly indorsed in blank with the intent and purpose that they should thereby take title to said bills of lading, and to said shipments of jerked beef and garlic, and should, on the arrival of the vessel at her destination, take delivery of the shipments and hold the same as security for their said advances until paid, and with the right to dispose of said shipments and to apply the proceeds to the payment of their said advances; and accordingly the said Kleinwort Sons and Company did become and ever since have been and still are as aforesaid the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to. The affidavits further stated that the advances were equivalent in money of the United States to about $30,644.35, and that no part of the same had been paid, or otherwise secured to be paid.

Statement of the Case.

The cause was heard on the libel and claims of the master of the bark and Kleinwort and Company, and the evidence taken *in preparatorio.* The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to "have sixty days in which to file further proof of ownership;" and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three *ex parte* affidavits before the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. From these affidavits and papers it appeared that the voyage of the Carlos F. Roses was a joint venture entered into by Pedro Pagés of Havana, a Spanish subject; the Spanish owners of the vessel, and Gibernau and Company. The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau and Company on commission, and by them delivered to the Carlos F. Roses "consigned to order for account and risk and by order of the parties noted" in the invoices. The shipment of jerked beef containing 275,640 kilos in bulk was divided thus: 60 %, 165,384 kilos, "to the expedition or voyage of the Carlos F. Roses;" 40 %, 110,256 kilos, "to Mr. Pedro Pagés of Havana." The shipment of garlic was divided thus: 9990 strings, "account of Mr. Pedro Pagés," and 9990 strings for "account of" Gibernau and Company. Both invoices were signed by Gibernau and Company, and bore date March 11 and 12, 1898.

Harcke stated in one of his affidavits that: "The said cargo was ultimately destined for Don Pedro Pagés, of Havana, who in the ordinary course of business would by payment to or in-

demnification of Kleinwort Sons & Co. or their agents in that behalf take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messieurs Kleinwort Sons & Co., or their agents, on account of the payments made by them through the said advances by said Don Pedro Pagés, or by any person on his behalf, or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments except so far as the proceeds of the said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own right to the extent of such payments the insurers of the said goods."

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was *viséd* by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau and Company, "to order." On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau and Company for transportation to Havana "for account and at the risk of whom it may concern;" one of the bills covering a shipment of 165,384 kilos of jerked beef; another of 110,256 kilos of jerked beef; and the third of 19,980 bunches of garlic.

March 15, Gibernau and Company drew this bill of exchange:

"No. 128. Montevideo, March 15, 1898. For £2714 13 8. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2714 13 8, value received, which you will charge to the account of Pedro Pagés of Havana as per advice.

"Pla Gibernau & Co.

"To Messrs. Kleinwort Sons & Co., London."

On the same day Maristany drew this bill of exchange:

"No. 129. Montevideo, March 15, 1898. For £3583 11 6.

Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3583 11 6, invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

"YSIDRO BERTRAN MARISTANY.

"To Messrs. Kleinwort Sons & Co., London."

This was indorsed by Gibernau and Company.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L't'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons and Company, and on May 9 were paid under discount by that firm. Harcke alleged that at the time of the acceptance of these bills of exchange, bills of lading covering the shipments of the garlic, and the jerked beef shipped for account and by order of Pagés, indorsed in blank by Gibernau and Company, were delivered to claimants, as security for the payment of the bills of exchange; and that thereafter the bill of lading covering the shipment of jerked beef made for the account and by the order of the Carlos F. Roses was delivered in like manner, but affiant did not state when. It was also alleged that on April 9 the bills of lading and invoices, covering the shipment of garlic and Pagés's share of the jerked beef were mailed by Kleinwort Sons and Company to Gelak and Company, bankers of Havana, to be held until the bills of exchange charged to the account of Pagés should be paid. Neither the instructions sent to Gelak and Company, nor a copy of them, were produced. Harcke further alleged that the bills of lading and the invoices covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons and Company "pending the disposal of the said cargo." On May 17, the day of the capture, Kleinwort Sons and Company cabled Gelak and Company requesting them to return the bills of lading and invoices, which had been forwarded on April 9. June 9, Gelak and Company replied that the bills and invoices had not been received. On October 21 claimants produced these bills of lading, alleging that they had been received from Gelak and

Company on October 18, and that neither Pagés, Gibernau and Company, nor the owners of the Carlos F. Roses had paid claimants anything for or on account of their acceptance and payment of the bills of exchange. The cause of the cargo was heard a second time on the claim, test affidavit, and Harcke's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale; from which decree the United States took this appeal.

Mr. James H. Hayden and *Mr. Assistant Attorney General Hoyt* for the United States. *Mr. Joseph K. McCammon* was on their brief.

Mr. Wilhelmus Mynderse for the claimants.

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

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The District Court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and, therefore, entered the decree in claimant's favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall. 451; *The Benito Estenger*, 176 U. S. 568.

Further proofs on claimant's behalf were ordered to be furnished within sixty days from June 2; and the time was enlarged to August 31; and again to October 15. The proofs

tendered were three affidavits of claimants' manager sworn to September 27, October 12 and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements, where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped "to order for account and risk and by order of the parties noted below." The consignees noted below in the invoice of the jerked beef were the owners of the vessel, "the expedition or voyage of the 'Carlos F. Roses'" and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned;" that is, Gibernau and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the consul of Spain, dated the day before, was: "Good for Havana, with a cargo of jerked beef and garlic." As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken "for account of whom it may concern," should be especially noted, since the reasonable inference is

that the consignees must have been known to the master. And it also should be observed that there was no charter party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the Carlos F. Roses. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau and Company, and they did not claim, and have not claimed it, nor was it asserted that Gibernau and Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244; *The Harrison*, 1 Wheat. 298. In fact, claimants admit that the whole cargo "was ultimately destined for Don Pedro Pagés of Havana." The bill of exchange drawn by Gibernau and Company named Kleinwort Sons and Company as acceptors, and directed them to charge the amount to the account of "Pedro Pagés of Havana as per advice." The bill drawn by Maristany also named Kleinwort Sons and Company as drawees, and directed them to charge the amount "to P. Roses Valenti of Barcelona as per advice." In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the persons named.

Harcke said that when the bills of exchange were accepted by Kleinwort Sons and Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlic were delivered to them in consideration of the acceptance of the

draft for £2714 13 8, and that bills of lading for the 165,354 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3583 11 6. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons and Company they were retained "pending the disposal of the cargo." Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlic were forwarded to Gelak and Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak and Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June, Gelak and Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak and Company's possession; and in October duplicates were also received by claimants from Gelak and Company, with, so far as disclosed, no accompanying explanation. And Harcke's affidavits failed to set forth the relations, transactions or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, "the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the court would have looked for satisfaction."

The affidavits alleged that claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to their Havana agents, or whether they retained them upon instructions from the enemy owners; or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity; nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the asserted neutral owners to prove

beyond question their right and title. And still for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard* v. *Vinton*, 105 U. S. 7; *Shaw* v. *Railroad Company*, 101 U. S. 557.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner, in virtue of some arrangement with his customer, or on the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of any-

thing to impeach the transaction, and at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion, — the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier, (Rawle's Revision,) 73; *The Young Mechanic*, 2 Curtis, 404.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created by

the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . . The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them,

and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

In *The Hampton*, 5 Wall. 372, the schooner Hampton and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed; nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overriden by the capture. Mr. Justice Miller said:

"The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his

hands already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts."

In *The Battle*, 6 Wall. 498, the steamer Battle and cargo were captured on the high seas as prize of war, brought into port and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials, furnished, and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks Prize Cases, 26.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . . But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in

a court of prize? . . . The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . . But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. . . . But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . . I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts."

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was

disallowed because the claimants' interest was not sufficient to support it; and the court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case, claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien,

and condemned the cargo as enemy property. Dr. Lushington referred to *The San Jose Indiano and Cargo*, 2 Gallison, 267, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers and Company of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. Dyson, Brothers, and Finnie, by order and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, Dyson, Brothers and Company wrote Dyson, Brothers, and Finnie: "For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected although Dyson, Brothers and Company had the proceeds of his hides in their hands.

The Lynchburg, Blatchford's Prize Cases, 57, and *The Amy Warwick*, 2 Sprague, 150, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner Lynchburg with a cargo of coffee had been libelled during the civil war as enemy property, and also for an attempt to violate blockade. Brown Brothers and Company, loyal citizens, intervened as claimants of 2045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright and Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright and Company drew drafts on Brown Brothers and Company for £6000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States attorney that 1541 bags of the coffee

should be released to Brown Brothers and Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers and Company, in which Wortham and Company of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value of the 1541 bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: "The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law, that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24. Here, the vessel was an enemy bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading." The 504 bags were condemned, "because, by intendment of law, that portion belonged to Wortham and Company, and was not shown by the proofs to be exempt from capture as prize."

In *The Amy Warwick*, J. L. Phipps and Company of New York, British subjects, purchased 4700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers and Co., their firm at Rio, with funds of an enemy firm, and £2000 of their own money by draft on Phipps and Co., their firm at Liverpool. They took from the master

a bill of lading which stated that Phipps Brothers and Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers and Company indorsed the bill of lading over to J. L. Phipps and Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. This letter stated that the coffee was shipped for account of merchants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps and Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and *The Frances*, *The Tobago*, *The Marianna* and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, "for, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but

merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee."

We agree with counsel for the United States that notwithstanding the indorsement of Gibernau and Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proven to be *bona fide*, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest.

Something was said in argument in relation to the character of the cargo. It is true that by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or ports of naval or military equipment. *The Benito Estenger*, 176 U. S. 568; *The Panama*, 176 U. S. 535; *The Peterhoff*, 5 Wall. 28; Grotius De Jure Belli et Pacis, lib. III, c. 1, § 5; Hall, § 236.

Doubtless, in this instance, the concentration and accumulation of provisions at Havana might fairly be considered a necessary part of Spanish military operations, *imminente bello*, and these particular provisions were perhaps especially appropriate for Spanish military use; but while these features may well enough be adverted to in connection with all the other facts and circumstances, we do not place our decision upon them.

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that

The decree below must be reversed, and a decree of condemnation directed to be entered, and it is so ordered.

Mr. Justice Shiras and Mr. Justice Brewer, dissenting.

Mr. Justice Shiras, with whom concurred Mr. Justice Brewer, dissenting.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida, awarding to Kleinwort Sons & Company, the claimants, the proceeds of the sale of the cargo of the Spanish bark Carlos F. Roses.

The vessel sailed under the Spanish flag, and was owned, officered and manned by Spaniards. On or about March 14, 1898, Pla Gibernau & Company, a firm of commission merchants doing business at Montevideo, in the Republic of Uruguay, shipped on board the bark, then lying at Montevideo, a cargo consisting of about 275,000 kilos of jerked beef and 20,000 strings of garlic. The property was consigned upon three bills of lading to the order of the shippers; and two bills of exchange, at ninety days, were drawn upon the claimants, Kleinwort Sons and Company, British subjects, domiciled and doing business as bankers at London, England. One of these bills, for £2714 3 8, was drawn by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited, a banking concern doing business in Montevideo; the other, for £3583 11 6, was drawn by the master of the Carlos F. Roses to the order of Pla Gibernau & Company, and was by them indorsed to the order of the London and River Plate Bank, Limited.

The bills of exchange and the bills of lading came that day, March 15, 1898, into the possession of the London and River Plate Bank, which cashed the drafts, and forwarded them for acceptance to Kleinwort Sons & Company at London, who accepted them on April 6, 1898, and paid them when due. At the time these bills of exchange were accepted the bills of lading, indorsed by Pla Gibernau & Company, came into the possession of the claimants.

The vessel sailed from Montevideo for Havana on March 16, 1898. On April 25, 1898, war between Spain and the United States was declared, and on May 17, when in the Bahama Channel, on her course to Havana, the Carlos F. Roses was captured by a war vessel of the United States, and sent in charge of a prize crew to Key West.

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On June 2, 1898, the District Court condemned the vessel as enemy's property, seized upon the high seas. On February 9, 1899, the District Court held that, as it satisfactorily appeared from the proof that both the title and the right of possession to the cargo were in a neutral at the time of the capture, as evidenced by the indorsed bills of lading and the paid bills of exchange presented at the hearing, the claim should be allowed, and it was so ordered. Thereupon the United States took this appeal.

It is admitted that, if the cargo in question belonged to a neutral, and was not contraband of war, it was not liable to confiscation, though found in an enemy's vessel: this upon well-established principles of international law, and as within the President's proclamation of April 26, 1898, expressly declaring that "neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

It can scarcely be pretended that, in this instance, the cargo consisted of articles contraband of war. They were the ordinary products of the Republic of Uruguay, a country with which the United States were at peace, and were purchased and shipped six weeks before war was declared. Little, if anything, is left for the commerce of neutrals if such goods, shipped in such circumstances, are not within the protection of the President's proclamation.

The question is whether the District Court erred in finding that the goods in question were neutral goods and exempt, as such, from condemnation.

The first contention, on behalf of the United States, is that the affidavits and exhibits relied on by the claimants to prove their title were not competent evidence, and it is urged that the evidence should have been in the form of depositions, taken under a commission, and of documents duly proved.

We think it is a sufficient reply to this objection that the proofs were received and considered by the District Court upon the trial entirely without objection on the part of the United States or the captors; and that the action of the court in receiving the evidence was not among the assignments of error made and filed under the appeal.

"If evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent of the parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the District Court; and we should not, therefore, incline to reject the further proof, even if we were of opinion that it ought not, in strictness, to have been admitted." *The Pizarro*, 2 Wheat. 241, per Mr. Justice Story.

Rule 13 of this court is as follows:

"In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is next contended that the claimants' evidence, regarded as a whole, does not support the decree of the court below. It is said that the burden of proof is upon the claimants, and that this burden has not been sustained.

This was not the view of the District Court, which, as we have heretofore stated, held that it appeared satisfactorily from the proof that both the title and right of possession were in a neutral at the time of capture.

What are the matters urged against this finding of the court below?

It is argued that, because it appears in the invoices and in the manifest that the shipments were made partly on account of "the expedition or voyage of the Carlos F. Roses," partly on account of "Mr. Pedro Pagés of Havana," and partly on account of the shippers, that is, Gibernau & Company, it is a reasonable inference that it must have been known to the master that the consignees were, as to some of the cargo, enemies, and that it must be concluded, on the face of the papers, that when the goods were delivered to the vessel they became the property of the consignees named in the invoices.

Such a view loses sight of the decisive and indisputable facts that the money used by Gibernau & Company in the purchase

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of the goods was procured from the London and River Plate Bank, which cashed the drafts drawn on Kleinwort Sons & Company, the claimants, and that when the latter company, on April 6, accepted the drafts they were furnished with the bills of lading covering the entire shipment; that the said bills of lading, at the time of such delivery, were duly indorsed in blank by Gibernau & Company, the shippers, and to whose order the said cargo was by the terms of the bills of lading to be delivered, all with the intent and result of entitling Kleinwort Sons & Company to the said bills of lading and to the cargo described therein as security for their acceptance of the drafts. It hence was entirely immaterial whether the ultimate consignees were, as to some of the cargo, residents of the enemy's country, and whether that fact was known to the master. Under the facts proved by the claimants the latter, through the London and River Plate Bank, had furnished the money used in the purchase of the goods, before the sailing of the vessel. This is made plainly to appear by the invoices furnished by the shippers, and wherein is stated that the master received the goods from Pla Gibernau & Company, and wherein also there is a statement of the cost of the goods and of the commissions charged by Gibernau & Company, corresponding in amount to the drafts.

The fact that the claimants' proofs do not set forth the correspondence between the claimants and the ultimate consignees is made a matter of unfavorable comment. But the transactions were substantially described in the affidavits, and it is not easy to see what further light would have been afforded by such correspondence, if, indeed, there was such correspondence.

The purchase of the goods, the drawing and cashing of the drafts, the indorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war, and were paid before the seizure of the vessel.

No counter evidence was offered by the United States, although the case was pending in the District Court from June 6, 1898, to February 9, 1899, when the decree in favor of the claimants was entered. It is, of course, true that the burden

of proof was on the claimants, but when the Government elected to stand on the proof adduced by the claimants, every fair and reasonable intendment must be made in favor of that proof. If the case so made out is consistent with the rightfulness of the claim, it should not be defeated by mere suggestions and suppositions, not founded on evidence. "All reasonable doubts shall be resolved in favor of the claimants. Any other course would be inconsistent with the high administration of the law and the character of a just government." *Prize Cases*, 2 Black, 635.

The final contention on behalf of the United States is that, even if the facts of the case were as set forth in the claimants' proofs, and as found by the District Court, yet, as matter of law, the claimants cannot succeed, because "the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties; that hence prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading; . . . that claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior."

To sustain this proposition the following cases are cited: *The Mary and Susan*, 1 Wheat. 25; *The Frances*, 8 Cranch, 418; *The Sally Magee*, 3 Wall. 451; *The Hampton*, 5 Wall. 372; *The Battle*, 6 Wall. 498; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, 1 Spinks' Prize Cases, 331.

The *Mary and Susan* was a case where an American house had ordered the purchase of goods in England before the declaration of war, and where their English agents had assigned the goods to certain brokers to secure advances made by them. The goods were captured en route to America, and were libelled in the District Court of the District of New York as prize of war. But it was held, both in the Circuit Court and in this court, that the property had vested in the American firm, who were the claimants, before and at the time of shipment, and was not divested by a mere request made by the shippers to the consignees to remit the purchase money to the bankers, although in the invoice it was stated that the goods were the property of the bankers.

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The transaction was regarded, not as a transfer of the goods, but as merely intended to transfer the right to the debt due from the consignees. No bills of exchange were drawn on the consignees in favor of the English bankers, nor were any bills of lading indorsed to them. The evidence of the transaction was found only in letters addressed to the consignees by the shippers, requesting them to pay the purchase money to the bankers; and this court held, after a careful examination of the evidence, that there was no intention to secure the bankers by any transfer of the title of the property, but only to secure them by a transfer of the debt due from the consignees.

The case of *The Frances* was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods, captured on board the Frances, and which were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of lien. It was stated by Mr. Justice Washington that "it was not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the claimant founds his pretensions on a lien created on the goods consigned, in consequence of an advance made to the shippers, in consideration of the consignment, by his agent in Glasgow, and also in virtue of a general balance of account due to him as their factor." And it was held that while, according to the common law, a factor has a lien upon the goods of his principal in his possession, for the balance of account due him, and likewise a consignee for advances made by him to the consignor; yet that this doctrine is unknown in prize courts, unless in very peculiar circumstances. And the court referred to the case of *The Tobago*, 5 C. Rob. 196, where it was held that a lien on a vessel created by a bottomry bond was not protected from capture.

It will be seen that in this case of *The Frances*, as in the case of *The Mary and Susan*, there was no question of the effect of a transfer of title by bills of lading, but a mere assertion of a lien by virtue of common law principles.

The *Sally Magee* is the next case cited. This was the case of an enemy's vessel bound for an enemy's port. A portion of the cargo was claimed by Fry, Price & Company, for Coleman &

Company, a Rio firm, because, as was alleged, Coleman & Company, as factors and commission merchants, had been directed to purchase and ship for the account of Davenport & Company, of Richmond, Va., a cargo of coffee, if procurable at not over ten and a half cents per pound; that Coleman & Company did make the shipment of the cargo claimed to the consignment of Davenport & Company, but that by the invoice thereof it appeared that the said purchase was not made at or within the said limit; for which cause Davenport & Company had refused to receive it as purchased for their account, or otherwise than on account of the shippers, Coleman & Company, and as agents of necessity for them; and that Davenport & Company had been authorized to receive it in their place and behalf. Another claim related to the residue of the cargo, also coffee, consigned to Dunlop & Company, of Richmond. It was not denied that this portion of the cargo was enemy's property, but the claimants alleged a lien because of a balance due claimants by Dunlop & Company.

In respect to the first claim, it was held that if Coleman & Company, as factors, bought the coffee at a price exceeding the limit prescribed by Davenport & Company, and the latter, on learning the fact, repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made; but that there was an entire failure, on the part of the claimants, to prove the facts as alleged, although more than two years had elapsed between the filing of the claim and the time when the decree was rendered. Accordingly, the decree of condemnation as to that portion of the cargo was affirmed.

The language of the court in disposing of the second claim was as follows:

"The other claim relates to the coffee consigned to Dunlop & Company, of Richmond, and it is not denied that this was enemy's property. The claimants allege a lien. The claim states that Dunlop & Company owed them a balance of upward of $35,326, and that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the

balance for the debtor firm. The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply to that subject. It is to be inferred, also, that the letters were written after the shipment of the cargo, and, indeed, after the capture. In either case, the arrangement was made too late to have any effect.

"The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and everything done thereafter, designed to incumber the property or change its ownership, is a nullity. No lien created at any time by the secret contention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by its capture. The allegation of a lien wears the appearance of an afterthought."

It will be observed that there was no effort in this case to claim property vested or transferred by bills of lading. Indeed, it appeared that the bills of lading were made out in favor of the consignees at Richmond, and it was said by the court that the legal effect of a bill of lading was to vest the ownership in the consignees, citing *Lawrence* v. *Minturn*, 17 How. 100, in which it was said that "the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded."

Next comes the cited case of *The Hampton*, libelled and condemned as prize of war in the Supreme Court for the District of Columbia. It was held that mortgages on vessels captured *jure belli* are to be treated only as *liens*, subject to be overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captor.

Then comes the case of *The Battle*, where there were claimants against the proceeds of sale of an enemy's vessel for supplies furnished and for materials furnished and for work and labor. The claims were dismissed by the District Court of the United States, and on appeal that decree was affirmed by this court,

which, through Justice Nelson, said: "The principle is too well settled, that capture as prize of war overrides all previous liens, to require examination," citing the cases of *The Hampton* and *The Frances*.

These are all the American cases cited, and it is to be observed that, in none of them, was the court called upon to decide the question whether bills of lading made or indorsed to neutrals, before the declaration of war, on account of money furnished to purchase cargoes, are protected as neutral goods from capture, within the general international rule, and the President's proclamation, protecting such goods, when not contraband, from condemnation as prize of war. The doctrine of these cases simply amounts to the proposition, that bottomry bonds, mortgages and private agreements that factor's balances and advances should be preferred claims, are mere *liens*, which create no property rights in vessels or cargoes, superior to the captor's rights.

Let us now examine the English cases cited.

The first is that of *The Tobago*, 5 C. Rob. 218. This was the case of a bottomry bond, and it was held that such a bond confers no property in the vessel; that the property continues in the former proprietor, who has given a right of action against it, but nothing more. In the case of *The Marianna*, 6 C. Rob. 24, there was a claim against a Spanish vessel, for unpaid purchase money on the vessel which had been sold by an American owner to a Spanish merchant, but which was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale. Sir William Scott said:

"A claim is given on behalf of the former American proprietor, in virtue of a lien which he is said to have retained on the property for the payment of the purchase money, but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a court of prize."

In respect to the goods which were said to have been pledged to secure the payment of the purchase money of the ship, Sir William Scott said:

"Then as to the title of property in the goods which are said to have been going as the funds out of which the payment for

the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

It will be noticed that the shipper of the goods in this case was the Spanish merchant, an enemy.

Finally, the case of *The Ida* is relied on. 1 Spinks' Prize Cases, 331. The statement of the case was as follows:

"The claim of neutral merchants for 2650 bags of coffee, consigned to them on the credit of advances made by them was disallowed. The claim is that of *lien*, which cannot be upheld against captors. Further proof cannot be allowed when there has been an attempt to deceive the court by simulated papers."

In considering the evidence in the case, Dr. Lushington said:

"Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this court that where there are contradictory papers the burden of proof lies on the claimant to show that the contradiction is not inconsistent with the rights of a belligerent power; and, I must say, I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not."

In discussing the law of the case, Dr. Lushington said:

"It is contended by counsel that the property is in Behrens & Company by virtue of the endorsement of the bills of lading; and cases from common law have been cited in support of this. I believe that, in some circumstances, that would be the case. They would have a legal title to the property; but I have considerable doubt whether it is not the law of this court that the claimant must show that he has not only a legal, but an equitable title. If a mere legal title would justify the court in restoring property the consequences would be most alarming;

for nothing would be more easy than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shown this court is bound to restore; for I hold that an equitable title is also necessary to support a claim in this court."

Upon the whole, the learned judge was of the opinion that the property belonged to an enemy, subject to claimant's charges, and that it was not possible to doubt for a single moment that there was an intention in the case, by means of colorable bills of lading, to deceive and defraud Great Britain of its belligerent rights, by attempting to cover enemy's property as neutral.

The case of *The Ida* can therefore be cited as conceding that, if the claimants had vested in them the legal title to the goods by virtue of the indorsement of the bills of lading, and had also an equitable title, they would be entitled to a judgment of restoration. But the court was of opinion that there was no evidence whatever of any portion of the cargo belonging to a neutral. While it was true that the claimants exhibited a bill of lading indorsed to them, yet another bill of lading not indorsed was found on capture in possession of the master. Such a state of facts justly created a belief that the transaction was essentially fraudulent, as an attempt to cover enemy's property.

We shall now consider some of the cases cited on behalf of the claimants.

The Amy Warwick, 2 Sprague, 150; 2 Black, 635, is, in several respects, a leading case, and is decisive of the present one. It was there held that, where a neutral commission merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, having a legal title and a beneficial interest, a prize court should award him the amount of his advances, although the residue of the property will be condemned as enemy's.

After a full statement of the facts, the conclusion was thus stated by Judge Sprague:

"The claim of J. L. Phipps & Company was filed on the 4th of September last. It alleges that this coffee was purchased by them partly by funds of Dunlop, Moncure & Company, of Rich-

mond, and partly by £2000 of their own money; that the legal title has always remained in them, and that no other person is the legal owner, except the equitable interest of said Dunlop, Moncure & Company.

"These facts seem plainly to lead to the conclusion that the claimants ought to be repaid the amount which they expended from their own funds in the purchase of the coffee, and that the residue of the proceeds should be condemned. This result I shall adopt, unless precluded from doing so by authority.

"The counsel for the captors contend that the claimants had only a lien, and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine and the reasons on which it is founded are stated by the Supreme Court in *The Frances*, 8 Cranch, 418. It is there said that 'cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud.' Similar reasons are given by Lord Stowell in *The Marianna*, 6 C. Rob. 24, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps & Company, that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an incumbrance upon the property of another. Their real character was that of trustees holding the legal title and possession, with a right of retention until their advances should be paid. . . . The case of *The San Jose Indians*, 1 Wheat. 208, has been cited by the counsel for the claimants, and they contend that it sustains their whole claim, and requires all the coffee to be restored to them. That case is a stringent authority to the extent of the £2000 which the claimants invested or ad-

vanced in the purchase; but I do not think that it authorizes me to go further."

This case was taken to the Circuit Court and there affirmed. No appeal was taken to the Supreme Court from that part of the decree which allowed the claim of Phipps & Company. The decree of condemnation of the residue was affirmed. 2 Black, 635.

The bark Winifred was captured in May, 1861, off Cape Henry, and confiscation of vessel and cargo was demanded as being enemy's property. The cargo, consisting of 4200 bags of coffee, had been purchased by Phipps & Company in Rio, as agents for Crenshaw & Company, Richmond merchants. Phipps & Company advanced their own funds to the extent of three eighths of the cargo. The consignment formally was to shipper's order, but the bills of lading were sent forward indorsed to Crenshaw & Company. Subsequently, Phipps & Company made further advances of $20,622 on April 26, while the goods were in transit, and, after the outbreak of hostilities, taking a reassignment of the bills of lading. The District Court ordered a restoration of three eighths of the cargo to Phipps & Company, but refused to allow their claim for the further advances on the other five eighths of the cargo, citing *The Marianna*, 6 C. Rob. 24, and *The Frances*, 8 Cranch, 418. But on appeal the Circuit Court, while affirming the decree allowing the claim against the three eighths of the cargo, reversed that part of the decree which refused the claim for the further advances, allowed further proofs, and in December 1863, allowed the entire claim of Phipps & Company, with interest. *The Winifred*, Blatchford's Prize Cases, page 35, and note.

The Lynchburg was captured with her cargo in May, 1861, at the mouth of Chesapeake Bay. Two thousand and forty-five bags of coffee, part of her cargo, had been purchased by Maxwell, Wright & Company, as agents for Wortham & Company, of Richmond. Maxwell, Wright & Company took bills of lading, consigning the cargo to their own order, and drew against them on Brown, Shipley & Company, of London, for £6090, who accepted the drafts and subsequently paid them. The entire cargo was destined ultimately for enemies. Wortham &

Company, of Richmond, claimed 504 bags of this shipment, subject to the lien of Brown, Shipley & Company. The District Court restored to Brown, Shipley & Company 1541 bags, but condemned the 504 bags claimed by Wortham & Company as enemy's property. Judge Betts said:

"The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts in derogation of the rights of captors, when the interest of the claimant is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24."

On appeal the Circuit Court affirmed as to the allowance of the claim of Brown, Shipley & Company for the 1541 bags, but reversed the refusal of their further claim for 504 bags, allowed the claimants to give further proofs, and ultimately the 504 bags were restored by consent to the claimants. *The Lynchburg*, Blatchford's Prize Cases, 51, and note on p. 52.

The exigencies of trade have called a class of instruments into being which are substantially acknowledgments by public or private agents that they have received merchandise, and from whom or on whose account; and usage has made the possession of such documents equivalent to the possession of the property itself. Among them the most notable is the bill of lading, in respect to which, and replying to the question whether at law the property of goods at sea passes by the indorsement of a bill of lading, Buller, J., said, in his opinion in *Lickbarrow* v. *Mason*: "Every authority which can be adduced, from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the con-

signee." Smith's Leading Cases, vol. part 11, 7th Am. ed. under the head of *Lickbarrow* v. *Mason.*

The conclusion warranted by the cases is that, as well advances made for the purchase of goods, as an absolute purchase, are protected by bills of lading, whether made out directly to the party purchasing or making the advancements, or indorsed to him by the shipper.

While possession of the bills of lading imports a legal title to the goods, yet in prize cases it is permitted for the courts to go behind the bills of lading, if there is evidence tending to show that the party in whose name they are issued, or to whom they have been indorsed, has no equitable interest or is a mere cover to an enemy. In the present case there was no transfer of the property from an enemy to a neutral. Up to the time of shipment the entire cargo was owned by Pla Gibernau & Company. They transferred it to the London and River Plate Bank, Limited, who in turn transferred it to Klienwort Sons & Company, who produced the bills of lading at the hearing and moved the payment by them, before the capture of the vessel, of the drafts whose negotiation furnished the moneys used in the purchase of the goods. The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Company, under indorsements which gave to them only the right to demand delivery from the vessel.

The case falls plainly within the law as administered in *The Amy Warwick*, *The Winifred* and *The Lynchburg.*

If the rule asked for by the captors in this case should be upheld, namely, that bills of lading indorsed to neutrals, acting in good faith, who have advanced money to purchase goods shipped long before the declaration of war, do not create a right of property in the goods, there would be very little room left for the operation of the President's proclamation exempting neutral goods from condemnation. Such a rule would be very unfortunate as respects the commerce of the United States in case of hostilities between European countries. Owing to the limited amount of merchant shipping owned in the United States, the greater part of their products, whether breadstuffs or manufactured goods, has to be carried in foreign vessels, and

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

it is quite evident that bankers and capitalists could not afford to advance the moneys needed to make purchases, if they could not be protected against seizure by foreign belligerents, by the indorsement to them of bills of lading. Only those who actually own the goods could safely ship them on vessels owned by belligerents, and, what constitutes the larger part of international trade, the purchase and shipment of merchandise by factors with moneys advanced by banking houses would, in case of war, have to cease. The decree of the District Court should be affirmed.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 561. CLIFFORD *v.* REUMPLER, SHERIFF. Appeal from the Circuit Court of the United States for the District of New Jersey. Submitted April 9, 1900. Decided April 16, 1900. *Per Curiam.* Order affirmed with costs on the authority of *Nobles* v. *Georgia*, 168 U. S. 398; *Kohl* v. *Lehlback*, 160 U. S. 293; *Clifford* v. *Heller*, 172 U. S. 641; *Clifford* v. *Reumpler*, 175 U. S. 723, and *Brown* v. *New Jersey*, 175 U. S. 172. *Mr. James S. Erwin*, for motions to dismiss or affirm. No one opposing.

No. . Original. BELL *v.* MISSISSIPPI. Submitted April 11, 1900. Decided April 16, 1900. *Per Curiam.* Motion for leave to bring an original suit denied on the authority of *Hans* v. *Louisana*, 134 U. S. 51. *Mr. C. J. Jones* for motion.

Decisions on Petitions for Writs of Certiorari.

No. 557. STREATOR CATHEDRAL GLASS COMPANY *v.* WIRE GLASS COMPANY. Seventh Circuit. Denied March 26, 1900. *Mr. Horace K. Tenney* for petitioners. *Mr. Lysander Hill* and *Mr. Charles Howson* opposing.

No. 559. AMERICAN SUGAR REFINING COMPANY *v.* UNITED STATES. Second Circuit. Granted March 26, 1900. *Mr. John E. Parsons* and *Mr. Henry B. Closson* for petitioner. *Mr. Solicitor General* and *Mr. Assistant Attorney General Hoyt* opposing.

No. 560. WATERBURY MANUFACTURING COMPANY *v.* WALES. Second Circuit. Denied April 9, 1900. *Mr. Edmund Wetmore* and *Mr. John K. Beach* for petitioner. *Mr. Roger Foster* opposing.

Decisions announced without Opinions.

No. 552. KELLY *v.* SPRINGFIELD RAILWAY COMPANY. Sixth Circuit. Denied April 9, 1900. *Mr. F. P. Fish* and *Mr. Julian C. Dowell* for petitioners. *Mr. Drury W. Cooper* and *Mr. T. B. Kerr* opposing.

No. 567. GEISER MANUFACTURING COMPANY *v.* FRICK COMPANY. Third Circuit. Denied April 9, 1900. *Mr. John G. Johnson* for petitioner. *Mr. F. P. Fish* and *Mr. Francis Rawle* opposing.

No. 568. OAKFORD *v.* HACKLEY. Third Circuit. Denied April 9, 1900. *Mr. John G. Johnson* and *Mr. Maxwell Evarts* for petitioner. *Mr. Henry W. Palmer* and *Mr. R. C. Dale* opposing.

No. 569. TENNESSEE COAL, IRON AND RAILROAD COMPANY *v.* PIERCE. Fifth Circuit. Denied April 9, 1900. *Mr. Walker Percy* and *Mr. W. I. Grubb* for petitioner. *Mr. W. A. Gunter* opposing.

No. 573. LA COMPAGNIE GENERALE TRANSATLANTIQUE *v.* MIDDLETON, ADMINISTRATOR. Denied April 9, 1900. *Mr. Edward K. Jones* for petitioner. *Mr. George Whitfield Betts* and *Mr. J. Parker Kirlin* opposing.

No. 576. NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY *v.* CLEMENT. Fifth Circuit. Denied April 16, 1900. *Mr. John W. Fewell* for petitioner. *Mr. Hoke Smith* opposing.

No. 582. THAMES TOWBOAT COMPANY *v.* HAINES, MASTER. Fourth Circuit. Denied April 16, 1900. *Mr. James Emerson Carpenter* for petitioner. *Mr. T. S. Garnett* and *Mr. Robert M. Hughes* opposing.

No. 589. NEAL, TRUSTEE, *v.* THAMES TOWBOAT COMPANY,

Decisions announced without Opinions.

CLAIMANT. Second Circuit. Denied April 16, 1900. *Mr. Henry Galbraith Ward* for petitioner. *Mr. Samuel Park* opposing.

No. 595. CLEWS *v.* JAMIESON. Seventh Circuit. Granted April 16, 1900. *Mr. Henry D. Estabrook* for petitioners. *Mr. Samuel P. McConnell*, *Mr. Horace K. Tenney*, *Mr. John H. Hamline* and *Mr. Frank H. Scott* opposing.

No. 598. WAITE *v.* CITY OF SANTA CRUZ. Ninth Circuit. Granted April 23, 1900. *Mr. John F. Dillon*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* for petitioner. *Mr. James G. Maguire*, *Mr. John Garber* and *Mr. Carl E. Lindsay* opposing.

No. 602. LOEB *v.* TRUSTEES OF COLUMBIA TOWNSHIP, OHIO. Sixth Circuit. Denied April 23, 1900. *Mr. J. W. Warrington* for petitioner. *Mr. Simeon M. Johnson* opposing.

No. 605. LAKE STREET ELEVATED RAILROAD COMPANY *v.* ZIEGLER. Seventh Circuit. Denied April 23, 1900. *Mr. Henry S. Robbins* for petitioner. *Mr. John J. Herrick* opposing.

No. 606. SPRING VALLEY COAL COMPANY *v.* PATTING. Seventh Circuit. Denied April 23, 1900. *Mr. Henry S. Robbins* for petitioner. No one opposing.

No. 607. COLES *v.* COLLECTOR OF CUSTOMS OF THE PORT OF SAN FRANCISCO. Ninth Circuit. Denied April 23, 1900. *Mr. Calderon Carlisle* and *Mr. Sidney V. Smith* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

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CONSTITUTIONAL LAW.

CORPORATION.

tion in a court of the United States is conclusively presumed, for the purposes of the litigation, to be one by or against citizens of the State creating the corporation. It is not sufficient that the association may be described as a *quasi* corporation or as a "new artificial person." The rule does not embrace a new artificial person that is not a corporation. *Great Southern Fire Proof Hotel Company* v. *Jones*, 449.

CRIMINAL LAW.

1. Murphy was tried in a state court of Massachusetts on an indictment charging him with embezzlement; was convicted; and was sentenced to imprisonment for a term, one day of which was to be in solitary confinement, and the rest at hard labor. He remained in confinement for nearly three years, and then sued out a writ of error, and the judgment was reversed on the ground that the sentence was unconstitutional. The case was then remanded to the court below to have him resentenced, which was done. Before imposing the new sentence the court said that as he had already suffered one term of solitary confinement, the court would not impose another, if a written waiver by the prisoner of the provision therefor were filed. He declined to file such a waiver, and the sentence was accordingly imposed. Upon his taking steps to have the sentence set aside, *held* that his contention in that respect was unavailing. *Murphy* v. *Massachusetts*, 155.
2. Three policemen in South Dakota attempted, under verbal orders, to arrest another policeman for an alleged violation of law, when no charge had been formally made against him, and no warrant had issued for his arrest. Those attempting to make the arrest carried arms, and when he refused to go, they tried to oblige him to do so by force. He fired and killed one of them. He was arrested, tried for murder and convicted. The court charged the jury: "The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. . . . In this connection, I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had gone beyond the force necessary to arrest the defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest." *Held*, that the court clearly erred in charging that the policemen had

tion of property in the county, assessed for taxation, twenty-four per cent, and officially notified him of their action. He refused to act upon the notice, and a writ of mandamus was issued from the Supreme Court of the Territory, to compel him to do so. He declined to obey the writ, was cited for contempt, was adjudged guilty, and was committed to prison until he should comply. There was no evidence, and nothing tending to show that he had any pecuniary interest in the increase. The case being brought here by writ of error and on appeal, *held*, that as there was nothing to show that the plaintiff in error and appellant was interested in the increase to the extent of five thousand dollars, therefore, under the statute of March 3, 1885, c. 355, 23 Stat. 443, this court had no jurisdiction. *Caffrey* v. *Oklahoma Territory*, 346.

6. By a petition filed by Jackson against Black in the District Court of Kay County, Oklahoma Territory, the following case was made: On the 17th day of November, 1896, Jackson made a homestead entry upon the S. W. $\frac{1}{4}$ sec. 26, T. 28, R. 2, east I. M. The same land prior to that date had been embraced in a homestead entry made by Black, but that entry was finally held for cancellation by the Secretary of the Interior, who by a decision rendered October 26, 1896, denied Black's motion for review and allowed Jackson to make entry of the land. After that decision Black continued to remain in possession of the west eighty acres of the tract, and refused and neglected to vacate the same, although requested to do so. He had upon the land a barbed wire fence and other improvements attached to the realty. It was alleged that he was financially unable to respond in damages for any injury he was causing the plaintiff by trespassing upon the land, and that plaintiff had no adequate remedy other than by this suit. The relief asked was a mandatory injunction to restrain the defendant from entering upon or in any manner trespassing upon or using any portion of the land embraced in the plaintiff's homestead entry; from removing or in any manner destroying the fence or other improvements on the lands that were permanently attached thereto; and for such other and further relief as the court deemed just and right. The defendant filed an answer, but it was withdrawn that he might file a demurrer. He demurred to the application for an injunction upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action and the court was without jurisdiction of the subject-matter of the action. The demurrer was overruled, and the defendant after excepting to that ruling filed an amended answer. In this answer he set up title in himself as a homestead settler, set forth the manner in which it had been acquired, alleged that the value of the property was $6000, and prayed judgment. In his original answer he claimed that he was entitled to a trial by jury, and in his amended answer he insisted that his rights could not be disposed of in equity before the court only. The trial court sustained a demurrer to the answer, and the defendant declining to further answer, judgment was rendered for the plaintiff as prayed for in the application for a mandatory injunction, the defendant being enjoined from in any manner entering upon the premises in question or exercising any control or possession over them except for the pur-

NATIONAL BANK.

NAVIGABLE WATERS.

RAILROAD.

RES JUDICATA.

TAX AND TAXATION.

1. The personal property of a citizen of and resident in one State, invested in bonds and mortgages in another State, is subject to taxation in the latter State; and the amount of the tax is a claim against the property of the person taxed which is a debt that may, in case of death of the person taxed, be proved against his estate in the State where the mortgages and loans are contracted, subject to the statutes of limitations of the State. *Bristol* v. *Washington County*, 133.
2. Cars of the Union Refrigerator Transit Company, a corporation of Kentucky, engaged in furnishing to shippers refrigerator cars for the transportation of perishable freight, and which were employed in the State of Utah for that purpose, were subject to taxation by that State. *Union Refrigerator Transit Co.* v. *Lynch*, 149.

TREASURY WARRANTS.

1. The treasury warrants in question in this case cannot be said upon the evidence to have violated the Constitution of the United States, or of the State of Texas. *Houston & Texas Central Railroad Co.* v. *Texas*, 66.
2. A warrant, drawn by the authorities of a State in payment of an appropriation made by the legislature, payable upon presentation if there be funds in the treasury, and issued to an individual in payment of a debt of the State to him, cannot be properly called a bill of credit, or a treasury warrant intended to circulate as money. *Ib.*
3. A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists, and to which the members have sworn obedience, is not to be lightly indulged; and it cannot properly be held that the receipt of the warrants issued in pursuance of legislative authority in Texas, and in payment of an indebtedness due the State from the individual paying them, is an illegal transaction, and amounts in law to no payment whatever. *Ib.*

VIRGINIA AND TENNESSEE BOUNDARY.

A decree is entered, ordering the appointment of commissioners to ascertain, re-trace, re-mark and reëstablish the boundary line between the States of Virginia and Tennessee, as established by the decree of this court in *Virginia* v. *Tennessee*, 148 U. S. 503, but without authority to run or establish any other or new line. *Tennessee* v. *Virginia*, 501.

WATER RIGHTS.

See CONTRACT, 10.

WILL.

Thomas W. Means died in 1890, leaving a large estate, and a will made some ten years before his death, containing, among other provisions, the following: "Item 4. I give, devise and bequeath all the residue and remainder of my estate, personal, real and mixed, wherever situated or located, of which I shall die possessed, to be equally divided among my four children, John Means, William Means, Mary A. Adams,

and Margaret A. Means, and my grandson, Thomas M. Culbertson (son and sole heir of my deceased daughter Sarah J. Culbertson) who shall be living at the time of my decease, and the issue of any child now living, and of said grandson, who may then have deceased, such issue taking the share to which such child or grandson would be entitled if living. But said share given, devised and bequeathed to said grandson or his issue is to be held in trust as hereinafter provided, and to be subject to the provisions hereinafter contained as to said grandson's share. "Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision, herein made for said children, and the provision for said grandson, to be a provision for them respectively, in addition to said advances made and that may hereafter be made, and that in the division, distribution and settlement of my said estate, said advances made and that may hereafter be made, be treated not as advances, but as gifts not in any manner to be accounted for by my said children and grandson, or any of them or the issue of any of them." He was in the habit of advancing money to his children, the amounts advanced to each individually being entered against him in the father's books. At the date of the will the several amounts so advanced were as follows: John, $79,214.36; William, $58,409.54; Mrs. Adams, $51,207.48; Margaret, $39,120.78; Mrs. Culbertson, $29,609.82. Subsequently, in 1898, William becoming involved, the amount advanced to him was largely increased in manner as set forth in the statement of the case and opinion of the court. After the death of the father a claim was made that the money thus paid out for William was to be held to be a part of his share of his father's estate. *Held*, (1) that in the absence of some absolute and controlling rule to the contrary, the intentions of a testator, as deduced from the language of the will, construed in the light of the circumstances surrounding him at the date of its execution, always control as to the disposition of the estate; (2) that the testator believed that after he had done in his lifetime what, in his judgment, his children severally required, there would be an abundance of his estate left for distribution, and intended that all dealings between himself and each of his children should be wiped out, and that what was left after having discharged to each his paternal obligation should be distributed equally. *Adams* v. *Cowen*, 471.

After the probate of his father's will, William gave to the administrators of the estate with the will annexed, an acknowledgment of the receipt from them of $136,035.75 in his own notes to his father as part of his distributive share of his father's estate. At the time when this was done he was in straitened circumstances, was broken in spirit and was wavering in his purposes. *Held*, that while a man in the full possession of his faculties, and under no duress may give away his property, and equity will not recall the gift, yet it looks with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears