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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1900

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1900.

YAZOO AND MISSISSIPPI VALLEY RAILWAY CO. *v.* ADAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 35. Argued October 22, 23, 1900.—Decided January 7, 1901.

An action was begun in a state court for taxes. Defendants pleaded in bar, but did not set up a Federal question. The case resulted in a judgment for a part of the taxes; was carried to the Supreme Court which passed upon all the issues, reversed the judgment, and practically held that defendants were liable for all the taxes, and remanded the case for a new trial. Defendants then set up a Federal question, which the court upon the new trial refused to consider, and the Supreme Court affirmed its action. *Held* that the Federal question was "specially set up and claimed" too late to be available as a defence.

As it appeared from the record in this case and the opinion of the court, that the defendants relied upon certain charter rights, which they insisted had been impaired by subsequent legislative action; and the Supreme Court held that no such rights existed, it was *held* that it sufficiently appeared that there was a Federal question necessarily involved in the case, and not only must have been, but actually was, passed upon by the Supreme Court.

It is only cases arising under the third clause of Rev. Stat. sec. 709, where a Federal right, title, privilege or immunity is claimed, that the question must be specially set up. Under the second clause it is sufficient, if the validity of a state statute or authority is necessarily involved in the disposition of the case.

Statement of the Case.

The Mississippi constitution of 1890 provided that every new "grant of corporate franchises" should be subject to the provisions of the constitution. Where several railroads were consolidated, subsequent to the adoption of this constitution, by a contract, under which the constituent companies were to go out of existence, their officers to resign their trusts in favor of officers of the new company, their boards of directors supplanted by another board, the stock of the constituent companies to be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company, and that the road should be operated by men holding their commissions from the new company, it was *held* that a new grant of corporate franchises had been made, and the consolidated company was subject to the new constitution.

Where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws.

THIS case originated in an action at law begun December 7, 1893, in the circuit court for the first district of Mississippi, by Wirt Adams, revenue agent, suing for the use of the State and of the counties through which the defendant railways pass, against the Yazoo and Mississippi Valley Railroad Company, incorporated under an act of the legislature of Mississippi of February 17, 1882, and also against the Illinois Central Railroad Company, as successors in interest by consolidation, of a number of other railways, to recover taxes assessed by the railroad commission of that State for the year 1892.

Exhibits annexed to the declaration showed that the Yazoo and Mississippi Valley Railroad Company, as now constituted, was the result of a consolidation made October 24, 1892, between a company of the same name, chartered as above stated, February 17, 1882, and the Louisville, New Orleans and Texas Railway Company, which latter company was itself formed by a consolidation made August 12, 1884, of the Tennessee Southern Railroad Company, the Memphis and Vicksburg Railroad Company, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the New Orleans and Mississippi Valley Railroad Company.

On December 27, 1893, a plea was filed by the Illinois Central Railroad Company, denying certain of the allegations in

the declaration; and a separate plea was filed by the Yazoo and Mississippi Valley Railroad Company, claiming in its own favor the benefit of the charter of the Louisville, New Orleans and Texas Railroad Company exempting such company from the assessment of these taxes by reason of the payment of the same in the construction of its road, and also denying material allegations of the declaration. No Federal question appeared in either of these pleas. A demurrer to these pleas having been overruled, replications were filed.

On December 18, 1894, another action was begun against the same defendants for the taxes of 1893 and 1894, and on January 1, 1896, another for the taxes of 1895. An order was made consolidating these actions.

The three cases thus consolidated came on for trial before a jury and resulted in a verdict and judgment, July 25, 1896, in favor of the plaintiff for the taxes of 1895, and in favor of the defendants for the taxes of 1892, 1893 and 1894. Both parties moved for a new trial, which was denied. Both parties appealed to the Supreme Court, but neither assigned a ruling upon a Federal question as error. The Supreme Court reversed the judgment of the court below and remanded the case for a new trial. 77 Mississippi, 194. The court, June 20, 1898, filed a summary of its holdings to the effect, first, that the case of the *Natchez, Jackson &c. Railroad Company* v. *Lambert*, 70 Mississippi, 779, which apparently had been set up as *res judicata*, was an estoppel only as to taxes for the year 1892, on property originally belonging to the Natchez, Jackson and Columbus Railroad Company in Adams County, but not upon other property, or as to the taxes for other years; second, that the Yazoo and Mississippi Valley Railroad Company was a new corporation taking its life from the date of the consolidation, and overruling the *Lambert* case to the contrary; third, that the twenty-first section of the Mobile and Northwestern Railroad Company's charter was an effort to secure an irrepealable grant of exemption, was in violation of the constitution of 1869, and that it would have been a violation even if it had not been irrepealable; and the case of *Mississippi Mills* v. *Cook*, 56 Mississippi, 40, to the contrary was overruled. 77 Mississippi, 305.

A motion to strike out this "summary of holdings" was denied November 28, 1898. 77 Mississippi, 302.

Meantime two new actions had been begun in the circuit court for the taxes of 1896 and 1897, which were also consolidated with the others.

On July 4, 1898, the mandate of the Supreme Court reversing the judgment of the court below was filed in the circuit court. Meantime, however, and on June 27, 1898, defendants filed a petition and bond for a removal of the cause to the Circuit Court of the United States upon the ground that the case arose under the Constitution and laws of the United States. This petition was also denied July 4, upon the day the mandate was filed.

Thereupon each of the defendants, July 6, 1898, filed special pleas to the declaration, setting forth at great length the exemption claimed under the charters of their constituent companies, and alleging that such exemption constituted a contract which had been impaired by the action of the State. Motion was made by the plaintiff to strike out certain of these pleas, viz., the third, fourth, fifth, sixth and seventh, as constituting no defence to the action, which was granted by the court, and all of such pleas, except the seventh, which was withdrawn, were stricken from the files. Whereupon the defendants, "to meet the new aspect put upon the case by the decision of the Supreme Court herein rendered on June 20, 1898," withdrew "their joint plea filed by them prior to such decision, and all other pleas filed before that decision," and also withdrew the two pleas filed by them respectively at this term, (No. 2,) and declined to plead further herein. They did not, however, withdraw the pleas which had been stricken out by the court. A judgment was entered the same day *nil dicit* against the defendants for the amount sued for in said consolidated case, amounting in all to $548,676.99. The case was again appealed to the Supreme Court and a new opinion rendered February 20, 1899, reiterating its former views and affirming the judgment of the court below. 77 Mississippi, 315. Whereupon defendants sued out this writ of error.

Opinion of the Court.

Mr. William D. Guthrie and *Mr. Edward Mayes* for plaintiffs in error. *Mr. James Fentress*, *Mr. Noel Gale* and *Mr. J. M. Dickinson* were on their brief.

Mr. R. C. Beckett for defendant in error. *Mr. Frank A. Critz* and *Mr. J. A. P. Campbell* were on his brief.

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

Motion was made to dismiss this writ of error upon the grounds: First, that the Federal question was not raised until after the decision of the Supreme Court on June 20, 1898. Second, that the action of the defendants in withdrawing their pleas and permitting a judgment *nil dicit* to go against them, because the circuit court had struck from the files their additional pleas attempting to set up a Federal question, was an admission that they had no defence upon the facts of the case, and deprived them of any right to insist upon a Federal question. Third, that the petition for removal was not made until after the case had been tried in the state Supreme Court, and reversed and remanded. No claim of error in the action of the state court in this last particular was made in this court. Indeed, the point seems to have been abandoned. Fourth, that the decision of the state Supreme Court on the first appeal, that the alleged exemption, if it existed at all, was lost by the consolidation of October 24, 1892, raised no Federal question. Several other reasons are assigned for the motion, but they are either addressed to the merits of the case, or become immaterial in the view we have taken of those herein specified.

1. Was the Federal question raised too late? The special pleas setting up distinctly the Federal question were filed after the case had been decided by the Supreme Court, its mandate had gone down to the circuit court, and the case was ready for a new trial. As already stated, certain of these pleas were stricken out upon motion of the plaintiff as constituting no defence to the action, and all the pleas, except such as had been stricken out by the court, were then withdrawn, and a judg-

ment *nil dicit* entered. On the case being again carried to the Supreme Court, that court held that the action of the court below "in striking out the special pleas was correct, for the obvious reasons that they presented no defence to the action, in whole or in part. The former opinion of the court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no sort of comment. These matters of practice and procedure, and all the other assignments of error touching matters of practice and procedure, were correctly settled by the court. The former opinion of the court in this cause, and its opinion on the motion to strike that opinion from the files, disposed effectively of such of these matters as are not here specifically adverted to." 77 Mississippi, 315.

It is very evident that the circuit court, in striking out these pleas, took the view that the Supreme Court had, upon the first hearing, settled the law to be that no valid contract of exemption existed, and that if such contract existed in favor of the Louisville, New Orleans and Texas Railway Company (hereinafter styled the Louisville Company) it had been lost by the consolidation of October 24, 1892, and that the only effect of the special pleas was to inject a claim under the Federal Constitution as an argument for reversing its ruling. These pleas evidently raised precisely the same questions that had been settled in a slightly different form. The circuit court treated this as an attempt to induce it to overrule the action of the Supreme Court, which of course was impossible. The Supreme Court not only held that the circuit court was correct in this view, but that the issues having already been settled, it would itself treat them as *res judicata*. This accords with what seems to be the uniform practice of the Mississippi courts. Thus, in *Smith* v. *Elder*, 14 S. & M. 100, it was held that where a demurrer to a plea, which had been sustained in the court below, was overruled by the Supreme Court, all the legal questions raised by the demurrer would be considered as having been settled by the decision overruling it; and that such decision would not only be binding upon the inferior but also upon the

appellate court. So also in *Bridgeforth* v. *Gray*, 39 Miss. 136, it was held that, where the construction of a will had been settled upon demurrer to a bill in chancery, the court would not permit that question to be reopened upon a hearing upon the merits, notwithstanding the chancery court of Tennessee in the mean time had placed a different construction upon the will. This is also the rule in this court. *Supervisors* v. *Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461; *Thompson* v. *Maxwell Land Grant & Railway Co.*, 168 U. S. 451. See also *Hook* v. *Richeson*, 115 Illinois, 431; *Brooklyn* v. *Orthwein*, 140 Illinois, 620; *McKinney* v. *State*, 117 Indiana, 26.

In this aspect the case is much like that of *The Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103. In that case the insurance company had loaned money to Kirchoff and had filed a bill to foreclose the trust deed. Pending this bill an agreement was entered into for the release to Kirchoff of two of the lots embraced in the foreclosure proceedings, but it was agreed that these proceedings should be prosecuted, and as soon as the company obtained a deed from the master, it would convey to Kirchoff. No defence was made to the foreclosure, and the case went to a decree and the property was sold. The case went to the Supreme Court of Illinois, which found the agreement between Mrs. Kirchoff and the insurance company as claimed by her; determined that she was entitled to the release sought, and remanded the case for the purpose of an accounting. As stated by the Chief Justice: "The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the Supreme Court of Illinois prior to the decision of the latter court on the first appeal. . . . The errors there assigned nowhere in terms raised a Federal question. And in affirming the judgment of the appellate court the Supreme Court did not consider or discuss any Federal question as such in its opinion." It appears to have turned upon questions of fact. "It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed un-

der an authority exercised under the United States; that a Federal question was thereby raised on the record; and that the decision of the case necessarily involved passing on the claim of title." Upon the second appeal, it was assigned as a Federal question that the circuit court erred in entering a decree which would in effect nullify the decree of foreclosure of the Circuit Court of the United States, and in refusing to the defendant leave to file the proposed amendment to its answer. "The appellate court on the second appeal held itself bound by the previous decision, and declined to enter on matters of defence which might have been availed of. The Supreme Court was of the same opinion, for it ruled that where a case which once had been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment." This court dismissed the writ of error, holding that, as the Supreme Court did not reopen the case as to matters previously adjudicated, and as the Federal question was not set up upon the first appeal, there was no action of that court in relation to it which we were called upon to revise. See also *Northern Pacific Railroad* v. *Ellis*, 144 U. S. 458; *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 339.

It is true that in the suit under consideration the case was not formally sent back for an accounting, but it was practically so, since all the questions of law had been settled upon the first appeal beyond the power of the circuit court to reopen, and upon the remand that court could do nothing else than enter judgment for the taxes of 1892, 1893 and 1894, as well as for the taxes of 1895. The Supreme Court, in deciding that it would not reopen the question involved upon the first hearing, to let in the Federal defence presented by the new pleas, merely settled a question of practice which we cannot review.

By another process of reasoning we are led to the same conclusion. No leave was applied for or granted to file these additional pleas after the issues had been made up, as seems to be required by the practice in Mississippi, where it is said that all such pleas must be presented, with the application to file them to the court, that it may judge of the propriety of the pro-

posed action, *Hunt* v. *Walker*, 40 Mississippi, 590; *Pool* v. *Hill*, 44 Mississippi, 306; *Pfeifer* v. *Chamberlain*, 52 Mississippi, 89, 90; and even if leave had been asked to file them, it was a matter of discretion with the trial court to permit it, and a matter of state practice which cannot be inquired into here. *Stevens* v. *Nichols*, 157 U. S. 370; *Mexican Central Railway Co.* v. *Pinckney*, 149 U. S. 194, 199; *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 688. We are therefore of opinion that the Federal question was "specially set up and claimed" too late to be of any avail to the plaintiffs in error.

2. But the very arguments urged upon us by the defendant in error for holding that the Federal question was set up too late, as well as the reasons given for affirming the decree of the court in striking out the additional pleas, furnish a strong argument in favor of the position assumed by the railroad companies, that the Federal question was necessarily involved and must have been passed upon at the first hearing. This argument is in substance that the pleas were properly stricken out, because they presented no defence as the case then stood, by reason of the decision of the Supreme Court on the first appeal. 77 Mississippi, 194, 237.

In order to ascertain exactly what was in issue and what was decided by the Supreme Court, it is necessary to set forth the facts at some length. The original declaration averred the several consolidations by which the defendant companies were formed; the assessment of the same for taxation by the railroad commission; a copy of the assessment by counties; and the refusal to pay. Annexed thereto as exhibits were copies of the various charters and contracts of consolidations.

Underlying all the questions in the case are the following provisions of the constitution of 1869:

"Article 12, section 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

"Section 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

By the twenty-first section of an act to incorporate the Mobile

and Northwestern Railroad Company, approved July 20, 1870, the State "hereby agrees with said company (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company, upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company, in constructing the same. . . . *Provided, however*, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

By an act of August 8, 1870, the provisions of this section were extended to the Memphis and Vicksburg Railroad, the Natchez and Jackson Railroad, and a number of others not necessary here to be mentioned.

The Memphis and Vicksburg Railroad Company was incorporated the same day, August 8, 1870. The sixteenth section of this act enacted "that said company shall have the right and power to consolidate the stock, property and franchises of the road with any other road or roads, in or out of this State, at any time the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company."

By an act to incorporate the New Orleans, Baton Rouge, Vicksburg and Memphis Short Line Railroad Company, (hereinafter called the Baton Rouge Company,) approved March 9, 1882, it was enacted, sec. 25: "That the company shall have power and authority to purchase and hold any connecting railroad, and to operate the same or to consolidate the company with any other company under the name of one or both; but when such purchase is made, or consolidation is effected, the said company shall be entitled to all the benefits, rights, fran-

chises, lands and property of every description belonging to said road or roads so sold or consolidated."

Both these two last-mentioned companies were consolidated by an agreement made August 12, 1884, into the Louisville, New Orleans and Texas Railway Company.

By an act approved March 3, 1882, and an act amendatory thereto of March 15, 1884, the Memphis and Vicksburg Road was authorized to consolidate with any other company or companies, "whether such company or companies have been incorporated under the laws of this State or of any other State, so that all of the companies so consolidating shall be merged into and become one company; and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this State, and shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities, which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act." Another section (5) applied the twenty-first section of the Mobile and Northwestern charter to the company so consolidated.

By a further act of February 17, 1882, the Yazoo and Mississippi Valley Railway Company (hereinafter called the Yazoo Company) was authorized "to consolidate with any other railroad company in or out of Mississippi upon such terms as the consolidating companies might agree upon, . . . and upon any such consolidation the said consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties, immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidated company." Finally by the act of February 19, 1890, the Louisville, New Orleans and Texas Company, and the Natchez, Jackson and Columbus Company were authorized to consolidate with each other under the name of the Louisville, New

Orleans and Texas Company, and upon such terms as might be agreed upon by the companies.

In 1890 the State adopted a new constitution, the following clauses of which only are pertinent:

"SEC. 180. All existing charters or grants of corporate franchises under which organizations have not in good faith taken place at the adoption of this constitution, shall be subject to the provisions of this article," etc.

"SEC. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent, as property of individuals, etc. Exemptions from taxation, to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

On October 24, 1892, articles of consolidation were entered into between the Louisville Company and the Yazoo Company, the effect of which will hereafter be considered.

By the Code of Mississippi of 1892, section 3875, a system of taxing the property of railroad companies by the railroad commission was put in force. This article provided for a complete schedule of the property of the company, the total amount of its capital stock, its par value and the value of its franchise; and, by a law subsequently enacted, February 7, 1894, a state revenue agent was provided for, whose duty it was to enforce the payment of taxes by all classes of property owners. It was under the provisions of the laws of 1892 that this action was begun.

The railroad companies went to a trial of these cases in an obvious reliance upon two previous decisions of the Supreme Court of Mississippi. In the first one, (*Mississippi Mills* v. *Cook*, 56 Miss. 40,) that court held the constitutional provision, that "the property of all corporations for pecuniary profits shall be *subject* to taxation," did not require that such corporations must always be *subjected* to taxation, but that their property could not be placed beyond the reach of the taxing power; and that the legislature might exempt property of a particular class, whether the owners were corporations or natural persons

—in other words, that the provision was *mandatory* as to the liability of such property to be taxed, but *permissive* to the legislature to tax it or exempt it, as might seem proper. It further held that the provision of section 20, that "all property shall be taxed in proportion to its value," did not require that *all* property should be taxed, or deny to the legislature the right to exempt any; that the legislature might exempt property of a certain class, or property used for a certain purpose; that it had the power to select such objects of taxation as it might deem appropriate; but when any article of property was selected for taxation, it must be taxed in proportion to its value, and not specifically.

In the second case, *Railroad Company* v. *Lambert*, 70 Mississippi, 779, that court held the exemption in the twenty-first section of the charter of the Mobile and Northwestern Railroad was one which the legislature had power to confer, but not to make irrepealable; that under the acts of August 8, 1870, and March 5, 1878, this immunity from taxation was extended and confirmed to the Natchez, Jackson and Columbus Railroad Company, and by the act of February 19, 1890, authorizing a consolidation with the New Orleans, Louisville and Texas Company, the latter company by its consolidation acquired the immunities of the former company, and was entitled to the same exemption from taxation; also, that after the consolidation of the Louisville Company with the Yazoo Company, the latter succeeded to the same immunity from taxation on that part of its lines which formerly comprised the Natchez, Jackson and Columbus Railroad. In short, these cases cover practically every point involved in the case under consideration, and counsel evidently acted upon the theory that it was unnecessary to specifically set up and claim that there was a contract for exemption which the legislature had subsequently impaired.

But upon the hearing of the case under consideration the court (now differently constituted) overruled both of these cases, and held, first, that the legislature could not grant an exemption to a railway company under the constitution of 1869; second, that it could not grant an irrepealable exemption under that constitution; third, that a new company was formed by

the consolidation of October 24, 1892, and no exemption passed into it; fourth, that if the consolidation were a technical merger, still section 180 of the constitution of 1890 prevented any exemption from passing into it; fifth, that any such exemption was repealed by the acts of 1884, 1886 and 1890. Manifestly, that court could not have held the railways liable for the taxes in suit without deciding either that the provision of section 21 did not constitute a legal contract in view of the constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidations, or that the subsequent tax legislation of the State of 1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

In short, the case is one of those frequently arising under the second clause of Rev. Stat. section 709, in which the validity of a state statute under the Constitution of the United States is necessarily drawn in question, and the decision of the state court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section where a right, title, privilege or immunity is claimed, that the Federal question must be specially set up. The cases are collected in *Columbia Water Power Company* v. *Columbia Electric Street Railway Company*, 172 U. S. 475, 488. Thus, in *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, the record did not show that the constitutionality of an act of a state legislature was drawn in question; "but," said the Chief Justice, "we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court." So, in *Satterlee* v. *Matthewson*, 2 Pet. 380, it was said that if it sufficiently appear from the record itself that the repugnancy of the statute of a State to the Constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See also *Crowell* v. *Randell*, 10 Pet. 368; *Furman* v. *Nichol*, 8 Wall. 44; *Chicago Life Ins. Co.* v. *Needles*, 113

U. S. 574; *Eureka Lake &c. Co.* v. *Yuba County*, 116 U. S. 410; *Kaukauna Co.* v. *Green Bay & Mississippi Canal*, 142 U. S. 254. And the fact that the Supreme Court of the State did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in *Chapman* v. *Goodnow*, 123 U. S. 540, 548: "If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

The decision of the Supreme Court that the exemption in the Mobile and Northwestern Railroad Company's charter of 1870 was void under the constitution of 1869 was practically a decision that the contract of the State was beyond the power of the legislature and void, and hence there was no contract to be impaired. But conceding this contract to have been valid, another distinct question arose, whether that contract enured to the benefit of the plaintiffs in error by the successive consolidations—in other words, whether, as to the plaintiffs in error, there was any contract ever existing which the taxing legislation of Mississippi could impair. Both these questions were ruled against the railroads; and while the contract clause of the Federal Constitution was not discussed, the case turned upon the existence of such a contract, and no question seems to have been made that, if there had been a contract, it was impaired by the taxing legislation of 1892. As we have often held, that where an impairment of a contract by state legislation is charged, the existence or non-existence of the contract is a Federal question, it is impossible to escape the conclusion that the foundation of the whole case was, whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated, this was a Federal question, and the fact that the Supreme Court did not in terms discuss the contract clause of the Constitution does not oust our jurisdiction. In view of this record and the opinions

of the Supreme Court, the certificate of the Chief Justice, that the validity of the state statutes was actually drawn in question under the contract clause of the Constitution, was but a further assurance of a fact already appearing. The motion to dismiss must therefore be denied.

3. At the foundation of the right to a reversal of this case is the question whether, conceding the validity of the exemption or commutation provision contained in the twenty-first section of the Mobile Company's charter of July 21, 1870, such exemption enured to the plaintiffs in error under their successive consolidations. It will be borne in mind that the existing constitution of Mississippi was adopted November 1, 1890; that the present Yazoo Company was formed October 24, 1892, (nearly two years after the adoption of the constitution,) by the consolidation of the original Yazoo Company with the Louisville Company. By the act of August 8, 1870, the exemption contained in the twenty-first section of the Mobile charter was extended to the Memphis and Vicksburg Railroad, which was chartered the same day. This charter gave it power to consolidate its stock, property and franchises with any other road upon such terms as might be consistent with the powers conferred upon the company. Twelve years thereafter, March 9, 1882, the Baton Rouge Company was incorporated with power to consolidate with any other company, and on March 3, 1882, the Memphis and Vicksburg Company was also authorized to consolidate. The same power had already been extended February 17, 1882, to the Yazoo Company.

It is unnecessary to discuss the terms of the first consolidation of August 12, 1884, between the Tennessee Southern, the Memphis Company, the Baton Rouge Company, and the New Orleans Company, forming the Louisville, New Orleans and Texas Company, since this was made prior to the adoption of the new constitution of 1890. We are specially concerned with the articles of consolidation between the Louisville Company, so organized, and the Yazoo Company, which were adopted October 24, 1892, and subsequent to the new constitution. The question in that connection is whether such consolidation created a new corporation, or, in the language of section 180 of the con-

stitution of 1890, whether it was a "grant of corporate franchises," in which case, by the express language of that section, such new corporation became subject to the provision of the new constitution. In their articles of consolidation these companies agreed "to and with each other, to unite, merge and consolidate their several capital stocks, corporate rights, franchises, immunities and privileges, and properties of every kind, real, personal and mixed." The first article provided that "such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part, (the Louisville Company,) with and into the stock, property and franchises of the said the Yazoo and Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This article was evidently drawn in view of the decisions of this court upon the subject of merger and consolidation, and evinces a desire to avoid the legal results following from a consolidation of the two constituent companies into a new corporation, but, at the same time, expresses a doubt whether the agreement would not after all be construed to create a new corporation. These doubts were unquestionably well founded, and if the effect of the agreement be in law the creation of a new corporation, the expression of a wish that it should not be so construed, is of course entitled to no weight. The final clause, that in any event the agreement shall stand and be effective, shows that effect should be given to all its stipulations, whatever be its legal consequences.

Subsequent articles provided that the corporate name should be the Yazoo and Mississippi Valley Railroad Company; that the capital stock should be fifteen million dollars; that the stockholders of either of the constitutent companies should "have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable

at par for the now outstanding shares of each of the constituent companies;" that all the rights, powers, privileges, immunities and franchises of the constituent companies should pass to the consolidated company, which should be managed by a board of directors, whose names, for the purpose of the organization, were given.

Reading this agreement in connection with the charters of the several companies, and especially with that of the Memphis and Vicksburg Railroad Company of March 3, 1882, providing that "all of the companies so consolidating shall be merged into and *become one company*, and the company so formed by such consolidation shall be deemed and held to be *a corporation* created by the laws of this State," it is impossible to escape the conclusion that a new corporation was created with a capital stock of fifteen million dollars, and that the stockholders of the constituent companies were to become stockholders of the new company, share for share, "as fully as if new shares of the consolidated company had been issued and exchanged therefor." Some question was made in the state courts whether the shares were actually issued in the new company. But the Supreme Court having found that they were, we accept that finding as conclusive. Power was expressly given to issue new shares, and the usual course of business would justify us in inferring that that was the method adopted. A new name was taken, which was none the less a new one by reason of the fact that it was the name of one of the constituent companies.

It cannot be doubted that under this agreement it was contemplated that the constituent companies should go out of existence, and that their officers should resign their trusts in favor of the officers of the new company; that their boards of directors should be supplanted by another board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the

new corporation. In short, nothing was left of the constituent companies but the memory of their existence—the mere shadow of a name. But the new company which took their place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road.

While as stated in *Tomlinson* v. *Branch*, 15 Wall. 460, the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, subsequent cases have settled the law that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws. But if, as was the case in *Tomlinson* v. *Branch*, one road loses its identity and is merged in another, the latter preserving its identity, and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation but an enlargement of the old one. In such case it was held that where the company which had preserved its identity held as to its own property a perpetual exemption from taxation, it would not be extended to the property of the merged company without express words to that effect.

In the earliest of these cases, *Philadelphia, Wilmington &c. Railroad* v. *Maryland*, 10 How. 376, it was held that a Maryland railroad, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware and Maryland Railroad Company, whose charter exempted the road from taxation, except upon that portion of the permanent and fixed works which might be in the State of Maryland.

In *Central Railroad & Banking Company* v. *Georgia*, 92 U. S. 665, 670, an act of the legislature authorized the Central Railroad and the Macon Railroad to unite and consolidate their stock, and all their rights, privileges, immunities and franchises, under the name and charter of the Central Railroad, in such manner that each owner of shares of stock of the Macon Road should be entitled to receive an equal number of shares of the stock of the consolidated companies. "Whether," said Mr. Jus-

tice Strong, "such be the effect [consolidation or amalgamation] or not, must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created." It was held that the act did not work a dissolution of the existing corporations and the creation of a new company, since there was no provision for a surrender of the stock of the shareholders of the Central, and none for the issue of other certificates to them. In that case, the road, whose charter contained the exemption from taxation, was preserved intact by the consolidation, and it was held that its exemption continued, while the other road was to go out of existence. As already stated, in the act authorizing the consolidation in this case of the Memphis and Vicksburg Railroad Company, there is an express provision that all the companies so consolidated shall be merged into and become *one company*, and held to be a corporation created by the laws of the State.

Other cases to the same effect, holding that the consolidation did not operate as a dissolution of the constituent companies, are *Chesapeake & Ohio Railroad* v. *Virginia*, 94 U. S. 718; *Greene County* v. *Conness*, 109 U. S. 104, and *Tennessee* v. *Whitworth*, 117 U. S. 139.

It may be observed that all these cases turn upon the question whether the new company inherited by consolidation certain privileges and immunities belonging to the constituent companies, or one of them, and that no question arose as to the applicability of a new constitutional inhibition intervening before the consolidation took place. This question, however, did arise in *Shields* v. *Ohio*, 95 U. S. 319, where it was held that a consolidation under a statute of Ohio of two or more railroad companies worked their dissolution, and that the powers and franchises of the new company thereby formed were subject to "be altered, revoked or repealed by the General Assembly" under a constitutional provision which took effect prior to the consolidation. The statute in that case expressly provided that the consolidated company should be a new corporation and subject to the constitutional provision. A like ruling was made

under a similar statute of Maine in *Railroad Company* v. *Maine*, 96 U. S. 499. In *Railroad Company* v. *Georgia*, 98 U. S. 359, two railroad companies were consolidated by an act of the legislature, which authorized the consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. We held in that case that a new corporation was created, which became subject to the provisions of a statutory code, adopted January 1, 1863, permitting the charters of private corporations to be changed, modified or destroyed at the will of the legislature. The case was distinguished from *Railroad Company* v. *Georgia*, 92 U. S. 665, as being a consolidation instead of a merger. "Nor was it," said Mr. Justice Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name; but the act authorized the consolidation of the stocks of the two companies, thus making them one company in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company." To the same effect is *St. Louis, Iron Mountain &c. Railway* v. *Berry*, 113 U. S. 465.

The latest declaration of this court upon the subject is found in *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301. In that case, a railroad corporation chartered in Missouri in 1857, with a provision that its property should be exempt from taxation for a period of twenty years after its completion, which took place in 1872, was consolidated with an Iowa corporation in 1870, under a general law of Missouri; and in 1886 the consolidated road was sold under a deed of foreclosure to purchasers, who conveyed it to an Iowa corporation. It was held that the act of the legislature of Missouri authorizing the consolidation, making one company of the two, whose stock should be consolidated upon such terms as might be mutually agreed upon, authorizing the adoption of a new corporate name and the exchange of the stock of the constituent companies for stock in the new company, and providing for the filing with the secretary of state of a copy of the consolidation agreement, which

should be conclusive evidence of the consolidation and of the corporate name of the new company, was in effect the extinguishment of the prior companies and the formation of a new one; and that an intervening constitutional provision, adopted in 1865, prohibiting exemptions from taxation, was thereby let in and to be read as a part of the charter of the new company.

In view of the terms of the consolidating agreement, to which reference has already been made, and of the several acts of the Legislature of Mississippi authorizing these consolidations, we are of opinion that a new corporation was contemplated, and that, taken together, these several documents should be read as if they had expressly provided, with legislative sanction, for the formation of a new association. Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may in the interest of the public contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies. In cases arising under the Mississippi constitution of 1869, the method adopted in the charter of the Mobile and Northwestern Company of commuting the taxes was originally sustained under the theory that the provision of that constitution declaring "the property of all corporations for pecuniary profits shall be *subject* to taxation, the same as that of individuals," did not mean that it should be necessarily *subjected* to taxation, but that it might be exempted altogether by the legislature. *Mississippi Mills* v. *Cook*, 56 Mississippi, 40. But by the constitution of 1890, "all existing charters or *grants of corporate franchises* under which organi-

zations have not in good faith taken place at the adoption of this constitution, shall be subject to the provisions of the article," one of which was (section 181) that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as property of individuals."

It is true that in the act of March 9, 1882, authorizing the Baton Rouge Company to consolidate, in the act of March 3, 1882, authorizing the Memphis and Vicksburg Company to consolidate, and in the act of February 17, 1882, authorizing consolidations by the Yazoo Company, there were provisions that the consolidated companies should be entitled to the rights, privileges, franchises, property, grants and immunities belonging to constituent companies, among which, under the name of immunities, might pass an exemption from taxation, as has been sometimes held by this court; and had not the constitutional provision of 1890 taken effect before the final consolidation of 1892, we might have been obliged to hold that the consolidated company was entitled to the commutation of taxes provided for in the twenty-first section of the charter of the Mobile and Northwestern Company. But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the constitution of 1890, with the disabilities attaching thereto, among which is the provision that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals." Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the constitution would be interpreted as nullifying it to that extent.

A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously such terms must be consistent with the law existing at the time of the consolidation. It could never have been the intention of the legislature, and if it were it would be vain, to permit these companies to adopt such terms as they chose, if such terms were inconsistent with existing laws. The language indicated evidently refers to the

method adopted for the consolidation, whether it was to be anything more than a simple merger, or whether it was to provide for a surrender of the stock of the constituent companies, the issue of new stock, the adoption of a new name and the choice of a new board of directors. Under no circumstances would they be interpreted as conveying rights to the new corporation which the legislature was incompetent to confer.

Great stress is laid by the railroad companies upon the fact that at the time these companies were incorporated the State was without credit, the treasury without money, the issue of state bonds in aid of public improvements forbidden by the constitution, the levy of general taxes to assist in the building of the roads fruitless, the resources of the State having been exhausted by the civil war, which had left the community so poor that it was with difficulty the inhabitants could raise the taxes necessary for carrying on the government; that millions of acres of land were being abandoned and forfeited to the State for non-payment of taxes and subsequently sold at incredibly low figures; that the paramount necessity was clearly the building of railroads to develop the resources of the State, and yet that the topography of the country was such that both the construction and the maintenance of the roads was difficult and expensive, and railroad enterprises promised very doubtful profits; that the lands along the river bottoms were waste and swamp, uncultivated and unexplored, and subject to annual inundations from the Mississippi; that the levees had been swept away again and again, and Congress asked for aid to rebuild them upon the ground of the impossibility of the State to do the work; that in this condition of affairs the best that could be done was to offer as a remuneration to vote taxes as a consideration for building the road; that these proposals were accepted and carried out in good faith; that the result has been to increase the value of property in portions of the State fully one hundred fold, and to immensely increase the revenues of the State and counties, and that under these circumstances the present repudiation of these contracts by the State, by pleading a technical incapacity to contract, is a gross breach of public faith, and should be discountenanced by the courts.

Potent as these considerations are, they address themselves to the legislative rather than to the judicial department of the government. The legislature is the proper guardian of the public faith, and in its action with respect to its own obligations, we are bound to assume that it will be guided, not only by its present necessity for revenue, but by consideration of its possible future needs. But whatever policy the State may choose to adopt with respect to encouraging or discouraging the investment of capital from abroad, the duty of the courts is to declare the law as they find it, and avoid the discussion of questions of policy, which are clearly beyond their province. Certainly this court is not the keeper of the State's conscience. We have not thought it proper to inquire what were the answers to these charges. Doubtless they are sufficient, or at least are such as the legislature deemed to be sufficient, or it would not have passed the taxing acts of 1892 and 1894. While we have never hesitated to vindicate the right of individuals or corporations to enforce the performance of lawful contracts as against subsequent legislation designed to impair them, we have always exacted as a condition that the contract was one which the legislature, or opposite party, had power to make under the Constitution, and that the other party was chargeable with knowledge of all its provisions in that connection. To enforce a performance, the plaintiff must also bring himself within the letter and spirit of the contract, and thus provide against any change in public sentiment which may render its performance obnoxious or unpopular.

Being of opinion that the consolidation in question, which took place nearly two years subsequent to the adoption of this constitution, was a new grant of corporate franchises within the meaning of section 180, it follows that it became subject to the provisions of section 181.

The question how far the case of *Railroad Co.* v. *Lambert*, 70 Mississippi, 779, is applicable as *res adjudicata* upon the taxes involved in this case, is a local question, upon which we are not called upon to express an opinion. We do not understand it to be pressed as ground for reversal.

The judgment of the Supreme Court is therefore

Affirmed.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* ADAMS.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Nos. 355, 356. Argued October 22, 23, 1900.—Decided January 7, 1901.

These cases do not differ materially from the one just decided, (*ante* page 1), except as to the year for which the taxes were assessed.

THIS was an action against the Yazoo Company and the Illinois Central Company for state, county, municipal and privilege taxes for the year 1898, upon the property of the Louisville, New Orleans and Texas Company, which became the property of the Yazoo Company by virtue of the consolidation of October 24, 1892, and has since been operated by the defendants.

Mr. William D. Guthrie and *Mr. Edward Mayes* for plaintiffs in error. *Mr. Noel Gale* was on their brief.

Mr. F. A. Critz and *Mr. Marcellus Green* for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court.

This case does not differ materially from the one just decided except as to the year for which the taxes were assessed. A joint plea was filed by the defendants setting up a claim to exemption under the charter of the former Louisville Company, which for twenty-five years from March 3, 1882, appropriated all taxes to its construction debts, with a proviso that this appropriation should cease when the profits were sufficient to enable it to declare and pay an annual dividend of eight per cent upon the capital stock over and above the payment of its debts and liabilities. But this plea did not allege that the railroad was built under this charter, nor that the profits had not been

sufficient to pay the dividends, and a demurrer was interposed for these reasons, which was sustained by the court.

Defendants then, under leave to answer over, filed two pleas, of which the first, called the amended or second plea, rectified the two foregoing omissions, and set up that this exemption was an irrepealable contract of appropriation of the taxes, and protected by the contract clause and the Fourteenth Amendment.

The third plea set up the record and decision in *Railroad Co.* v. *Lambert*, 70 Miss. 799, as *res adjudicata*, and alleged that the contrary decision of June 20, 1898, in the case of *Adams* v. *Yazoo Company* was violative of the contract clause. Then followed a maze of replications, rejoinders and demurrers, into which it would be wholly unprofitable to enter. Suffice it to say that from this "labyrinth of special pleadings," as it was termed by the Supreme Court, (77 Miss. 780,) three questions were evolved:

First. Whether the provisions of section 21 of the charter of the Mobile and Northwestern Company constituted a valid and irrepealable contract between the state and the railroad company under the Mississippi constitution of 1869.

Second. Whether, conceding its validity, the consolidation of 1892 operated to terminate this contract.

Third. Whether the decision in the *Lambert* case operated as an estoppel against the prosecution of this action.

It is sufficient to say of the third question that it is not Federal in its character. What weight shall be given as an estoppel to a prior judgment of the same court is not a matter which can be reviewed here. We do not understand this point to be pressed.

The second question we have already disposed of in the main case. The immunity from taxation, contained in the charters of the constituent companies, did not enure to the new company formed by the consolidation of 1892.

In the view we have taken of the second question, the first becomes immaterial, as we have held in the prior case.

It is stipulated that another case (No. 356) brought against these companies for the taxes of 1898 upon the property of the Natchez, Jackson and Columbus division of the Louisville Com-

pany, now owned and operated by the Yazoo Company, shall abide the result of this.

The judgment of the Supreme Court of Mississippi in these cases is therefore

Affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* ADAMS.
ILLINOIS CENTRAL RAILROAD COMPANY *v.* ADAMS.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* ADAMS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Nos. 77, 78, 79. Argued October 24, 1900. — Decided January 7, 1901

An appeal to this court from a Circuit Court will not be dismissed upon the ground that, after an injunction against the collection of certain taxes was refused by the Circuit Court, and while the suit was still pending in that court, defendant brought suit in the state court and recovered the taxes in question. The defence of *res adjudicata* cannot be made available upon motion to dismiss an appeal.

Jurisdiction is the right to put the wheels of justice in motion, and to proceed to the final determination of the cause upon the pleadings and evidence. It exists in the Circuit Courts, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2000, and if the defendant be properly served with process within the district.

A failure to allege a compliance with the Ninety-fourth rule in equity concerning bills brought by stockholders of corporations against the corporation and other parties, does not raise a question of jurisdiction but of the authority of the plaintiff to maintain his bill.

As the bill set up a contract with the State in a railway charter, and also averred that such contract had been impaired by subsequent legislation, it was *held* that the bill presented a case under the Constitution of the United States, and that jurisdiction might be sustained upon that ground alone.

The question whether a suit, nominally against an individual by name, is in reality a suit against the State within the Eleventh Amendment to the

Statement of the Case.

Constitution, is a defence to the merits rather than to the jurisdiction of the court.

Such defence should be raised either by demurrer or other appropriate pleadings, and cannot be made available upon motion to dismiss.

Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case.

As the suit was against a revenue agent appointed by the State who represented all the parties interested, to enjoin the collection of a gross sum far exceeding the jurisdictional amount, the fact that such sum when collected would ultimately be distributed in small amounts to the various municipalities interested, does not defeat the jurisdiction of the court.

No. 77 was a bill in equity filed by the railroad company, an Illinois corporation, against Wirt Adams, revenue agent, a citizen of the State of Mississippi, the railroad commission of that State, and the Canton, Aberdeen and Nashville Railroad Company, a corporation of the State of Mississippi, to enjoin the railroad commission from approving and certifying an assessment for taxes on the Canton, Aberdeen and Nashville Railroad for any of the years from 1886 to 1897 inclusive; also to enjoin the revenue agent from beginning any suit, or advising any of the counties or towns along the line of such road to bring suit for the recovery of such taxes, and for a decree adjudging such railroad to be exempt from state and county taxation for the years aforesaid.

A temporary injunction, issued upon the filing of the bill, was subsequently discharged, an appeal taken to the Court of Appeals, which was dismissed for the want of jurisdiction, and a final decree subsequently entered in the Circuit Court dismissing the bill with the following certificate upon the questions of jurisdiction:

"1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen and Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen and Nashville Railroad Company a party defendant in the cause.

"2. That the complainant by its original bill showed no juris-

diction in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question.

"3. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the Eleventh Amendment to the Constitution of the United States."

Mr. William D. Guthrie for appellant.

Mr. F. A. Critz and *Mr. Marcellus Green* for appellees. *Mr. R. C. Beckett*, *Mr. S. Calhoun* and *Mr. Garner Wynn Green*, were on their brief.

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

1. Motion was made to dismiss this bill upon the ground that the purpose and object of the original injunction bill have failed by reason of the fact that, (as appears from an affidavit filed by Adams in this court since the case was docketed here,) after the injunction was refused, and before the bill was finally dismissed or an appeal taken to this court, he filed a bill in equity in the chancery court of Clay County, Mississippi, against the Illinois Central Railroad Company and the Canton, Aberdeen and Nashville Company to collect the same taxes involved here, and in addition thereto the taxes for the year 1898; that the defendants in their answer set up the same defences relied upon here, which were overruled by the chancery court, and a final judgment given against the property as a paramount lien, June 16, 1899, from which decree an appeal is now pending and undetermined in the Supreme Court of the State.

The argument is that, inasmuch as the injunction in this suit was vacated by the Circuit Court, the assessment of taxes completed, and suit brought upon it and judgment recovered, the appeal in this case is abortive and improper for the reason that the very things the bill was filed to prevent are accomplished facts, and the railway companies cannot be injured, inasmuch as they have a complete remedy by writ of error to the Supreme

Court of the State from this court, if any Federal question be involved and decided against them by that court.

The question which arises upon this state of facts is, first, whether a decree in an equity cause in a state court can be set up as *res adjudicata* pending an appeal from such decree to the Supreme Court of the State; and, second, whether, assuming the decree to be still in force pending the appeal, it can be pleaded as *res adjudicata* upon motion to dismiss the appeal in this court. We are of opinion that this is a defence to the merits of the case, and is no ground for the dismissal of the appeal. It would hardly be contended that, if this decree of the state court had been pronounced before the bill was filed in the Federal court, the appeal would be dismissed upon motion upon that ground; much less that it could be set up as ground for dismissing an appeal to this court. The case is not different, if the decree, instead of being rendered before the bill is filed in the Federal court, is rendered after such a bill is filed, and pending suit. In either case it is a question whether it operates as an estoppel. While the fact that an appeal has been taken from such decree, which is still pending, introduces a new element, it is still the same question whether the decree can be made available as an estoppel upon motion to dismiss.

It is true that since the injunction against him was dissolved, Adams has sued and has succeeded, but it does not follow that his judgment may not be reversed by the Supreme Court when plaintiff's right to prosecute this bill would be revived.

We think the question is practically covered by the decision of this court at the last term in the case of *Huntington* v. *Laidley*, 176 U. S. 668. In that case Huntington, as a receiver of the Central Land Company, on February 28, 1891, filed a bill in the Circuit Court of the United States against Laidley and other defendants, to set aside certain deeds which were claimed to be in fraud of the rights of the land company and a cloud upon its title. Defendants answered and set up by way of estoppel certain judgments in the state courts rendered before the bill was filed, in favor of Laidley and against the Central Land Company in an action of ejectment, and also in a suit in equity between them. The Circuit Court upon this state of

facts certified to this court whether that court was without jurisdiction, because of the pendency in the state court, prior to the suit, of the action of ejectment begun by Laidley against the Central Land Company, and also of the suit in chancery brought in the state court prior to the commencement of the case. It was held by this court that the question "whether the proceedings in any or all of the suits, at law or equity, in the state courts, afforded a defence, either by way of *res adjudicata*, or because of any control acquired by the state court over the subject-matter to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction." "The Circuit Court of the United States," said Mr. Justice Gray, "cannot, by treating a question of merits as a question of jurisdiction, enable this court (upon a direct appeal on the question of jurisdiction only) to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case." So, too, in *Reilly* v. *Bader*, 50 Minnesota, 199, it was held that a former adjudication could not be set up by motion after trial and verdict. All that was held in *Marsh* v. *Shepard*, 120 U. S. 595, was that one of several appellants cannot dismiss an appeal to this court, if the other appellants oppose such dismissal, though after the appeal was taken the Supreme Court of the State had enjoined all the appellants from enforcing their claims. Motion was denied upon the grounds that one appellant cannot control the appeal as against his co-appellants. In *Mills* v. *Green*, 159 U. S. 651, it was only held that where, after appeal taken, an event occurs which would render it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment but will dismiss the appeal—in other words, that the court will not decide moot cases. In the case under consideration, however, the question still remains whether a decree of a state court can be made available as an estoppel pending an appeal to the Supreme Court, and this, as already stated, is a defence upon the merits.

As the Circuit Court certifies to this court, pursuant to section 5 of the Courts of Appeal Act, that the bill was dismissed for the want of jurisdiction, and this fact further appears on the face of the decree discharging the restraining order and overruling the motion for an injunction, the motion to dismiss must be denied.

Coming now to the three questions certified upon the subject of jurisdiction by the Circuit Court, we are next to inquire whether such jurisdiction can be supported upon the ground (1) of diversity of citizenship; (2) of a question arising under the Constitution or laws of the United States; or (3) whether it is ousted by the fact that the suit is against the State of Mississippi in violation of the Eleventh Amendment to the Constitution.

2. Plaintiff is averred to be a citizen of Illinois, and all the defendants citizens of Mississippi; but it further appears that the Illinois Central Company claims the right to bring the bill upon the ground that it is the lessee of the property and a creditor and a mortgage bondholder of the Canton, Aberdeen and Nashville Railroad Company, whose property is sought to be taxed. It seems that it was once the owner of all the bonds, amounting to $2,000,000, but for some reason a subsequent mortgage was executed, and under it bonds to the amount of $1,750,000 were issued and sold, and a like number of the first two million issue were surrendered, and a note, secured by a second mortgage, taken for the balance. The latter bonds and note are averred to have been paid for at par in good faith, and to be secured by a paramount lien, and in reliance upon the charter as valid, and upon the mortgaged premises as being free from taxation for twenty years. It is not averred in the bill that the Canton Company has ever refused to sue, or has in any way been requested to sue, by the appellant, or by any one else. The gravamen of the bill is that the Canton Company was chartered by the legislature of the State by act of February 17, 1882, and that by such charter it "was exempt from taxation for a term of twenty years from the date of approval of this act."

It is here insisted, and such seems to have been the opinion of

the court below, that the appeal cannot be sustained under the Ninety-fourth equity rule, which provides that every bill brought by stockholders of corporations against the corporation and other parties, founded on rights which may properly be asserted by the corporation, "must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer upon a court of the United States jurisdiction of a case, of which it would not otherwise have cognizance;" and must "also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." Assuming, under the affidavit of Adams, though made only upon information and belief, that the plaintiff, the Illinois Central, owns a majority of the stock of the Canton Company, we are still of the opinion that the defence set up under the Ninety-fourth rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain this bill. Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2000, and the defendant be properly served with process within the district. Excepting certain *quasi*-jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the Circuit Courts. It may undoubtedly be shown in defence that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the

cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of *Smith* v. *McKay*, 161 U. S. 355, and *Blythe* v. *Hinckley*, 173 U. S. 501, that it was not a question of the jurisdiction of the Circuit Court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity. The objection that plaintiff has failed to comply with the Ninety-fourth rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case.

3. But we are also of opinion that the bill presents a case under the Constitution of the United States, and that jurisdiction may be sustained upon that ground alone. The bill set forth the provisions of the constitution of 1869, and the interpretation put upon it in the case of *Mississippi Mills* v. *Cook*, 56 Mississippi, 40, rendered in 1878, wherein that court construed these provisions, and declared that they did not require the legislature to tax the property of corporations for pecuniary profits; that this ruling had been repeatedly affirmed and had become the settled rule of property in the State, adopted and acted upon by the legislative, judicial and executive departments. The bill further alleged a continued course of legislative exemption of railway properties from taxation; that the railroad commission had never before denied the validity of the exemption of the Canton Company, nor attempted to assess that company for taxation; that the constitution of 1890 expressly provided that exemptions from taxation to which corporations were legally entitled at the adoption of this constitution should remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the gene-

ral laws, unless sooner repealed by the legislature, and that successive legislatures had since the adoption of that constitution refused to repeal exemptions contained in charters theretofore granted; that the plaintiff, upon the faith of this interpretation of the constitution of 1869, and of a provision in the charter of the Canton Company exempting it from taxation for twenty years, advanced over $2,500,000 to build and equip the road; that the same was built with the money so furnished; that a lease of such road was executed to plaintiff, and that it had since been and is now in possession of the property; that the charter, with its exemption, the right to lease and the lease itself, were contracts rightfully made in view of the settled law as declared, and were valid under the constitution of Mississippi as previously expounded, and that the obligations of these contracts were binding as against any subsequent change of judicial decision. The bill further averred that the defendants, "claiming to act under laws of said State, passed subsequently to said charter and its acceptance, are endeavoring to and will, illegally, impair and destroy the obligations of said charter contract, as aforesaid, unless restrained by your honors, . . . and that they are also attempting and claim that they have succeeded in fastening upon said railroad a first and paramount lien under acts of said State, passed in 1892 and 1894, and acts done by them in 1898 which displaces and is paramount to the lien to secure said mortgage bonds." It also denied the constitutional power of subsequent legislatures to compel the payment of taxes retroactively, while not denying its power to repeal the exemption in the charter as to future taxes, and, generally, that the contract had been impaired by the acts of the legislature ordering the assessment of the property for taxation.

The bill clearly avers a case arising under the Constitution of the United States, and is one of which the Circuit Court would have jurisdiction irrespective of the citizenship of the the parties. As we had occasion to observe in *City Railway Company* v. *Citizens' Street Railroad Company*, 166 U. S. 557, 564, "whether the State had or had not impaired the obligation of this contract was not a question which could properly

be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one." See also *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79, 88.

4. The question whether this is a suit against the State within the Eleventh Amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another State, is also one which we think belongs to the merits rather than to the jurisdiction. If it were a suit directly against the State by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858, wherein he makes the following observation: "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

It may be said in a certain sense that the judicial power does not extend to civil suits (at least if begun by *capias*) against members of Congress or of the state legislatures, pending the session; or against witnesses going to, attending or returning from courts of justice; or against bankrupts for causes for action arising before bankruptcy and covered by the discharge; or against infants upon their general contracts; or against the owners of vessels who have petitioned for a limitation of liability; but it was never doubted that such power extended to an

examination of the question whether the defendant was entitled to the exemption of liability claimed by him, and in passing upon this question the court necessarily assumed jurisdiction of the cause. In the great case of *Chisholm* v. *Georgia*, 2 Dallas, 419, it was never intimated, either by court or counsel, that the question of the suability of the State was not within the jurisdiction of the court to decide, the whole argument being addressed to the question of non-liability to a citizen of another State. In that case the process was served upon the Governor of the State, but as he did not appear, counsel for the plaintiff made a motion that unless the State caused its appearance to be entered judgment should be rendered by default. This seemed to be the only method by which the court could be called upon to pass upon the suability of the State, and was in reality a motion for judgment. See also *Hans* v. *Louisiana*, 134 U. S. 1.

But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. As already observed, this question depends upon the language of the statute, although the word "jurisdiction" is frequently, and somewhat loosely, used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case. To put a familiar test: can it be possible that if the plaintiff company were to succeed in this suit, the decree in its favor could be attacked collaterally as null and void for want of jurisdiction, by reason of the fact that the bill failed to allege a compliance with the Ninety-fourth rule in equity, or because the defendant was really a representative of the State, and the suit was in fact a suit against the State?

But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case. *Howard* v. *Waldo*, 1 Root, 538; *Conger* v. *Dean*, 3 Iowa, 463;

Lyon v. *Smith*, 66 Mich. 676; *Bloss* v. *Tacke*, 59 Missouri, 174; *Chapman* v. *Blakeman*, 31 Kansas, 684; *Hill* v. *Hermans*, 59 N. Y. 396; *Oregon & Transcontinental Co.* v. *Northern Pacific Railroad*, 32 Fed. Rep. 428; *The Othello*, 1 Ben. 43; *Cushing* v. *Laird*, 4 Ben. 70.

In *Fitts* v. *McGhee*, 172 U. S. 516, where a suit was brought against state officers to enjoin them from proceeding under an alleged unconstitutional law, the question whether they were representatives of the State was disposed of upon answers filed by officers of the State.

5. The question whether the amount in controversy be sufficient to sustain this bill is not one of those certified by the Circuit Court, nor upon which that court expressed an opinion; but, assuming it to be properly before us, we think that jurisdiction cannot be defeated upon that ground. The allegation of the bill is that the taxes assessed amount to a "large sum, much more than twenty thousand dollars, to wit, the sum of ———dollars." The suit is against the revenue agent, who represents all the parties interested, to enjoin the collection of a gross sum far exceeding the jurisdictional amount. How that sum, if collected, would ultimately be disposed of, and to which and in what proportions and amounts it would be parcelled out to the several municipalities interested, is one which does not arise upon the face of the bill, and is unnecessary to be considered here. In *Walter* v. *North Eastern Railroad Co.*, 147 U. S. 370, the bill was filed by the railroad company against the officers of four counties through which the road passed to enjoin the collection of certain taxes. The amount applicable to each county was stated in the bill, and it appeared that in each case it was much less than $2000. It was held that had these taxes been paid under protest and the plaintiff sought to recover them back, it would have been obliged to bring separate actions in each county, as the amount recoverable from each county would be different, and no joint judgment could possibly be rendered. So, if the injunction had been sought in a state court, the defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county. This was also the case in *Fishback* v. *Western Union Telegraph Co.*, 161 U. S.

96. These cases are quite distinguishable from those which hold that an action may be maintained for a lump sum, though such sum when collected may be subsequently distributed among various parties, each receiving less than the jurisdictional amount. *Shields* v. *Thomas*, 17 How. 3, 4; *Rodd* v. *Heartt*, 17 Wall. 354; *The Connemara*, 103 U. S. 754; *New Orleans Pacific Railway Co.* v. *Parker*, 143 U. S. 42.

In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the Circuit Court to entertain this bill, and its authority to pass upon the several defences set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer; but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits.

No. 78, another case between the same parties, arises upon a similar record. This was also a bill by the Illinois Central Company against the revenue agent and railroad commission of the State, and against the Yazoo and Mississippi Valley Railway Company, to enjoin the assessment of taxes on railroad property formerly belonging to the Natchez, Jackson and Columbus Railroad Company for the years 1886 to 1891 inclusive. The plaintiff sued as owner of all but four shares of the capital stock of the Yazoo Company, which company in turn owned a large part of the capital stock of the Louisville, New Orleans and Texas Company, of which plaintiff was a large bondholder. The Louisville Company had acquired by purchase the property and franchises of the Natchez, Jackson and Columbus Company, which was sought to be taxed by the assessment enjoined. The bill further set forth the consolidation of the Louisville Company with the Yazoo Company upon which the first of these cases turned, and claimed all the immunities belonging to the

constituent companies. The same questions are presented by the record and the same result must follow.

Still another case (No. 79) is brought by the Yazoo and Mississippi Valley Railway Company, consolidated October 24, 1892, with the Louisville, New Orleans and Texas Company, whereby all the property and franchises formerly belonging to the Natchez, Jackson and Columbus Company were transferred to and became the property of the plaintiff, including which were the contract rights of the Natchez Company under section 21 of the Mobile and Northwestern charter. This suit was brought to enjoin the collection of taxes for the year 1898 upon the property originally belonging to the Natchez and Louisville Companies. As the plaintiff was a citizen of Mississippi no question of the diversity of citizenship arose, and jurisdiction was not claimed upon that ground. The questions are otherwise identical with those presented in the former cases, and a similar result must follow.

The decrees of the Circuit Court dismissing the bills in these cases for the want of jurisdiction must therefore be reversed, and the cases remanded to that court for further proceedings not inconsistent with this opinion.

YAZOO AND MISSISSIPPI RAILROAD COMPANY *v.* ADAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 80. Submitted October 22, 1900.—Decided January 7, 1901.

A writ of error to the Supreme Court of a State cannot be sustained when the only question involved is the construction of a charter or contract, although it appear that there were statutes subsequent to such charter which might have been, but were not, relied upon as raising a Federal question concerning the construction of the contract. If the sole question be whether the Supreme Court has properly interpreted the contract, and there be no question of subsequent legislative impairment, there is no Federal question to be answered. The court is not bound to search the statutes to find one which can be construed as impairing the obliga-

Statement of the Case.

tion of the charter, when no such statute is set up in the pleadings or in the opinion of the court.

Such omission cannot be supplied by the certificate of the Chief Justice that, upon the argument of the case, the validity of the subsequent legislation was drawn in question, upon the ground of its repugnancy to the Constitution of the United States.

THIS was an action begun in the circuit court of Hinds County, Mississippi, by Adams, as state revenue agent, suing for the use and benefit of certain cities and towns through which the defendant railway runs, to recover municipal taxes upon its property for the years 1893 to 1896, inclusive.

A demurrer to the declaration having been sustained upon the ground that the exemption claimed by defendant in its charter was perpetual and unconditional as to the municipal taxes, an appeal was taken to the Supreme Court which reversed the action of the circuit court, and remanded the case for a new trial. 75 Mississippi, 275. An amended declaration having been filed claiming taxes from 1886 to 1897 inclusive, defendant interposed pleas (1) of the general issue; (2) that defendant was organized under an act of February 17, 1882, containing the following provision in section 8: "That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond 25 years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the state

Counsel for Appellant.

treasury, to be dealt with as the legislature may direct; *but said company shall be exempt from taxation by cities and towns;*" that the railroad was completed to the Mississippi River, October 25, 1892, by a consolidation with the Louisville, New Orleans and Texas Railway Company, which had constructed and was then the owner of certain branches which reached the Mississippi River at several different points; (3) that after the company was organized, but before its line was finally located and constructed, the municipal authorities of the city of Jackson adopted an ordinance releasing the road from all city taxation for twenty years from date, provided it selected Jackson for its southeastern terminus, and provided further that the work on said road be commenced within one year and be completed within three years to Yazoo City; and that such ordinance was accepted and complied with by the defendant; (4) that, prior to the assessment of these taxes, defendant leased its road to the Illinois Central for a term of fifty years, which, until the bringing of this suit held and operated such road under such lease; that by its terms the Illinois Central agreed to pay and discharge all taxes assessed upon the defendant company; that under defendant's charter it was exempted from all municipal taxation; that the right of the legislature to make such exemption had been judicially recognized in the case of *Mississippi Mills* v. *Cook*, 56 Mississippi, 40, and that such exemption entered into and constituted a part of the aforesaid lease, and of the charter contract between the defendant and the State; and that "the said exemption, by said charter conferred, has never been repealed by the legislature of said State," but that during the four years named the legislature refused to pass bills introduced to repeal such exemption.

A new trial resulted in a verdict for the plaintiff, which was affirmed by the Supreme Court. 76 Mississippi, 545. Hence this writ of error.

Mr. William D. Guthrie and *Mr. Edward Mayes* for appellants. *Mr. Noel Gale*, *Mr. James Fentress* and *Mr. J. M. Dickinson* were on their brief.

Mr. F. A. Critz and *Mr. Marcellus Green* for appellees. *Mr. R. C. Beckett* was on their brief.

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

Motion was made to dismiss for the want of a Federal question. The ground of the motion is that, while the second and fourth pleas set up the exemption contained in the charter from all municipal taxation, and the third pleads the exemption from city taxation by the ordinance of the mayor and aldermen of the city of Jackson, and inferentially at least, that these constitute a contract under which the road was built, there is not only no averment that this contract had been impaired by subsequent legislation, but no discussion of the case in that aspect by the Supreme Court, which held that under a proper construction of the charter the railroad company is not entitled to an exemption from municipal taxation, because the road had never been completed to the Mississippi River. There was undoubtedly legislation both before and subsequent to the charter of this company, February 17, 1882, authorizing municipalities to impose taxes, but no allusion to them is made either in the pleadings, proofs or in the opinion of the Supreme Court.

The case then resolves itself into this: whether jurisdiction can be sustained when the only question involved is the construction of a charter or contract, although it appear that there were statutes subsequent thereto which might have been, but were not, relied upon as raising a Federal question concerning the construction of the contract. There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the Supreme Court of the State. The authorities upon this point are very numerous, but they all belong to a class of cases in which it was averred that, properly construed, the contract was impaired by subsequent legislation; but, if the sole question be whether the Supreme Court has properly interpreted the contract, and there be no question of subsequent

legislative impairment, there is no Federal question to be answered. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388.

To sustain our jurisdiction under the second clause of Rev. Stat. sec. 709, relied upon here, there must be drawn in question the validity of a state statute upon the ground of its being repugnant to the Constitution or laws of the United States; but of what state statute is the validity attacked in this case? None is pointed out in the record; none set up in the pleas; none mentioned in the opinion of the court. In fact, in the fourth plea it is expressly averred that "the exemption by said charter conferred has never been repealed by the legislature of the State;" and we are only asked to infer that certain statutes describing in detail methods of municipal taxation did in fact impair the obligation of the chartered contract. But are we bound to search the statutes of Mississippi to find one which can be construed as impairing the obligation of the charter? It is true that, in the first assignment of error in this court, it is averred that the Supreme Court of the State erred in rendering its judgment, whereby the tax provisions of the Annotated Code of 1892, providing for the office of revenue agent, and chapter 34 of the Laws of 1894, defining the powers of that office, "were given effect against the contract rights of the plaintiffs in error," contrary to the contract clause of the Constitution; but no mention is made of this in the assignments of error filed in the Supreme Court of the State, which were of the most general description, and no allusion is made to the Code of 1892 or of the act of 1894 in the opinion of the court.

There is a laxity of pleading, in failing to set up the subsequent law impairing the obligation of the contract, which ought not be encouraged. Granting that, as the case arose under the second clause of Rev. Stat. sec. 709, the invalidity of the statute need not be "specially set up and claimed," it must appear under the most liberal construction of that section that it was necessarily involved, and must indirectly, at least, have been passed upon in the opinion of the Supreme Court; but, for aught that appears, the very statutes under which this road was taxed were in existence before the road was chartered, although others, prescribing a different method of assessing

and collecting such taxes, may have been passed subsequent thereto. This subsequent legislation, however, may have had, and apparently did have, nothing to do with the disposition of the case.

Three recent cases in this court are pertinent in this connection. In *Central Land Co.* v. *Laidley*, 159 U. S. 103, an action of ejectment was brought by Laidley against the land company in a court of West Virginia. The case turned upon the defectiveness of a wife's acknowledgment to a deed of land. The Court of Appeals of Virginia, prior to the organization of the State of West Virginia, had in several cases held that acknowledgments in this form were sufficient; but the Court of Appeals of West Virginia in this case held it to be insufficient, and the change of the settled construction of the statute was charged as an impairment of the contract. This court held that under the contract clause of the Constitution, not only must the obligation of the contract be impaired, but it must have been impaired by some act of the legislative power of the State and not by decisions of the judicial department only. "The appellate jurisdiction of this court," said Mr. Justice Gray, "upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, . . . and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity." It was said by Mr. Justice Miller in *Knox* v. *Exchange Bank*, 12 Wall. 379, 383: "We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

So also in *Turner* v. *Wilkes County Commissioners*, 173 U. S.

461, it was said that "this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject." In this case, too, the plaintiff in error sought to take advantage of a change of judicial construction by the Supreme Court of the State, which had held that the bonds were void, because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the constitution.

The case of the *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas*, 132 U. S. 174, is much relied upon by the plaintiff in error, and is claimed to be full authority for the maintenance of the writ in this case. This was a bill by the plaintiff in error in the case under consideration to enjoin a collection of taxes upon its property. "The illegality complained of was that the tax was in violation of the company's charter, by which it was insisted the property of the company incident to its railroad operations was exempted from taxation; and it was averred that the charter, as respects the exemption claimed, was a contract irrevocable, and protected by the contract clause of the Constitution of the United States; *that the unwarranted application of the general laws subsequently passed*, as well as the application of the general laws in force at the time, is equivalent to a direct repeal of the charter exemption; that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the State." Not only does it appear from the opinion that the taxes in question were assessed under an act passed in 1888, subsequent to the charter, but on reference to the original bill, which we have consulted for that purpose, we find that this act of April 3, 1888, was specially set up and pleaded in the bill, and was charged to be a violation of the charter contract, which exempted the orator's road from taxation, and that such application of said act was the same as a repeal or revocation of the granted exemption, and therefore in violation of the Constitution of the United States

forbidding such violation. In other words, the bill in that case not only pointed out the exemptions contained in the plaintiff's charter, but also set up the subsequent statute, which it was contended impaired the obligation of that contract. The bill thus contained the allegation which is wanting in this case, and put it in the power of this court to say whether the contract set up in the bill had been properly construed by the state court. This was also the case in *Columbia Water Power Co.* v. *Columbia Electric Street Railway Co.*, 172 U. S. 475, and *McCulloch* v. *Virginia*, 172 U. S. 102.

If jurisdiction in this case be sustained, it results that whenever a state court gives a certain construction to a contract, it is our duty to search the subsequent statutes and to find out whether there be one which, under a different construction of the contract, may be held to impair it. We must decline the obligation. As was said by the Chief Justice in *Powell* v. *Brunswick County*, 150 U. S. 433, 440: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon in arriving at conclusions upon the matters actually presented and considered." See also *Louisville & Nashville Railroad Co.* v. *Louisville*, 166 U. S. 709, 715.

It is true that the Chief Justice of the Supreme Court certifies that upon the argument of this case the validity of legislation of the State of Mississippi subsequent to the statute of February 17, 1882, was drawn in question by the company upon the ground of its repugnacy to the Constitution of the United States; but we have repeatedly held that such certificate is insufficient to give us jurisdiction where it does not appear in the record, and that its office is to make more certain and specific what is too general and indefinite in the record. *Lawler* v. *Walker*, 14 How. 149; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477. It is said in *Lawler's* case that "the

statutes complained of in this case should have been stated. Without that the court cannot apply them to the subject-matter of litigation to determine whether or not they have violated the Constitution or laws of the United States." See also *Railroad Co.* v. *Rock*, 4 Wall. 177; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Powell* v. *Brunswick County*, 150 U. S. 433, and cases cited.

The writ of error is therefore

Dismissed.

QUEEN OF THE PACIFIC.

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

No. 130. Argued and submitted December 14, 1900.—Decided January 7, 1901.

A stipulation in a bill of lading that all claims against a steamship company, or any of the stockholders of the company, for damage to merchandise, must be presented to the company within thirty days from the date of the bill of lading, applies, though the suit be *in rem*, against the steamship carrying the property covered by the bill of lading.

In the view of the facts that the loss occurred the day after the bill of lading was signed, and the shippers were notified of such loss within three days thereafter, the stipulation was a reasonable one, and a failure to present the claim within the time limited was held a bar to recovery against the company *in personam* or against the ship *in rem*.

The reasonableness of such notice depends upon the length of the voyage, the time at which the loss occurred, and all the other circumstances of the case.

THIS was a joint libel by the Bancroft-Whitney Company, a California corporation, and the firm of Hellman, Haas & Company against the steamship, Queen of the Pacific, owned by the Pacific Coast Steamship Company, to recover damages to certain miscellaneous merchandise shipped April 29, 1888, at San Francisco, to consignees at San Pedro in the State of California.

The contracts of affreightment were evidenced by bills of lading in the usual form and with the usual exception of perils of the sea, and amongst others with the following stipulation:

"It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

The steamship left San Francisco about two o'clock in the afternoon of April 29, 1888, bound for the port of San Diego and intermediate ports, having on board a cargo of general merchandise and upwards of two hundred persons. A little more than twelve hours after she sailed, and about half past two o'clock in the morning of the 30th, the steamer was seen to have sprung a leak and to be taking in water through a watertight compartment known as the starboard alleyway. At this time she had a list of from five to eight degrees to starboard, which, when she reached Port Harford, four or five hours afterwards, had increased to an angle of thirty degrees. When about two hundred and fifty or three hundred yards from the wharf, where she usually made her landing, she took the bottom in about twenty-three feet of water, and in about twenty minutes thereafter filled, sank and lay in a helpless condition for three or four days. A diver, procured for that purpose, after repeated efforts, found the leak and stopped it, whereupon the water was pumped out of the vessel, and she was towed to San Francisco, where she arrived the next day. Her cargo was all discharged upon the wharf, and delivery thereof tendered and accepted by the several owners, who gave the usual average bonds. On May 19, that portion of the cargo belonging to Hellman, Hass & Company was sold by them at public auction. No claim for damage to the merchandise was made

upon the owners of the Queen prior to the sale, nor were they invited to such sale. In short, nothing further appears to have been done for nearly four years, though the steamer was constantly running to and from San Francisco, when on April 28, 1892, this libel was filed. Exceptions to the libel were interposed and overruled, (61 Fed. Rep. 213,) and the case subsequently went to a hearing upon libel, answers and testimony, and resulted in a decree for the libellants for the full amount of their claim, (78 Fed. Rep. 155,) which was affirmed by the Court of Appeals. 94 Fed. Rep. 180. Whereupon this writ of certiorari was granted.

Mr. Thomas B. Reed for the Pacific Coast Steamship Company.

Mr. Milton Andros for the Bancroft-Whitney Company and others.

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

The Court of Appeals in its opinion dwelt upon several propositions arising upon the pleadings and evidence, but in the view we have taken of the case we shall find it necessary to discuss but one, which is, in substance, that the libellants did not, as required by the bill of lading, present to the company their claims for damage to the merchandise within thirty days from the date of the bills of lading, April 27 and 28, 1888. There is no pretence of a compliance with this condition. Two answers are made to this defence: First, that the limitation applies only to claims against the steamship company or any of the stockholders of said company, and not to claims against the vessel; second, that the limitation is unreasonable.

1. The first objection is quite too technical. It virtually assumes that there were two contracts, one with the company and one with the ship, the vehicle of transportation owned and employed by the company; and that while the company as to all its other property is protected by the contract, as to this

particular property, used in carrying it out, it is not so protected. But if such be the case with respect to this particular stipulation, must it not also be so with respect to the other stipulations in the bill of lading to which the company is a party but not the ship? Thus, "the responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles." Can it be possible that the responsibility of the ship shall not cease at the same time? "The company shall not be held responsible for any damage or loss resulting from fire at sea or in port; accident to or from machinery, boilers or steam," etc.; but shall the company be exempt and not the ship? "It is expressly understood that the said company shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, etc., . . . nor for loss of specie, bullion, etc., unless shipped under its proper title or name, and extra freight paid thereon;" but shall the ship be liable for all these excepted losses notwithstanding that the company is exonerated? These questions can admit of but one answer. There was in truth but one contract, and that was between the libellants upon the one part, and the company in its individual capacity and as the representative of the ship, upon the other.

There is no doubt of the general proposition that restrictions upon the liability of a common carrier, inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed, still they ought not to be wholly frittered away by an adherence to the letter of the contract in obvious disregard of its intent and spirit. It is too clear for argument that it was the intention of the company to require notice to be given of all claims for losses or damage to merchandise entrusted to its care, and as such damage could only come to it while the merchandise was upon one of its steamers or in the process of reception or delivery, and as the owner would have his option to sue either *in rem* or *in personam*, it could never have been contemplated that in the one case he should be obliged to give notice and not in the other. In either event, the money to pay for such damage must come from the treasury of the company; and we ought not to give such an effect to the stipulation as would enable the owner of

the merchandise to avoid its operation by simply changing his form of action. It would be almost as unreasonable to give it this construction as to hold that it should apply if the action were in contract, but should not apply if it were in tort. The "*claim*" is in either case against the company, though the *suit* may be against its property.

2. The question of the reasonableness of the requirement is one largely dependent upon the object of the notice and the length of the voyage. Thus, a notice which would be perfectly reasonable as applied to steamers making daily trips, might be wholly unreasonable as applied to vessels engaged in a foreign trade. Indeed, a thirty-day notice, such as is involved in this case, would be wholly futile as applied to a steamship plying between San Francisco and trans-Pacific ports. Notice might also be deemed reasonable, or otherwise, according to the facts of the particular case. Thus, if the Queen had been driven out to sea and was not heard from for thirty days, obviously the provision would not apply, since its enforcement might wholly destroy the right of recovery. The question is whether under the circumstances of the particular case the requirement be a reasonable one or not.

The Queen was engaged in short trips and in general trade to San Diego, doubtless delivering merchandise in different parcels and in different quantities to large numbers of consignees at the termini, and at intermediate ports. If any damage occurred to such articles, it was of the utmost importance to the company to have the claim made as soon as possible, while the witnesses, who must often be sailors, difficult to find and still more difficult to retain, might be reached, and while their memory was fresh, that the company might then know whether it had a defence to the claim. In case of a disaster occurring on such voyage, it could hardly fail to be known in San Francisco within three or four days from the time the steamer left there. As a matter of fact, the bills of lading in this case were signed April 27 and 28; the loss occurred on April 30, and notice was mailed to the shippers on May 2. There were thus over three weeks during which they were at liberty to make

inquiries, examine into the facts, and determine whether to make claim upon the company or not.

Similar stipulations requiring notices of losses to be given to common carriers, express companies, telegraph and insurance companies have so often been upheld by the courts, when reasonable, that a review of the cases is quite unnecessary. Indeed, this is not the first time that the question has been before this court.

In *Express Co.* v. *Caldwell*, 21 Wall. 264, an agreement by an express company that it should not be liable for any loss of or damage to any package unless claim should be made therefor within ninety days from its delivery to the company, was held to be one which the company could rightfully make, since the time for transit required only about a day. In *Lewis* v. *Great Western Railway Co.*, 5 H. & N. 867, there was a provision in the bill of lading that no claim for damage should be allowed, unless made within three days after the delivery of the goods. This was held to be valid. "The company, wishing to guard against any allegation of neglect in the delivery of goods confided to them, require that when the goods are delivered they shall be promptly examined and complaint at once made if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort."

In *Goggin* v. *Kansas Pacific Railway Co.*, 12 Kansas, 416, there was a requirement that claims for damage to live stock should be made in writing, before or at the time the stock was unloaded. Plaintiff alleged that he had signed the bill of lading under protest, and also verbally notified the servants of the company of the damage, before the cattle were unloaded from the cars, and immediately after giving verbal notice, sought for writing materials to make out a written notice, but before he was able to find them, the cattle were unloaded, so that no notice was given. A demurrer was sustained to this reply, the court holding that his inability to procure writing materials was no excuse for not giving notice for more than a year afterward. "The parties were competent to make the contract, and did make it, and it must be held good, unless it is contrary to

public policy." See also *Wolf* v. *Western Union Tel. Co.*, 62 Penn. St. 83.

In *Adams Express Co.* v. *Reagan*, 29 Indiana, 21, where a package was shipped from a town in Indiana to Savannah, Georgia, during the civil war, when transportation was much interrupted, it was held that a condition that the carrier should not be liable unless a claim was presented within thirty days after shipment was unreasonable. It was put upon the ground that the country, being in an unsettled condition, occasioning great delays in shipments and in the transmission of mails, an attempt to incorporate this condition into their contract was placing it within the power of the company by a delay, which under the circumstances would, perhaps, not have been unreasonable, to prevent any claim for loss or damage, however gross may have been its negligence. It appeared that the plaintiff's agent delayed shipping the property for a month or more until Savannah was taken by the Federal troops, when he delivered it to the company and the receipt was executed. That the case was determined upon the particular facts is evident from the subsequent case of *United States Express Co.* v. *Harris*, 51 Indiana, 127, in which a stipulation that the company was not to be liable for any loss, unless the claim therefor should be made in writing, at the office of shipment, within thirty days from the date of said receipt, was held to be binding and valid, though it was doubted whether the claim must be made at the office of the company, where the property had passed into the hands of another carrier, or might be made in such case upon some agent or officer chargeable with the loss. The former case was distinguished as being applicable to its own facts.

There are doubtless some cases to the contrary, where upon the particular facts the condition was held to be unreasonable. In *Missouri Pacific Railway Co.* v. *Harris*, 67 Texas, 166, the requirement was that the shipper should give notice in writing of his claim to some officer of the company, or its nearest station agent, before the cattle were removed from their place of destination, and before they were mingled with other stock. The shipment was from an interior town in Texas to Chicago, the line of railway did not extend to the point of destination,

and both parties understood that the carrier would transport the cattle from its own road over a connecting road. It was held that the failure of the answer to show that the carrier had an officer or agent so situated that the contract to give notice to such officer or agent was reasonable, was fatal on demurrer, and that no presumption could be indulged that the carrier had an officer near the place of destination. This case was evidently decided upon its special facts. In another case decided by the Supreme Court of Texas, *Pacific Express Co.* v. *Darnell*, 6 S. W. Rep. 765, a piece of machinery was delivered to an express company in Texas for shipment to Baltimore. The contract of shipment provided that the company should not be held liable for any claim arising from the contract, unless it were presented within sixty days of the date of the contract. Held, that the failure to present the claim was not a bar to the right of recovery, the restriction of presentment of claims without reference to the time of loss being unreasonable. The court seemed to assume that the stipulation imposed a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed. The opinion seems to have gone off upon the point that, while the notice as applied to the facts might have been reasonable, it would be unreasonable when applied to a different state of facts. It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable, or worked a manifest injustice to the libellants, we should not give it effect. All that was decided in *Westcott* v. *Fargo*, 61 N. Y. 542, was that a similar limitation of thirty days was pleaded as a condition precedent to the plaintiff's right to recover, when it should have been set up in the answer. See also *Southern Express Co.* v. *Caperton*, 44 Alabama, 101.

Other analogous limitations upon the common-law liability of a carrier, not operating to restrict his liability for negligence, have been sustained by this court, viz., exempting the carrier from liability from losses by fire occasioned without his negligence, *York Company* v. *Central Railroad*, 3 Wall. 107; *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174; a restriction in value upon the property shipped, *Railroad Co.* v. *Fraloff*, 100

U. S. 24; *Hart* v. *Penn. Railroad Co.*, 112 U. S. 331; limiting its liability upon through shipments to losses occurring upon its own line, *Railroad Co.* v. *Pratt*, 22 Wall. 123; and providing that in the case of loss the carrier shall have the full benefit of any insurance that may be effected upon the goods, *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312. Indeed, in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, in an elaborate opinion by Mr. Justice Bradley, it was held by this court that common carriers may impose almost any just and reasonable limitation upon their common-law liability, not amounting to an exemption from the consequences of their own negligence. The methods of transportation have changed so radically during the century which has just closed, that it seems almost necessary to the proper protection of a carrier, in transacting the enormous business of railway and steamship lines, that he should have the power by just and reasonable limitations incorporated in his contract, or brought to the attention of his shippers, to place some restrictions upon the unlimited liability of the common law, particularly where articles of great value, such as jewels, money, bullion, laces and precious stones, are transported without disclosing their contents, or articles or animals of exceptional value, such as race horses, are carried without information of their character; and that persons intending to make claims for losses should manifest their election to do so as soon as the circumstances can by reasonable diligence be ascertained. The law recognizes the fact that the measure of liability originally applied to a carter's wain or a waterman's hoy may often be illy adapted to the exigencies of modern commerce.

There is no hardship to the libellants in giving effect to the stipulation in this case. As was said of a similar condition in *Express Co.* v. *Caldwell*, 21 Wall. 264, 268: "It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity, which the strictest rules of the common law ever required, and it is intrinsically just, as applied to the present case." The loss was known to the shippers within three days after it occurred. The steamer was then and continued to be in port, and the facts were easily ascer-

tainable. Under the stipulation the company had a right to assume that the proper inquiries had been made, and that the shippers were either satisfied that the company was not liable, or that they had elected to rely upon their policies of insurance. Instead of giving notice libellants permitted four years to elapse before beginning suit, although both the ship and the company were readily accessible. True, the Court of Appeals found there was no change of circumstances and no loss of testimony in the mean time; but that is not material. The question concerns the binding effect of the stipulation. Had the ship been transferred to a *bona fide* purchaser there certainly would have been, had the witnesses whose testimony could explain the loss have disappeared, there probably would have been, laches, which would render the claim stale, irrespective of the stipulation; but the stipulation itself would be invalid only upon showing that under the circumstances of the particular case its enforcement would work a manifest injustice. In this view it is unnecessary to consider whether the limitation of thirty days for the commencement of suit be reasonable or not.

We are of opinion that the clause in question was perfectly reasonable, and the decree of the Court of Appeals must therefore be

Reversed, and the case remanded to the District Court for the Northern District of California with directions to dismiss the libel.

BRADSHAW *v.* ASHLEY.

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

No. 60. Argued November 1, 1900.—Decided January 14, 1901.

When, in an action of ejectment, the plaintiff proves that on a day named he was in the actual, undisturbed and quiet possession of the premises, and the defendant thereupon entered and ousted him, the plaintiff has proved a *prima facie* case, the presumption of title arises from the possession, and, unless the defendant prove a better title, he must himself be ousted.

Although the defendant proves that some third person, with whom he in no manner connects himself, has title, this does him no good, because the prior possession of the plaintiff is sufficient to authorize him to maintain the action against a trespasser; and the defendant being himself without title, and not connecting himself with any title, cannot justify an ouster of the plaintiff.

In *Sabariego* v. *Maverick*, 124 U. S. 261, the latest case in this court on the subject, the rule is stated to be that a person who is in possession of premises under color of right, which possession had been continuous and not abandoned, gave thereby sufficient proof of title as against an intruder or wrongdoer, who entered without right.

That case expresses the true rule prevailing in the District of Columbia, as well as elsewhere.

THE case is stated in the opinion of the court.

Mr. William F. Mattingly and *Mr. John Ridout* for the plaintiff in error. *Mr. William John Miller* was on their brief.

Mr. J. J. Darlington and *Mr. A. S. Worthington* for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The defendant in error, the plaintiff below, brought this action of ejectment in the Supreme Court of the District of Columbia to recover from the defendant the possession of one undivided fifth part of certain lots in the city of Washington,

in square 939, sometimes described as lots 1, 2 and 3 in that square, and sometimes as lots 4, 5 and 6; and he also sued to recover an undivided fourth part of another lot in the same square, sometimes designated as lot 20 and sometimes as lot 3. Entry and ouster were alleged to have taken place on March 22, 1889, and in another count on November 28, 1890. There were proper counts also for the recovery of mesne profits. The defendant pleaded not guilty. There was a verdict for the plaintiff for the possession of the property and for one cent damages. The defendant appealed to the Court of Appeals of the District, where the judgment was affirmed, and he comes here by writ of error.

On the trial the plaintiff endeavored to prove a record title to the lots, through various mesne conveyances from the original owners, and for that purpose gave evidence, under the objection of defendant, tending to explain the appearance of two sets of numbers on the map of square 939, on file in a public office of the District, one set being in ink and one set in pencil, and he claimed that the pencil were the correct numbers, in which case he contended his record title in fee was perfect. He also gave evidence tending to show a title by adverse possession for twenty years.

The defendant controverted these claims, but at the time he rested his case there was not the slightest evidence which tended to show title in himself or to connect himself in any way with the title. He put in evidence some deeds executed by certain individuals residing in England, which recited that they (the grantors) were some of the heirs at law of George Walker, who was the original owner of the square, but there was no evidence of the truth of those recitals, nor was any attempt made to show that these grantors were heirs of Walker, or that they had any title to the lots which the deeds purported to cover. The deeds seem to have been offered in evidence upon the theory that the defendant by that means showed that he was not a mere trespasser or intruder, but came in under a claim of title, although it was not shown to have the least validity. Some other deeds of like nature were also put in evidence.

Opinion of the Court.

At the close of the case the evidence showed that the defendant was a simple trespasser without the color of title, and the counsel for the plaintiff, not insisting upon the proof regarding his record title or upon an adverse possession for twenty years, thereupon based his case upon the claim that he had proved that at the time when the defendant intruded upon and ousted him he had been, by himself or his grantors, for a number of years in the actual, continuous and undisturbed possession of the lots, claiming to own under deeds purporting to cover them, and that he was, therefore, entitled to recover as against the defendant, who was a mere intruder, without further proof of title.

The court was, therefore, requested by the plaintiff to charge the jury that if it found from the evidence that the plaintiff and his grantors had been thus in possession, when he was ousted by the defendant, himself being without title, the plaintiff was entitled to recover. The court charged as requested, the defendant excepted, and the jury found in accordance with the plaintiff's claim. This course eliminated all questions regarding a valid record title or a title by adverse possession for twenty years, and so all questions of admissibility or sufficiency of evidence to prove either of those claims drop out of the case, and we have to deal with the simple proposition of the correctness of the charge.

The defendant urges here that the charge was erroneous because it ignored and ran counter to the rule in ejectment, that the plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant; that the mere fact of prior possession of the premises by the plaintiff without evidence of any legal title to them was not sufficient to allow a recovery as against the defendant in possession, even though the defendant had no title himself and did not connect himself with the legal title. He claims that whatever it may be in other jurisdictions, the rule as charged by the court does not obtain in the District of Columbia, and that in this District the plaintiff is always bound to prove a good and valid title as against a defendant in possession, by some other evidence than prior possession. He also contends that if the rule be otherwise, yet in this case there is not sufficient evidence that the

plaintiff had such possession of the lots at the time the defendant entered as to enable him to base a claim to the benefit of the rule or to authorize a recovery in this action.

The evidence is that when defendant entered upon them they were unimproved and vacant city lots. It is undisputed that the plaintiff and his grantors claimed title to them by virtue of conveyances, which they contended came from the original owners, and plaintiff and his predecessors, under such deeds, had exercised usual acts of ownership and possession natural in the case of a city lot which was vacant and unimproved. The lots had not been fenced, but the evidence showed there had been a building on one of them, and after its sale to Ashley, the plaintiff's decedent, the house had been removed by Ashley's permission, and rent had been paid for it to him while it remained on the lot. It also appeared that for quite a long time the plaintiff and his grantors had rented, and collected the rent of the other lots for pasturing cattle thereon; they had authorized others to take sod therefrom, and pursuant to such authority sod had been taken from these lots by other persons, and although this had ceased about 1886, and the defendant did not enter until 1889 or 1890, yet the possession of the plaintiff was not in the mean time in any manner disturbed or interfered with, but continued as it had been, up to defendant's entry; taxes had been paid by him or his predecessors upon the lots, and in brief it appears that all that the nature of the case admitted in order to show actual and continuous possession and claim and acts of ownership had been proved and claimed in regard to the property by the plaintiff. Although the tenancy may have ceased and the sale of the sod concluded some time before defendant entered, yet the plaintiff had remained in the constructive possession, claiming full ownership of the premises, even since the tenancy, and up to the time of defendant's entry. There was an utter absence of any evidence of abandonment.

The contention of the defendant practically is that in ejectment there can be no possession within the rule referred to, of a vacant and unimproved city lot, unless it is at least surrounded by a fence sufficient to warn off trespassers or intruders; that if the lot be vacant, unimproved and unfenced, no matter what

acts of ownership have been exercised over the lots for a long time by the person claiming to own it, the trespasser or intruder may nevertheless enter upon the land, and cannot be ousted without strict proof that the plaintiff has a good and valid title to the lot aside from any claim of prior possession. We do not assent to this contention.

We think the plaintiff in this case proved enough to submit to the jury the question of possession, and enough if believed, to entitle him to recover as against the defendant, who gave no evidence of any title in himself nor in any one under whom he claimed, and who was, so far as the evidence disclosed, a mere trespasser upon the lots claimed by the plaintiff.

An examination of the authorities will, as we think, render it clear that the rule in regard to possession and the presumption arising therefrom was correctly stated, and it will appear that it is not inconsistent with the acknowledged rule in ejectment that the plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant. The question is what presumption arises from the fact of possession of real property? Generally speaking, the presumption is that the person in possession is the owner in fee. If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title. Therefore, when in an action of ejectment the plaintiff proves that on the day named he was in the actual, undisturbed and quiet possession of the premises, and the defendant thereupon entered and ousted him, the plaintiff has proved a *prima facie* case, the presumption of title arises from the possession, and unless the defendant prove a better title, he must himself be ousted. Although he proves that some third person, with whom he in no manner connects himself, has title, this does him no good, because the prior possession of the plaintiff was sufficient to authorize him to maintain it as against a trespasser, and the defendant being himself without title, and not connecting himself with any title cannot justify an ouster of the plaintiff. This is only an explanation of the principle that the plaintiff recovers upon the strength of his own title. His title by possession is sufficient, and it is a title, so far as regards a defendant who only got into possession by a pure tort, a

simple act of intrusion or trespass, with no color or pretense of title.

The latest case in this court upon the subject is that of *Sabariego* v. *Maverick*, 124 U. S. 261. It was there stated that the rule was that a person who was in possession of the premises under color of right, which possession had been continuous and not abandoned, gave thereby sufficient proof of title as against an intruder or wrongdoer who entered without right. Mr. Justice Matthews, in delivering the opinion of the court, said (at page 297):

"This rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title. *Lessee of Fowler* v. *Whitman*, 2 Ohio St. 270; *Drew* v. *Swift*, 46 N. Y. 204. And in the language of the Supreme Court of Texas in *Wilson* v. *Palmer*, 18 Texas, 592, 595, 'The evidence must show a continuous possession, or at least that it was not abandoned, to entitle a plaintiff to recover merely by virtue of such possession.' That is to say, the defendant's possession is in the first instance presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion by the defendant, whose possession, therefore, originated in a trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession, and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive possession. If the lands, when entered upon

by the defendant, were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his actual possession was not abandoned; otherwise he cannot be said to have had even a constructive possession."

Many of the leading cases on the subject are referred to in the opinion of the court in the above case, and it is unnecessary to cite them here. They show that the rule has been recognized by nearly all those jurisdictions which acknowledge the common law, and that it is indeed one of the fundamental rules applicable to the action of ejectment, and it does not interfere with or overrule the other principle also applicable to that action, that a plaintiff is bound to recover on the strength of his own title, and not upon the weakness of that of his adversary. The rule is intended to prevent and redress trespasses and wrongs, and it is limited to cases where the defendants are trespassers and wrongdoers; it is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and it does not extend to cases where the defendant has acquired possession peaceably and in good faith under color of title.

It would seem to be under this limitation of the rule that the defendant proved he had deeds from individuals who asserted they were some of the heirs at law of Walker, the original owner, but this clearly was not enough to show the entry was in good faith and under color of title. Otherwise, a party might wrongfully intrude and enter upon the possession of another, as a pure intruder, and yet make a claim of title under a deed which manifestly conveyed none, and which the party could not in good faith have supposed conveyed title, and then call upon plaintiff for full proof of title in fee. Such entry could not be excused by any subterfuge of that kind. Mr. Justice Matthews in the foregoing case, in speaking of a defendant acquiring possession peaceably and in good faith, under color of title, cited among others the case of *Drew* v. *Swift*, 46 N. Y. 204. In that case the plaintiff relied upon a prior possession of the disputed land and gave no proof of a conveyance from the original proprietor, nor of any paper title, and he recovered

upon the strength of such possession alone. This judgment was reversed in the Court of Appeals on the ground that the deed from a former owner, under which the defendant entered, included the premises in controversy, and the title to the *locus in quo* was, therefore, in the defendant, and he was entitled to a verdict and to retain the lands as within the boundaries of his grant; that the defendant was not a trespasser, but went into possession having title, and the plaintiff was not, therefore, entitled to recover upon proof of any prior possession other than an adverse possession for a period which would bar an entry, and no such possession was shown. The court held that the defendant was entitled to a judgment on the merits. In that case, as will be seen, the presumption of title arising from the prior possession by the plaintiff was overcome, and the defendant proved title in himself by virtue of the deed under which he entered. But the rule applies where there is on the side of the defendant an absence of proof showing any color of title in him, and in such case, where the plaintiff proves prior and peaceable possession under a claim and color of title, an entry and ouster by the defendant, without a pretence of title, will not be upheld, even though the defendant seeks to justify his entrance by proof of a deed from some one who had no title to the premises, and this is so although at the time of such entry the lands were apparently vacant and actually unoccupied. 124 U. S. *supra*, 298.

In *Jackson* v. *Denn*, 5 Cowen, 200, the premises were actually vacant and unoccupied at the time of the entry by the defendant, who entered without color of title, but it was shown that the plaintiff had leased the land to a tenant who had left the premises without informing the landlord, who did not know of it until after the defendant entered. "This shows," said the court, "that the possession had never been abandoned by the lessors, without the *animus revertendi*." Prior possession, although the land was at the time of defendant's entry actually unoccupied, was also said in *Whitney* v. *Wright*, 15 Wend. 171, to be sufficient to enable the plaintiff to recover as against a mere intruder, where the prior possession of the plaintiff had not been voluntarily relinquished without the *animus revertendi*.

Opinion of the Court.

In *Smith* v. *Lorillard*, 10 Johns. 338, cited in *Sabariego* v. *Maverick*, *supra*, the plaintiff had been in the possession of the premises for many years until he was expelled by the British in 1776, and in 1795 the defendant entered upon the premises, which were then vacant, and continued to live there for some years. An action of ejectment was brought by the plaintiff, and it was held by the Supreme Court, Kent, Ch. J., delivering the opinion, that his prior possession was *prima facie* evidence of right, and it was not necessary that he should show either a possession of twenty years or a paper title so long as the subsequent possession of the defendant was acquired by mere entry without any lawful right.

The case of *Greenleaf* v. *Brooklyn, Flatbush &c. Railway Company*, cited by defendant, 141 N. Y. 395, reported on previous appeal in 132 N. Y. 408, is not opposed to these views upon the question of occupancy. The case shows that the plaintiff never was in possession of the land, actually or constructively, never exercised the slightest act of ownership over it, nor were his grantors ever in possession or occupancy thereof, nor did they exercise any act of ownership over the land except when they assumed to convey it to others. In the report in 132 N. Y. the court stated that the land in question was on the beach, incapable of being enclosed with fences or occupied like ordinary agricultural lands, but at the same time there was no evidence that the land had ever been occupied by plaintiff or his grantors for any purpose whatever, and it did not even appear that grass or sand had been taken from the land, or that it had been used as a means to approach the ocean for fishing or for any other purpose. It was simply the case of a conveyance by deed of land which the grantor had no title to and never occupied or possessed, the only claim of ownership being the execution of a deed assuming to convey the premises and on some occasions an oral statement of ownership. Clearly all this was wholly insufficient to show possession within the rule and the case is entirely unlike the one at bar.

Nor is it material that the plaintiff, in addition to proof of prior possession, also gave proof of a record title, which defendant claims is not valid. He is still entitled to recover on

proof of his prior possession where the defendant is simply an intruder and has no color of title. As was said by Pollock, Chief Baron, in *Davison* v. *Gent*, 38 E. L. & Eq. 469, if a party has a right to maintain an action of ejectment, by reason of his possession, and attempts also to show title and discloses a flaw in it, he may still recover by reason of his possession. He may say, "I claim to recover both by reason of my title and my possession; and failing in one I will rely upon the other." His prior possession is good in any event as against a trespasser entering without right. Bramwell and Watson, BB., were of the same opinion. See also *Asher* v. *Whitlock*, L. R. 1 Q. B. 1, 5, opinion by Cockburn, Ch. J., and concurred in by Mellor and Lush, JJ.; decided in 1865.

Notwithstanding the authorities above referred to, the defendant claims that the law is different in this District, because he says, the law was different in Maryland at the time of the cession of the District to the United States, and that the law of Maryland as it was then governs this case. 2 Stat. 103, c. 15, sec. 1. Counsel makes this claim because the land originally formed part of the State of Maryland, and we must look to the law of the State in which the land is situated for the rules which govern the descent, alienation and transfer of property, and the effect and construction of wills and other conveyances. *De Vaughn* v. *Hutchinson*, 165 U. S. 566, 570. Upon this foundation counsel for the plaintiff in error seeks to show that the law of Maryland was, when this District was ceded by it to the United States, opposed to the rule enunciated by the trial court, and as evidence of what the law of Maryland was at that time he cites the case of *Mitchell* v. *Mitchell*, decided in 1851, and reported in 1 Maryland, 44. The case actually decided did not involve this question. According to the facts stated in the report, Francis J. Mitchell obtained possession of the premises in 1817, and held the same until the time of his death in 1825. Immediately after his death, his son, James D. Mitchell, his devisee, entered upon and possessed the land until his death in 1837. Immediately after his death, his widow Elizabeth, as devisee for life under his will, entered and possessed the land until her death in 1841. The plaintiff's lessor was the

sole sister of the whole blood of James D. Mitchell and his heir at law. The possession of the premises from 1817 to 1841, the time of the death of Elizabeth, was continuous, peaceable, exclusive, uninterrupted and adverse to all persons. The defendant was half brother of James D. Mitchell, and upon the death of Elizabeth entered on the land, declaring that it was his son's property, and that no other brother or sister survived the said James D. Mitchell. The verdict was for the defendant. The plaintiff was never personally in possession of the premises, but was simply claiming under James D. Mitchell as his heir at law. The defendant was in possession at the time the plaintiff commenced his suit, holding for his son under a claim that his son was the heir at law of James D. Mitchell. He was not a mere trespasser or intruder within the meaning of the rule, but took possession on the death of the life tenant, ousting no one, and claiming title for his son as heir at law. The question then became one of superiority of title as between the two claimants, the defendant being in possession.

Upon these facts it would seem that in other States which follow the common law the plaintiff would have been entitled to recover on proof that he was the sole heir at law of James D. Mitchell, the latter having been devisee of Francis J. Mitchell, and their possession, together with that of the widow of James D. Mitchell, as his devisee, having been continuous, peaceable, exclusive, uninterrupted and adverse to all persons from 1817 to 1841, when Elizabeth died and the defendant took possession. But the court held that in Maryland a plaintiff in ejectment was bound to recover, not only on the strength of his own title, but must show that he had a legal title to the land and a right of possession, and that he could not establish legal title in himself without first showing the land had been granted by the State. The case decides that upon a question of a conflict of title, the plaintiff must prove that the State had at some time granted the land. It was not a case of prior peaceable possession, interfered with by the defendant without pretense or color of title and simply as a mere trespasser or intruder.

The cases of *Hall* v. *Gittings*, 2 H. & J. 112, decided in 1807;

Cockey's Lessee v. *Smith*, 3 H. & J. 20, 26, decided in 1810; and *Wilson's Lessee* v. *Inloes*, 11 G. & J. 351, 358, decided in 1840, are cited by the court, and justify the statement that there seems to be a particular rule in Maryland, by which it is necessary in actions of ejectment, where there is a real contest as to title, to show either a grant from the Lord Proprietary, or the State as successor, or else very strong facts and circumstances, as secondary evidence upon which to presume a grant, as mentioned in *Cockey's Lessee* v. *Smith*, *supra*. None of the cases presents the phase of a mere trespasser, intruding without color of title, upon the possession of the plaintiff and ousting him by a plain tort. It will be observed they were all decided since the cession. A Declaration of Rights preceded the first constitution of Maryland, and was affirmed by it. 1 Kilty's Laws of Maryland, sec. 3, Declaration of Rights. It was therein provided that the people of that State were entitled to the common law of England. The decisions of the courts of Maryland prior to the cession might be regarded as authority for what the common law then was in that State, but those made after the cession, while entitled to very high respect as the decisions of a State court, are not to be regarded as authority for what the common law was prior to 1801. That question was not involved in those cases.

There are, however, some cases in that State arising before the cession, in actions of ejectment, where possession alone seems to have been regarded as sufficient to maintain the action as against an intruder. They are *Hutchins' Lessee* v. *Erickson*, 1 H. & McH. 339, and *House's Lessee* v. *Beatty*, 3 H. & McH. 182. There was no opinion delivered in either case, (and those reports contain but few opinions in any of the decided cases,) but the facts stated in the first show that prior possession was relied on as against an intruder, by counsel, who referred to the very case of *Allen* v. *Rivington*, 2 Saund. 111, which was cited to maintain the same proposition by Kent, Ch. J., in 10 Johns. *supra*, and by Mr. Justice Matthews in *Sabariego* v. *Maverick*, *supra*. The case certainly looks in the direction of maintaining the proposition charged by the court in this case. The facts in the other case do not make it so clear. Neither is very satisfactory authority, but they certainly do not maintain the proposition of

the plaintiff in error, and we have found no case that does. Upon the whole, we think the almost universal character of the rule laid down by the trial court, taken in connection with the slight evidence in its favor in the two cases arising before the cession, and the absence of cases to the contrary, are enough to show that the rule prevailed in 1801 in Maryland the same as elsewhere.

There are no cases to which our attention has been called involving this question in the District of Columbia, which hold a different doctrine from that laid down herein by the trial court. In a very late case, the opinion in which was written by Mr. Chief Justice Alvey of the Court of Appeals, formerly Chief Justice of Maryland, *Staffan* v. *Zeust*, 10 App. D. C. 260, he made use of the following language:

"The action of ejectment is, strictly speaking, a possessory action, the plaintiff being required to show a present legal right to the possession of the premises as against the defendant. This may be done by evidence to establish the fact of prior possession by the plaintiff, even though that possession be for a time less than twenty years; such possession being sufficient to give rise to the presumption of title as against a defendant who has subsequently acquired possession by mere entry without any lawful right; provided, however, that such prior possession of the plaintiff was not voluntarily relinquished without the *animus revertendi*. *Allen* v. *Rivington*, 2 Saund. 111; *Smith* v. *Lorillard*, 10 Johns. 338, 356; *Christy* v. *Scott*, 14 How. 282, 292; *Sabariego* v. *Maverick*, 124 U. S. 296, 300."

Although this exact question was not involved, it shows that the Court of Appeals of the District was not of opinion that the law in regard to ejectment was in any exceptional condition here. The Chief Justice cites the same case in 2 Saund., so frequently cited, to show the rule in this particular.

After a carefnl consideration of the question we are of opinion that the case of *Sabariego* v. *Maverick*, *supra*, expresses the true rule in this District as well as elsewhere, and therefore the trial court was right in the direction given to the jury, and the judgment of the Court of Appeals, affirming that of the trial court, must be

Affirmed.

THOMPSON *v.* LOS ANGELES FARMING AND MILLING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 87. Argued and submitted November 8, 1900.—Decided January 7, 1901.

The papers offered in evidence in this case, instead of showing the non-existence of special circumstances with reference to the sale to de Celis which authorized the governor to make it, affirm the existence of those circumstances, and the condition of the plaintiff in error is reduced to this dilemma: — the papers being ruled out, the validity of the grant will be implied: — the papers being ruled in, the validity of the grant will be shown.

THE case is stated in the opinion of the court.

Mr. Harvey M. Friend for plaintiffs in error.

Mr. Stephen M. White and *Mr. James H. Shankland* for defendant in error submitted on their brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of ejectment in which defendant in error was plaintiff in the court below, and the plaintiffs in error were defendants. It was brought in the Superior Court of Los Angeles County, State of California. Besides a prayer for the recovery of the land in controversy an injunction was asked against the commission or repetition of certain described trespasses. The land sued for was the south half of the Rancho ex-Mission de San Fernando, with certain exceptions. The defendant in error relied for title upon a patent of the United States to Eulogio de Celis, dated January 8, 1875, which recited that it was based upon the confirmation of his title as one derived from the Mexican government through a deed of grant made the 17th day of June, 1846, by Pio Pico, the then constitutional governor of the department of the Californias. The grantor of defendant in error purchased an undivided half of

the rancho in 1869, and became the owner in severalty of the tract sued for by partition proceedings.

One of the defences of the action, and the only one we are concerned with on this writ of error, was the invalidity of the patent based on the invalidity of the grant from the Mexican government, and its confirmation by the Board of Land Commissioners.

The answer sets out the proceedings before the board, its decision and decree, and the deed of Pio Pico. As much of the deed as is necessary to quote is as follows:

"The undersigned, constitutional governor of the department of the Californias, in virtue of the powers vested unto him by the supreme government of the nation, and in virtue of a decree of the honorable departmental assembly of April third of the present year, to raise means for the purpose of maintaining the integrity of the territory of this department, for the sum of fourteen thousand dollars, which he receives, sells unto Don Eulogio de Celis and his heirs, ex-Mission of San Fernando with all its properties, estates, lands and movables, with the exception of the church and all its appurtenances, which remains for public use. Said purchaser obligating himself to maintain on their lands the old Indians on the premises during their lifetime, with the right to make their crops, with the only condition that they shall not have the right to sell the lands they cultivate and any other which they possess without anterior title from the departmental government, for all of which the aforesaid Senor Celis shall be acknowledged as the legitimate owner of the aforesaid ex-Mission of San Fernando, to use the same as to him shall seem best, guaranteeing unto him, as this government does guarantee, that he is well possessed of the aforesaid estate with all the prerogatives granted by law to purchasers, with the only condition that the above mentioned purchaser shall not take possession within the space of eight months from the date hereof, within which delay the government shall have the right to annul this contract by reimbursing to the aforesaid Senor Celis the sum of fourteen thousand dollars with interest at the current commercial rates; but if this reimbursement is not operated within the aforesaid eight months, this sale shall be valid."

The petition to the board was as follows:

"Before the commissioners to ascertain and settle private land claims in the State of California.

"Eulogio de Celis gives notice that he claims a tract of land situated in the present county of Los Angeles, known by the name of Mission of San Fernando, bounded as follows: On the north by the rancho of San Francisco, on the west by the mountains of Santa Susanna, on the east by the rancho of Miguel Triumfo, and on the south by the mountains of Portesuelo, which tract is supposed to contain fourteen square leagues.

"Said land was sold to said Celis by a deed of grant dated the seventeenth day of June of the year eighteen hundred and forty-six, by Pio Pico, constitutional governor of the Californias, thereto duly authorized by the supreme government of the nation and by a decree of the departmental assembly of April third, eighteen hundred and forty-six; said sale was made for the sum of fourteen thousand dollars, which was paid by the said Celis to the said Pio Pico, who acknowledged the receipt thereof, as will more fully appear by reference to the aforesaid deed of grant, copy whereof marked A is hereto annexed.

"Claimant avers that the aforesaid deed of sale contains the condition that the government of Mexico shall have the right to annul the contract by reimbursing to this claimant the aforesaid sum of fourteen thousand dollars, with the current rates of interest, and in case said sum is not reimbursed within said eight months, said Mission of San Fernando shall be his in full property. And this claimant avers that said sum of fourteen thousand dollars was never reimbursed to him by the Mexican government, or by any person whatsoever.

"Said Mission of San Fernando was leased by the government of Mexico to Andres Pico in December, 1845, for the term of ——— years, which lessee has been in the occupancy of the said property up to the present date.

"Claimant further avers that he knows of no other claim to the aforesaid mission, and he relies on the documents above referred to and witnesses he shall produce to substantiate his claim."

The material part of the decision was as follows:

"The grant purports to have been made in consideration of the payment of the sum of fourteen thousand dollars in money. Pio Pico testifies that he executed the grant at the date that the same bears, and that it was made under special instructions of his government for the purpose of raising the necessary funds to enable the department to prepare for a defence against the attack of the Americans, and that the sum of fourteen thousand dollars was actually received by him from the grantee in consideration thereof, and that the funds were used by him for the benefit of the nation in the defence of the same. The genuineness of the grant is clearly established and the circumstances under which it was made so clearly explained as to leave no doubt but it was done in good faith."

A decree was entered confirming the grant.

The title based on the proceedings before the commissioners is alleged in the several answers to be invalid for the following reasons:

"I. Because, as appears on its face, it was a deed of sale whereby said Pio Pico, governor of California, attempted, for the consideration of $14,000, to grant the land, therein mentioned to said Eulogio de Celis, which act was *ultra vires*, unauthorized by and in violation of the laws of the republic of Mexico.

"II. Because the lands so attempted to be granted were lands embraced within and belonging to the Mission of San Fernando, and not legally subject to the granting power of said governor.

"This defendant further says in this behalf that said 'commissioners to ascertain and settle the private land claims in the State of California,' never had any jurisdiction over the subject-matter of said claim of said Eulogio de Celis, otherwise called Eulogio Celis, because he says that it was set out and appeared on the face of the notice and petition of said Eulogio Celis and accompanying documents, to wit, the alleged grant itself, that at the time of the making of said alleged grant the lands embraced therein were mission lands, and also that said so-called grant was in the nature of a sale for money, and that said grant was therefore without authority of law and void, and did not

constitute a claim by virtue of any right or title derived from the Spanish or Mexican government.

"And defendant says that because of the facts so set out and shown in said notice and petition and accompanying documents so filed with said commissioners by said Eulogio de Celis, said commissioners were wholly without jurisdiction to adjudicate upon or to confirm said claim, and that their said decree of confirmation thereof is and always was *ultra vires* and utterly void, and that all subsequent proceedings based thereon, including the survey and patenting of said lands by the United States Government, were and are wholly without authority of law and void."

The defendant in error obtained judgment in the trial court, which was affirmed by the Supreme Court of the State. 117 California, 594. Thereupon the Chief Justice of the State allowed this writ of error.

The error assigned is as to the action of the trial court in excluding testimony which it is claimed tended to support the said defence.

To support the assignment of error it is urged that the governor of the Californias had no authority to make the grant, "and therefore the decree of confirmation was without that authority of law, and was also absolutely void and a mere nullity." And it is hence further contended that the patent based on and reciting the decree was void on its face. The ultimate basis of the contention is that the Court of Private Land Claims had no jurisdiction to confirm the grant because the governor of the Californias had no power to convey the public land for a money consideration. That is to say, the grant being void it could not be the basis of a claim to lands "by virtue of any right or title derived from the Spanish or Mexican government." This conclusion is attempted to be deduced from the words of section 8 of the act of Congress of March 3, 1851, 9 Stat. 631, c. 41, creating the Board of Land Commissioners. The section provided—

"That each and every person claiming lands in California *by virtue of any right or title derived from the Spanish or Mexican government* shall present the same to said commissioners when

sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners when the case is ready for hearing to proceed promptly to examine the same upon such evidence and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claims."

We think that counsel put too limited a signification on the words of section 8, that the claim shall be "by virtue of any right or title derived from the Spanish or Mexican government." The words of course were descriptive of the class of claims of which the Board of Land Commissioners was given jurisdiction. They made a special tribunal of the board limited to hear a particular class of claims, but not limited to the questions of law and fact which could arise in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the claim—propositions of law or propositions of fact—the fact of a grant, or the power to grant, was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the District Court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfil our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. Sec. 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the

District Court. Sec. 9. Indeed, the proceedings in the District Court were really new, and further evidence could be taken. Sec. 10. Upon the confirmation of the claim by the commissioners or by the District or Supreme Court, a patent was to issue and be conclusive against the United States. Sec. 15.

Further general discussion we do not think is necessary. This court has had occasion heretofore to consider the statute and the jurisdiction of the Board of Land Commissioners. *Beard* v. *Federy*, 3 Wall. 478; *More* v. *Steinback*, 127 U. S. 70.

In considering what was involved in the inquiry into the validity of a claim to land under the act, this court said in *More* v. *Steinback*, quoting *United States* v. *Fossatt*, 21 How. 445:

"It is obvious that the answer to this question must depend in a great measure upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or *it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made.* . . ."

The plaintiff in *More* v. *Steinback* depended upon a patent of the United States issued to one Manuel Antonio Rodrigues de Poli, dated August 24, 1864. It recited the proceedings taken before the Land Commissioners under the act of March 3, 1851; the filing of his petition in March, 1852, asking for the confirmation of his title to a tract of land known as the Mission of San Buena Ventura, his claim being founded upon a sale made on the 8th of June, 1846, by the then governor of the department of the Californias; the affirmation of the decree successively by the District Court of the Southern District of California, and by the Supreme Court of the United States, and the survey of the claim confirmed. It was contended that the sale to Poli of the ex-Mission San Buena Ventura was illegal and void, and hence no title passed to the patentee on its confirmation, and in support of the contention, *United States* v. *Workman*, 1 Wall. 745, was cited.

Replying to the contention, the court said by Mr. Justice Field:

"In that case (*United States* v. *Workman*) it was held that the departmental assembly of California had no power to authorize the governor to alienate any public lands of the department, and that its own power was restricted to that conferred by the laws of colonization, which was simply to approve or disapprove of the grants made by the governor under those laws. But it does not follow that there were not exceptional circumstances with reference to the sale to Poli, which authorized the governor to make it. We are bound to suppose that such was the case, in the absence of any evidence to the contrary, from the fact that the validity of his claim under it was confirmed by the Board of Land Commissioners, by the District Court of the United States, and by this court on appeal. The question of its validity was thereby forever closed, except as against those who might be able to show a prior and better title to the premises."

More fully on the point of the effect of the patent it was said in *Beard* v. *Federy:*

"This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interest in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recog-

nized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be opened to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and therefore he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section. The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

Plaintiffs in error deny the applicability of *Beard* v. *Federy* to the case at bar. We think it is applicable. They attempt to distinguish *More* v. *Steinback*. We think it cannot be distinguished. That case, it is said, depended upon the possible presence of "exceptional circumstances with reference to the sale to Poli which authorized the governor to make it (the grant)." And it hence contended that the court felt itself "bound to suppose such was the case *in the absence of any evidence to the contrary*. And taking for granted," counsel further say, "as it had to do, the jurisdiction of the board of commissioners that confirmed the Poli claim, the court could reach no other conclusion. But the very thing which this court was compelled to assume in the case of the Poli claim (namely, the jurisdiction of the land commissioners), for the want of *evidence to the contrary*, is the thing which in this case we offered to prove in the court below *did not exist;* but we were denied that privilege, and this denial we insist was error."

But how was it attempted to be shown that such jurisdiction did not exist? It was attempted to be shown, as declared in the assignment of error, by "the petition of said de Celis before the board of land commissioners for the confirmation of his claim to the land, together with copies of the grant from Governor Pico to him, and the decision of confirmation by the board."

There is nothing in either of those papers which show that exceptional circumstances with reference to the sale to de Celis did not exist. The petition makes a claim of title based on "a deed of grant dated the seventeenth day of June of the year eighteen hundred and forty-six, by Pio Pico, constitutional governor of the Californias, thereto duly authorized by the supreme government of the nation and by a decree of the departmental assembly of April third, eighteen hundred and forty-six."

The decision of the board recites that Pio Pico testified that he had special instructions from his government to make the grant, and the decision further recites that "the genuineness of the grant is clearly established and the circumstances under which it was made so clearly explained as to leave no doubt but it was done in good faith."

The papers offered in evidence therefore, instead of showing the non-existence of special circumstances with reference to the sale to de Celis, which authorized the governor to make it, affirm the existence of those circumstances, and the contention of plaintiffs in error is reduced to this dilemma: The papers ruled out, the validity of the grant will be implied. The papers ruled in, the validity of the grant will be shown.

Judgment affirmed.

GUSMAN *v.* MARRERO.

APPEAL FROM THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 223. Submitted December 3, 1900.—Decided January 7, 1901.

The purpose of the proceeding in this case was to deliver from the custody of the sheriff of the parish of Jefferson, Louisiana, a person who was under sentence of death for the crime of assault with intent to commit rape, of which he was convicted. The contention of the appellee was that this was not an application for *habeas corpus*, nor for a writ of mandamus, but was an ordinary action. The appellant not only concedes the fact, but asserts it. It follows necessarily that he has no cause of action. The same result would follow if the court regarded the proceeding as one in *habeas corpus*.

THE case is stated in the opinion of the court.

Mr. A. A. Birney and *Mr. A. L. Gusman* for appellant.

Mr. Robert J. Perkins for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellant has not ventured to give a specific name to this action. The appellee claims that it is not an application for a writ of *habeas corpus*, nor for writ of mandamus, (this word is used in the prayer of the petition,) but that it is "an ordinary action of which the appellant has no concern."

The purpose of the proceeding is to deliver from the custody of the sheriff of the parish of Jefferson, State of Louisiana, one Samuel Wright, who is under sentence of death for the crime of assault, with intent to commit rape, for which he was convicted in the twenty-first judicial district court for the parish of Jefferson.

The appellant's petition was filed in the Circuit Court of the United States for the Eastern District of Louisiana, and alleges that he appeared on behalf of Nathan Wright. It further alleges that Wright was convicted of criminal assault with intent to commit rape and sentenced to death, and that Marrero (appellee) as sheriff "proposes, under said sentence, and an order of execution lately received by him from Murphy J. Foster, governor, so called, of the State of Louisiana, to hang said Wright on February 9, 1900, until dead, and will do so unless restrained therefrom by this honorable court; . . . that said conviction was obtained and sentence passed without due process of law, in direct violation of the Fourteenth Amendment of the Constitution of these United States; that the grand jury that indicted Wright consisted of only twelve members, whilst the fundamental law of the State, the constitution of 1879, imperatively requires that the grand jury shall consist of sixteen members, and that the assent of at least thirteen of these members shall be secured for the presentation of a true bill;" and "that these fatal departures from an indispensable due

process of law arose from the very erroneous beliefs of the hon. judge of said district court and of Governor Foster, that a so-called constitution of 1898 is the fundamental law of the State, and not that of 1879; that they erred, and that the latter is the real and valid constitution of Louisiana, petitioner in proof presents the following counts and pleas."

There is a specification of reasons, under eight "counts and pleas," why the constitution of 1898 is not the constitution of the State. The reasons are all reducible to the general and ultimate one that the constitution of 1898 was not adopted in pursuance of the provisions of the constitution of 1879, and "hence act No. 52 of 1896, (an act of the legislature,) generally known as the constitutional convention law, goes far beyond the limits of legislative authority, is *ultra vires* and absolutely null and void, and everything done under it equally null and void."

It is also alleged that certain other acts, to wit, acts Nos. 89 and 13 of 1896, are unconstitutional, because they reduce the number of registered voters, and therefore are "not in any sense an expression of sovereignty, and therefore of no force, effect or validity." The particular reasons given are that the acts are bills of attainder, *ex post facto* laws, violate the guarantees of the Fourteenth Amendment to the Constitution of the United States, take away suffrage without due process of law, make sweeping exemptions from additional qualifications of the suffrage based upon wealth and money, do not provide for ratification by the people of the State in compliance "with the provisions of the Federal Constitution exacting from every State of the Union a republican form of government."

The petition concludes as follows:

"Petitioner further shows in behalf of said Wright that the aforesaid insurrectionary, revolutionary, usurpative and unconstitutional proceedings compel him to go outside of the state courts, and to appeal to this hon. court for protection against an ordered extrajudicial murder, under the well-established maxim of constitutional law that state courts are not competent to pass upon the validity of the constitution under which

they themselves exist and from which they derive all their power.

"Wherefore, the above duly considered, petitioner prays for citation and service of petition upon the aforesaid Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, commanding him to show cause, if any he has, why the said Nathan Wright, now in his illegal and wrongful custody, should not be by him set at liberty.

"Petitioner further prays that, after all necessary services, legal delays and due trial, there be judgment by this hon. court mandamusing and ordering the said Lucien H. Marrero, sheriff of the parish of Jefferson, to restore Nathan Wright to that liberty he has been wrongfully depriving him of.

"Finally, petitioner prays for such general and special relief for said Wright as the law and evidence may on trial show him entitled to receive.

"Respectfully submitted.

(Signed) "A. L. Gusman.

"Before me, the undersigned authority, personally appeared A. L. Gusman, to me known, who, being first by me duly sworn, says that the above facts and allegations are true and correct; that the aforesaid Wright has no adequate legal remedy in the state courts of Louisiana for the denial of due process of law, of which he is the victim, and that his only avenue of escape from an unconstitutional sentence of death is an appeal to this hon. court for justice and protection.

(Signed) "A. L. Gusman.

"This done and subscribed in my office, city of New Orleans, this 2d day of January, A. D. 1900.

[seal.] (Signed) "W. B. Barnett, *Not. Pub.*"

Upon the filing of the petition and without any action of the court or of the Circuit Judge, the clerk or the court issued a citation, entitled in the cause and in the name of the President of the United States, to Lucien H. Marrero, sheriff of the parish of Jefferson, and summoned him to comply with the demand of the petition, (a copy of which accompanied the citation,) or

to deliver his answer in the office of the clerk of the court within ten days after service thereof, with increase of one day for every ten miles Marrero's residence was distant from New Orleans, the place where the court was held.

In due time Marrero, by attorney; filed exceptions to the petition on the ground that the court had no jurisdiction in the case, and on the ground that the petition disclosed no cause of action.

The answer concluded as follows:

"In the event that defendant's exception be overruled, and only then, defendant answers that he holds no prisoner named Martin Wright nor Nathan Wright, as alleged in plaintiff's petition, but that a man named Sam. Wright, now in his custody as sheriff of the parish of Jefferson, was tried and convicted on Monday, the 11th day of December, 1899, before the honorable the twenty-first judicial district court for the parish of Jefferson, presided over by Hon. Emile Rost, judge, of the crime of 'entering a dwelling house in the night time, armed with a dangerous weapon, and, having so entered, having made an assault upon the body of a girl therein residing with the felonious intent to commit rape.'

"Further answering, defendant alleges that, pursuant to a subsequent order of the court aforesaid sentencing him to be hanged, the said Sam. Wright was committed to custody of defendant to await a day to be fixed by his excellency the Governor of Louisiana for the execution of said Wright.

"Defendant alleges that Friday, February the ninth, has been fixed by the Governor of Louisiana for the execution of the orders of the said court.

"Whereupon defendant prays that plaintiff's petition be dismissed."

The exceptions were set down for trial for the 2d of February, 1900, at eleven o'clock, and the petitioner's counsel was ordered to be notified. On that day the exceptions came on to be heard, and were argued, submitted and sustained, and the petition was dismissed.

On February 5, 1900, the petitioner, by his counsel, moved for a new trial on the following grounds:

"First. That the court erred grievously and to Wright's prejudice and injury in holding that this is a mandamus suit. No writ is needed, none was asked, and the words 'mandamus' and 'writ' are nowhere to be found in the petition. No perpetuation of the writ of mandamus that has no existence is either asked or denied. The petition and prayer shows that this is simply an ordinary action. The summons to the defendant Marrero evidences the same thing, and his exceptions and answer are additional proofs of this fact.

"Second. The court also erred grievously when it refused to allow a trial of the merits of the question, since this was necessary in order to show whether or not Sheriff Marrero, in holding Wright in forcible custody under an assumption of governmental authority, was not invading Wright's constitutional rights and guarantees without due process of law.

"Third. The court also erred grievously and injuriously in ruling that appearer's contentions as to jury trials and juries are untenable, on the grounds that Amendments 4, 5, 6, 7 of the Federal Constitution do not apply to state courts, as held by the United States Supreme Court in the 110 U. S. Supreme Court Report in a California case, the said court since then having held that they do.

"Fourth. That this hon. court furthermore grievously and injuriously erred in holding that appearer's eighth count involves a political question over which Congress alone has jurisdiction. This was once true, but it is so no longer, for Congress a number of years ago settled the question affirmatively, and it is now the duty of this court to enforce this decision just as much as it is its duty to enforce the provisions of the statutes of Congress.

"Fifth. The court additionally erred in holding that Wright had no valid right of action, since a resort to mandamus proceedings was not the proper remedy. As no such resort was ever made the decision is clearly erroneous."

The motion for new trial having been submitted to the court it was refused.

A petition for appeal was presented assigning as errors substantially the grounds stated in the motion for new trial, and

Counsel for Parties.

excepting to the court's action thereon. The appeal was allowed, and the case is here in consequence.

The contention of appellee is that this is not an application for *habeas corpus* nor for writ of mandamus, but is an ordinary action. The appellant not only concedes the fact, but takes pains to assert it. It follows necessarily that he has no cause of action. However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this. The judgment of the Circuit Court must therefore be affirmed. Even if we regard the proceeding as one in *habeas corpus*, the same result would follow. *Davis* v. *Burke*, 179 U. S. 399.

Judgment affirmed.

Mr. Justice Harlan took no part in the decision.

TURNER *v.* RICHARDSON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 408. Submitted October 29, 1900.—Decided January 7, 1901.

It is again decided that, to render a Federal question available on writ of error from a state court, it must have been raised in the case before judgment, and cannot be claimed for the first time in a petition for rehearing.

This was a motion to dismiss or affirm. The case is stated in the opinion of the court.

Mr. Frank L. Richardson and *Mr. Frank Soulé* for the motion.

Mr. Henry L. Lazarus and *Mr. J. N. Luce* opposing.

Opinion of the Court.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The commercial firm of M. Schwartz & Company of the city of New Orleans was indebted to the American National Bank of that city on the 5th of August, 1896, in the sum of $88,600.16. To secure this indebtedness certain shares of the Schwartz Foundry Company and other securities were pledged to the bank.

Schwartz & Company became insolvent, and after proper proceedings in the civil district court of the parish of Orleans, Sumpter Turner and Edward Weil were elected syndics of the firm and of the individual members thereof. Weil subsequently died and Turner was elected sole syndic, and is plaintiff in error here.

The bank also failed, and F. L. Richardson was appointed receiver by the Comptroller of the Currency. He attended the meeting of the creditors of the insolvent firm, proved the claim of the bank, voted to accept the cession and for the appointment of the syndics. Subsequently he applied to the civil district court to have the claim recognized and his rights as pledgee enforced by a sale of the securities pledged and the proceeds applied to the payment of the claim. Exceptions to his petition were filed and overruled, and an answer was then filed. The case was tried and judgment rendered in favor of the receiver for $74,045.16, being the greater part of the claim, and the securities pledged were ordered to be sold and the proceeds applied to the payment of the indebtedness adjudged. A suspensive appeal was taken to the Supreme Court of Louisiana and the judgment was affirmed. 52 La. Ann. 1613. This writ of error was then sued out.

One of the assignments of error in the state Supreme Court was as follows:

"That it is not averred nor proved by plaintiff, nor does the record show the averment and proof, that the receiver of the American National Bank was authorized to sue and stand in judgment herein, nor that the receiver was authorized to have sold the collaterals set up as pledged at public auction in the manner demanded by the receiver or ordered by the court; that without the direction and authorization required under sec-

tion 5234 of the United States Revised Statutes, the receiver was incompetent to stand in judgment herein and to have sold or to cause to be sold the stocks, bonds and securities belonging to or pledged to the American National Bank, and that, therefore, his demand for a judgment for the amount claimed, with recognition of a pledge, and his demand to have the alleged pledged collaterals sold, should be rejected at his cost."

In his brief for rehearing filed in the Supreme Court of the State plaintiff in error urged "that the jurisdiction over and affecting the liquidation of national banks was vested exclusively in the United States Circuit Courts and the Federal courts, and that the state courts were without jurisdiction, in the said cause, to grant and order the sale authorized under section 5234 of the United States statutes and its provisions, said defendant and plaintiff in error citing paragraphs 3, 10 and 11 of sec. 629 of the United States statutes, and the proviso of sec. 4 of the act of Congress, adopted August 13, 1888; that said paragraphs and said proviso vested the courts of the United States with exclusive jurisdiction in cases commenced by the United States by direction of any officer thereof, or cases for winding up the affairs of such (national) banks."

It is assigned as error here that the Supreme Court of Louisiana erred in holding—

"1. That the defendant and plaintiff in error was not entitled to the right and privilege, under sec. 5234 of the United States statutes and its provisions, to have the direction and authority of the Comptroller of the Currency for the application to sell such securities, the sale, and the time, manner, and terms thereof;

"2. That defendant and plaintiff in error was not entitled to have the proceedings for the sale instituted and prosecuted by a person competent to stand in judgment, and that the receiver was competent to make such application to sell and to prosecute the same and stand in judgment;

"3. In holding that the Supreme Court of Louisiana and the state courts had jurisdiction *ratione materia*, and in denying the exclusive jurisdiction of the United States courts;

"4. That the court further erred in not setting aside the

judgment of the lower state court and rejecting the demand of the defendant in error."

The claim presented in the trial court and in the Supreme Court, as expressed by the latter, was "that it was necessary for the receiver to aver and prove he was authorized by the Comptroller of the Currency, United States Treasury Department, to institute the present action and to sell at public auction the collaterals pledged to secure the indebtedness declared on, and that without this authorization the judgment recovered cannot stand."

On that contention both courts passed. It was discussed at length by the Supreme Court, and was held to have "no sufficient basis of fact to rest upon." This conclusion was based on the ruling in *Bank* v. *Kennedy*, 17 Wall. 19. We think it was correctly based on that decision.

Section 5234 of the Revised Statutes enacts:

"That on becoming satisfied, as specified [in this act], that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a *receiver*, and require of him such bond and security as he shall deem proper, who, *under the direction of a Comptroller*, shall take possession of the books, records and assets of every description of such association, *collect all debts, dues and claims belonging to it*, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders [provided for by the twelfth section of this act]; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller," etc.

This section was construed in *Bank* v. *Kennedy*, and Mr. Justice Bradley, speaking for the court, after distinguishing between stockholders and ordinary debtors of the national bank, which was the ground of decision in *Kennedy* v. *Gibson*, 8 Wall. 498, 506, said:

Opinion of the Court.

"The language of the statute authorizing the appointment of a receiver to act *under the direction of the Comptroller* means no more than that the receiver shall be *subject* to the direction of the Comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do. We think there was no error in the decision of the court below on these points, and that the action was properly brought by the receiver."

Expressing what it was necessary for the receiver to do to collect the assets of the bank, the Supreme Court of Louisiana said:

"The receiver here could not sell the collaterals in his hands without obtaining the order of a court of competent jurisdiction, and this order must fix the terms of the sale.

"The object of this suit was to obtain such an order. The civil district court of the parish of Orleans is a court competent to grant the order. It did so."

The other point now made, to wit, that the state courts had no jurisdiction of the petition of the receiver because under paragraphs 3, 10 and 11 of section 629, and the proviso of section 4 of the act of Congress adopted August 13, 1888, the courts of the United States had exclusive jurisdiction, was not made in the trial court nor in the Supreme Court at the original hearing. It was made for the first time in the brief filed for rehearing. To maintain its availability to plaintiff in error it is claimed that "if the state courts were utterly without jurisdiction, it was their duty to dismiss the proceedings *ex proprio motu*, and such is the jurisprudence of Louisiana. Where there is a want of jurisdiction *ratione materia*, it is not too late to suggest or raise it on rehearing or at any time."

Whether such was the duty of the state courts and what questions could be suggested or raised on rehearing, the Supreme Court was undoubtedly competent and able to decide. For this court we need only say that we have decided too often to make

it necessary to do more than announce the rule, that to render a Federal question available on writ of error from a state court it must have been raised in the case before judgment, and cannot be claimed for the first time in a petition for rehearing. *Meyer* v. *Richmond*, 172 U. S. 82, 92 and cases cited.

As there is no error in the record, judgment is

Affirmed.

MR. JUSTICE BROWN took no part in this decision.

DISTRICT OF COLUMBIA *v.* ROBINSON.

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

No. 86. Argued November 7, 8, 1900.—Decided January 7, 1901.

The testator of the defendants in error commenced in his lifetime an action against the District of Columbia for trespasses on land of his in the District. The alleged trespasses consisted in entering on the land and digging up and removing, under claim of right, a quantity of gravel to be used for repairing and constructing public highways. The testator died before the action was brought to trial. His executors brought it to trial and secured a verdict and judgment in their behalf, which was sustained by the Court of Appeals of the District. The issues involved are stated fully by the court in its opinion here, on which statement it is *held:*

(1) That as there was no evidence of a formal grant, and as the District relied upon an alleged dedication of the trust to the uses to which the District put it, the issue was properly submitted to the jury;

(2) That the Court did not err in holding and instructing the jury that the use of the tract by the public must have been adverse to the owner of the fee;

(3) That there was no error in holding and instructing the jury that the prescriptive right of highway was confined to the width as actually and without any intermission used for the period of twenty years;

(4) That there was no error in so instructing the jury as to deprive the District of a legal presumption that the public acts required to be performed by it in order to give the right claimed had been performed;

(5) That there was no error in leaving to the jury the question whether

the District of Columbia had done the acts constituting the trespass, without the execution of its lawful powers according to law;

(6) That there was no error in submitting to the jury the question whether the gravel was obtained incident to the lawful exercise of the power to grade;

(7) That there was no error in sustaining the twelfth prayer of the defendants in error, and thereby submitting to the jury to find and determine both the law and facts of the case; and also thereby holding that if the jury found any one of the facts enumerated in said prayer without regard to its probative force, it would tend to prove that Harewood road was not a public way, and rebut any presumption that it was a public highway;

(8) That there was no error in refusing the twenty-third prayer of the District;

(9) That the Court properly instructed the jury that they might enhance the damages that would make the claimants whole, by any sum not greater than the interest on such account from the time of the filing of the original declaration.

THE case is stated in the opinion of the court.

Mr. Andrew B. Duvall for plaintiff in error. *Mr. Clarence A. Brandenburg* was on his brief.

Mr. Conway Robinson and *Mr. Walter D. Davidge* for defendants in error. *Mr. Leigh Robinson* and *Mr. Conway Robinson, Jr.*, were on their brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action for damages which was brought by Conway Robinson against the District of Columbia, for certain alleged trespasses on his land called the "Vineyard." The trespasses consisted in breaking and entering his close and digging a trench 386 feet long, 33 feet wide and 14 feet deep, and carrying away 4683 cubic yards of gravel. The grounds of action were presented in several counts. The District pleaded the general issue and the statute of limitations. The plaintiff joined issue on the first plea, and demurred to the second. No disposition was made of the demurrer until February 18, 1884, when the death of the plaintiff was suggested.

On the 29th of October, 1886, the defendants in error, execu-

tors of Conway Robinson, filed an amended declaration, presenting the cause of action in three counts. The first alleged the taking of the gravel from Harewood road; the second, its taking and using upon other roads; the third, the breaking and entering the close; the fourth, the breaking and entering the close, and the excavation of a trench, thereby separating parts of the close from other parts and impairing its value as suburban property.

On December 30, 1896, the District pleaded the general issue to the amended declaration. Issue was joined on the plea. Subsequently, by leave of the court, the District filed additional pleas. First, the statute of limitations of three years; second, *liberum tenementum;* third, that the trespasses complained of consisted in the excavation and removal of gravel and soil from within the lines of a public highway known as Harewood road. Upon motion the first plea was stricken out and a demurrer was sustained to the second. The case was tried on the general issue and the third plea.

A verdict was rendered for the plaintiffs (defendants in error) in the sum of $8000, and a judgment was duly entered thereon. It was affirmed by the Court of Appeals, 14 D. C. App. 512, and the case was then brought here.

The errors assigned are on exceptions taken to the giving, refusing and modifying instructions. It is not necessary to detail the testimony. It is enough to say that it tended to support the issues made by the parties respectively, and to support the claim that Harewood road was a public highway. For the latter the District relied upon prescription and dedication arising from twenty years' use by the public, and also upon the action of the levy court in relation to the road.

For the statutes in regard to the levy court and its functions we may quote from the opinion of the Court of Appeals as follows:

"The law of Maryland in force at the time of the cession of the District declared that the county courts 'shall set down and ascertain in their records, once every year, what are the public roads of their respective counties.' Act 1704, ch. 21, sec. 3.

"The act of Congress, July 1, 1812, empowered the levy court to lay out public roads, condemn lands therefor, and so forth, and provided that when a road shall have been so established, marked and opened they shall return the courses, bounds and plat thereof to the clerk of the county to be by him recorded, and it shall thereafter be taken, held and adjudged to be a public road. 2 Stat. 771.

"Section 2 of the act of May 3, 1862, declares that all roads which have been used by the public for a period of twenty-five years or more as a highway, and have been recognized by the levy court as public county roads, and for the repairs of which the levy court has appropriated and expended money, shall be public highways whether they have been recorded or not. Section 3 provides that within one year from its passage, the levy court shall cause the county surveyor to survey and plat all such roads and have the same recorded. In making the survey he was required to follow as near as possible the boundaries heretofore used and known for the highway and to mark the same at all angles with stones or posts. 12 Stat. 383. This time for surveying, platting and recording was extended three years by act of February 21, 1863, 12 Stat 658, and again for three years from July 1, 1865, by act of June 25, 1864. 13 Stat. 193. The Revised Statutes of the District (A. D. 1874) also provide that all public roads which have been duly laid out, or declared and recorded as such, are public highways, Rev. Stat. D. C. sec. 246; and that every public highway shall be surveyed and platted and that a certificate of the survey and plat shall be recorded in the records kept for that purpose. Rev. Stat. D. C. sec. 248.

"The penalty provided for the obstruction of public roads, as reënacted in the Revised Statutes of June 22, 1874, is limited to such as have been used and recognized for twenty-five years prior to May 1, 1862, and which 'were thereafter duly surveyed, recorded and declared public highways according to law.' Rev. Stat. D. C. sec. 269."

Whatever evidence is necessary to illustrate the instructions will be stated hereafter.

There is an assignment of error which in effect, though in

form an attack on instructions, questions the sufficiency of the evidence to justify any recovery, and which asserts that it was the duty of the court to have taken the case from the jury. In other words, it is claimed that the trial court should have decided, and not left to the jury to decide, that the road was a public highway. It is not clear upon what the contention is rested. Whether it is rested on the ground that the road was established by the levy court, or that evidence showed beyond reasonable dispute that the road had been acquired by adverse use, or had been dedicated by plaintiff's predecessors in the title. But the evidence did not establish either conclusion beyond reasonable dispute. Both conclusions were disputable and disputed, and whether they were or were not justifiable inferences from the evidence, which was conflicting, was for the jury to determine, not for the court, and the court properly declined to do so. What were within the functions of the court and what were within the functions of the jury are questions entirely aside from the distinction between public and private ways and the manner of acquiring either—whether by grants or by acts *in pais* establishing title by dedication or prescription, the propositions which counsel have learnedly argued.

There is no evidence of a formal grant. The dedication of the road or the prescriptive right of the public to it was sought to be proved by the acts of the owners of the land and certain uses by the public. There was opposing evidence or rather evidence of opposing tendency which could be claimed to show that the use by the public was in subordination to the title—was permissive, not adverse. The issue hence arising was properly submitted to the jury.

The other assignments of error are more specific and exhibit for review the legal propositions which were involved in the issues. These are that the court erred in the following particulars:

(1) In holding and so instructing the jury that the use of the road by the public must have been adverse to the owner of the fee.

(2) In holding and instructing the jury "that the prescriptive

right of highway is confined to the width as actually and without any intermission used for the period of twenty years."

(3) By depriving the District of the presumption that the public acts required to be performed were performed.

(4) By leaving to the jury a pure question of law, to wit, "whether the District of Columbia had done the acts constituting the trespass 'without the execution of its lawful powers according to law.'"

(5) By submitting to the jury a question of law, to wit, "whether the gravel was obtained incident to the lawful exercise of the power to grade."

(6) By "sustaining the granting of the twelfth prayer of the defendants in error and thereby submitting to the jury to find and determine both the law and the facts of the case; and also thereby holding that if the jury found any one of the facts enumerated in said prayer without regard to its probative force, it would tend to prove Harewood road was not a public way and rebut any presumption that it was a public highway."

(7) By refusing the twenty-third prayer of the District, "and thereby holding that the defendants in error were not bound by the answer of the Commissioners to the bill of discovery filed by the testator of the defendants in error respecting the *bona fides* of the action of said Commissioners in respect of the alteration of Harewood road and the purpose of such alteration."

(8) By instructing the jury that they "might enhance the damages that would make them whole by any sum not greater than the interest on such amount from the time of the filing of the original declaration."

1. The first proposition was presented by the following prayers requested by the District and modified by the court. The words in brackets were struck out by the court, those in italics were added:

"II. If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the 'Harewood road,' in the District of Columbia, and that the said road had been used and recognized as a public county road for a period of twenty-five years prior to May 3,

1862, *adverse to the plaintiff's testator and those under whom he claimed*, and that said road was, after said last-mentioned date and *prior to the 1st day of July, 1868*, surveyed and recorded in the records of the levy court as a public highway, then the [plaintiffs are not entitled to recover in this action, and the verdict should be for the defendant] *the* jury should find that the said roadway is a public highway of the width that it had actually been used prior to May 3, 1862.

"*The maps introduced by the defendants are not such surveys and records as the act of 1862 contemplated, but may be considered, together with all the other evidence in the case bearing upon that point, in determining whether such survey and record was made.*

"III. If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the 'Harewood road,' in the District of Columbia, and that said road was a public county road, generally used and recognized as such by the public for an uninterrupted period of more than twenty years prior to 1880, *and adversely to the plaintiff's testator and those under whom he claimed*, under the control of and kept up and repaired by the public authorities, and used by it publicly, openly and notoriously for all the purposes of a public highway, under a claim of right, then the jury may and ought to presume a grant of a right of way to the public over said road [and the plaintiffs are not entitled to recover in this action and the verdict should be for the defendant] *to the width it had been so used.*"

"V. [The rule of presumption is one of policy as well as of convenience, and is necessary for the peace and security of society and] if the jury believe from the evidence that the public used 'Harewood road' as a public highway, whenever it saw fit, without [asking] leave *of the owner* and without objection *from him*, this is adverse, and uninterrupted adverse enjoyment for twenty years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant."

"XX. If the jury believe from the evidence that Harewood

road was on May 3, 1862, a road within the county of Washington, in the District of Columbia, which had been used by the public *adverse to the plaintiffs' testator and those under whom he claimed* for a period of twenty-five years or more as a highway, and had been recognized by the levy court of said county *prior to that date* as a public county road, and the said levy court had appropriated and expended money for the repairs of said Harewood road, then they are instructed that the said Harewood road was at the time of the alleged trespasses complained of a public highway, *of the width it had been used*, although the same may not have been recorded."

But for the criticism of counsel the modifications and additions made by the court might be considered as having done no more than to bring out more clearly the meaning of the prayers. The recognition and control of the road by the District and its use by the public under "a claim of right" (third prayer) or "without asking leave of the owner and without objection from him" (fifth prayer), seem equivalent to a declaration of adverse use. Counsel, however, now contend for a different meaning and a different principle of law. They contend first, as we understand, that use alone without regard to the consent of the owner of the fee or his attitude to the use constituted the road a highway (prayer 2), and required a grant of it to be presumed (prayers 3 and 5).

The contention is not justified. The use must be adverse to the owner of the fee. The rule is correctly stated in 2 Greenleaf on Evidence. The learned author, after defining prescription and the period of possession which constituted it, and explaining the modern practice which has introduced "a new kind of title, namely, the presumption of a grant, made and lost in modern times; which the jury are advised or directed to find, upon evidence of enjoyment for sufficient length of time," says, "in the United States grants have been very freely presumed, upon proof of an *adverse, exclusive and uninterrupted enjoyment for twenty years.*" And after stating the quality of presumption which arises, he continues: "In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been *adverse*, that is, un-

der a claim of title, with the knowledge and acquiesence of the owner of the land, and uninterrupted; and the *burden of proving* this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." Secs. 538 and 539. Under a different rule licenses would grow into grants of the fee and permissive occupations of land become conveyances of it. "It would shock that sense of right," Chief Justice Marshall said in *Kirk* v. *Smith*, 9 Wheat. 286, "which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title."

2. This proposition arises on the following prayer given at the request of the plaintiff:

"The jury are instructed that the right to an easement of common and public highway acquired by a prescriptive use or long use of the road is confined to the lines and width of the road as actually used for and at the end of the period of twenty years, and does not extend to a greater width beyond the width of the road so actually used, and in this connection the jury are further instructed that the planting or placing of the boundary stones mentioned in the evidence, if the same occurred within twenty years before the acts complained of, which are in evidence, would not extend such easement *by prescription* beyond the lines and width of such actual use."

The same reason and principle applies to this as to the preceding proposition. Relying for right of way on use, the right could not extend beyond the use. Or, as it has been expressed, "if the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, the easement cannot be broader than the user." 1 Elliott on Roads, page 136, and cases cited.

3. This proposition is based upon the modifications by the court of the twelfth prayer requested by the District. It was as follows:

"[The levy court of the District of Columbia was a corporation. Its duty, among other things, was to supervise and

keep in repair the public roads of the county of Washington, and to plat, record and mark with boundary stones such roads.]

"If the jury find from the evidence that boundary stones were placed along Harewood road and at the point of the alleged trespass by the surveyor of the levy court in 1865 or thereabouts, and that thereafter said levy court worked and kept said road in repair, then [in the absence of evidence to the contrary the presumption is that] *it is a question for the jury to determine whether* said levy court caused said road to be surveyed, platted and recorded as a public highway in accordance with the act of Congress [requiring the same to be done, and such presumption is not overcome by the fact that the record of the survey and plat of said road is lost or cannot be found], *and it will be competent for them to so find if all the evidence establishes the fact to their satisfaction, although no record of a survey and plat of said road has been given in evidence.*"

The objection to the action of the court is that the District was thereby deprived of the presumptions which attend and support the acts of public officers.

One of the defences made by the District was that the road had become a highway under and by virtue of the acts of Congress heretofore referred to. As a condition of this defence it was necessary to establish that the road had been surveyed, platted and recorded by the levy court, and it was the effect of the prayer which was requested that the performance of that duty would be presumed by the law from the fact that the road had been worked and kept in repair by the levy court. In other words, such surveying, platting and recording would be presumed because it was the duty of the levy court to have done them under the acts of Congress. Undoubtedly the law indulges presumptions of the performance of their duty by public officers and presumptions of the existence of circumstances which generally precede or accompany acts testified to and which are necessary to their validity, but such presumptions are in aid of the evidence. They are not independent of the evidence nor raised against it. The record shows that the plaintiffs' testimony tended to establish "that the road was never surveyed, platted or recorded as a public road, as required by

law." The testimony on the part of the District was that the secretary to the governor of the District in 1871 obtained from the former secretary of the levy court what were supposed to be all of the records of the court, and turned them over to the treasurer of the board of public works, and that those records may be among the old records of the District, but witness did not know; nor did he know what was among them, and had no distinct recollection of any map of the road. Another witness, who was road supervisor from 1869 to 1871, testified that he saw the map of Harewood road and other roads among the records of the old levy court of the District in its room in the city. He did not know, however, when the map was prepared or by whom; that it embraced several roads; it was a map of the District of Columbia and the roads in it. Another witness (William T. Richardson), a civil engineer, testified that under the direction of the Commissioners of the District he found records and maps of the levy court relating to Harewood road; that he found some maps, one made in 1873, in Governor Shepherd's time, and also a copy of the levy court map; that the maps and records were found in the vault of the old District building on First street; that he found no other maps or records relating to the levy court or Harewood road; that the map found was a copy of the original map showing the roads of the District signed by a president of the levy court and clerk; that the first map was in pen work, and was an original made in 1873 under authority of an act of the late legislative assembly of the District. There was another map professing to have been made in 1857 by Mr. Boscke, while he was an employé of the District. The accuracy of the Boscke map was testified to, and it and the other maps were put in evidence.

The evidence therefore showed what the levy court did as to surveying, platting and recording the road, and the effect of it could not be taken from the jury and a presumption substituted for it. Such presumption might have been given to the jury as an element of decision in connection with the evidence, and might have been so given by the court if asked.

The prayer was objectionable for another reason. It assumed that a record of the survey and plat of the road was

made and lost. This was a fact in issue, and could not be assumed. The court left the fact to be deduced from the evidence, telling the jury, however, that they could infer it, although there was no direct evidence of it.

4. The eighth prayer given at the request of the plaintiff was as follows:

"If the jury believe from the evidence that at the time of doing the acts complained, which are in evidence, there was a right of common and public highway in the defendant to a road of only about twenty-five feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway and of about thirty-three feet in width was made by the defendant upon the land of plaintiffs' testator, and believe from the evidence that the defendant so exceeded its right of highway and excavated gravel on the land of the plaintiffs' testator, and removed and used the same beyond the limits of said land to repair or improve other public highways in the District of Columbia without making just compensation to the owner of the soil or having any condemnation proceedings *or exercising its lawful powers according to law*, then the jury are instructed that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiff and assess such damages as the evidence shows would make them whole."

The italics are ours, and they indicate the words upon which the District especially bases its objection. That objection is that a pure question of law was submitted to the jury. The objection is very general, and hardly attains to such specification of an error as can be noticed. However, we have examined the charge of the court, and think what was meant by the words objected to was sufficiently explained.

5. The eleventh prayer asked by the plaintiff was as follows:

"The burden of proof is upon the defendant to satisfy the jury that the gravel was obtained incident to the legal exercise of the power to grade. Such power to be lawful must have been exercised by the Commissioners jointly. It could not be exercised by any one of the said Commissioners, as the power could not in law be delegated. If the gravel obtained and used

was not the incident to the exercise of the power to grade, but was obtained without the lawful exercise of the power to grade, then the use of the said gravel, as well as the said excavation, was unlawful, and the defendant has not maintained its plea of justification.

"*If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers and by the employés of said defendant, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the Commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact.*"

It is objected that the prayer submitted to the jury a pure question of law, to wit, whether the gravel was taken as an incident to the legal exercise of the power to grade. But a definition accompanied the question. The jury was told that what was meant by the legal power to grade was a power exercised by the Commissioners jointly, and the court carefully added that such legal power could be presumed from the supervision of the grading by the officers and employés of the District. The prayer is not amenable to the objection made.

6. The twelfth prayer requested by defendants in error, and given by the trial court with the modifications expressed in italics, was as follows:

"If the jury believe from the evidence that there was a lane or road over the land of the plaintiffs' testator, yet if from the evidence the jury believe that travel over said lane or road originated for the accommodation of some prior owner or owners of that tract and the adjoining tract, or either of said tracts, and of those deriving title from or under such owner or owners of either or both of said tracts, and believe that said lane or road was never surveyed, platted or recorded as a public road or highway, as required by law, and believe that the various owners of said tract of land by mesne conveyances conveyed the same from one to the other, with covenants of warranty, without showing, mentioning or excepting any lane or road over the same, either in the body of any of these deeds or in plats annexed to any of them, and believe that the location of

said lane or road or part thereof over the land of the plaintiffs' testator was changed by Mr. John Agg, a prior owner of said land, for the reason that he wished it further from his house, and that he employed and paid the hands who made this change, and believe that from about 1843 to about the time of the conveyance of May 15, 1857, to the plaintiffs' testator gates were maintained across said lane or road by the owner or owners of said tract or their tenants, and that the gate posts of such gates continued to stand for some time after the gates themselves wore out or disappeared, and stood there until some time in 1861, after the late war had commenced, and believe that taxes were assessed by the public authorities upon and paid by the owners of said land or their tenants upon said tract of land, as a whole, including land within the limits of said lane or road, and believe that acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator, and believe that said lane or road was not repaired by the public authorities until after the late civil war, or recognized by the public authorities as a public road until after the late civil war, or if the jury believe any of these facts, then the jury are instructed that these facts or any of them which the jury may believe would tend to prove that said lane or road was not a common or public highway, and would tend to rebut any presumption of its being a common or public highway, and any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury upon the whole evidence believe that said lane or road was not such a highway at the time of the acts complained of which have been given in evidence, *and was not a highway by dedication*, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs."

The objection that this prayer left to the jury to decide the law and the facts of the case is not justified, nor, that it was held, that if any one of the enumerated facts was proved, the Harewood road was not a public way. The prayer summarized the facts in evidence but did not express an opinion as to their probative force, whether collectively or separately considered.

Each fact had some probative quality and value, and it was proper for the court to say so, "and that any and all such facts," as the court remarked, "if believed by the jury, were to be considered in connection with the other evidence in the case." And the court further said: "If the jury upon the whole evidence believe" [not upon any one fact believe] "that the said lane or road was not such highway at the time of the facts complained of and was not a highway by dedication," then they should find that the gravel was not removed from a public highway, which was the defence made in the third additional plea of the District.

7. The testator of defendants in error filed a bill for discovery in 1882 on the equity side of the Supreme Court of the District of Columbia against the District, its Commissioners, and two assistants of the Engineer Commissioner. The bill alleged that he intended to bring an action against the defendants in said bill for the trespasses which constitute the matter of the present controversy, and after stating with particularity the grounds of discovery submitted interrogatories to be answered by the defendants, as to the time the acts were done which were complained of as trespasses, by whom done, under whose superintendency, by whom paid and out of what fund the work was paid for, the amount of gravel or earth dug and where taken, if taken from the limits where dug, and if any books, accounts, documents or papers were kept recording or evidencing the facts. Certain of the defendants made answer under oath to the interrogatories. As to the probative force of the answers the District at the trial of the case at bar asked the court to instruct the jury as follows:

"The jury are instructed that the plaintiffs are bound by the answer of the Commissioners *and* the District of Columbia to the bill of complaint of their testator [No. 7959, equity, Supreme Court, District of Columbia] offered in evidence by them, and so far as said answer is responsive to the allegations of said bill it is the evidence of the plaintiffs themselves, and the jury are not at liberty to ignore it or find the facts otherwise than in said answer set forth."

The prayer was refused. Upon what ground, however, does

not appear. It might have been refused and could have been, even if it contained a correct declaration of law, on account of its general character. It is attempted here to be particularized. The specification of error is that the court, by refusing the prayer, held "that the defendants in error were not bound by the answer of the Commissioners to the bill of discovery filed by the testator of the defendants in error respecting the *bona fides* of the action of said Commissioners in respect of the alteration of Harewood road and the purpose of such alteration." Whether the trial court would have given the prayer if it had been limited to the good faith of the District Commissioners we cannot know. Presumably not, if it made their answer in the discovery suit conclusive proof, as claimed in the prayer which was refused. The greatest strength of proof attributable to an answer under oath in a suit in equity is that it cannot be overcome by a single witness unaccompanied by some corroborating circumstance. That it has even that strength in a common-law court we are not called upon to decide. It certainly has not conclusive strength. *Lyon* v. *Miller*, 6 Grattan, 427, 438, 439; 1 Pomeroy's Equity Jur. § 208. The prayer requested was therefore properly refused.

8. At the request of the plaintiff the court instructed the jury as follows:

"If the issues joined upon both of the defendant's pleas, which issues are submitted to the jury, are found by them in favor of the plaintiffs, then they are instructed that they may assess such damages in favor of the plaintiffs as they believe from the evidence would make the plaintiffs whole, and may [include] *enhance the damages by any sum not greater than the* interest on the amount from August 28, 1882, when this action was brought, to the time of this trial [as part of the plaintiffs' damages], if the jury [see fit to include such interest as damages, and may consider the time during which the plaintiffs and their testator were kept out of their money between those dates] *shall find from the evidence that such allowance would be reasonable and just.*"

The objection is to the interest. It is not claimed that in cases of tort interest may not be allowed in the discretion of

the jury. It is asserted that under the circumstances of the case the court should not have submitted the claim of interest to the jury. But it was the plaintiffs' right to have invoked the exercise of the discretion of the jury, and the circumstances of the case were to be considered by it in exercising such discretion, and presumably were considered.

9. One of the issues in the case was whether the gravel was taken as an incident to grading the road or for use on certain streets in the District. There was also an issue as to the width of the road and the right to take gravel outside of that width. Prayers were asked on those issues. The ninth prayer of the District was modified by the court and given as modified as follows (the additions of the court are in italics):

"[Unless] *If* the jury shall believe from the evidence that Harewood road at the point of the alleged trespass was a public highway, *and that the gravel was taken in pursuance of the power to grade and not for the sole purpose of obtaining gravel for use elsewhere*, then if they find for the plaintiffs in this case they are instructed that the measure of damages is the value to the plaintiff's testator of such gravel as is shown by the evidence to have been taken by the defendant from the plaintiffs' testator's land exterior to the lines of Harewood road, *and such damages, if any, to the residue of the land as was occasioned by the removal of the gravel exterior to the boundaries of the road.*"

The criticism of the court's action is that it allowed the jury to consider the motive of the District in grading the road. We think counsel misapprehended the purpose of the modifications of the prayer. It did not question the motives of the District authorities nor did it assume anything that was not within the issues of the case. The right to take gravel within the limits of the road which might be established by the evidence and in the exercise of grading was conceded. The right to take gravel outside the limits of the road or not for the purpose of grading it, was denied, and properly denied. It was an easement in the land, not the fee to the land, which the public acquired by the road and the measure of the easement was the width of the road. The right to grade and improve was incident to the easement, but the easement gave no other right in the soil

or to the soil. The right to remove soil from one part of a road to another part may be conceded. And it has been decided such right extends to other streets forming parts of the same system. Of this, however, we are not required to express an opinion, as it is not involved in the prayer.

Finding no error in the record,

The judgment is affirmed.

MR. JUSTICE GRAY took no part in the decision.

NEELY *v.* HENKEL (No. 1).

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 387. Argued December 10, 11, 1900.—Decided January 14, 1901.

There is no merit in the contention that Article 401 of the Penal Code of Cuba, which provides that the public employé, who, by reason of his office, has in his charge public funds or property, and takes or consents that others should take any part therefrom, shall be punished, applies only to persons in the public employ of Spain. Spain, having withdrawn from the island, its successor has become "the public," to which the code, remaining unrepealed, now refers.

Within the meaning of the act of June 6, 1900, c. 793, 31 Stat. 656, providing for the surrender of persons committing defined crimes within a foreign country occupied by or under the control of the United States, and fleeing to the United States, or any Territory thereof, or the District of Columbia, Cuba is foreign territory which cannot be regarded in any constitutional, legal or international sense, as a part of the territory of the United States; and this is not affected by the fact that it is under a Military Governor, appointed by and representing the President in the work of assisting the inhabitants of the island in establishing a government of their own.

As between the United States and Cuba that island is territory held in trust for its inhabitants, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

The act of June 6, 1900, is not unconstitutional in that it does not secure to the accused when surrendered to a foreign country for trial all the rights,

privileges and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States.

The provisions in the Constitution relating to writs of *habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument have no relation to crimes committed without the jurisdiction of the United States, against the laws of a foreign country.

When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

The contention that the United States recognized the existence of an established government, known as the Republic of Cuba, but is now using its military or executive power to overthrow it, is without merit.

The act of June 6, 1900, is not in violation of the Constitution of the United States, and this case comes within its provisions; and, the court below having found that there was probable cause to believe the appellant guilty of the offences charged, the order for his extradition was proper, and no ground existed for his discharge on *habeas corpus*.

THE case is stated in the opinion of the court.

Mr. John D. Lindsay for appellant. *Mr. De Lancey Nicoll* was on his brief.

Mr. Assistant Attorney General Beck for Henkel.

MR. JUSTICE HARLAN delivered the opinion of the court.

By section 5270 of the Revised Statutes of the United States it is provided:

"Whenever there is *a treaty or convention for extradition* between the Government of the United States and any *foreign* government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes

provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

This section was amended by Congress June 6, 1900, by adding thereto the following proviso:

"*Provided*, That whenever any *foreign* country *or territory*, or any part thereof, *is occupied by or under the control of the United States*, any person who shall violate, or who has violated, the criminal laws *in force therein*, by the commission of any of the following offences, namely: Murder, and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; *embezzlement or criminal malversation of the public funds, committed by public officers, employés or depositaries;* larceny or embezzlement of an amount not less than one hundred dollars in value, robbery; burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the

intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices or other buildings, when the act endangers human life, *and who shall depart or flee, or who has departed or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia,* shall, when found therein, be liable to arrest and detention by the authorities of the United States, and *on the written request or requisition of the military governor* or *other chief executive officer in control of such foreign country or territory shall be returned and surrendered* as hereinafter provided to such authorities for trial under the laws in force *in the place where such offence was committed.* All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further,* That such proceedings shall be had *before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offence charged; And provided further,* That no return or surrender shall be made of any person charged with the commission of any offence of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such person a fair and impartial trial." 31 Stat. 656, c. 793.

On the 28th day of June, 1900, a warrant was issued by Judge Lacombe of the Circuit Court of the United States for the Southern District of New York commanding the arrest of Charles F. W. Neely, who "being then and there a public employé, to wit, Finance Agent of the Department of Posts in the city of Havana, Island of Cuba, on the 6th day of May in the year of our Lord one thousand nine hundred, or about that

time, having then and there charge of the collection and deposit of moneys of the Department of Posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said Island of Cuba the sum of ten thousand dollars and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employé and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10, article 401, of the penal code of the said Island of Cuba — that is to say, a crime within the meaning of the said act of Congress, approved June 6, 1900, as aforesaid, relating to the 'embezzlement or criminal malversation of the public funds committed by public officers, employés, or depositaries.'" The warrant directed the accused to be brought before the judge in order that the evidence of probable cause as to his guilt could be heard and considered, and, if deemed sufficient, that the same might be certified with a copy of all the proceedings to the Secretary of State, that an order might issue for his return and surrender pursuant to the authority of the above act of Congress.

The warrant of arrest was based on a verified written complaint of an Assistant United States Attorney for the Southern District of New York.

On the same day and upon a like complaint a warrant was issued against Neely by the same judge, commanding his arrest for the crime of having unlawfully and fraudulently—while employed in and connected with the business and operations of a branch of the service of the Department of Posts in Havana, Cuba, between July 1, 1899, and May 1, 1900—embezzled and converted to his own use postage stamps, moneys, funds and property belonging to and in the custody of that Department which had come into his custody and under his authority as such employé, to the amount of $57,000, in violation of sections 37 and 55 of the Postal Code of Cuba.

Neely having been arrested under these warrants application was made by the United States for his extradition to Cuba. The accused moved to dismiss the complaints upon various grounds. That motion having been denied, the case was heard

upon evidence. In disposing of the application for extradition, Judge Lacombe said: "In the opinion of this court, the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offence of 'embezzlement or criminal malversation of the public funds,' he being at that time a 'public officer' or 'employé' or 'depositary.' Such an offence is obnoxious to the Penal Code in force in Cuba, Article 401 of which provides that 'the public employé who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished,' etc. There is no merit in the contention that this article applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the 'public' to which the Code, remaining unrepealed, now refers. The suggestion that under this Penal Code no public employé could be prosecuted or punished until his superior had heard the case and turned the offender over to the criminal law for trial is matter of defence and need not be considered here. The evidence shows probable cause to believe that the prisoner is guilty of an offence defined in the act of June 6, 1900, and which is also a violation of the criminal laws in Cuba, and upon such evidence he will be held for extradition." But, it was further said: "Two obstacles now exist. He [the accused] has been held to bail in this court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover $45,000, which, it is alleged, he has converted. When both of these proceedings have been discontinued, the order in extradition will be signed. This may be done on August 13 at 11 A. M."

Subsequently, August 9, 1900, Neely presented in the court below his written application for a writ of *habeas corpus* and prayed that he be discharged from restraint in the extradition proceedings. He claimed on various grounds that the act of June 6, 1900, under which he was arrested, detained and imprisoned was in violation of the Constitution of the United States.

The application for the writ of *habeas corpus* having been

denied and an appeal having been duly taken, the petitioner was remanded to the custody of the marshal to await the determination of such appeal in this court.

I. That at the date of the act of June 6, 1900, the Island of Cuba was "occupied by" and was "under the control of the United States" and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that Island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.

On the 20th day of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the Island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was, therefore, resolved: "1. That the people of the Island of Cuba are, and of right ought to be, free and independent. 2. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect. 4. That the

United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." 30 Stat. 738.

The adoption of this joint resolution was followed by the act of April 25, 1898, by which Congress declared: "1. That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain. 2. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect." 30 Stat. 364, c. 189.

The war lasted but a few months. The success of the American arms was so complete and overwhelming that a Protocol of Agreement between the United States and Spain embodying the terms of a basis for the establishment of peace between the two countries was signed at Washington on the 12th of August, 1898. By that agreement it was provided that "Spain will relinquish all claim of sovereignty over and title to Cuba" and that the respective countries would each appoint commissioners to meet at Paris and there proceed to the negotiation and conclusion of a treaty of peace. 30 Stat. 1742.

Commissioners possessing full authority from their respective Governments for that purpose having met in Paris, a Treaty of Peace was signed on December 10, 1898, and ratifications having been duly exchanged it was proclaimed April 11, 1899. 30 Stat. 1754.

That treaty contained among other provisions the following:

"ART. I. Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

"ART. XVI. It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any government established in the island to assume the same obligations." 30 Stat. 1754–1761.

On the 13th of December, 1898, an order was issued by the Secretary of War stating that, by direction of the President, a division to be known as the Division of Cuba consisting of the geographical departments and provinces of the Island of Cuba, with headquarters at Havana, was created and placed under the command of Major General John R. Brooke, United States Army, who was required, in addition to his command of the troops in the Division, to "exercise the authority of Military Governor of the Island." And on December 28, 1898, General Brooke, by a formal order, in accordance with the order of the President, assumed command of that Division, and announced that he would exercise the authority of Military Governor of the Island.

On the 1st day of January, 1899, at the palace of the Spanish Governor-General in Havana, the sovereignty of Spain was formally relinquished and General Brooke immediately entered upon the full exercise of his duties as Military Governor of Cuba.

Upon assuming the positions of Military Governor and Major General commanding the Division of Cuba, General Brooke issued to the People of Cuba the following proclamation:

"Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to persons and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights. To this end, the protection of the United States Government will be directed, and every possible provision made to carry

out these objects through the channels of *civil administration, although under military control*, in the interest and for the benefit of all the people of Cuba, and those possessed of rights and property in the island. The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government. The people of Cuba, without regard to previous affiliations, are invited and urged to coöperate in these objects by the exercise of moderation, conciliation, and good-will one toward another, and a hearty accord in our humanitarian purposes will insure kind and beneficent government. The Military Governor of the Island will always be pleased to confer with those who may desire to consult him on matters of public interest."

On the 11th day of January, 1899, the Military Governor, "in pursuance of the authority vested in him by the President of the United States, and in order to secure a better organization of the civil service in the Island of Cuba," ordered that thereafter "the civil government shall be administered by four Departments, each under the charge of its appropriate Secretary," to be known, respectively, as the Departments of State and Government, of Finance, of Justice and Public Instruction, and of Agriculture, Commerce, Industries and Public Works, each under the charge of a Secretary. To these Secretaries "were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government." Subsequently, by order of the Military Governor, a Supreme Court for the island was created, with jurisdiction throughout Cuban territory, composed of a President or Chief Justice, six Associate Justices, one Fiscal, two Assistant Fiscals, one Secretary or Chief Clerk, two Deputy Clerks, and other subordinate employés, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of a later date, issued by the Military Governor, the jurisdiction of the ordinary courts of criminal jurisdiction was defined.

Under date of July 21, 1899, by direction of the Military Governor, a code known as the Postal Code was promulgated

and declared to be the law relating to postal affairs in Cuba. That Code abrogated all laws then existing in Cuba inconsistent with its provisions. It provided that the Director General of Posts of the Island should have the control and management of the Department of Posts and prescribed numerous criminal offences, affixing the punishments for each. It is not disputed that one of the offences charged against Neely is included in those defined in the Postal Code established by the Military Governor of Cuba, and that the other is embraced by the Penal Code of that Island which was in force when the war ensued with Spain, and which by order of the Military Governor remained in force, subject to such modifications as might be found necessary in the interest of good government.

On the 13th day of June, 1900, the present Military Governor of Cuba, General Leonard Wood, made his requisition upon the President for the extradition of Neely under the act of Congress.

The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States.

While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that Island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the re-

lations of this country with that Island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the Island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that Island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6, 1898, the President said that "as soon as we are in possession of Cuba and have pacified the Island, it will be necessary to give aid and direction to its people to form a government for themselves," and that "until there is complete tranquillity in the Island and a stable government inaugurated, military occupation will be continued." Nothing in the Treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6, 1900, indicating any change in the policy of our Government as defined in the joint resolution of April 20, 1898. In reference to the declaration in that resolution of the purposes of the United States in relation to Cuba, the President in his annual message of December 5, 1899, said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the Treaty of Paris contemplated only a temporary occupancy and

control of Cuba by the United States. While it was taken for granted by the treaty that upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that "so long as such occupation shall last" the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, should "advise any government established in the Island to assume the same obligations."

It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba and determined to occupy and control that island until there was complete tranquillity in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty under international law and pending the pacification of the Island, to protect in all appropriate legal modes the lives, the liberty and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the Treaty of Paris and the act of June 6, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States, than legislation securing the return to that island, to be tried by its

constituted authorities, of those who having committed crimes there fled to this country to escape arrest, trial and punishment? No crime is mentioned in the extradition act of June 6, 1900, that does not have some relation to the safety of life and property. And the provisions of that act requiring the surrender of any public officer, employé or depositary fleeing to the United States after having committed in a foreign country or territory occupied by or under the control of the United States the crime of "embezzlement or criminal malversation of the public funds" have special application to Cuba in its present relations to this country.

We must not be understood, however, as saying that but for the obligation imposed by the Treaty of Paris upon the United States to protect life and property in Cuba pending its occupancy and control of that island, Congress would have been without power to enact such a statute as that of June 6, 1900, so far as it embraced citizens of the United States or persons found in the United States who had committed crimes in the foreign territory so occupied and controlled by the United States for temporary purposes. That question is not open on this record for examination, and upon it we express no opinion. It is quite sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the Island of Cuba and its people.

II. It is contended that the act of June 6, 1900, is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is here made to the provisions of the Federal Constitution relating to the writ of *habeas corpus* bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.

Opinion of the Court.

In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States and then only upon evidence establishing probable cause to believe him guilty of the offence charged; and when tried in the country to which he is sent, he is secured by the same act "a fair and impartial trial"—not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6, 1900.

III. Another contention of the appellant is that as Congress, by the joint resolution of April 20, 1898, declared that "the people of Cuba are, and of right ought to be free and independent" and as peace has existed since, at least, the military forces of Spain evacuated Cuba on or about January, 1899, the occupancy and control of that island, under the military authority of the United States is without warrant in the Constitution and an unauthorized interference with the internal affairs of a friendly power; consequently it is argued the appellant

should not be extradited for trial in the courts established under the orders issued by the Military Governor of the Island. In support of this proposition it is said that the United States recognized the existence of the Republic of Cuba, and that the war with Spain was carried on jointly by the allied forces of the United States and of that Republic.

Apart from the view that it is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification—it being the function of the political branch of the Government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba—the contention that the United States recognized the existence of an established government known as the Republic of Cuba, but is now using its military or executive power to displace or overthrow it, is without merit. The declaration by Congress that the people of Cuba were and of right ought to be free and independent was not intended as a recognition of the existence of an organized government instituted by the people of that Island in hostility to the government maintained by Spain. Nothing more was intended than to express the thought that the Cubans were entitled to enjoy —to use the language of the President in his message of December 5, 1897—that "measure of self control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country." In the same message the President said: "It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question." Again, in his message of April 11, 1898, referring to the suggestion that the independence of the Republic of Cuba should be recognized before this country entered upon war with Spain, he said: "Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country

now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction and to assume to it the mere relation of a friendly ally." To this may be added the significant fact that the first part of the joint resolution as originally reported from the senate committee read as follows: "That the people of the Island of Cuba are and of right ought to be free and independent, *and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island.*" But upon full consideration the views of the President received the sanction of Congress, and the words in italics were stricken out. It thus appears that both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba. It is true that the coöperation of troops commanded by Cuban officers was accepted by the military authorities of the United States in its efforts to overthrow Spanish authority in Cuba. Yet from the beginning to the end of the war the supreme authority in all military operations in Cuba and in Cuban waters against Spain was with the United States, and those operations were not in any sense under the control or direction of the troops commanded by Cuban officers.

We are of opinion, for the reasons stated, that the act of June 6, 1900, is not in violation of the Constitution of the United States, and that this case comes within the provisions of that act. The court below having found that there was probable cause to believe the appellant guilty of the offences charged, the order for his extradition was proper, and no ground existed for his discharge on *habeas corpus*.

The judgment of the Circuit Court is, therefore,

Affirmed.

NEELY *v.* HENKEL (No. 2).

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 406. Argued December 10, 11, 1900.—Decided January 14, 1901.

The decision in this case follows that in No. 387, *ante*, 109.

THIS case was argued with No. 387, *ante*, 109, by the same counsel.

MR. JUSTICE HARLAN delivered the opinion of the court.

The record in this case, it is admitted, shows the same state of facts as in the case just decided. This was a second application for a writ of *habeas corpus*, upon substantially the same grounds as were urged in the other case. The additional allegations in this application for the writ did not materially change the situation.

For the reasons stated in the opinion just delivered, the judgment of the Circuit Court is

Affirmed.

DOOLEY *v.* PEASE.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 97. Argued November 12, 1900.—Decided January 21, 1901.

In Illinois the law does not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure and attachment at the suit of creditors of the vendor; and in cases of this kind the courts of the United States regard and follow the policy of the state law.

Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review.

Opinion of the Court.

Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by this court, if there was any evidence upon which such findings could be made.

Applying the settled law of Illinois to the facts as found, the conclusion reached in this case by the Circuit Court, and affirmed by the Circuit Court of Appeals, that the sale was void against the attaching creditors, must be accepted by this court.

THIS was an action brought on June 25, 1895, in the Circuit Court of the United States for the Northern District of Illinois, by Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, against James Pease, a citizen of the State of Illinois. The declaration complained of a trespass by the defendant, who was sheriff of Cook County, Illinois, in levying upon and taking possession of a stock of silk goods, in a store room in the city of Chicago, which were claimed by the plaintiff to belong to him. After a plea of not guilty the case was, by consent, tried without a jury.

On May 28, 1897, judgment, under the findings, was entered in favor of the defendant.

The case was then taken to the Circuit Court of Appeals for the Seventh Circuit, and on July 6, 1898, the judgment of the Circuit Court was affirmed. A writ of error was thereupon allowed from this court.

Mr. Edward Winslow Paige for plaintiff in error.

Mr. Lockwood Honoré for defendant in error. *Mr. A. W. Green* and *Mr. F. Peters* were on his brief.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Among other questions passed upon by the Circuit Court was whether the alleged sale of goods by the Natchaug Silk Company, through J. D. Chaffee, its president, to Dooley, as receiver of the First National Bank of Willimantic, either as payment in part, or as security for payment, of the debt of the silk company to the bank, was accompanied or followed by the open, visible and notorious change of possession, required by the law of the State of Illinois.

It is conceded, or, if not conceded, we regard it as well established, that the policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, purchase it, and an attaching creditor stands in the light of a purchaser, and as such will be protected. *Thornton* v. *Davenport*, 1 Scammon, 296; *Shawn* v. *Jones*, 16 Illinois, 117; *Martin* v. *Dryden*, 1 Gilman, 187; *Burnell* v. *Robertson*, 5 Gilman, 282.

It is equally well established that the courts of the United States regard and follow the policy of the state law in cases of this kind. "Any other rule," said this court in *Green* v. *Van Buskirk*, 7 Wall. 139, "would destroy all safety in derivative titles and deny to a State the power to regulate its personal property within its limits."

In *Henry* v. *R. I. Locomotive Works*, 93 U. S. 664, 671, it was said:

"It was decided by this court in *Green* v. *Van Buskirk*, 15 Wall. 307; 7 Wall. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former. . . .

"The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot

be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. . . . Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick* v. *Haddon*, 37 Illinois, 370; *Ketchum* v. *Watson*, 24 Illinois, 591;" *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 22.

It being, then, established that, under the policy of the law of Illinois, in order to protect the goods in question from attachment by creditors of the Natchaug Silk Company, an attempted sale must be accompanied by a change of possession, which change must be visible, open or notorious, did the facts of the transaction between the silk company and Dooley show such a change of possession?

The findings of the Circuit Court on this feature of the case were as follows:

"Said store had for several years prior to the sale to Dooley been operated by said Natchaug Silk Company as a store for the sale to dealers of its manufactured goods through one H. L. Stanton, who down to the date of said sale, April 25, 1895, had acted as its agent for that purpose, and at the time said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods, that were included in said bill of sale, sold and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness of said Natchaug Silk Company to said First National Bank of Willimantic.

"On the morning of April 26, 1895, an attorney employed by said plaintiff called at said store, purported to take possession of said goods in the name of the plaintiff, employed said H. L. Stanton as agent of the plaintiff to sell said goods and

remit the proceeds of such sales to the plaintiff, and took from said Stanton a receipt stating that he, said Stanton, had received said stock of goods for the plaintiff and subject to the plaintiff's directions. Immediately thereafter said Stanton caused the said stock of goods to be insured in the name of the plaintiff, and opened a new set of books for the purpose of keeping an account of the sale and disposition of said goods and of the expenses of said Stanton in and about the making of such sale, and also made an inventory of the said goods and delivered the same to said attorney for the plaintiff. From that date said Stanton understood himself to be acting solely as the agent of the plaintiff. A portion of the said stock of goods was sold by said Stanton to various persons, to whom the said goods were billed in the name of the plaintiff, and the proceeds of said sales, amounting to about $7000, were received by said Stanton and placed to the credit of the plaintiff. No change was made from April 25, 1895, until after May 20, 1895, in the signs on the outside of the store, which signs were 'Natchaug Silk Company.' . . .

"After the making of said bill of sale there was no change in the possession of the goods other than as above named, but they remained in the custody of the same persons who had theretofore been in charge of them for the silk company, and they were apparently in the possession of the silk company, so far as appeared to the public, and were sold in the same way as theretofore down to the day of the attachment. There was no change in the title to or possession of said goods which was visible, open or notorious, down to the date of the attachment, unless the facts hereinbefore and hereinafter specifically stated did as matters of law constitute a visible, open and notorious change of possession. . . . The signs of the Natchaug Silk Company, on the outside and inside of the store, were not changed between April 24th and the time of the levy of the attachments. There was nothing in the appearance of the store, outside or inside, to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 25th, the time of the attachment. The same persons, being five or six in number, remained in the store performing,

after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th. The salesmen were instructed not to inform the public nor customers of the transfer to Dooley, and they did not do so, but all the goods that were shipped from said store were billed to customers in the name of the plaintiff and not in the name of the silk company. Orders kept coming in addressed to the Natchaug Silk Company after April 25th for several weeks, in all respects as they had come in prior to that, and these orders were appropriated and filled by Stanton out of the stock in the store. The office fixtures were not attempted to be transferred to Dooly, but they were used in conducting the business after April 25th, in all respects as before, by Stanton in the sale of the goods. Stanton's books of account and papers in relation to sales after April 25th were all kept in a safe belonging to the Natchaug Silk Company, and which had its name painted in large letters thereon and which was standing in the store. No advertisement was made of the transfer to Dooley, nor was any public notice given thereof, unless as a matter of law the facts hereinbefore and hereinafter stated constituted such public notice. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895, unless as matter of law the facts hereinbefore and hereinafter mentioned constituted sufficient information to the public of such change. The change of ownership was not open, or visible, or notorious, unless as matter of law the facts hereinbefore or hereinafter stated constituted open, or visible, or notorious change of ownership."

We have thus stated all the findings of fact relative to the question of the change of possession, shown by the record.

Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley* v. *Supervisors*, 121 U. S. 547.

Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if

there was any evidence upon which such findings could be made. *Hathaway* v. *National Bank*, 134 U. S. 498; *St. Louis* v. *Retz*, 138 U. S. 241; *Runkle* v. *Burnham*, 153 U. S. 225.

We agree with the Circuit Court of Appeals in its statement that "the facts stated in the findings were evidentiary only, and instead of being conclusive of publicity, tended rather to show intentional concealment; that they were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact." 60 U. S. App. 248.

Applying, then, the settled law of Illinois to the facts as found, the conclusion reached by the Circuit Court, and affirmed by the Circuit Court of Appeals, that the sale was void as against the attaching creditors, must be accepted by this court.

This conclusion disposes of the case, and renders a consideration of the other questions presented by the findings unnecessary.

The judgment of the Circuit Court of Appeals is

Affirmed.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* KEARNEY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 85. Submitted November 7, 1900.—Decided January 7, 1901.

The plaintiff in error insured the defendants in error against loss by fire by two policies, one dated in June, 1894, the other in February, 1895, each of which contained the following provision: "The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of

Counsel for Parties.

the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." On the night of April 18, 1895, between the hours of one and three A. M., fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom and to his residence some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of the plaintiffs or either of them. An action for the amount of the loss was brought by the insured against the insurance company, on the trial of which the jury gave a verdict in the plaintiffs' favor, on which judgment was entered, which judgment was sustained by the Circuit Court of Appeals. *Held:*

(1) That it was not intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur; but that it was sufficient if the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient:

(2) That if the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place, not exposed to a fire which might destroy the building in which they carried on business, it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, the same were lost or destroyed, they using such care on the occasion, as a prudent man, acting in good faith, would exercise.

THE case is stated in the opinion of the court.

Mr. E. S. Quinton for plaintiff in error.

Mr. A. C. Cruce and *Mr. W. I. Cruce* for defendants in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover the amount alleged to be due on two policies of fire insurance issued by the Liverpool and London and Globe Insurance Company—one dated June 15, 1894, for $2500 and the other dated February 11, 1895, for $1000 —each policy covering such losses as might be sustained by the insured, Kearney & Wyse, in consequence of the destruction by fire of their stock of hardware in the town of Ardmore, Indian Territory.

Each policy contained the following clause, called the iron-safe clause: "The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

The insurance company insisted in its defence that the terms and conditions contained in this clause of the policies had not been kept and performed by the insured.

There was a verdict and judgment in favor of the plaintiffs in the United States Court for the Southern District of the Indian Territory, and that judgment was affirmed in the United States Court of Appeals for that Territory.

The insurance company sued out a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that court affirmed the judgment. 94 Fed. Rep. 314.

The controlling facts are thus (and we think correctly) stated in the opinion of Judge Thayer, speaking for the court below: "On the night of April 18, 1895, between the hours of one and

three A. M., a fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store, in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom, and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire, and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of plaintiffs, or either of them. The trial judge charged the jury that the set of books which had been kept and which were produced on the trial 'were substantially in compliance with the terms of the policy upon that subject,' and no exception was taken by the defendant to this part of the charge."

It was also said in the same opinion: "The books, though used at the trial as exhibits, do not form a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held. The only substantial ground for complaint seems to be that the inventory was not produced."

The argument in behalf of the defendant assumes that the insurance company is entitled to a literal interpretation of the words of the policies. But the rules established for the con-

struction of written instruments apply to contracts of insurance equally with other contracts. It was well said by Nelson, C. J., in *Turley* v. *North American Fire Insurance Co.*, 25 Wend. 374, 377, referring to a condition of a policy of insurance requiring the insured, if damage by fire was sustained, to produce a certificate under the hand and seal of the magistrate or notary public most contiguous to the place of the fire setting forth certain facts in regard to the fire and the insured, that "this clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form—following words rather than ideas."

To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers or agents prepared the policy, and it is its language that must be interpreted. *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678–9; *Moulor* v. *American Life Ins. Co.*, 111 U. S. 335, 341.

Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement "to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business," should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show, to a man of ordinary intelligence, "all purchases and sales, both for cash and credit." There is no reason to suppose that the books of the plaintiff did not meet such a requirement.

Opinion of the Court.

That of which the company most complains is that the insured did not produce the last inventory of their business, and removed the books and inventory from the fireproof safe in which they had been placed the night of the fire. It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It cannot be supposed that more was intended. If the company contemplated the use of a safe perfect in all respects and capable of withstanding any fire however extensive and fierce, it should have used words expressing that thought.

Nor do the words "or in some secure place not exposed to a fire which would destroy the house where such business is carried on" necessarily mean that the place must be absolutely secure against any fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated. Indeed, upon the facts stated, the plaintiffs were under a duty to the insurance company to remove their books and inventory from the iron safe, and thereby avoid the possibility of their being destroyed in the fire that was sweeping towards their store, provided the circumstances reasonably indicated that such a course on their part would more certainly protect the books and inventory from destruction than to allow them to remain in the safe. If they believed, from the circumstances, that the books and inventory would be destroyed by the fire if left in the safe, and, if, under such circumstances, they had not removed them to some other place and the books or inventory had been burned

while in the safe, the company might well have claimed that the inability of the insured to produce the books and inventory was the result of design or negligence, and precluded any recovery upon the policies. We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed "in some secure place not exposed to a fire" that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice.

We perceive no error in the view taken by the court below; and having noticed the only questions that need to be examined, its judgment is

Affirmed.

HEWITT *v.* SCHULTZ.

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

No. 34. Argued October 15, 16, 1900.—Decided January 7, 1901.

The controlling question in this case is whether it was competent for the Secretary of the Interior upon receiving and approving of the map of the definite location of the Northern Pacific Railroad to make the order of withdrawal, stated by the court in its opinion, in respect of the odd-numbered sections of land within the indemnity limits, that is, of lands between the forty mile and fifty mile limits. In 1888 Secretary Vilas, in an elaborate opinion, held that the Northern Pacific act forbade the Land Department to withdraw from the operation of the preëmption and homestead laws, any lands within the indemnity limits of the grant made by the act of July 2, 1864, 13 Stat. 365, c. 217; and that, until a valid selection by the grantee was made from the lands within the indemnity limits, they were entirely open to disposition by the United States, or to appropriation under the laws of the United States for the disposition of the public lands. *Held*, that the question could not be said to be free from doubt, but that it was the settled doctrine of the court that in case of ambiguity the Judicial Department will lean in favor of a construction given to a statute by the Department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties, who have contracted with the Government upon the faith of such construction, may be prejudiced.

If the question whether there has been deficiency in the grant of lands to the Northern Pacific Railroad Company was at all material in this case, no effect can be given to the certificate of Commissioner Lamoreux set out in the findings of fact.

THE case is stated in the opinion of the court.

Mr. J. H. McGowan for plaintiff in error. *Mr. James A. Kellogg* and *Mr. C. D Austin* were on his brief.

Mr. C. W. Bunn and *Mr. James B. Kerr* for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action is in the nature of ejectment. It was brought to recover the possession of the northeast quarter of section thir-

teen, township one hundred and thirty-two north of range fifty-seven west of the fifth principal meridian, situated in the county of Sargent, North Dakota, and of which the plaintiff Hewitt, now plaintiff in error, claimed to be the owner in fee in virtue of a patent issued to him by the United States.

The present defendants in error, who were defendants below, claimed title as purchasers from the Northern Pacific Railroad Company, which asserted ownership of the land in virtue of the act of Congress of July 2, 1864, granting public lands to that corporation to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route. 13 Stat. 365, c. 217.

There was a verdict and judgment in the court of original jurisdiction in favor of the plaintiff. But that judgment was reversed in the Supreme Court of North Dakota, and the cause was remanded with directions to dismiss the action. 7 North Dakota, 601.

This appeal questions the final judgment of the highest court of North Dakota upon the ground that it denied to Hewitt rights and privileges specially set up and claimed by him under the laws of the United States.

The record contains a voluminous finding of facts based upon the stipulation of the parties. In the view taken of the case by this court many of those facts are immaterial. The precise case to be determined is shown by the following statement, based upon the finding of facts:

On the 30th day of March, 1872, the railroad company having by a map designated its *general* route from the Red River of the North to the Missouri River in the then Territory of Dakota, an Acting Commissioner of the General Land Office transmitted to the register and receiver of the proper local office a diagram showing such route, and in conformity with instructions from the Secretary of the Interior, directed them "to withhold from sale or location, preëmption or homestead entry all the surveyed or unsurveyed odd-numbered sections of public lands falling within the limits of forty miles" (the place or granted limits) as designated on such map. This order took effect April 22, 1872, on which day it was received at the local land office.

Opinion of the Court.

The land in dispute is coterminous with the general route of the railroad as indicated by the above map.

On the 11th day of June, 1873, the railroad company having previously filed a map of the *definite* location of its line from the Red River of the North to the Missouri River in Dakota Territory, the General Land Office transmitted to the local land office a diagram showing the forty and fifty mile limits of the land grant along that line, and that office was directed "to withhold from sale or entry all the odd-numbered sections, both surveyed or unsurveyed, falling within those limits, and to hold subject to preëmption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits, and $1.25 per acre between the forty and fifty-mile or indemnity limits." This order was recorded at the local land office June 24, 1873.

The land in dispute, the finding of facts states, was coterminous with such line of definite location, was more than forty but within fifty miles of such line, that is, was within the indemnity limits, and was at the date of such location public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, free from preëmption or other claims or rights, and non-mineral in character.

It may be here observed that the controlling question in this case is whether it was competent for the Secretary of the Interior, upon receiving and approving the map of the definite location of the road, to make the above order of withdrawal in respect of the odd-numbered sections of land within the *indemnity* limits, that is, of lands between the forty-mile and fifty-mile limits. This question will be adverted to after we shall have stated other facts material in the case.

On or about the 10th day of April, 1882—the railroad company not having at that time made or attempted to make any selection of lands in the indemnity limits to supply losses in the place limits—Hewitt, being qualified to acquire and hold lands under the preëmption laws of the United States, settled upon and improved the lands here in dispute with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, 5 Stat. 453, c. 16, and the acts sup-

plemental thereto and amendatory thereof, authorizing the entry and purchase of public lands by citizens of the United States and by those who declared their intention to become citizens.

The township embracing the land in dispute was surveyed in July, 1882, and the plat of survey was filed in the local land office on the 13th day of October of the same year.

On the 2d day of November, 1882, Hewitt presented to the proper United States local land office a declaratory statement for this land, as provided by law, which was received, filed and placed upon the records of that office.

On the 19th day of March, 1883, the railroad company filed in the local land office a list of selections of land "in bulk" embracing the land in dispute, which, as already stated, was within the indemnity limits of the railroad company.

Having from the day of his settlement upon the land until April 4, 1883, resided upon and cultivated the same as required by law, Hewitt, on the day last named, submitted his final proofs for the land, and duly tendered to the local land office the Government's price for it, together with all required fees. But such final proof was rejected, the reason assigned for such rejection being that the land had been withdrawn from entry under the act of July 2, 1864, granting lands to the Northern Pacific Railroad Company, and the acts of Congress supplemental thereto and amendatory thereof. From that decision Hewitt appealed to the Commissioner of the General Land Office, and on the 5th of October, 1883, that officer affirmed the decision of the local land office.

On the 21st of June, 1884, while Hewitt was in possession—he had been in actual possession since April 10, 1882, and had made valuable improvements on the land—the defendant Emil Schultz (his co-defendant being his wife) made a contract with the railroad company, by which the latter agreed, in consideration of $1200, to sell and convey to the former the land in dispute. Thereupon Schultz entered upon the land, ousting Hewitt from actual possession, and taking up his residence thereon, and cultivating the same. Schultz having paid the above consideration, the railroad company conveyed the land to him. But the conveyance was not made until December 18, 1889.

Before that conveyance was made, namely, on the 15th day of August, 1887, the Secretary of the Interior revoked the above order withdrawing the odd-numbered sections of the indemnity lands from sale or entry.

Subsequently, October 12, 1887, the railroad company filed in the local land office a list designating an amount of lands equal to those "selected" in the list of March 19, 1883, as having been lost and excepted from the grant and within its place lands as defined on the map of definite location.

Of the decision of the Commissioner of the General Land Office on the 5th day of October, 1883, Hewitt had no notice whatever until on or about August 1, 1888. On the latter day he applied for a review by the Commissioner. That review was had with the result that the decision of the local land office against Hewitt was reversed and set aside, his final proofs were admitted, and the selection by the railroad was held for cancellation.

In his opinion delivered September 25, 1888, the Commissioner said: "Said tract is within the 50-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific R. R. Co., ordered by letter from this office, dated June 11th, 1873, received at the local land office then at Pembina, June 24th, 1873. The township was surveyed July 12th to 27th, 1882, and the plat of survey was filed in your office on the 13th day of October following; the whole of said section was selected by the agent of the railroad company March 19th, 1883, per list No. 6. . . . The final proof submitted by applicant shows that he is a native born citizen, over 21 years of age, and a qualified preëmptor, July 10th, 1882; his improvements consisted of a frame house, 16×16 feet, stable 10×12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor. Under the late decision of the Hon. Secretary of the Interior in the case of the *Northern Pacific Railroad Company* v. *Guilford Miller*, 7 L. D. 100, it is held that the withdrawal of the indemnity lands for the benefit of said company was prohibited by the sixth section of the granting act, and,

being in violation of law and without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad had been made. In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5th, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation."

The next step was the filing by the railroad company on the 23d day of February, 1892, of a rearranged list of selections—"tract for tract" selection—selecting the tract in dispute for one previously selected in Wisconsin but which was lost to the company.

The railroad company having appealed from the decision of September 25, 1888, in favor of Hewitt, the Secretary of the Interior by a decision rendered August 11, 1894, sustained Hewitt's right to the land. The Secretary, addressing the Commissioner of the General Land Office, said: "I have considered the appeal of the Northern Pacific R. R. Co., from your office decision of September 25th, 1888, holding for cancellation its indemnity selection of the N. E. $\frac{1}{4}$, sec. 13, T. 132 N., R. 57 W., Fargo., North Dakota, on account of the prior claim of Fred. Hewitt under his preëmption filing upon which he has submitted proof. Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decisions of this Department in the case of *Jennie L. Davis* v. *Northern Pacific R. R. Co.*, 19 L. D. 87, and your office decision is therefore affirmed and the company's selection will be cancelled."

In conformity with the decision of the Secretary of the Interior, and based upon the final preëmption proof made by Hewitt, a patent of the United States was issued to him on the 22d day of June, 1895.

We have seen from the above statement that upon the filing

and acceptance of the map of the definite location of the line of the Northern Pacific Railroad, the Land Office withdrew from sale or entry all the odd-numbered sections, surveyed and unsurveyed, within both the place and indemnity limits. Was it competent for the Secretary of the Interior, immediately upon the acceptance of the map of definite location, to include in his withdrawal from sale or entry lands within the indemnity limits? Was he invested with any such authority by the act of July 2, 1864, 13 Stat. 365, c. 217? Did Congress intend, by that act, to declare that when the railroad company indicated its line of definite location the odd-numbered sections outside of the forty-mile limit and within the fifty-mile limit, on each side of such line, along the whole of the line thus located, should not be subject to the preëmption and homestead laws until it was finally ascertained whether the railroad company was entitled by reason of the loss of lands within the place or granted limits to go into the indemnity limits in order to obtain lands to meet such loss? An answer to these questions may be found in the act of July 2, 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

By the third section of the act Congress granted to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate

sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: . . . *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided. . . ."

This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress "*granted* to the Northern Pacific Railroad Company *only* public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claim or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office"—lands that were not, at that time, free from preëmption or other claims or rights being excluded from the grant. *United States* v. *Northern Pacific Railroad*, 152 U. S. 284, 296; *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 634, 635, and *United States* v. *Oregon & California Railroad*, 176 U. S. 28, 42, and authorities cited in each case. The cases all speak of the granted lands as those within the place limits.

The fourth section of the act provided: "That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the

United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid: . . . *Provided*, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also*, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

But so far as the present case is concerned the most material section of the act is the sixth. That section provided: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land *hereby granted* shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, [5 Stat. 453, c. 16,] granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, [12 Stat. 392, c. 75,] *shall be, and the same are hereby*, extended to *all other lands* on the line of said road, when surveyed, excepting those *hereby granted* to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

It is contended that, construing the third and sixth sections together, it is clear that the words, "the odd sections of land hereby granted" in the first part, and the words, "excepting those hereby granted to said company," in the latter part of the sixth section refer to the lands described in the first section of the act—that is, to the odd-numbered sections in the place limits which were free from preëmption or other claims or rights, and had not been appropriated by the United States

prior to the definite location of the road; that as to "all other lands on the line of the said road, when surveyed," the act expressly declares that the provisions of the preëmption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road which were unappropriated when the line of the railroad was definitely fixed; and that if at the time such line was "definitely fixed," it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the forty-mile and within the fifty-mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the sixth section of the Northern Pacific act to the preëmption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

This construction of the act of July 2, 1864, finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31, 1870, Congress declared: "That the Northern Pacific Railroad Company be, and hereby is, authorized . . . also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land be-

longing to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, *beyond the limits prescribed in said charter*, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864. . . ." 16 Stat. 378.

Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits.

We do not find from the published decisions of the Land Department that the question of the power of the Secretary of the Interior, simply upon the definite location of the Northern Pacific Railroad, to withdraw from the operation of the preemption and homestead laws lands within the indemnity limits, was ever distinctly presented and disposed of prior to the year 1888. It was mooted in the case of the *Atlantic and Pacific Railroad Company*, reported in 6 L. D. 84, 87. The third and sixth sections of the charter of that company were the same as the third and sixth sections, above quoted, of the charter of the Northern Pacific Railroad Company. From the opinion of Secretary Lamar in that case, we infer that some of his predecessors had assumed that the power to withdraw lands in indemnity limits from sale or entry could be exercised upon the definite location of the railroad even before it had been ascertained by losses in place limits that the company must look to the indemnity limits in order to supply its grant. The Secretary said: "Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd-numbered sections of land hereby granted shall not be liable to sale or entry or preëmption before or after they are surveyed, except by said company, as pro-

vided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered—'but the provisions of the act of September, 1841, granting preëmption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers upon the public domain," approved May 20, 1862, *shall be* and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company'—it is difficult to resist the conclusion that Congress intended that 'all other lands excepting those hereby granted to said company' shall be open to settlement under the preëmption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn. Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed exactly in the position which the law gave it, and deprived of no rights acquired thereunder. It would yet have its right to select indemnity for lost lands, but in so doing it would have no advantage over the settler, as it now has in contravention of the policy of the Government in denial of the rights unquestionably conferred upon settlers by land laws of the country, apparently specially protected by the provisions of the granting act under consideration."

But in 1888 the question was directly presented to Secretary Vilas in *Northern Pacific Railroad Company* v. *Miller*, 7 L. D. 100, 120, (referred to in the decision of the Commissioner of the General Land Office of September 25, 1888, upholding Hewitt's

claim,) and it was there held, in an elaborate opinion, that the Northern Pacific act forbade the Land Department to withdraw from the operation of the preëmption and homestead laws any lands within the indemnity limits of the grant made by the act of July 2, 1864. The Secretary said:

"In my opinion, and it is with great deference that I present it, the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits, and lands in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well settled rules upon this subject.

"As to the lands in the primary, or granted, limits: 'The title to the alternate sections to be taken within the limits, when all the odd sections are granted, becomes fixed, ascertained and perfected in each case by this location of the line of road, and in case of each road the title relates back to the act of Congress.' *St. Paul, Sioux City &c. Railroad* v. *Winona &c. Railroad*, 112 U. S. 720, 726; *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 501; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Cedar Rapids & Missouri Railroad Co.* v. *Herring*, 110 U. S. 27; *Grinnell* v. *Railroad Co.*, 103 U. S. 739. As to indemnity limits: 'The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road. In *Ryan* v. *Railroad Co.*, 99 U. S. 382, this court, speaking of a contest for lands of this class, said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose;" and the reason given for that is that "when the road was located and the maps were made the right of the company to the odd

sections first named became fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specified tracts until the selection was actually made in the manner prescribed." The same idea is suggested, though not positively affirmed, in the case of *Grinnell* v. *Railroad Co.*, 103 U. S. 739. In the case of *Cedar Rapids Railroad Co.* v. *Herring*, 110 U. S. 27, this principle became the foundation, after much consideration, of the judgment of the court rendered at the last term. And the same principle is announced at this term in the case of the *Kansas Pacific Railroad Co.* v. *Atchison, Topeka and Santa Fé Co.*, *ante*, (112 U. S.) 414. The reason for this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or preëmption. It may be still longer before a selection is made to supply this loss.' *St. Paul Railway* v. *Winona Railway Co.*, 112 U. S. 720, 731.

"The consequence of this difference is that until a valid selection by the grantee is made from the lands within the indemnity limits, they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposition of the public lands. There is nothing to the line bounding the indemnity limits to distinguish lands within it from any other public lands; the only purpose of that being to place a boundary upon the right of selection in the grantee to make good losses sustained within granted limits. This effect has been most explicitly declared by the Supreme Court in the case of *Kansas Pacific Railroad* v. *Atchison, Topeka and Santa Fé Railroad*, 112 U. S. 414, and in other cases. In that case, the court said of an order of the Commissioner of the General Land Office similar to this, so far as applicable to indemnity limits: 'The order of withdrawal of lands along the

probable lines of the defendant's road made on the 9th of March, 1863, by the Commissioner of the General Land Office, affected no rights which without it would have been acquired to the land, nor in any respect controlled the subsequent grant.' It also said of the indemnity limits under discussion there: 'For what was thus excepted from the granted limits other lands were to be selected from adjacent lands, *if any then remained, to which no other valid claim had originated.* But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the Government, subject to its disposal at its pleasure.'

"It was in view of this difference and its consequences that the language of the granting act was employed by Congress, by which it was explicitly provided that the provisions of the preëmption and homestead laws 'shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.' If lands within the indemnity limits are to be regarded as 'on the line of said road,' this declaration appears to me prohibitory of any withdrawal, for the benefit of this road. It might be that such lands could be withdrawn for some other public purpose, within executive authority to provide for, such, for example, as to constitute a reservation for Indians. But this language was introduced into the same section which declared the granted lands not to be liable to sale, etc., and immediately following that declaration, and in the same sentence, so as obviously to mark the legislative intent to make clearly distinguishable the lands beyond the granted limits as being liable to disposition under those laws. Having so explicitly de-

cleared, it was not necessary to add a prohibition upon executive officers against withdrawal for the benefit of the road. It gave to any person entitled under the preëmption or homestead laws to take any such lands, the absolute right to acquire any proper quantity thereof, in accordance therewith; and this right an executive officer could not deprive the settler of. The act as much makes that his right, as it makes it the right of the company to take the others.

"I cannot be satisfied with the idea that this language was so introduced in immediate qualification of and distinction upon the words rendering lands in the granted limits 'not liable to sale or entry' for the mere purpose of declaring 'what was already enacted by general laws.' The general laws applied without this declaration, and they applied more extensively than this would apply them, since by the general laws entries of other kinds might, if conditions concurred, be also made. The aim of this language was, as I am forced to read it, towards the availability to settlement of all lands not granted. It was a vast grant, and even as so limited, a threatening shadow to fall on the settlement of the Northwest. Well might Congress say, 'The lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development.'

"It may be claimed that the words, 'all other lands on the line of said road,' do not embrace lands within the indemnity limits. That construction would seem still more to deny the Commissioner's power to withdraw them; since it cannot be supposed Congress intended him to withdraw lands not on the line of the road. But the phrase immediately after employed in the section—'the reserved alternate sections'—when speaking of the lands to which the double minimum price must be attached, seems to indicate clearly that Congress had, in the use of the power, a more comprehensive meaning than simply to include by it the lands of the even-numbered sections within the granted limits.

"The Supreme Court appears to have fairly set the question at rest in the case of *United States* v. *Burlington &c., Railroad Co.*, 98 U. S. 334, 339, where it is said of the similar point raised in respect to the line then under consideration: 'And the land

was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific Company, in which the lateral limit is twenty miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.'

"The general rule alluded to in the opinion that lands once properly withdrawn by executive order remain so until restored to market by like order or by statute is not questioned. But every such general rule yields to the will of the legislature in a particular case; and the considerations presented are designed to show the grounds of my opinion that the legislation is in this case particular and exhaustive."

The same question arose in *Northern Pacific Railroad* v. *Davis*, 19 L. D. 87, 90, and Secretary Smith expressed his concurrence in the views announced by Secretaries Lamar and Vilas. Referring to certain passages in the opinion of Secretary Vilas, he said: "These views alone would be sufficient, in my judgment, to sustain the conclusion reached in this case, but I am not left to stand upon them only, for Congress in the same section has gone further. Not content with ordering a withdrawal, that body expressly declared a prohibition against the making of any other withdrawal, when it said, in the next clause of the same sentence, that the provisions of the preëmption and homestead laws 'shall be, and hereby are, extended to all other lands on the line of the said road when surveyed excepting those hereby granted to said company.' Here is an enactment in which the most comprehensive language is used. Having withdrawn the granted sections, 'all other' lands within the grant, along the line of the road, are being legislated for. It would seem, therefore, to follow logically, when it was commanded that the preëmption and homestead laws be extended to 'all other lands,' it was all those lands within the limits of the grant which had not been otherwise disposed of by the act. The

'other' lands within the limits of the grant were the reserved sections and the odd and even sections within the indemnity limits, and it is clear to my mind that Congress meant all of those lands, for 'all' other lands surely cannot mean only a portion of the other lands. *Qui omne dicit, nihil excludit* is a maxim well recognized in the construction of statutes and is applicable here. This aspect of the case is presented and fully discussed by Mr. Secretary Vilas in the *Guilford Miller* case, and concurring in his reasoning, it is not necessary that there should be further elaboration of the argument. The views which I have herein expressed were entertained also by Mr. Secretary Lamar, and are clearly and tersely stated by him in his opinion, before quoted from, in the case of the *Atlantic and Pacific Railroad*, in 6 L. D. p. 87."

It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the preëmption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries

Lamar, Vilas and Smith, and upon which the Land Department has acted since 1888. "It is the settled doctrine of this court," as was said in *United States* v. *Alabama Great Southern Railroad*, 142 U. S. 615, 621, "that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced." These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute.

It is appropriate to refer to one other matter. It appears from the finding of facts that Mr. Lamoreux, when Commissioner of the General Land Office, issued a certificate, dated May 2, 1896, in which it was stated: "I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of lands excepted from and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are, or will be when surveyed, available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office."

It does not appear from the finding of facts that this certificate was given in any proceeding pending between parties in the Land Department. On the contrary, the Commissioner of

the General Land Office in a supplemental report for the year 1899 referred to the grant to the Northern Pacific Railroad Company, and said: "In view of the large quantities of unsurveyed lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it; of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the act of July 1, 1898, and the right of selection for lands within the Mount Ranier forest reserve under the act of March 2, 1899, and the prospect of the creation of other forest reserves within the limits of the grant, I am of opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of 1864." Besides, in *Northern Pacific Railroad Co.*, 25 L. D. 511, and in *Northern Pacific Railroad Co.* v. *Streib*, 26 L. D. 589, it was found that there never had been any ascertained deficiency in the grant to the Northern Pacific Railroad Company. In the above case in 26 L. D. the Secretary of the Interior, referring to the certificate of Commissioner Lamoreux, said: "Relative to the certification of a deficiency in the grant to this company [the Northern Pacific] made by your predecessor, it is sufficient to say that this department has never given recognition to that certificate, nor has the company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant." So that if the question whether there has been deficiency in the grant of lands to the Northern Pacific Railroad Company was at all material in the present case, no effect can be given to the certificate of Commissioner Lamoreux set out in the findings of fact.

In our opinion the plaintiff Hewitt was entitled to a judgment upon the facts found; and the judgment of the Supreme Court of the State reversing the judgment of the court of original jurisdiction and directing the dismissal of the action is itself reversed, and the cause is remanded for further proceedings consistent with this opinion.

JUSTICES BREWER and SHIRAS, dissenting.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE BREWER (with whom MR. JUSTICE SHIRAS concurred), dissenting:

I am unable to concur in the opinion and judgment just announced, and will state briefly the ground for my dissent.

From the beginning of land grants the Land Department has exercised the power of withdrawing from preëmption and homestead entry any body of lands which in its judgment might be necessary for the satisfaction of the grant. And the existence of this power has been affirmed by this court in many cases, and without a single exception up to the present decision. The grant for the improvement of the Des Moines River terminated, as finally decided, at the Raccoon Fork of that river, about half way between the northern and southern boundary of the State of Iowa, yet a withdrawal of lands along that river above that fork, and up to the northern boundary of the State, was sustained. *Wolcott* v. *Des Moines Company*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755. It was held that as the extent of the grant was doubtful, it was within the power of the Land Department and also proper for it to withdraw from settlement and sale all lands that might under any construction of the grant be needed to satisfy it. See among other cases sustaining this power of withdrawal: *Homestead Company* v. *Valley Railroad*, 17 Wall. 153; *Williams* v. *Baker*, 17 Wall. 144; *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 109 U. S. 329, 332, 333; *Bullard* v. *Des Moines Railroad*, 122 U. S. 167, 170, 171, 176; *United States* v. *Des Moines Navigation &c. Co.*, 142 U. S. 510, 528; *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 536; *Riley* v. *Welles*, 154 U. S. 578; *Wood* v. *Beach*, 156 U. S. 548; *Wisconsin Central Rd. Co.* v. *Forsythe*, 159 U. S. 46, 54, 57; *Spencer* v. *McDougal*, 159 U. S. 62, 64; *Northern Pacific Railroad* v. *Musser-Sauntry Co.*, 168 U. S. 604, 607.

It is to be assumed that when Congress makes a grant of a certain number of sections per mile it intends that its grantee shall obtain that number of sections. And when it provides that, if there be not within the place limits the requisite num-

ber of sections free from homestead or preëmption entry, the grantee may go into an indemnity limit and select enough to complete the full amount of the grant, its purpose is that within this territory added for selection the grantee shall receive a full equivalent for the deficiencies in the place limits. Action by the administrative department which tends to accomplish this purpose is, to say the least, not inconsistent with justice. And in order that it be not defeated it is certainly not unreasonable to temporarily withdraw from private entry a sufficient body of land within such indemnity limits.

That in the actual administration of the Northern Pacific land grant such withdrawals of land within the indemnity limits were proper is clear from the certificate of the Commissioner of the General Land Office, of date May 2, 1896, and in evidence in this case, to the effect that there is a known deficiency of 3,559,222 acres of the grant which cannot be satisfied from the limits recognized in the department. As this certificate was the only evidence in the case and was incorporated by the trial court into its findings of fact, it would seem that our inquiry in this direction should be limited thereby. But in the opinion of the majority there is a reference to a report of the Land Department, made a year after the decision in this case, and to two opinions of the Secretary of the Interior, announced about the time of the decision. In these some question is made of the accuracy of this certificate. It will be noticed that in neither report nor opinions is the fact of a deficiency denied, but only a suggestion as to the amount thereof. It is, of course, not a pleasant fact that by reason of the change in the ruling and practice of the Land Department the Northern Pacific Railroad Company fails to receive the full measure of its grant, and I do not wonder at any effort to discredit the fact or minimize the amount of such loss, but I submit that in the disposition of this case we ought to be guided by the evidence before us and not be misled by recent speculations of the department concerning what may yet be developed.

Much is said about the vastness of this land grant, but it must be remembered that it was a grant of lands within what was then a wilderness. Though it was made in 1864, nothing was

done towards the building of the road until more than six years afterwards. Capital finds little temptation in a promise, no matter how great, of lands in an unknown wilderness.

The Land Department, believing that the power so constantly exercised by it and so frequently sustained by this court still continued, made orders of withdrawal as from time to time the maps of the line of definite location were filed and approved. Indeed, the question of power in respect to this very Northern Pacific grant was distinctly presented to Secretary Teller on May 17, 1883, and affirmed by him in a letter of instructions to the Commissioner of the General Land Office. 2 L. D. 511. See also Same 506. These withdrawals prior to the ruling hereafter noticed were over forty in number, and included substantially all the odd-numbered sections within the ten-mile indemnity limit from one end of the road to the other. They continued with unbroken regularity until the ruling referred to.

The first section of constructed road of twenty-five miles in length was accepted by the President on January 6, 1873, as having been finished on October 18, 1872. The last section of constructed road was accepted on July 10, 1888, as having been finished on June 11, 1888. During these years of construction, and of course as inducement to the company to continue the work undertaken, these various withdrawals were made. Not until 1887 was there any question of their validity. The first intimation appears in an opinion announced by Mr. Justice Lamar (then Secretary of the Interior) on August 13, 1887, (6 L. D. 84, 87,) in which he said:

"Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grants, I should, at least, have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd-numbered sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said

company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered—'but the provisions of the act of September, 1841, granting preëmption rights, and the acts amendatory thereof,' and of the act entitled 'An act to secure homesteads to actual settlers upon the public domain,' approved May 20, 1862, 'shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company'—it is difficult to resist the conclusion that Congress intended that 'all other lands, excepting those hereby granted to said company,' shall be open to settlement under the preëmption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn."

Following this opinion Secretary Lamar revoked the orders of withdrawal theretofore made in behalf of some twenty-four corporations, the Northern Pacific Railroad Company among the number. Such revocation was undoubtedly legal, for the power which could order a withdrawal could revoke such order whenever in its judgment the appropriate time therefor had arrived. But such revocation did not disturb the rights which had become vested during the continuance of the orders of withdrawal. Thus consistency in the rulings and practice of the department was preserved.

Subsequently the question was presented to Secretary Vilas, who on August 2, 1888, in the case of the *Northern Pacific Railroad Company* v. *Miller*, 7 L. D. 100, ruled that all these withdrawals were void, thus upsetting that which had been done in the administration of this grant from the time of its inception.

It is unfortunate that during the years of construction, when it seemed important to hold out every inducement to the company to continue its work, the ruling and practice of the Land Department should have been unvarying in the line of securing to it the full amount of its grant, and that as soon as the road was completed and no further inducement to action by the com-

pany was needed the ruling of the Land Department should be changed, and that theretofore done with a view of securing to it the full amount of its grant be declared void. A change in the ruling of the department at that time was inauspicious.

Reference is made in the opinion to the duty of following in doubtful cases the construction placed by the Land Department. I fully agree with this, and I think it is a duty as incumbent upon the department as on the courts, and that when a construction has been once established in respect to a particular matter it should be followed by the department, unless plainly wrong; and that this court, when the question is presented, should hold to the original construction, especially if it be one which obtained during a score of years, and during all the time that the company was engaged in doing the work for which the grant was made, and should refuse to uphold a change made after that work was completed, and which has the effect of unsettling and destroying the rights of many created in reliance upon that construction.

Was the power of withdrawal rightfully exercised by the Land Department? It is not pretended that the Northern Pacific act contains any express denial or taking away of such power. The conclusion that it was taken away rests upon a mere implication, but it is familiar law that repeals by implication are not favored. If the old law and the new are consistent, and can with any reasonable interpretation of the latter be both enforced, they will be; and I respectfully submit that the same rule obtains as to powers belonging to and exercised by a department.

Was there any implied denial of this power to the Land Department? Section 6 of the granting act of July 2, 1864, c. 207, is relied upon by Secretary Vilas and by this court. I quote the section, 13 Stat. 369:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are sur-

veyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Now, confessedly, every part of this section, except the clause commencing "but the provisions," and ending "to said company," applies solely to lands within the place limits, and has no reference or application to lands within the indemnity limits. By its connection, therefore, the natural application of this clause would be to lands within like limits. This natural application is enforced by the words "when surveyed," near the close of the clause, for there is an express provision (as appears in the first of the section) for a survey of the place limits, and there is no reference in the entire body of the act to any other survey. Further, the clause was seemingly necessary to secure beyond question to preëmptors and those seeking homesteads a full and continuous right to the even-numbered sections within the place limits. The preëmption law of September 4, 1841, 5 Stat. 456, defining the classes of lands to which preëmption rights should not extend, included therein the following:

"No sections of land reserved to the United States alternate to other sections granted to any of the States for the construction of any canal, railroad or other public improvement."

The act of March 3, 1853, 10 Stat. 244, which extended the preëmption right to the alternate reserved sections, contained this provision:

"*Provided*, That no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office."

The exact scope of this limitation as applied to grants directly

to railroad companies may not be entirely clear. Perhaps the limitation began with the approval of the map of definite location which, as frequently held, determines the time at which the right of the company to the odd-numbered sections is established, or perhaps, at least in cases where the grant was to a State instead of directly to a company, at the date of the official certification to the State of the list of allotted lands. Such at least seems to have been the opinion of the Land Office, as shown by the rules announced. 1 Lester, 509. Be that as it may, some limitation was prescribed, and this clause was unquestionably introduced in order to remove all doubt as to the full and continuous right of preëmption in respect to the alternate reserved sections. The same provision was found in several land grants, as, for instance, that to the California and Oregon Railroad Company, July 25, 1866, 14 Stat. 239, c. 242; that to the Atlantic and Pacific Railroad Company, July 27, 1866, 14 Stat. 292, c. 278; that to the Stockton and Copperopolis Railroad Company, March 2, 1867, 14 Stat. 548, c. 189; that to the Oregon Central Railroad Company, May 4, 1870, 16 Stat. 94, c. 69; that to the Texas and Pacific Railroad Company, March 3, 1871, 16 Stat. 573, c. 122. That it did not apply to lands outside the place and within the indemnity limits is made clear by the fact that the provision was introduced into an act in which there were no indemnity limits, to wit, the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company, 14 Stat. 94, c. 182.

Reference is made in the opinion of Secretary Vilas, approved by this court, to *United States* v. *Burlington & Missouri River Railroad Company*, 98 U. S. 334, as indicative that the words "on the line of said road" necessarily extend to lands within the indemnity limits. But that case justifies no such inference. There were no place or indemnity limits in terms prescribed. There was simply a grant of ten alternate sections per mile on each side of the road "on the line thereof." When the right of the company attached it was found that the full complement of the grant could not be satisfied by the ten successive alternate sections, and on application of the company patents were issued to it for certain lands beyond the limits of those sections,

and the court held on a bill to set aside these patents that the action of the Land Department was justified in that the full amount of the grant was intended and that there were no prescribed limits within which the grant must be satisfied. It was said (p. 340) that the words "do not require the lands to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line;" and again, "and the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end."

It is also suggested that to disturb this decision of the Land Department in 1888 might work confusion in the administration of the grant and entail hardship on many who have acted in reliance upon that ruling. I concede the hardship. Every change in the ruling of the Land Department in the administration of a grant will almost inevitably work hardship upon some, but it is well to note the comparative hardships, and no better illustration can be presented than the case at bar; and this irrespective of the loss by the company of a large portion of its promised lands. The plaintiff in error immediately upon his application for an entry of the tract in controversy was notified that it was withdrawn. He could then easily have changed his settlement to an even-numbered section and perfected his title thereto. He persevered, however, in his application, and was finally allowed preëmption, paid his money and received his patent. If that action were now adjudged void he would have a claim for the money paid and a claim against a solvent debtor. Rev. Stat. sec. 2362. On the other hand, the defendant in error, who purchased from the railroad company in reliance upon the then ruling of the department, paid to the company the sum of twelve hundred dollars, and has placed upon the lands improvements to the value of six hundred dollars. All this he loses; and while he may have a claim against the company for the amount of money he paid it, yet if it be true (as I am informed, although not appearing in the record) that mortgages upon the railroad company property have been foreclosed and all its property disposed of, his judgment will be

simply against an insolvent corporation. In other words, instead of a claim for reimbursement against a solvent debtor he will have what is tantamount to a judgment against a vacuum, and this will be the experience of all who, during those many years, purchased from the company in reliance upon the then ruling of the department.

For the reasons thus outlined I dissent from the opinion and judgment, and I am authorized to say that Mr. Justice SHIRAS concurs herein.

MOORE *v.* CORMODE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 49. Argued October 15, 16, 1900.—Decided January 7, 1901.

Hewitt v. *Schultz*, *ante* 139, followed in regard to the construction of the act of July 2, 1864, c. 217, to be observed in the administration of the grant of public lands to the Northern Pacific Railroad Company.

THIS action was commenced in the Superior Court of the State of Washington for Garfield County. From an amended complaint filed by Moore, now plaintiff in error, it appears that on December 12, 1883, the Northern Pacific Railroad Company, under authority of the act of Congress of July 2, 1864, 13 Stat. 365, c. 217, granting lands to aid in the construction of its road, selected under the direction of the Secretary of the Interior, the northwest quarter of section 3, in township 13 north of range 42 east, Willamette meridian, in Garfield County in the then Territory of Washington, as indemnity and in lieu of other specified lands excepted from its grant.

On July 2, 1895, the railroad company for a valuable consideration sold and conveyed to Moore by general warranty deed the north half of the above described quarter section.

Prior to that transfer, namely, on the 17th day of July, 1890, the defendant Cormode presented for filing in the district land

office at Walla Walla, Washington, a declaratory statement setting forth that the land in question had been settled on in March, or April, 1882, by Mrs. Ora Standiford, and that she and a subsequent purchaser of her improvements had resided continuously thereon until 1889, when the defendant purchased the improvements and moved upon the land.

Upon a hearing ordered before the land office at Walla Walla, to determine the right of the Northern Pacific Railroad Company to the land in dispute, the register and receiver of that office, in January, 1891, held that the settlement upon the premises by Mrs. Standiford and the occupation of the same thereafter by her and the subsequent purchasers, including the defendant, excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it. The selection made by the company was accordingly recommended to be cancelled.

An appeal was taken by the railroad company to the Commissioner of the General Land Office, and that officer rendered a decision on April 25, 1895, directed to the register and receiver at Walla Walla, in which he said: "I have considered the above entitled case, involving N. W. 3, 13 N., 42 E., appeal by the R'y Co., from your decision in favor of Cormode. The land is within the indemnity limits of the grant to the Northern Pac. R. R. Co., and was selected by the Co. Jan. 5th, 1884, list No. 1. Both parties appearing at the hearing held Jan. 6th, 1891, and from the testimony then taken it appears in substance as follows: The land was settled on March or April, 1882, by Mrs. Ora Standiford, who was qualified to enter under the homestead law. Her settlement consisted of the erection of a frame house 16×18 ft., 1 story and a half high, on the land, the plowing and cultivating of three or four acres, and the digging of a well. At that time she established her residence on the land and remained there continuously with her family until the fall of 1885, when she sold her improvements upon and interest in the land to John A. Long, who occupied the land for a short time and was succeeded by his brother, Henry W. Long, in 1888, who remained in possession until the fall of 1889, when the present applicant, Cormode, who applied for the same under

preëmption law in July, 1890, purchased the improvements and moved onto the land. Since then Cormode continuously resided upon and improved the land. It would thus appear that on Jan. 5th, 1884, when the right of the R'y Co. attached, the land was embraced in the *bona fide* settlement of a party, Mrs. Standiford, qualified to enter the same under the settlement laws. Your decision is therefore affirmed and the Co.'s selection of that date held for cancellation as invalid."

The decision of the Commissioner was sustained by the Secretary of the Interior on May 20, 1896.

Thereafter the defendant Cormode made final proof of his claim, and, a final receipt having been issued to him by the district land office, on the 2d of May, 1898, he received a patent from the United States conveying to him the title to the land.

The plaintiff averred that the decisions of the register and receiver of the General Land Office and the Secretary of the Interior were made and rendered under misapprehension of law; that the officers of the Land Department and the Secretary of the Interior were wholly without jurisdiction to consider the application of the defendant to make preëmption entry of the land, for the reason that the land was not at that time public land of the United States and was not then subject to homestead entry, but before the date of the defendant's application had been withdrawn from entry or sale, and that the decisions allowing the defendant to enter the land were void, and the entry made also void and of no effect; that the Northern Pacific Railroad Company under the grant by the act of July 2, 1864, became and was the owner in fee simple of the land and entitled to a patent therefor from the United States; that the defendant's patent constituted him a trustee, holding the legal title for the benefit of the plaintiff, and was a cloud upon the latter's title; and that the defendant wrongfully and unlawfully withheld the possession of the premises, although the plaintiff had at various times demanded the same.

A demurrer to the complaint was sustained; and the plaintiff declined to plead further. Whereupon the court, on motion of the defendant, dismissed the action. That judgment was affirmed in the Supreme Court of the State, all the mem-

bers of the court concurring in such affirmance. In its opinion in the case that court said: "But, taking a broad view of the question in considering the primary effect of the act [of Congress of July 2, 1864] as a matter of public policy, which is always permissible where there is room for construction and the true intent is a matter of doubt, we are of the opinion that there was no intention to withdraw from actual settlement the immense quantity of lands embraced within the indemnity limits. This phase of the matter has received consideration in a number of cases. Attention is called to the fact that it was expected when the law was enacted that the road would be speedily constructed, and that it would traverse, in the main, practically unoccupied territory, and that there would be consequently no great loss of lands within the place limits. It might well have been considered that there would be ample lands within the indemnity limits to make good such losses, although these lands were open to settlement at all time prior to their actual selection. See *Northern Pacific Railroad* v. *Musser-Sauntry Land &c. Co.*, 168 U. S. 604. And after a consideration of the numerous cases cited in the briefs we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement. It has been the long-continued policy of the Government to facilitate the settlement of its unoccupied lands, and so great a restriction as this would have been under the company's contention could hardly have been contemplated. The departmental withdrawal was subsequently set aside and cannot operate to extend the provisions of the act. Those parts of the discussion or statements in some of the cases most relied upon by the appellant are not in harmony with the later expressions of the court, especially in *Northern Pacific Railroad* v. *Colburn*, 164 U. S. 383, and *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620. Also the prevailing and long-continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. Many patents have been issued thereunder to settlers who are now occupying the lands, as in this case, and doubtless frequent transfers have

been made to others who have regarded the title as perfect, for the issuance of a patent is regarded by the common mind as conclusive, and if it is a matter of doubt the overturning of these rights and the construction of the Land Department should be reserved for the highest court in the land. Furthermore it is most strenuously insisted by the respondent that the case must be decided in his favor on the ground that it does not appear that there was any finding by the Land Department that there was any deficiency in place lands, and that under the familiar rule applied to judgments, if an affirmative finding that there was no loss of place limits was necessary, then that such finding would be presumed; that all presumptions are in favor of the regularity of the proceedings in the Land Department to sustain a patent. The appellant has undertaken to conclude this matter by averment in his complaint, and contends that the indemnity lands were appropriated without selection by reason of the deficiency in place limits, and that the court is bound by the allegations of the complaint in this particular. There is no allegation, however, that there was a finding by the Secretary of the Interior or in the proceedings before the Land Department that there was a deficiency in place limits. And it seems to us that to enable the company to claim this land there must have been a finding that there was a deficiency within the place limits for which the lands claimed were taken, or that it was conclusively established in the proceedings before the department. This matter was a question of fact essentially within the jurisdiction of the Land Department, and its judgment should be sustained unless it appears that it is in conflict with the facts therein found or established. It may have been found that there was no deficiency entitling the company to select these lands. It was found that when the selection was made the land was occupied by a qualified settler, and the company therefore not entitled to take it. The contention of the appellant with reference to the allegations of the complaint in this respect are in our opinion overborne by the authorities. *Johnson* v. *Drew*, 171 U. S. 93; *Durango Land and Coal Co.* v. *Evans*, 80 Fed. Rep. 425; *Gale* v. *Best*, 78 California, 235; *New Dunderberg Min. Co.* v. *Old et al.*, 79 Fed. Rep. 598;" 20 Wash. 305.

Mr. James B. Kerr and *Mr. C. W. Bunn* for plaintiff in error.

Mr. George H. Patrick for defendant in error. *Mr. George Turner* filed a brief for same.

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

The land in controversy is within the indemnity limits of the Northern Pacific Railroad Company as shown by its map of definite location. It was embraced by the order made by the Secretary in November, 1880, whereby the local land office was directed to withdraw and hold reserved "from sale or homestead or other entry" all of the odd-numbered sections "within the place and first indemnity limits" of the Northern Pacific Railroad, as indicated on its map of definite location filed in October, 1880. That order of course proceeded on the ground that under the act of July 2, 1864, 13 Stat. 365, c. 217, it was competent for the Secretary of the Interior immediately upon the filing and acceptance of the company's map of definite location to withdraw from the operation of the preëmption and homestead laws all the odd-numbered sections within the indemnity limits of the road and coterminous with the line of such definite location. The act of 1864 has been differently interpreted in the Land Department since the decision in 1888 of Secretary Vilas in *Northern Pacific Railroad* v. *Miller*, 7 L. D. 100. For the reasons stated in the opinion just delivered in *Hewitt* v. *Schultz*, we accept that decision as indicating the construction of the act of 1864 to be observed in the administration of the grant of public lands to the Northern Pacific Railroad Company. This leads to an affirmance of the judgment without reference to other questions discussed at the bar.

The judgment of the Supreme Court of the State of Washington must be and is hereby

Affirmed.

Mr. Justice White concurred in the result.

Mr. Justice Brewer and Mr. Justice Shiras dissented.

POWERS *v.* SLAGHT.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 47. Argued and submitted October 15, 16, 1900.—Decided January 7, 1901.

For reasons stated in *Hewitt* v. *Schultz*, *ante* 139, the court holds, in conformity with the long established practice in the Land Department, that the order of withdrawal of lands within the indemnity limits of the Northern Pacific Railroad Company is inconsistent with the true construction of the act of July 2, 1864, c. 217.

THIS action was commenced in one of the courts of the State of Washington by the present plaintiffs in error. They alleged in their second amended complaint that on or about December 15, 1883, the Northern Pacific Railroad Company, under and by virtue of the act of Congress approved July 2, 1864, 13 Stat. 365, c. 217, granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof, applied at the United States district land office in the district in which the lands were situated to select and selected lots 10, 11, 14 and 15 in section 1, township 16 north of range 45 east, Willamette meridian, Washington, with other lands, as indemnity in lieu of lands within the place limits of the grant to the company and which had been reserved, sold, granted or otherwise appropriated, or to which preëmption or other claims or rights had attached at the date when the line of the company coterminous therewith was definitely fixed by filing a plat thereof in the office of the Commissioner of the General Land Office—a list of the lands selected, prepared in the manner and form prescribed by the rules and regulations of the Interior Department, being filed by the company in the district land office, and tender and payment made to the receiver thereof of the fees required by law to be paid upon the selection of lands. The list was allowed and approved by the register and receiver on December 17, 1883, the fees accepted, and thereafter the list

was transmitted to the Commissioner of the General Land Office for approval. These lands were selected as public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, except such reservation, appropriation, claim and rights as had attached thereto in favor of the railroad company.

On October 26, 1887, the railroad company, in compliance with other and additional instructions of the officers of the Interior Department issued and given after the above selection had, as stated, been accepted, allowed and approved, filed a list designating the losses in lieu of which the lands described in the selection list were selected; and thereafter, in the years 1892 and 1893, the company, in compliance with instructions issued by the officers of the Interior Department subsequently to the acceptance, allowance and approval of the selection, re-arranged the list of losses and the selection list so that the losses for which each tract of land selected by the company had been taken should be specifically designated. It appeared from the re-arranged list that the lands in question were selected in lieu of certain lands included in section 7, township 9 north of range 15 east, Willamette meridian, Washington, which last-described land was located coterminous with and within forty miles of the line of the company as definitely fixed, and was at the date of the grant to the company, and at the date when its line coterminous therewith was definitely fixed, included in a reservation of the land set apart for the Yakima Indians.

On or about December 24, 1885, after the selection of the above-described land, the Northern Pacific Railroad Company entered into a contract in writing with the plaintiff William L. Powers to convey to him lots 3, 6, 11 and 14 in section 1, township 16 north of range 45 east, upon the payment by him to the company of the sum of $822; and on August 4, 1887, payment having been made, the company conveyed the lots to him.

On July 30, 1887, the company conveyed to Powers lots 2, 7, 10 and 15 in that section.

In the year 1877 A. M. Duffield settled upon lots 2, 3, 6, 7, 10, 11, 14 and 15 in the section in question. Shortly thereafter

he sold and assigned his possessory rights and improvements to L. M. Rhodes, and thereafter, Rhodes having failed to make payment therefor, the property was assigned to the plaintiff Powers, who settled thereon in 1881 with the expectation and intention of purchasing the lands or a portion thereof from the railroad company. Soon after such settlement Powers offered to purchase lots 2, 7, 10 and 15 from the company, and at the same time John G. Powers, a brother of the plaintiff, offered to purchase lots 3, 6, 11 and 14 from the company. Thereafter, as above stated, the plaintiff William L. Powers purchased the lands from the railroad company, having prior thereto taken a relinquishment from his brother of all interest in and to lots 2, 7, 10 and 15.

On or about March 1, 1883, the defendant Slaght rented and leased lot 10 of the plaintiff Powers, and received and took possession of the same. He paid rental therefor, as agreed, from the date upon which he took possession of the premises until the 31st day of October, 1887.

On the last-named day Slaght presented an application at the United States district land office for the district in which the land was situated, to enter lots 10, 11, 14 and 15 as public lands of the United States, under the act of Congress approved May 20, 1862, 12 Stat. 392, c. 75, entitled "An act to secure homesteads to actual settlers on the public domain," alleging in his application that he had settled and established his actual residence upon those lands March 4, 1883, that such residence had been thereafter continuous, and that he had built a house on the land and improved the same. In the complaint in this case the plaintiffs averred that the settlement, occupation and improvement by Slaght were under and in pursuance of the renting and leasing of and from Powers, as above set forth, and not otherwise.

The Northern Pacific Railroad Company having been notified of the application of Slaght to enter the land, filed its objections against the allowance thereof on or about December 2, 1887. A hearing was ordered by the United States district land officers for the district in which the land was situate to determine the rights thereto of the railroad company and

Slaght, and such proceedings were had in the contest that the district land officers, in July, 1889, held the land to be excepted from the operation of the selection of the railroad company by reason of the settlement of the plaintiff Powers, and that the defendant Slaght had settled upon the land as the tenant of Powers.

The railroad company appealed from the decision of the district land officers to the Commissioner of the General Land Office. On April 13, 1895, the Commissioner rendered the following decision, directed to the register and receiver of the district land office at Walla Walla: "I have considered the contest of *Jacob Slaght* v. *Northern Pacific Railroad Company and William L. Powers, Intervenor*, involving lots 10, 11, 14, 15, sec. 1, T. 16 N., R. 45 east, the record in which was transmitted with your letter of July 10, 1889, on appeal by Jacob Slaght and said railroad company from your decision in favor of William L. Powers, intervenor. The land is within the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was filed February 21, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for the withdrawal of which was received at the local office November 30, 1880. These withdrawals have been held by the department to be without authority of law and of no effect. 17 L. D. 8, and 18 L. D. 87. On December 17, 1883, the company selected the land in question under the act of July 2, 1864, 13 Stat. 365, per list No. 1, and on the same day said company selected the land under acts of July 2, 1864, 13 Stat. 365, and May 31, 1870, 16 Stat. 376 for indemnity purposes per amendatory list No. 2. On October 31, 1887, Jacob Slaght presented an application to make homestead entry for this land and alleged that he settled and established his actual residence thereon March 4, 1883, and the same has been continuous; that he built a house 12×14 feet, a kitchen 10×12 feet, a stable, dug a cellar and broke a garden spot, and built a half mile of fence, and that his improvements are worth about $275. The company was duly notified of said application and filed its objections against the acceptance of the same December 2, 1887. Upon the issuance of notice to the parties in interest a hearing

in the case was had and concluded April 4, 1889, at which all parties were represented. The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March, 1883; that he broke and planted a garden; that within a few days after moving in the log house on the land he built an addition thereto; that in September, 1883, he built a house 12×14 feet, a kitchen, a stable, a chicken house, dug a cellar, and fenced about eighty acres; that his residence on the above-described tracts of land has been continuous since March 1, 1883, and that his improvements are worth $400, and that he is a qualified settler."

After stating the substance of the evidence adduced, the Commissioner proceeded: "Therefore, in view of this showing, your decision in favor of William L. Powers is hereby reversed, likewise your decision adverse to Jacob Slaght. Your opinion that said company's selection as to this land was improperly allowed, and that the company had no right to the land prior to its selection, and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be cancelled, was in accordance with the uniform practice of the department, and I concur therein. Accordingly, said amendatory list No. 2 of selections of Dec. 17th, 1883, by said company is hereby held for cancellation as to said lots 10, 11, 14 and 15, sec. 1, twp. 16 N., R. 45 E. The usual time, sixty days after notice, will be allowed the railroad company and William L. Powers within which to appeal to the honorable Secretary of the Interior. Should this decision become final, Slaght will be permitted to make homestead entry for this land. You will advise him of this action."

From the decision of the Commissioner the Northern Pacific Railroad Company appealed to the Secretary of the Interior, who, in 1896, affirmed the action of the Commissioner.

In 1897 Slaght received from the Interior Department letters patent of the United States conveying to him lots 10, 11, 14 and 15.

The plaintiffs averred that the letters patent were issued to Slaght under a misconstruction and misinterpretation of the

law; that long prior to the settlement upon the land by Slaght the lands and each and all of them had been reserved for the use and benefit of the railroad company; that the plaintiff Powers had settled upon the lands with the intention of purchasing them from the company; that the lands were subject to selection by the company, and by its selection thereof it acquired the title in and to the same; that at the time Slaght applied to enter the land, and at the date of the hearings in the contest above referred to, and at the date of the issuing of the letters patent to him, the land was not, nor was it at any of those times, public land subject to settlement or entry under the land laws of the United States other than the act of Congress approved July 2, 1864, above referred to, granting lands to the railroad company; and that the officers of the Interior Department were without authority to issue letters patent purporting to convey the land to Slaght, because the United States had long prior to the issuing of those letters parted with the title to the railroad company.

The complaint stated that the other of the above named plaintiffs in this cause asserted and claimed title to certain portions of the lands in dispute under and by virtue of conveyances from Powers and his grantees.

It was also averred that the plaintiff Powers had conveyed to various parties, with warranty to defend the title thereof, certain other portions of the land; that the questions involved and to be determined in this action were of common and general interest to many persons, who were so numerous that it was impracticable to bring them into court; that the plaintiffs and such other persons were the owners in fee-simple and had an indefeasible title and were in possession of the lots named, and the defendant claimed an interest or estate therein adverse to the plaintiffs, but that defendant had no estate, right, title or interest whatever in the same or to any part thereof; that the defendant was threatening to commence divers suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and the other numerous parties of and from the premises or a portion thereof, and unless restrained by an order of court would bring such suits, and would also without suit forci-

bly enter the premises and without any right whatever eject and dispossess them; and that thereby a multiplicity of suits would be caused and great costs and injuries inflicted upon them, the courts of the State greatly and unnecessarily burdened, and great and irreparable injury wrought to the other parties having common and general interest in the question involved in the cause.

The plaintiff therefore prayed (among other things) that the letters patent issued to Slaght be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of the plaintiffs and of the various persons to whom the plaintiff Powers had conveyed any portion of the land in dispute; that Slaght be decreed to be a trustee holding such right, title and interest in and to those lands as he acquired under and by virtue of such letters patent, if any, for the benefit of the plaintiff Powers and his grantees, both direct and through mesne conveyances, and that Slaght be required to convey such right, title and interest, if any, to the plaintiff Powers and his grantees. The plaintiffs also prayed for such other and further relief as was equitable and just.

A demurrer to the amended complaint was sustained and the plaintiffs electing not to plead further, the action was dismissed.

The judgment of dismissal was affirmed by the Supreme Court of the State of Washington upon the authority of the decision of that court in *Moore* v. *Cormode*, 20 Wash. 305, 712, just decided upon appeal to this court.

Mr. C. W. Bunn and *Mr. James B. Kerr* for plaintiffs in error.

Mr. U. L. Ettenger, *Mr. Charles L. Wyman* and *Mr. Thomas Neill*, for defendant in error, submitted on their brief.

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

The issue as to the validity of the order of withdrawal made by direction of the Secretary of the Interior of lands within the

indemnity limits of the Northern Pacific Railroad Company, as indicated by the company's accepted map of definite location, presents the controlling question in this case. Unless such order be sustained as a valid exercise of power by that officer, there is no ground upon which a decree could be rendered against Slaght.

For the reasons stated in *Hewitt* v. *Schultz*, just decided, we hold, in conformity with the long-established practice in the Land Department, that that order of withdrawal must be regarded as inconsistent with the true construction of the act of Congress of July 2, 1864. The judgment of the Supreme Court of Washington is, accordingly,

Affirmed.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE BREWER and MR. JUSTICE SHIRAS dissented.

MOORE *v.* STONE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No 48. Argued October 15, 16, 1900.—Decided January 7, 1901.

Hewitt v. *Schultz*, *ante*, 139, again followed.

ON the 12th day of December, 1883, the Northern Pacific Railroad Company selected the northeast quarter of section 3, in township 13 north of range 42 east, Willamette meridian, in Garfield County, Washington, under the direction of the Secretary of the Interior, as indemnity in lieu of other lands. In making the selection it filed in the district land office at Walla Walla a list showing the tract selected, at the same time tendering to the officers of the district land office the fees required by law. The tract was selected as public land, to which the United States had full title, not reserved, sold, granted or other-

wise appropriated, and free from preëmption or other claim or rights. The list was accepted, allowed and approved by the officers named on January 5, 1884, and transmitted to the Commissioner of the General Land Office. On October 26, 1887, in compliance with and in pursuance of certain orders and directions subsequently made by the Secretary of the Interior, the railroad company designated the losses for which the above-described lands were selected as indemnity.

On the 30th day of June, 1884, the defendant Dimon B. Stone presented an application to make a preëmption declaratory statement for the lands selected as above stated by the railroad company, to the district land office at Walla Walla, alleging settlement upon the land April 25, 1882. His application was rejected, and on appeal to the Commissioner of the General Land Office a hearing in the matter was ordered to determine the condition of the land at the date of its selection and the respective rights of the defendant and the railroad company. At the hearing the officers of the district land office, in January, 1891, held that the settlement of the defendant and the application to file the preëmption declaratory statement excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it; and the selection made was recommended to be cancelled.

The railroad company appealed to the Commissioner of the General Land Office. In a decision rendered April 30, 1895, and directed to the register and receiver at Walla Walla, that officer said: "The land is within the limits of withdrawal upon the line of amended general route of said road, the map showing which was filed Feb. 21st, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for withdrawal of which was received at the local office Nov. 30th, 1880. These withdrawals have been held by the department to be without authority of law and of no effect. 17 L. D. 8 and 19 L. D. 87. . . . The testimony adduced at the hearing shows that Stone is a qualified settler, and established his actual residence with his family on the land about the middle of April, 1882, in a cabin he built upon the tract; that in the summer of 1882 he built a house 16×24 feet, one and a half

stories high, dug a well, and cultivated a garden; that in 1883 he cropped 15 acres to grain, in 1884 and 1885, 15 acres, and in 1886 and 1887, 40 acres, in 1888, 45 acres, in 1889, 140 acres, and in 1890, 155 acres; that he has fenced the whole place, and that his improvements are worth from $700 to $800. You are of the opinion that Co.'s selection as to this land was improperly allowed, and that the Co. had no right to the tract prior to its selection, and that as the land was occupied and improved as the home of a qualified settler at the date of such selection, that such selection as to the land in question should be cancelled and Stone's application to make preëmption should be overruled; your ruling is in accordance with the uniform practice of the department, and I concur in same. Therefore, your decision is sustained and the amendatory list No. 1 of selection of Jan. 5th, 1884, by said Co. is hereby held for cancellation as to the above-described tract of land."

On July 2, 1895, the railroad company, by general warranty deed and for a valuable consideration, sold and conveyed the north half of section 3 in the above-named township to the plaintiff Moore.

On May 20, 1896, the Secretary of the Interior sustained the above decision of the Commissioner of the General Land Office.

The amended complaint of the plaintiff Moore, after setting out the foregoing facts, alleged that the above decisions by the officers of the Land Department and the Secretary of the Interior were made and rendered under a misapprehension and mistake of law and were contrary to law; that under the rules and practice of the Department of the Interior, the decision of the Secretary finally closed and determined in that department the controversy as to the tract of land, of which fact the parties received notice, the contest being closed July 10, 1896; that thereafter the defendant made final proof and received a final receipt for the land, in which it was recited that he was entitled to a patent for the land from the United States; and that in 1897 a patent was issued to him.

The plaintiff averred that the United States district land officers, the Commissioner of the General Land Office and the Sec-

retary of the Interior were wholly without jurisdiction to consider the application of the defendant Stone to make preëmption entry of the land, for the reason that it was not public land of the United States subject to homestead entry, but at the time of the defendant's application had been withdrawn by order of the Secretary of the Interior from entry or sale under the settlement laws of the United States; that the railroad company was the owner in fee simple of the premises and entitled to the legal title thereto and to a patent from the United States; that the patent issued to the defendant, or which, if not issued, would be issued to him, constituted the defendant a trustee, holding the legal title for the benefit of the plaintiff, and cast a cloud upon his title.

It was set out in the complaint that in 1898 the wife of the defendant Stone died intestate, "leaving as her heirs the defendants herein, who, excepting defendant D. B. Stone, are her children and the only children surviving her and the only children which she has or ever had; that the premises and property herein described, if any right or interest was ever acquired by defendant D. B. Stone, was acquired after his marriage with the said deceased; that some of said children of said deceased are of age and some are minors; that the names of those who are minors are Sylvia S. Jenks, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone; that the said Ammvillis Allen and Sylvia S. Jenks are married; that said children and defendants other than D. B. Stone have no other rights except as heirs of the said deceased."

The plaintiff therefore prayed that the defendants be declared trustees for the use and benefit of plaintiff; that by decree it be adjudged that defendants or either of them have no right, title, interest or estate whatever in and to these lands and premises or any part thereof; that the title of plaintiff be decreed good, valid and a fee simple title; and that defendants be required to execute and deliver to plaintiff deed or deeds so as to vest in plaintiff a complete record title in and to the premises; that any and all pretended claims of defendants or either of them be held for naught and cancelled; that the defendants and each of them be enjoined aud debarred from as-

serting any claim whatever in or to the lands or any part thereof adverse to the plaintiff; that plaintiff have judgment quieting his title against defendants and each of them, and removing the cloud thereon created by the pretended claim or claims of defendants or either of them; that plaintiff be adjudged entitled to immediate and exclusive possession of the premises and the whole and every part thereof and be put into possession thereof by order of the court; and that plaintiff have such other or further relief as should seem meet, proper and agreeable to equity.

The amended complaint was demurred to, and the demurrer was sustained; and the plaintiff declining to plead further, the action was dismissed. The judgment of dismissal was affirmed in the Supreme Court of the State, on the authority of *Moore* v. *Cormode*, 20 Wash. 305, 713.

Mr. James B. Kerr and *Mr. C. W. Bunn* for plaintiff in error.

Mr. George Turner filed a brief for defendants in error.

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

As in the other cases just decided, the plaintiff's right to recover depended upon the validity of the order made by the Secretary of the Interior directing the withdrawal from sale or entry under the preëmption and homestead laws of the United States of the odd-numbered sections of land within the indemnity limits of the Northern Pacific Railroad Company as defined by its map of definite location. The order was based wholly upon the filing and acceptance of that map, and in advance of any selection based on ascertained losses of distinct tracts in the place limits.

For the reasons stated in *Hewitt* v. *Schultz*, such order must be regarded as not authorized by the act of July 2, 1864, under which the railroad company and its grantee claimed title; and

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upon that ground the judgment of the Supreme Court of the State of Washington must be and is

Affirmed.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE BREWER and MR. JUSTICE SHIRAS dissented.

NEW ORLEANS *v.* FISHER.

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

No. 46. Argued October 12, 1900.—Decided January 28, 1901.

The city of New Orleans having collected school taxes and penalties thereon, and not having paid over these collections, judgment creditors of the school board of the city, whose claims were payable out of these taxes, were entitled, if the school board failed to require it, to file a creditor's bill against the city for an accounting.

The city was bound to account not only for school taxes but also for the interest thereon collected by way of penalty for delay in payment.

As the collections were held in trust, the statute of limitations constituted no defence.

Jurisdiction of the actions in which the judgments were recovered against the school board could not be attacked on the creditor's bill.

No demand for an accounting as of a particular date being alleged or proved, interest on the amount found due prior to the filing of the creditor's bill is allowed only from the latter date.

THIS was a bill filed by Mrs. M. M. Fisher, joined and authorized by her husband, John Fisher, citizens of the Kingdom of Spain, May 11, 1896, against the city of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, which alleged—

"That she recovered a judgment in this hon. court against the board of school directors, a corporation created by the laws of the State of Louisiana, and a citizen thereof, in the sum of more than ten thousand dollars, as more fully appears by the record of said suit;

"That your oratrix obtained two other judgments against

the same school board, before the civil district court for the parish of Orleans, amounting in the aggregate to many thousand dollars;

"That all of said judgments are now final; that they are made payable out of the school taxes levied by the city of New Orleans, prior to 1879.

"Your oratrix avers that the school taxes out of which said judgments have been made payable, is a trust fund levied by the city of New Orleans, for the purpose of paying the expenses of the public schools of the city of New Orleans.

"1st. That the city of New Orleans has failed to collect the said taxes punctually and that it was through her fault and negligence that the same remain uncollected, and by reason of her neglect she has become liable for the amount of taxes yet remaining uncollected.

"2d. Your oratrix further complains and says that said taxes, under the law, carried interest at the rate of ten per cent per annum and that the city of New Orleans has never paid to the school board any of the interest due on said taxes, but she has misapplied and diverted the same to other unlawful uses.

"3d. Your oratrix further avers that the school board created the obligation against said school taxes, by virtue of contracts which were legally entered into and your oratrix was protected by the Constitution of the United States from any impairment of her contract.

"That in violation of this constitutional right, the State of Louisiana passed act 82 of 1884, which directed that the property of delinquent taxpayers should be sold for what it would bring and that all taxes due thereon should by virtue of said sale be cancelled.

"That by reason of said law, the city of New Orleans allowed the property on which the school taxes were due to be sold for state taxes, and she caused the city taxes, including the school taxes, to be cancelled; that she was thus guilty, 1st, as a delinquent trustee for not having enforced the collection of the said tax; and 2d, for having failed to protect the interest of your oratrix at said state tax sale; that the cancellations thus made amount to many thousands of dollars.

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"4th. That the said city of New Orleans at various times passed ordinances cancelling and annulling the said taxes and remitting the interest thereon:

"That your oratrix is unable to give the exact amount of each kind of violations of her obligations by the trustee, and it is absolutely necessary to make the city of New Orleans account for the various amounts which have been lost to your oratrix through the unfaithfulness of said trustee.

"That the board of school directors to whom the city of New Orleans should account have refused to demand such an account and will continue so to do and your oratrix would be left without a remedy.

"That the fund which the city of New Orleans administers seems now to be sufficient to satisfy the demands of all the creditors who are entitled to be paid out of the same.

"Your oratrix further avers that her judgments are made directly payable out of the school taxes levied prior to 1879 and she has an equitable lien thereagainst enforceable before a court of equity.

"She further avers that under the law her certificates which are merged in her judgments have been under the law, received by the city of New Orleans, directly in payment of the school taxes without the intervention of the board of school directors.

"That for those reasons your oratrix brings her bill against the city of New Orleans and the board of directors of the city schools of New Orleans for an account.

"Your oratrix brings this bill for herself and all parties similarly situated who are willing to appear and contribute to the costs thereof, they being too numerous to be made parties hereto."

The prayer was that the city school board and the city answer, and "give a full, fair and perfect account of all the school taxes collected by the city of New Orleans for the years 1873, 1874, 1875, 1876, 1877 and 1878; of all the interest received thereon by said city and never accounted for; of all the taxes which were not collected for want of proper enforcement, and which have since been cancelled both by sales made by the state tax collectors and by ordinance adopted by the city council;" and for general relief.

Subsequently a supplemental bill was filed in respect of property alleged to have been acquired by the city through seizures for taxes.

The bill was taken as confessed as against the school board, and general demurrers were filed by the city, and overruled.

The city thereupon, March 12, 1897, answered, admitting "that oratrix recovered judgments against the board of school directors, a corporation of the State of Louisiana, and a citizen thereof, both in this honorable court and in the civil district court for the parish of Orleans as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein;" "that all of said judgments are now final and are payable as decreed and provided for in the said judgments;" but denying "that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city;" and "that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected, they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be."

Also admitting "that the city of New Orleans had never paid to the school board any interest which she may have collected on any back taxes, and defendant denies that any such interest, if same has ever been collected, was due to the school board, and defendant denies that she has ever misapplied or diverted to unlawful uses any interest that she may have collected from delinquent taxpayers or back taxes, and defendant avers and shows that by express provision of law all interest which she may collect on any back taxes is especially set aside for certain purposes and cannot by her be used for school purposes or for any other purpose than that commanded by law;" and denying "that the school board created the obligations against the school taxes, set forth in oratrix's bill of complaint, by virtue of any contracts legally entered into, and denies that the oratrix has any right to invoke the protection of the Constitution of the United

States herein, and denies that the provisions of the same regarding impairment of contract have been in any manner violated by this defendant;" "that act No. 82 of 1884 was passed in violation of any constitutional rights of oratrix in the premises, and defendant declares that whatever was done by the State of Louisiana in passing the said act, if it was done, was within the legislative authority, and the said taxes and legislative provisions were subject to change, amendment and repeal by the same authority which created them, and defendant shows and avers that the city of New Orleans had no authority or control over the action of the legislature in the premises;" "that the city of New Orleans allowed any property on which school taxes were due, to be sold for said taxes, and denies that she caused the city taxes, including the school taxes, to be cancelled;" "that she has been or is guilty as a delinquent trustee for not having enforced the collection of said taxes, denies that she ever was a trustee in the matter, denies that she ever failed to enforce the collection of any taxes which it was her duty to enforce, denies that it ever was her duty to protect the interests, if any she had, of oratrix, at said tax sales, denies that oratrix had any such interest and denies that there were any such tax sales;" "that any cancellations amounting to many thousands of dollars, or to any amount, were made by reason of said sales as set forth in oratrix's bill of complaint;" "that the city of New Orleans passed ordinances cancelling and annulling any taxes, or remitting any interest thereon, but if any taxes were so cancelled or remitted, defendant avers the same was done by authority of law or by judgment of a competent court. Defendant denies that there was or is any obligation on the part of the city to account either to the school board or to the oratrix for any taxes, moneys or appropriations such as are set forth in oratrix's bill of complaint."

The answer further denied "that it was the duty of the school board to call this defendant to account, and denies that the school board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the school board and this defendant, or between Mrs. Fisher and this defendant. And

further answering defendant says, that if any such cause of action for an accounting ever did exist in favor of said school board or of said oratrix, the same was effective and executory in the year 1880, and became actionable and exigent in the year 1880, and in the years following the year 1873 up to 1879 inclusive; that said action of accounting was personal to said school board and could only be exercised and availed of by the said school board, which action is prescribed by the lapse of ten years from and after each of the said years, and that oratrix has no right or cause of action in the premises;" and "that there is any fund now administered, or which ever was administered by the city of New Orleans, derived either from appropriations, taxes or money said to be due said school board, and denies that if there is or was any such fund, that the said school board or oratrix has any rights in the premises."

It was admitted "that the judgments of oratrix are payable as stipulated in said judgments," but denied "that oratrix has any equitable lien enforceable against the city of New Orleans before a court of equity by reason thereof;" and also "that under the law were the services which she alleges have been merged in her judgments ever received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors."

The city further denied the purchase of property "for the taxes due for the years during which oratrix's claim is alleged to have arisen;" any resulting trust if purchases had been made; any statutory lien; and "that the oratrix has any right or reason to invoke the equitable jurisdiction of this honorable court."

Replication was filed, and the cause referred to a master "to take a full, true, fair and perfect account of all the funds, principal and interest, received by the city of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877 and 1878, and of all interest remitted illegally, and of all properties purchased for said taxes as more fully prayed in the bill and supplemental bill filed herein, and to that effect the parties shall produce before said master all books, papers, documents to be examined and which may be necessary or proper in the premises."

Statement of the Case.

Numerous persons claiming to have judgments against the School Board, similar to the judgments of Mrs. Fisher, intervened and asked to share in the proceeds of any amount found to be due by the city of New Orleans on the accounting. May 22, 1897, the master reported:

"1st. The city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of $23,180.03.

"2d. The proportion of the interest actually collected by the city of New Orleans on the taxes of the years 1871 to 1878, both inclusive, up to January 1st, 1897, to which the school board will be entitled, if it is entitled to the same proportion of the interest as of the principal of said taxes, is $48,758.75.

"It is a question of law whether the school board is entitled to any part of the interest. I think it is—the interest as a mere accessory of the principal belongs in my opinion to the same person to whom the principal belongs. Accordingly in my opinion the amount the city of New Orleans now owes to the school board for taxes collected, and for interest on the taxes collected, is as above stated, $71,938.78."

That complainant had abandoned the attempt to show that the city owed anything on account of properties purchased for taxes. That the city was not chargeable "with the calculated amount of interest not collected." And "that the following parties have proved their claims against the fund herein, by judgments rendered in their favor against the school board, in the civil district court for the parish of Orleans, namely:

"M. M. Fisher	$11,094 87
"	8,802 39
"	5,864 64
T. J. Gasquet	57,059 69
Jose Venta	21,297 72"

Complainants with several intervenors filed exceptions to the master's report, and on June 7, 1897, the city of New Orleans filed exceptions as follows:

"Defendant excepts to that part of the report of the master wherein he expresses his opinion that the interest on taxes is a

mere accessory of the principal, and belongs to the person to whom the principal belongs, and that, therefore, in his opinion, the city of New Orleans owes the school board for taxes collected and interest collected. Exceptor excepts to this on the ground that:

"1st. It was no part of the master's duty, under his reference, to decide this question or to express any opinion upon the question of law involved therein, but in the event that the court overrules this exception and holds that such was his duty, then and in that case the city of New Orleans excepts to his conclusions of law, and asserts that, on the contrary, his conclusion is erroneous; that the interest does not follow the taxes, and does not belong to the party to whom the taxes belong.

"Defendant excepts to the statement of the master that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, is due by the city to the school board or to the board of liquidation at any time since its collection."

June 29, 1897, the city filed an exception to the jurisdiction of the court *ratione materiæ et personæ*, averring "that plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action;" and on July 1, a plea in abatement "that plaintiff, Mrs. M. M. Fisher, and defendant are both citizens of the State of Louisiana, and that by reason thereof this court is without jurisdiction *ratione personæ*." This exception and plea were afterwards stricken from the files as irregular and not filed in accordance with the rules. The city then offered in open court to file a motion and a plea further attacking the jurisdiction of the court, but leave was refused; and thereafter the case came on for final hearing on the bill, answer, replication, exhibits, proofs and testimony, and master's report.

Included in the evidence offered on behalf of complainant were the pleadings and judgment in the cause of Mrs. Fisher against the School Board, in which judgment was rendered in the Circuit Court, May 19, 1892. The petition in that case alleged that Mrs. Fisher and her husband were "both citizens of the Kingdom of Spain residing in the island of Cuba;" counted

upon a judgment against the School Board rendered by the civil district court of the parish of Orleans; and stated that the claim which formed the basis of the judgment was for salary due petitioner as a school teacher of the public schools of the city, and for the salary of other teachers, whose claims had been transferred to petitioner. The defendant filed an exception to the effect that the court was without jurisdiction as the rights, credits and school warrants proceeded on were held by petitioner under assignments, and that the assignors were all citizens of the State of Louisiana and without right to sue defendant in the Circuit Court. This exception was tried before a jury and a verdict rendered in favor of petitioner, whereupon the exception was overruled, and judgment was thereupon rendered in favor of petitioner for $8097.17, the amount of the judgment rendered in the state court. It appeared that on this judgment garnishee process had been served on the city treasurer and *ex officio* treasurer of the School Board and the sums of $1893.09 and of $312.56, less costs, realized in 1894, and in 1895.

On February 21, 1898, the court gave judgment in favor of plaintiffs and intervenors, and, among other things, decreed: "That the city of New Orleans, trustee of the special school taxes levied and collected for the years 1871 to 1878, inclusive, be condemned to pay plaintiffs and intervenors the said taxes, received and collected by her, as follows: $71,938.78 with five per cent interest per annum on $71,139.60 from January 24, 1881, and on $799.18 from May 11, 1896, until paid. And it is further ordered that this bill be retained for a further accounting and such orders and decrees as may be necessary."

Mrs. Fisher died February 25, 1898, and on April 22, 1898, John Fisher was made party complainant as natural tutor of his minor children. April 23, 1898, the city filed a petition for rehearing which was denied, but the court directed the final decree to be amended so as to only allow interest on the amount recovered, to wit: $71,139.60 from February 21, 1898, the date of said decree, instead of from January 24, 1881, as theretofore allowed. On the same day, April 23, and prior to the decision on the rehearing, a plea in abatement was put in by the city to the effect that John Fisher, being a citizen of Spain, was unable

to prosecute the suit, and that it should be abated because a state of war existed between Spain and the United States, and the subjects and citizens thereof. On the proofs the court was satisfied that complainant was a citizen of Great Britain, whereupon the plea was overruled. From the decree of the Circuit Court both parties appealed to the Circuit Court of Appeals for the Fifth Circuit, which modified the decree so as to allow five per cent interest on the sum of $71,139.60 from January 24, 1881, and on the sum of $799.18 from May 8, 1897, and as so modified the decree was affirmed with costs. 91 Fed. Rep. 574.

The city applied to this court for the writ of certiorari, which was granted.

Mr. J. J. McLoughlin and *Mr. Branch K. Miller* for the city of New Orleans.

Mr. Charles Louque for Fisher and others.

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

Fourteen errors were assigned in the Circuit Court of Appeals, which were considered and disposed of *seriatim*. Many of these alleged errors raised questions not within the exceptions to the master's report, and, in any view, we think the case may be determined without minutely retraversing the ground.

Mrs. Fisher and her husband recovered judgment against the board of school directors in the state District Court, May 22, 1890, which, on appeal, was affirmed by the Supreme Court. *Fisher and Husband* v. *School Directors*, 44 La. Ann. 184.

February 23, 1892, Mrs. Fisher and husband brought an action against the school board on the judgment so recovered, in the Circuit Court of the United States for the Eastern District of Louisiana. The petition set forth that Mr. and Mrs. Fisher were citizens of the Kingdom of Spain, and that the judgment sued on was recovered on certain claims for school teachers' salaries, including Mrs. Fisher herself. An exception was filed to the jurisdiction of the court on the ground that the assignors

of the school warrants held by Mrs. Fisher as assignee could not have sued in that court. The matter was submitted to a jury, and a verdict returned in plaintiffs' favor, whereupon the exception was overruled, and afterwards the case went to judgment payable out of the school taxes levied prior to 1879. This judgment was rendered May 19, 1892, and on May 11, 1896, the present bill, in the nature of a creditor's bill, was filed on behalf of Mrs. Fisher, joined and authorized by her husband, (setting up that judgment and others,) and of all others similarly situated, to compel an accounting for their benefit by the city in respect of the school taxes levied prior to 1879, and the interest thereon, collected and not paid over to the school board, as a trust fund for the payment of the expenses of the public schools, it being averred that the school board had refused to require such accounting.

After demurrer filed and overruled, the city answered, admitting the recovery of the judgments as alleged; that they had become final; and that they were payable as provided therein; and denying that the school taxes collected constituted a trust fund; any liability for interest collected; any privity between Mrs. Fisher and the city; and pleading prescription by the lapse of ten years.

The cause was referred to a master, who reported certain amounts of school taxes, and of interest on school taxes, collected by the city. The city filed exceptions to the conclusions of the master that the city was indebted to the school board for interest collected; and that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, was due by the city to the school board "at any time since its collection."

The facts are not in controversy, and the questions raised, or attempted to be raised, are questions of law.

The bill invoked the ordinary exercise of equity jurisdiction in this class of cases. The school taxes collected were held in trust by the city, and, as the school board declined to require an accounting, these creditors, whose claims were payable out of the taxes, were entitled to the interposition of a court of equity to reach the fund. The suggestion of want of privity between complainants and the city, as defeating the jurisdiction,

is without merit. Nor is the defence of the statute of limitations well founded.

The judgments were rendered since 1890, and were made payable out of these taxes; the school certificates were merged in these judgments; and this bill was filed within ten years.

As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other; the possession of the city was precarious, and not *animo domini;* and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation. *Oliver* v. *Piatt*, 3 How. 333, 411; *New Orleans* v. *Warner*, 175 U. S. 120, 130.

After the master's report and the exceptions thereto had been filed, the city undertook to raise the question of the jurisdiction of the Circuit Court on the ground of the want of competency in the assignors of Mrs. Fisher to sue in that court, and of want of diversity of citizenship between Mrs. Fisher and the city. The first of these objections had been made and after trial overruled in the proceedings which resulted in the judgment of May 19, 1892. The petition in that case also alleged that Mrs. Fisher and her husband were citizens of Spain. The judgment was conclusive on both points, and not open to impeachment as to either collaterally or on a creditor's bill. *Mattingly* v. *Nye*, 8 Wall. 370, 373; *Evers* v. *Watson*, 156 U. S. 527, 533; *Laing* v. *Rigney*, 160 U. S. 531, 539.

On July 1, 1897, a plea to the jurisdiction of the court in this case because Mrs. Fisher was a citizen of Louisiana was put upon the files without leave of court, and was stricken off as irregular on December 20. This action of the court is not open to review, and as this bill was merely ancillary the plea was immaterial. *Root* v. *Woolworth*, 150 U. S. 401, 413.

The city on the same day, December 20, applied for leave to file a plea alleging that Mrs. Fisher was a citizen of Louisiana at the time the original action was brought in the Circuit Court, and had so continued down to the filing of the bill; that she had fraudulently otherwise represented; and that the city had no information of the facts until after the exceptions to the mas-

ter's report were filed, which was on the seventh of June. This application was denied by the Circuit Court, and it is impossible for us to say that in this ruling the court abused its discretion.

This was not the proper way to attack the original judgment on the ground of fraud; nothing was said in the proposed plea as to the citizenship of Mr. Fisher, who was a party plaintiff, and a necessary or at least proper party, if the choses in action sued on were community property, and even if paraphernal, La. Civ. Code, §§ 2385, 2402, 2404; and the record, so far from indicating fraud, showed that Mr. Fisher was an alien, being a subject of the British crown residing at Cuba, which had led to a mistake of counsel in framing the pleadings.

It may be added that there was nothing in the case bringing it within the exceptional rule applied in *Lawrence Man. Co.* v. *Janesville Cotton Mills*, 138 U. S. 552, relied on by counsel.

The city excepted to the inclusion of the interest on school taxes collected by the city with the school taxes collected, as part of the amount for which the city was liable.

The Circuit Court of Appeals disposed of this point in these words:

"Under the law, the school taxes carried ten per cent interest per annum from the day they became delinquent. It was a penalty for non-payment of the taxes. This interest, or penalty, for delayed payment of school taxes, formed no part of the city's proper revenues. The city in collecting the same was acting as a trustee for the school board. Delay in payment of taxes operated to the prejudice, not of the city, but of the school fund and its creditors. We are unable to find any authority in law or morals for the city to appropriate to itself this interest. To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes due the school fund. We fully agree with the master that 'the interest, as a mere accessory of the principal, belongs to the same person to whom the principal belongs.'" 91 Fed. Rep. 583.

We concur in this view, and are moreover of opinion that the city, having made such collections, cannot now be permitted to escape liability therefor on the suggestion that school taxes are

not within the terms of the statute inflicting the penalty on "all taxes imposed by the city of New Orleans." Acts La. 1871, No. 48, sec. 9.

The only other matter necessary to be referred to is the allowance of interest. The Circuit Court by its amended decree gave interest on the larger sum found due from the date of the decree. The Circuit Court of Appeals modified that decree so as to award interest on the sum of $71,139.60, collected prior to January 24, 1881, from the latter date, and on the item of $799.18, reported by the master May 8, 1897, as having been collected after January 24, 1881, from the date of the report.

The bill did not charge the city with any wilful default, nor did it appear therefrom when the school board was requested to demand an accounting. The bringing of the bill amounted to such demand, and it was filed May 11, 1896, and the appearance of the city entered June 1.

The city occupied the position of agent of the school board to collect and pay over school taxes, as held in *Labatt* v. *New Orleans*, 38 La. Ann. 283, yet it may fairly be said that, under the legislation upon the subject, it was not the duty of the city to pay the money over immediately, but only as occasion might arise, and that, as no charge of fraudulent conversion was made, interest would not commence to run until after failure to pay when required to do so, or failure to account on demand.

Where interest is sought by way of damages for delay, courts of equity exercise a certain discretion as to its allowance.

In view of the acquiescence of the school board in the retention by the city of the interest collected on school taxes, an acquiescence in good faith so far as appears; the attitude of the city as a public corporation; and the lack of averment or evidence of demand prior to the filing of the bill, or of effort to compel an accounting, we think that interest should not be allowed in this case prior to May 11, 1896.

The decree of the Circuit Court of Appeals is modified so as to provide for five per cent interest on the sum of $71,139.60 from May 11, 1896, and on the sum of $799.18 from May 8, 1897, and as so modified is affirmed with costs; and the cause is remanded to the Circuit Court with a direction

to amend its decree in the particulars above specified, it being affirmed as so modified.

MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA took no part in the consideration and disposition of the case.

NEW ORLEANS *v.* WARNER.

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

No. 281. Argued December 11, 13, 1900.—Decided January 28, 1901.

The decree heretofore entered upon the mandate of this court, 175 U. S. 120, permitted of no distinction being made between drainage warrants issued for the purchase of the dredging plant of the Mexican Gulf Ship Canal Company, and such as were issued in the purchase of the franchises, and in settlement of the claim for damages urged by the Canal Company and Van Norden against the city of New Orleans.

There was no error in permitting all parties holding drainage warrants of the same class, to come in and prove their claims without formal intervention or special leave, though the validity of such warrants in the hands of their holders might be examined, except so far as such validity had been already settled by the decree.

Warrants to the amount of twenty thousand dollars issued for drainage funds collected by the city and misapplied and appropriated to the general funds of the city were also properly allowed.

THIS was a writ of certiorari to review a decree of the Court of Appeals, rendered May 1, 1900, affirming a decree of the Circuit Court for the Eastern District of Louisiana, rendered March 26, 1900, which overruled certain exceptions of the defendant, the city of New Orleans, to a master's report upon the amounts due under a decree rendered by the Court of Appeals, May 7, 1898, and affirmed by this court January 15, 1900. 175 U. S. 120.

The decree of the Circuit Court of Appeals, affirmed by this court, contained the following paragraphs:

1. That the city of New Orleans was indebted to John G.

Warner in the sum of $6000 with interest, and that he was entitled to be paid such sum out of the drainage assessments set forth in the bill.

2. That such drainage assessments constituted a trust fund in the hands of the city for the purpose of paying the claims of the complainant and holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of Louisiana, approved February 24, 1876.

3. That it be referred to a master to take and state an account of all said drainage assessments; that warrant holders be entitled to establish their claims before the master without formal interventions or special leave of the court, and that, upon the coming in of his report, complainant and other claimants would be entitled to an absolute decree for the amounts due them, if the fund established by the accounting be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, etc. The other provisions of the decree are immaterial.

Upon this reference warrants to the amount of $316,000, of a total of $320,000, ($4000 having been paid,) were presented by different parties, including Warner, and the master found, (1) that all these warrants were "issued to Warner Van Norden, transferee of the Mexican Gulf Ship Canal Company, by the defendant, the city of New Orleans, in payment of the consideration of the agreement and contract of sale between himself and said city, by act (of sale) . . . dated June 7, 1876, as in said act specified, pursuant to the authority of the act of the legislature of Louisiana, No. 16, dated February 24, 1876, as set forth in the complainant's bill, etc.; . . . that each of said warrants was indorsed in blank by Warner Van Norden, transferee, to whose order they were made payable, and delivered to said claimants, or other parties through whom they have acquired title; and that the said Van Norden has since . . . formally transferred to the complainant, and to all holders of warrants who might intervene in this cause, any and all interest he ever had in said warrants, and subrogated them to all his rights of actions and remedies against the defendant appertaining to the same."

Opinion of the Court.

Exceptions were filed to this report upon the ground (1) that the advantages of the decree extended only to such warrants as were issued in payment of the property purchased by the act of sale, which said property as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750; "that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of said warrants were issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company, and Warner Van Norden, against the city of New Orleans." (2) "That of said warrants the sum of $20,000 were issued, as will appear by the express terms of the act, in payment of work which had been done by said Van Norden, that is, digging canals and building levees, which, at the time of the passage of said act, had not been surveyed or measured by the city surveyor; and hence, that as to these warrants there could be no recovery or allowance made."

In a supplemental report upon these exceptions the master found that the city issued warrants Nos. 313 to 392, inclusive, in discharge of the consideration of the agreement of sale passed before Le Gardeur, notary public, amounting to $300,000, and also issued warrants, Nos. 393 to 402, inclusive, aggregating $20,000, not for work, but as a compromise for drainage taxes collected and misappropriated, as stated in the said act of sale.

Mr. Branch K. Miller for the city of New Orleans. *Mr. Samuel L. Gilmore* and *Mr. Frank B. Thomas* were on his brief.

Mr. Wheeler H. Peckham for Warner and others. *Mr. Richard De Gray* filed a brief for same. *Mr. J. D. Rouse* and *Mr. William Grant* filed a brief for same.

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

1. The second assignment of error filed in the Circuit Court, adopting the substance of the exceptions to the master's report, raises a distinction between the drainage warrants issued for the purchase of the dredge boats, derricks and other tangible property of the ship canal company, appraised at $153,750, and such as were issued in the purchase of the franchise and in settlement of the claim for damages urged by the canal company and Van Norden against the city of New Orleans. No such distinction, however, appears in the decree of the Circuit Court of Appeals, affirmed by this court in 175 U. S. 120, which declared that the drainage assessments set forth in the bill should constitute a trust fund in the hands of the city for the purpose of paying the claims of complainant *and other holders of the same class of warrants* issued under the act of sale from Van Norden to the city, and referred the case to a master to state an account of all the drainage assessments, before whom all warrant holders were to be notified to appear and establish their claims, without being required to file intervention or to obtain special leave of the court. Pursuant to this notice the warrant holders did appear and presented their warrants, which were allowed. The decree did not permit of any distinction being made and none was made between warrants issued for the purchase of the property and such as were issued in purchase of the franchise or in settlement of damages, and it is difficult to see in what respect the master or the court departed from the decree of this court.

As the bill was brought by Warner on his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind, there was no error in permitting all such parties to come in and prove their claims without formal interventions or special leave. All the warrants allowed belonged to the same class as Warner's, and were issued upon the same consideration. This is the method commonly resorted to in bills for the foreclosure of railway mortgages, or other securities, under which bonds have been issued and are widely scattered in the hands of holders, many of whom are unknown and impossible to ascertain except by advertisement. In cases of this character decrees are treated as decrees in favor of all in like

situation as the plaintiff who come in and claim the benefit of them. *Richmond* v. *Irons*, 121 U. S. 27; *Brooks* v. *Gibbons*, 4 Paige, 374; *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Hammond* v. *Hammond*, 2 Bland, 306.

Doubtless the validity of these claims in the hands of holders may be examined, except so far as such validity has been already settled by the decree; but where the master upon the reference has followed the decree and enforced its directions, no objection can be taken upon appeal as to what he has done, when the appeal arises upon exceptions to his report. *New Orleans* v. *Gaines*, 15 Wall. 624. The master was powerless to entertain any objection to the decree or any proposal for its modification. His duty was simply to carry it out according to its terms.

It should be stated in this connection that no such distinction between the different classes of warrants as is now made was called to the attention of this court when the case was here upon questions certified, 167 U. S. 467, or upon the merits, 175 U. S. 120. In fact, the present exceptions to the master's report obviously involve an attempt to set up a new defence as to a part of these warrants, after the merits of the case have been fully considered and disposed of. This is impossible. *Yazoo &c. R. R. Co.* v. *Adams*, *ante*, 1; *Supervisors* v. *Kennicott*, 94 U. S. 498.

But considering the question to be still an open one, and that we are at liberty to inquire whether the court exceeded its authority in decreeing the payment of these warrants, without reference to whether they were given for the purchase of the property or franchises, or the settlement of damages, the result would not be different. It was evident there had been a claim for damages pending a long time against the city. By the act of February 24, 1871, No. 30, "to provide for the drainage of New Orleans," the former boards of drainage commissioners were abolished, and their assets transferred to a board of administrators, who were "subrogated to all the rights, powers and facilities" possessed by the commissioners. The ship canal company was authorized to undertake the work of draining the city, and by section 6, it was made the duty of the board of

administrators "to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work of the said company. . . . And should the city council fail to locate the lines of said canal and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the *damages* resulting from such delay."

By the act of February 24, 1876, No. 16, authorizing the city to control its own drainage and to purchase the property of the ship canal company, the common council was empowered "to transact and contract" with the ship canal company, and its transferee, "for the purchase and settlement of all or any rights, franchises and privileges created, authorized or arising in favor of said company or said transferee under and by virtue of act No. 30, of acts of 1871; also, for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company or its transferee," etc. It will be observed that the city is invested with a double power: First, to *transact* and contract for the purchase and *settlement* of any rights, franchises, privileges, etc., and the other for the purchase and transfer of the dredging plant. The word "transact," which seems ambiguous here, is explained by article No. 3071 of the Civil Code of Louisiana, which defines "a transaction or compromise" to be "an agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their differences by mutual consent." By the second clause of the section the purchase and transfer of the dredging plant was authorized.

Pursuant to this act the city surveyor was authorized by ordinance of April 26, 1876, to examine the condition and value of the dredging plant, making a report to the committee of the whole, "together with a statement of all information in the possession of his office concerning *damages* claimed by said . . . canal company, or transferee thereof." In compliance with this ordinance he appraised the value of the dredging plant at $153,750, and stated that the damages claimed by the transferee were for delays at various times and places, and further stated that he was unable to arrive at a conclusion as to their amount, and

did not feel called upon to express an opinion; but that he had no doubt the committee, from the facts stated, would be able to arrive at a just and satisfactory conclusion. This left the common council free to settle for the damages without an appraisement. Under these circumstances the failure to appraise the damages would not vitiate their settlement.

By a further ordinance, adopted May 26, 1876, the mayor was authorized to enter into an agreement with the canal company for the purchase of its plant, and "also for the full settlement of all claims for damages, and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all rights, privileges and franchises," etc., and upon the execution of the agreement to draw upon the administrator of finance for the sum of $300,000 in drainage warrants, in full settlement, as above provided.

Conceding that the power given by the act of 1876 to transact and contract with the canal company for the purchase and settlement of all or any *rights*, franchises and privileges, is somewhat ambiguous as the source of a power to compromise for *damages*, the practical construction put upon that act by the ordinances of April 26 and May 26, 1876, as including claims for damages, is entitled to great weight, particularly in view of the long subsequent acquiescence of the city in that construction.

By the act of sale executed June 7, 1876, the canal company transferred its dredging plant to the city, as well as its franchises, privileges, contracts and advantages, and subrogated the city to all its rights, actions and remedies, in consideration of the sum of $300,000; and the president and secretary of the canal company, and Van Norden, their transferee, also agreed that the above amount should be in full settlement of "all existing claims for damages" which either of them "ever had, or have now, or may have against the said city of New Orleans."

It is difficult to see how the intention of the city to settle all these claims could be made clearer, or the terms of the actual settlement more sweeping than they were by these proceedings. What the items of damages were does not appear.

As to what influences were brought to bear upon the common council to induce it to pay so large a sum as $146,250 for these damages, we are equally in the dark. Certainly we are not at liberty to impute corrupt motives to the council. The arrangement may have been an unfortunate one, but the arrangement as made is beyond doubt.

It is obviously impossible to distinguish as between these warrants, and to say that such were issued in payment of the plant, and such others for the purchase of franchises and in settlement of the damages. Granting the position taken by the city to be correct, it would result that all the warrants must be scaled down *pro rata* in the proportion of about fifty per cent, which would obviously be unfair to those who received purchase warrants, or there must be some attempt to classify these warrants. But as the warrants were all alike in form, no such classification is possible. It is suggested by the city that it must be considered that the warrants were issued and applied in the numerical order of their execution: First, for the payment of the price of the property purchased; next, for the claim for the settlement of damages; and lastly, for the payment of work mentioned in the said notarial act. But this would result in the rejection of the Warner warrants, which were expressly allowed by the decree of this court to the amount of $6000, since it appears by the report of the master that the warrants issued to Warner and allowed by such decree were Nos. 379, 380 and 381, and did not fall among the first $153,750 issued, but were payable long after this amount, appraised as the value of the plant, had been exhausted. It would also result in the disallowance of certain warrants to Wilder & Company, upon which a judgment at law was recovered on May 24, 1898, after the case had been remanded from the Circuit Court of Appeals. Obviously the position of the city in respect to these warrants is untenable.

2. The only other item to which exception is taken is one of $20,000, for which warrants Nos. 392 to 402, inclusive, were issued as a compromise of drainage taxes collected by the city and misappropriated. These were in excess of the $300,000 allowed in payment of the plant and various claims of the canal

company, and were especially provided for in the act of sale as follows: "That inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of $20,000 in drainage warrants in full satisfaction of the same."

The authority to include this in the act of sale is questioned by the city, but we think it comes within the first section of the act of 1876, which provides for "the purchase and settlement of all or any *rights* . . . arising in favor of said ship canal company, or said transferee," under the act of 1871, and within the ordinance of May 26, to which allusion has already been made, which provides for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all *rights* . . . arising in favor of the canal company." Money collected by the city, applicable to the drainage funds, and appropriated to the general funds of the city, manifestly creates a *right* in favor of the canal company to a restoration of the amount. If there were doubt of the proper construction of these words the long acquiescence of the city and the failure to raise an objection to this claim until after final decree is sufficient to put the matter at rest.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM took no part in this case.

MISSOURI *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO.

ORIGINAL.

No. 5. Original. Argued November 12, 13, 1900.—Decided January 28, 1901.

This suit was brought by the State of Missouri against the State of Illinois and the Sanitary District of Chicago. The latter is alleged to be "a public corporation, organized under the laws of the State of Illinois and located in part in the city of Chicago, and in the county of Cook, in the State of Illinois, and a citizen of the State of Illinois." The remedy sought for is an injunction restraining the defendants from receiving or permitting any sewage to be received or discharged into the artificial channel or drain constructed by the Sanitary District, under authority derived from the State of Illinois, in order to carry off and eventually discharge into the Mississippi the sewage of Chicago, which had been previously discharged into Lake Michigan, and from permitting the same to flow through said channel or drain into the Des Plaines River, and thence by the river Illinois into the Mississippi. The bill alleged that the nature of the injury complained of was such that an adequate remedy could only be found in this court, at the suit of the State of Missouri. The object of the bill was to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants, and the bill charged that the acts of the defendants, if not restrained, would result in the transportation, by artificial means, and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois River, which will poison the water supply of the inhabitants of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi River which lies within its territory. The bill did not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway, but it sought relief against the pouring of sewage and filth through it by artificial arrangements into the Mississippi River, to the detriment of the State of Missouri and its inhabitants. The defendants demurred to the bill for want of jurisdiction and for reasons set forth in the demurrer. This court *held* that the demurrer could not be sustained, and required the defendants to appear and answer.

In January, 1900, the State of Missouri filed in this court a bill of complaint against the State of Illinois and the Sanitary

District of Chicago, a corporation of the latter State, in the following terms:

"The complainant, the State of Missouri, and one of the States of the United States, brings this its bill of complaint against the State of Illinois, one of the States of the United States, and the Sanitary District of Chicago, a public corporation, organized under the laws of the State of Illinois, and located in part in the city of Chicago and in the county of Cook, in said State of Illinois, and a citizen of the State of Illinois.

"And your orator complains and says that it is a State containing a population of upwards of three millions of people, and lying on the west bank of the Mississippi River, a public, navigable and running stream, and having a frontage on said stream of over four hundred miles.

"And your orator shows that by the act of Congress providing for the organization and admission of Illinois and Missouri as States of the Union it was declared that the western boundary of Illinois and the eastern boundary of Missouri should be the middle of the main channel of the Mississippi River; that the shores of the Mississippi River, where its waters form the Missouri and Illinois boundary, and the soil under the waters thereof, were not granted by the Constitution of the United States, but were reserved to the States of Illinois and Missouri respectively.

"And your orator shows that the States of Missouri and Illinois each have concurrent general jurisdiction over the waters of the Mississippi River forming the boundary between them, and each of said States has exclusive territorial jurisdiction over that portion adjacent to its own shore, and your orator shows that the Illinois River empties into the Mississippi River at a point above the city of St. Louis, on the Illinois side of said Mississippi River.

"And your orator further shows that within the territory of your orator and on the banks and shores of said Mississippi River and below the mouth of the Illinois River are many cities and towns in the State of Missouri, and many thousands of persons who are compelled to and do rely upon the waters of said river, in their regular, natural and accustomed flow, for their daily

necessary supply of water for drinking and all other domestic and agricultural and manufacturing purposes, and for watering stock and animals of all kinds, and that said Mississippi River has been flowing in its regular course and has been used for the purposes aforesaid by the inhabitants of the said State of Missouri for a time whereof the memory of a man runneth not to the contrary, and that said river and its waters and the use thereof for drinking, agricultural and manufacturing purposes, in their accustomed and natural flow, are indispensable to the life and health and business of many thousands of the inhabitants of the State of Missouri and of great value to your orator as a State.

"And your orator shows that cities and towns below the mouth of said Illinois River, within the territory of your orator, do and are compelled, by means of water works, water towers and intakes, built and constructed for that purpose, to supply the inhabitants of said cities and towns with an adequate supply of pure and wholesome water, fit and healthful for drinking and all other domestic purposes and uses, from the said Mississippi River so flowing in its ancient, accustomed and natural course.

"And your orator shows that said water works systems are constructed with reference to said Mississippi River and for the purpose of taking water therefrom and not from any other source.

"And your orator shows that heretofore, to wit, in 1889, the State of Illinois enacted a law known as the Sanitary District act, together with an act for the improvement of the Illinois and Des Plaines Rivers, and that under said act of said State the said corporation known as the said Sanitary District of Chicago was organized and is now existing and operating, and that by the express terms of said act any canal or drain corporation organized in accordance with its provisions may have conditions, restrictions or additional requirements placed on said corporation, or the act authorizing the creation of said corporation may be amended or repealed, and that by the express provisions of said act, before any water or sewage shall be admitted into any channel constructed under said act, the trustees of said channel shall notify the Governor of Illinois

of the completion of said channel, and the Governor of Illinois shall appoint three commissioners to examine said canal or channel and report to the Governor if the same complies with the act of the State of Illinois; and if it does, the Governor shall authorize the water and sewage to be turned into said channel; and that without the said permit it cannot be so turned in; and that by the general provisions of said act said channel is at all times subject to the control and supervision of the State of Illinois and her authorities.

"And your orator further shows that the Chicago River is situated in the basin of Lake Michigan and has two forks or branches flowing through the city of Chicago and into Lake Michigan, and that the natural drainage of Chicago, Illinois, is into Lake Michigan, and the sewage and drainage of the territory embraced in the defendant's district, the Sanitary District of Chicago, is led into or flows into the Chicago River and Lake Michigan.

"And your orator further shows that the defendant herein, the Sanitary District of Chicago, with the authority of the State of Illinois, and acting as a governmental agency of said State, and under the supervision and control and subject to the approval of the State of Illinois, has constructed a channel or open drain from the west fork of the south branch of the Chicago River, in the city of Chicago and county of Cook, in the State of Illinois, to a point near Lockport, in the county of Will, in said State, where said channel or drain connects with and empties into the Des Plaines River, which empties into the Illinois River, and which latter river flows and empties into the Mississippi River at a point distant about forty-three miles above the city of St. Louis, Missouri.

"And your orator further states that the channel built by the Sanitary District of Chicago was so built by said Sanitary District as one of the governmental agencies of the State of Illinois, and by the pretended lawful authority of said State, and under the direction, supervision and control and governmental power of the State of Illinois, and which said State has heretofore at all times sanctioned and now, through its Governor and other officers, sanctions the building of said channel and opening thereof.

"And your orator further shows that in the construction of said channel or drain the defendant, the Sanitary District of Chicago, Illinois, with the sanction and approval of the State of Illinois, cut through the natural ridge or watershed which divides the basin of Lake Michigan from the basins of the Des Plaines and Illinois Rivers and the basin of the Mississippi River, and that having so constructed said channel and having about completed the same, and having, under the supervision of and with the sanction of the State of Illinois, extended said artificial channel through said natural divide of the watershed, the defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago, which embraces nearly the whole city of Chicago and a portion of the county of Cook, and, without any legal authority so to do, has already in part effectuated its said threat and purpose and threatens to permit and to cause said sewage and filth, by artificial means of pumping and otherwise, to flow through the channel or drain towards and into the said Des Plaines River and eventually into the Mississippi River, thereby, with the approval of and subject to the inspection and control and supervision of the State of Illinois, and by the pretended authority thereof, reversing the natural flow of said Chicago River.

"And your orator further shows that the sewage matter and poisonous filth which it is thus threatened to receive and to permit and to cause to flow through said artificial channel into said Des Plaines River is that which is created by a population of upwards of one and one half millions of people, besides that which is created by a great number of stock yards, slaughtering establishments, rendering establishments, distilleries and other business enterprises and industries lining both sides of the Chicago River, producing filth and noxious matters; all of which are there discharged into the said Chicago River or drained therein from the surface.

"And your orator further shows that for many years past the said city of Chicago, the greater portion of which is embraced in the limits of the defendant corporation, the Sanitary District of Chicago, as aforesaid, has been discharging its sewage mat-

ter and filth into the Chicago River and into Lake Michigan in such large quantities that much of it has accumulated in the bed and along the sides of the river and upon the bed of said Lake Michigan, near the shores thereof, and that the plan threatened and attempted now to be adopted by the defendant, the Sanitary District of Chicago, acting in conjunction with and subject to the control of the defendant, the State of Illinois, and by the pretended authority of the said State of Illinois, will loosen said accumulated matter and filth, and will also direct it and cause it to flow towards and into said artificial channel or drain, and thence into said Des Plaines River, and finally into the Mississippi River and into the waters thereof within the jurisdiction and under the control of your orator and past the homes of the inhabitants of your orator and the towns and cities within the borders of your orator, and past the water works of said cities and towns within the State of Missouri.

"And your orator further shows that the amount of said undefecated filth and sewage and poisonous and unhealthful and noxious matters proposed to be, and now about to be, permitted to be turned into said artificial channel and through said Des Plaines and Illinois Rivers into the Mississippi River from the said Sanitary District of Chicago by the defendants, acting jointly, will amount daily to about fifteen hundred tons, and that if defendants should be permitted to carry their said threats into execution, and should cause said above amount of undefecated sewage and other poisonous and noxious matters, which would otherwise flow into Lake Michigan, to flow into the Mississippi River, that the waters of the Mississippi River within the jurisdiction of your orator will of a certainty be poisoned and polluted and rendered wholly unfit and unhealthful for drinking and domestic uses, and will render wholly valueless and entirely worthless the various water works systems of towns and cities on the borders of the State of Missouri, established and acquired at great cost and expense, and will deprive your orator, the State of Missouri, and its inhabitants, of the right to use of the waters of said river for drinking and all other domestic and manufacturing and agricultural purposes, as said water has been so used in its accustomed and natural flow hereto-

fore for the length of time that the memory of man runneth not to the contrary thereof.

"And that said threatened action of the defendants will amount to a direct and continuing nuisance and be an interference with the use by your orator and its inhabitants of the waters of the Mississippi River flowing in their natural state, polluting and poisoning the same by the means aforesaid, whereby the health and lives of the inhabitants of your orator will be endangered and the business interests of said State will be greatly and irreparably injured, and which said damage to the lives and health and the business interests of said State resulting from said poisoning and polluting of said waters as aforesaid to your orator cannot be estimated in money value.

"And your orator on information and belief states and charges the fact to be that said fifteen hundred tons of poisonous undefecated filth and sewage of said Sanitary District of Chicago will be daily carried through said artificial channel and sent through the Des Plaines and Illinois Rivers into the Mississippi, and great quantities thereof will be deposited in the bed and soil of said river belonging to your orator and wholly within the jurisdiction thereof, to your orator's great and irreparable damage, and that the fifteen hundred tons of undefecated sewage and filth now about to be daily injected into the waters of the Mississippi River and into the portion thereof over which the State of Missouri has jurisdiction, and from which thousands of her inhabitants obtain drinking water, will pollute and poison the said water of the Mississippi River to such an extent as to render it unwholesome and unfit and unhealthful for use for drinking by the said inhabitants in the territory of your orator and unfit for use for watering stock and for manufacturing purposes.

"And your orator further shows that great quantities of undefecated sewage turned into the Mississippi River in the manner and by the means aforesaid will poison and pollute said water with the germs of disease of various and many kinds. And your orator further shows that the acts herein complained of on the part of the State of Illinois, acting in conjunction with one of her governmental agencies, the said Sanitary District of

Chicago, will cause a continuing nuisance in the Mississippi River, and that the said State of Illinois has no power or authority to cause or permit or assist in causing the commission and continuance of a nuisance in the flowing waters of the Mississippi River, a navigable stream, to the detriment and irreparable and continuing damage and injury of the State of Missouri, and the continuing and irreparable injury to the lives and health of the citizens and inhabitants of the State of Missouri, and that unless restrained by the order and decree of this court the defendants, the State of Illinois and the Sanitary District of Chicago, acting together, will, in accordance with the terms of the act under which said Sanitary District is organized, upon the permit and authority of the Governor of Illinois and of the State of Illinois, turn said water and sewage aforesaid, by the manner and means aforesaid, into the Des Plaines and Illinois Rivers and thence into the Mississippi, all of which your orator says and avers is contrary to equity and good conscience, and would result in the manifest and irreparable injury of your orator and the health of her citizens in the premises, and your orator is wholly without remedy at law and without any adequate remedy to prevent the flowing of said sewage, as aforesaid, save by the interposition of this court.

"For as much as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, and to the end that the defendants may make a full, true, direct and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and to the end that the defendants, their officers, agents, servants and employés may be restrained by injunction issuing out of this court from receiving or permitting any sewage to be received or discharged into said artificial channel or drain, and from permitting the same to flow or causing the same to be made to flow through said channel or drain towards and into the Des Plaines River, your orator prays that your honors may grant a writ of injunction, under the seal of this honorable court, properly restraining and enjoining the defendants, the officers, agents, employés and

servants of the Sanitary District of Chicago and the State of Illinois, from permitting or causing any of said sewage to be discharged into said channel or drain, and from permitting or causing said sewage and poisonous filth thence to flow into said Des Plaines River; that defendant, the State of Illinois, be enjoined and restrained from issuing to its codefendant permission and authority to do and perform the acts aforesaid or to allow them to be done; and your orator also prays for a provisional or temporary injunction pending this cause, restraining and enjoining the several acts aforesaid, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

"May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the State of Illinois, the Governor and Attorney General thereof, and to said Sanitary District of Chicago, its officers, trustees and agents, commanding them on a day certain to appear and answer unto this bill or complaint, and to abide such order and decree of the court in the premises as to the court shall seem proper and required by the principles of equity and good conscience."

In March, 1900, came the defendants and filed a demurrer to the bill of complaint, in the following terms:

"Now comes the State of Illinois by its Attorney General, Edwin C. Akin, and the Sanitary District of Chicago, by its attorneys, and demur to the bill of complaint filed herein, and say that the said bill of complaint and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said State of Missouri to have and maintain its aforesaid action against the said State of Illinois and the Sanitary District of Chicago, and that said defendants are not bound by the law of the land to answer the same; and the said defendants, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said bill of complaint:

"*First.* That this court has no jurisdiction of either the

parties to, or of the subject-matter of, this suit, because it appears upon the face of said bill of complaint that the matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Missouri and the State of Illinois, or any of its citizens.

"*Second.* That the matters alleged and set forth in said bill of complaint show that the only issues presented therein arise, if at all, between the State of Illinois and a public corporation created under the laws of said State, and certain cities and towns, in their corporate capacity as such, in the State of Missouri, and certain persons in said State of Missouri, residing on or near the banks of the Mississippi River, and which matters so stated in said bill of complaint, if true, do not concern the State of Missouri as a corporate body or State.

"*Third.* That said bill of complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said State of Missouri, situate on the banks of the Mississippi River, and certain persons who reside in said State on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name of the State of Missouri, said State is, in effect loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said State.

"*Fourth.* That it appears upon the face of said bill of complaint that the said State of Missouri, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said State, in their corporate capacity as such, and of certain private citizens of said State, while under the Constitution of the United States and the laws enacted thereunder, the said State possesses no such sovereignty as empowers it to bring an original suit in this court for such purpose.

"*Fifth.* That it appears upon the face of said bill of complaint that no property rights of the State of Missouri are in any manner affected by the matters alleged in said bill of com-

plaint; nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

"*Sixth.* That in order to authorize this court to maintain original jurisdiction of this suit as against the State of Illinois, or against any citizens of said State, it must appear that the controversy set forth in the bill of complaint and to be determined by this court, is a controversy arising directly between the State of Missouri and the State of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said State or of particular individuals residing therein.

"*Seventh.* That said bill of complaint is in other respects uncertain, informal and insufficient, and that it does not state facts sufficient to entitle the said State of Missouri to the equitable relief prayed for in said bill of complaint.

"Wherefore, for want of a sufficient bill of complaint in this behalf, the said defendants pray judgment; and that the said State of Missouri may be barred from having or maintaining the aforesaid action against said defendants, and that this court will not take further cognizance of this cause, and that the said defendants be hence dismissed with their costs."

On November 12, 1900, the case came on to be heard on bill and demurrer, and was argued by counsel.

Mr. William M. Springer and *Mr. Charles C. Gilbert* for the demurrer. *Mr. Edward C. Akin* and *Mr. Samuel M. Burdett* were on their brief.

Mr. B. Schnumacher in opposition to the demurrer. *Mr. Edward C. Crow* was on his brief.

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

This cause is now before us on the bill of complaint and the demurrer thereto.

The questions thus presented are two: First, whether the allegations of the bill disclose the case of a controversy between

the State of Missouri and the State of Illinois and a citizen thereof, within the meaning of the Constitution and statutes of the United States, which create and define the original jurisdiction of this court; and, second, whether, if it be held that the allegations of the bill do present such a controversy, they are sufficient to entitle the State of Missouri to the equitable relief prayed for.

The question whether the acts of one State in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent State, would create a sufficient basis for a controversy, in the sense of the Constitution, would be readily answered in the affirmative if regard were to be had only to the language of that instrument.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, . . . to controversies between two or more States, between a State and citizens of another State. . . . In all cases, . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction." Constitution, Article 3.

As there is no definition or description contained in the Constitution of the kind and nature of the controversies that should or might arise under these provisions, it might be supposed that, in all cases wherein one State should institute legal proceedings against another, the original jurisdiction of this court would attach.

But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.

After the declaration of independence the united colonies, through delegates appointed by each of the colonies, considered

Articles of Confederation, which were debated from day to day, and from time to time, for two years, and were on July 9, 1778, ratified by ten States; by New Jersey, on November 26 of the same year; by Delaware, on the 23d of February, 1779, and by Maryland on March 1, 1781.

The first Article was as follows: "The style of this Confederacy shall be, 'The United States of America.'"

The ninth Article contained, among other provisions, the following:

"The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more States, concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislature or executive authority, or lawful agent, of any State, in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties, by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in be-

half of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive—the judgment or sentence, and other proceedings, being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward: provided, also, that no State shall be deprived of territory for the benefit of the United States."

It will therefore be perceived that under the confederation the necessity of a tribunal to hear and determine matters in question between two or more States was recognized; that a court was provided for that purpose; and that the scope or field within which it was expected such matters in question or controversies should or might arise for the determination of such court, extended to "*all disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction or any other cause whatever.*"

When the Federal convention met in 1787 to form the present Constitution of the United States several drafts of such an instrument were presented for the consideration of the convention. One of these was offered on May 29 by Edmund Randolph, of Virginia, in the shape of resolutions covering the entire subject of a national government. The ninth resolution prescribed the formation of a national judiciary, to consist of a supreme and inferior tribunals, with jurisdiction to hear and determine, among other things, "questions which involve the internal peace or harmony." Elliot's Deb. vol. 1, p. 143. On the same day Charles Pinckney, of South Carolina, submitted a draft of a Federal Government, the seventh article whereof was as follows:

"The Senate shall have the sole and exclusive power to declare war and to make treaties, and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court."

"They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now subsisting, or which may arise, between the States respecting jurisdiction or territory." Elliot's Deb. vol. 1, p. 145.

On June 19 the committee of the whole, to which had been referred the several propositions and drafts, reported to the convention for its consideration a draft as altered, amended and agreed to in the committee. The thirteenth resolution was as follows:

"That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony." Elliot's Deb. vol. 1, p. 182.

On August 6, a committee of five members, to which the various propositions, as originally made and as amended in the committee of the whole, reported to the convention a draft of the Constitution, the ninth article of which was as follows:

"Sec. 1. The Senate of the United States shall have power to make treaties and appoint ambassadors and judges of the Supreme Court.

"Sec. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers, etc. [And here follows a scheme for a special court, in terms similar to that provided in the articles of confederation.]

"Sec. 3. All controversies concerning lands claimed under different grants of two or more States, whose jurisdiction, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different States."

The eleventh article contained, among other sections, the following:

"SEC. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States. . . .

"SEC. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State or the citizens thereof and foreign states, citizens or subjects." Elliot's Deb. vol. 1, p. 224.

It may be observed, in passing, that, in this draft, all disputes and controversies between two or more States, respecting jurisdiction or territory, are to be determined by a special court to be constituted by the Senate; and controversies between two or more States, except such as shall regard territory or jurisdiction, are determinable by the Supreme Court. It is, therefore, apparent that other disputes or controversies between States were regarded and provided for besides those respecting territory or jurisdiction.

This draft, together with numerous suggestions and amendments, was on August 7 submitted to the committee of the whole.

On September 12 a committee on revision reported a draft of the Constitution as revised and arranged. This draft, which, as respects our present subject, was in the terms of the Constitution as finally adopted, took from the Senate the power to constitute a court to try disputes between the States respecting territory or jurisdiction, and struck out the provision excluding from the jurisdiction of the Supreme Court disputes between the States in matters respecting jurisdiction and territory. The entire jurisdiction of controversies between States was bestowed upon the Supreme Court, in the second section of article three, in the following terms:

"The judicial power shall extend to all cases in law and

equity, arising under this Constitution, the laws of the United States and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States, and between a State or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

As in this section power is conferred on Congress to make regulations affecting the exercise by the Supreme Court of its jurisdiction, it may not be out of place to quote the provisions in this respect of the judiciary act of 1789:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Revised Stat. sec. 687.

The case of *New York* v. *Connecticut*, 4 Dall. 1, in 1799, was the first instance of an exercise by the Supreme Court of its jurisdiction in a controversy between two States. It was a case of a bill in equity filed by the State of New York against the State of Connecticut and certain private persons who were grantees of the latter State of lands, the jurisdiction over which was claimed by both States. The object of the bill was to obtain an injunction to stay proceedings in ejectment pending in the Circuit Court of the United States for the District of Connecticut.

The court was of opinion that, as the State of New York was not a party to the suits below, nor interested in the deci-

sions of those suits, an injunction ought not to issue. No argument was made that the court had not jurisdiction, and the court proceeded on the assumption that it possessed jurisdiction, although, under the facts of the case, it refused the injunction prayed for.

New Jersey v. *New York*, 5 Pet. 284, was the case of a bill filed by the State of New Jersey against the State of New York for the purpose of ascertaining and settling the boundary between the two States. In an opinion awarding the process of subpœna Chief Justice Marshall said:

"The Constitution of the United States declares that 'the judicial power shall extend to controversies between two or more States.' It also declares that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.' . . . It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress."

In March, 1832, the State of Rhode Island filed in this court a bill against the State of Massachusetts, for the settlement of the boundary between the two States, and moved for a subpœna to be issued, according to the practice of the court in similar cases. An appearance was entered for Massachusetts, and a motion was made to dismiss the bill for want of jurisdiction. In support of the motion it was contended that this court had no jurisdiction because of the character of the respondent independent of the nature of the suit, and because of the nature of the suit independent of the character of the respondent. It was not denied that Massachusetts had agreed, by adopting the Federal Constitution, to submit her controversies with other States to judicial decision, but it was claimed that Congress had passed no law establishing a mode of proceeding, the character of the judgment to be rendered, and means of enforcing it. As respects the nature of the suit, it was argued that it was in its character political, brought by a sovereign, in that avowed character; that the judicial power of the United States extended, by the Constitution, only to cases of law and equity,

and that questions of jurisdiction over territory were not cases of that kind, nor of "a civil nature."

The court held that jurisdiction was conferred by the Constitution and the Judiciary Act, and that, as Massachusetts had appeared, submitted to the process, and pleaded in bar of the plaintiff's action certain matters on which the judgment of the court was asked, all doubts as to jurisdiction over the parties were at rest.

As respected the power of the court to hear and determine the subject-matters of the suit, it was held that jurisdiction existed; that the dispute was a controversy between two States within the judicial power of the United States. 12 Pet. 657; 13 Pet. 23.

Before leaving this case it is to be remarked that the principal contest was as to whether a question of boundary, involving as it did the question of sovereignty over territory, was a judicial question of a civil nature. The implication was that the controversies between two or more States, in which jurisdiction had been granted by the Constitution, did not include questions of a political character. In some of the later cases the contention has been the very opposite; that the intention of the Constitution was only to apply to questions in which the sovereign and political powers of the respective States were in controversy.

In *Florida* v. *Georgia*, 11 How. 293, leave was given by this court to the State of Florida to file a bill against the State of Georgia, and process of subpœna was directed to be issued against the State of Georgia. The object of the bill was to ascertain and establish the boundary between the two States, which was in controversy. The State of Georgia answered, and the cause was proceeded in in pursuance of the prayers of the bill. Subsequently an application was made by the Attorney General of the United States, alleging that the latter were interested and concerned in the matter in controversy, and moving the court that he be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court should order. This motion was opposed by the States, and the matter was argued at length. The

judges differed, but neither in the opinion of the majority, granting the motion of the Attorney General, nor in that of the dissenting minority, was any doubt expressed of the existence of the jurisdiction of the court over the controversy between the two States.

Pennsylvania v. *Wheeling & Belmont Bridge Company*, 9 How. 647; *Same* v. *Same*, 11 How. 528; *Same* v. *Same*, 13 How. 518; *Same* v. *Same*, 18 How. 421, 429, was a case in equity, in which the State of Pennsylvania filed a bill against the Wheeling and Belmont Bridge Company, a corporation of Virginia, and certain contractors, charging that the defendants, under color of an act of the legislature of Virginia, were engaged in the construction of a bridge across the Ohio River at Wheeling, which would, as was alleged, obstruct its navigation to and from the ports of Pennsylvania, by steamboats and other crafts which navigated the same. Many different questions were discussed by counsel and considered by the court, respecting the nature and extent of the jurisdiction of this court, the right of the complainant State, whether at law or in equity, and the character of the decree which could be rendered. Several observations made in the opinion of the court will be hereafter adverted to when we come to consider the second ground of demurrer urged in the case before us. It is sufficient for our present purpose to say that the original jurisdiction of the court was sustained, a commissioner was appointed to take and report proofs, and a decree was entered declaring the bridge to be an obstruction of the free navigation of the river; that thereby a special damage was occasioned to the plaintiff, for which there was not an adequate remedy at law, and directing that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

South Carolina v. *Georgia*, 93 U. S. 4, was a suit in equity brought in this court, whereby the State of South Carolina sought an injunction to restrain the State of Georgia, the United States Secretary of War, the Chief Engineer of the United States army, their agents and subordinates, from obstructing the navigation of the Savannah River, in violation of an alleged compact subsisting between the States of South Carolina and

Georgia, and which had been entered into on April 24, 1787. This court, not denying but assuming jurisdiction in the case, held that, by adopting the Federal Constitution, and thereby delegating to the General Government the right to regulate commerce with foreign nations and among the several States, the compact between the two States, in respect to the Savannah River, ceased to operate, and that the acts complained of, being done in pursuance of congressional authority, and designed to improve navigation, could not be deemed an illegal obstruction, and accordingly the special injunction previously granted was dissolved and the bill dismissed.

Wisconsin v. *Duluth*, 96 U. S. 379, was the case of a bill in chancery filed in this court by the State of Wisconsin, by virtue of the constitutional provision which confers original jurisdiction of suits between the States and between a State and citizens of other States. The city of Duluth, a corporation and citizen of the State of Minnesota, was defendant; and, after answer, replication and the taking of a large amount of evidence, the case came on for a final decree. The nature of the case and the reasoning upon which this court proceeded in disposing of it will sufficiently appear in the following quotations from the opinion delivered by Mr. Justice Miller:

"The present suit was brought by the State of Wisconsin on the ground that the channel of the St. Louis River, as it flowed in a state of nature, was the common boundary between that State and the State of Minnesota, and that she had an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course; that the canal cut by Duluth across Minnesota Point, deeper than the natural outlet of the St. Louis River at its mouth, has diverted, and will continue to divert, the current of that river through Superior Bay into the lake by way of that canal. That the result of this is, that while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet, causes it to fill up, and thus destroy the usefulness of the river and bay as an aid of commerce, on which the State had a right to rely. The bill, after reciting the facts which we have already detailed,

insists that the city of Duluth cannot, by any right of her own, nor by any authority conferred on her by the State of Minnesota, thus divert the waters of the stream—the St. Louis River—from their natural course, to the prejudice of the rights of the State of Wisconsin or of her citizens. It declares that this canal at Duluth does this in violation of law; and it prays this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made.

"The answer, while admitting the construction of the canal, denies almost every other material allegation of the bill. It denies especially that the canal has the effect of changing the course of the current of the river, or does any injury to the southern entrance to Superior Bay or diminishes the flow of water at that point. A large amount of testimony, professional and non-professional, is presented on that subject.

"The answer also sets up, as an affirmative defence to the relief sought by the bill, that the United States, by the legislative and executive departments of the Government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of the great system of lake navigation.

"Many very interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defence deny that the State of Wisconsin has any such legal interest in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a State in her political or sovereign character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a State, in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable to the case before

us. Nor shall we address ourselves to the consideration of the mass of conflicting evidence as to the effect of the canal on the flow of the waters of Superior Bay.

"We will first consider the affirmative defence already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for."

The court then proceeded to inquire into the action of the General Government in the matter of the canal in question, and found that, as matter of fact, the United States had taken possession and control of the canal as a public work. The opinion concluded as follows:

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"When Congress appropriates $10,000 to improve, protect and secure this canal, this court can have no power to require it to be filled up and obstructed. While the engineering officers of the Government are, under the authority of Congress, doing all they can to make this canal useful to commerce and to keep it in good condition, this court can owe no duty to a State which requires it to order the city of Duluth to destroy it.

"These views show conclusively that the State of Wisconsin is not entitled to the relief asked by the bill, and that it must, therefore, be dismissed with costs."

The court, therefore, did not decline jurisdiction, but exercised it, by inquiring into the facts put in issue by the bill and answer, and by dismissing the bill for want of equity.

In *Virginia* v. *West Virginia*, 11 Wall. 39, a bill was filed in this court to settle the boundaries between the two States.

There was a demurrer to the bill. In delivering the opinion of the court Mr. Justice Miller said:

"The first proposition on which counsel insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two countries which are the subject of dispute. This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided."

And, after citing *Rhode Island* v. *Massachusetts*, 12 Pet. 651; *Missouri* v. *Iowa*, 7 How. 660; *Florida* v. *Georgia*, 17 How. 478, and *Alabama* v. *Georgia*, 23 How. 505, the conclusion of the court was thus expressed:

"We consider, therefore, the established doctrine of this court to be that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts and agreements between those States, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding."

In *New Hampshire* v. *Louisiana and Others*, and *New York* v. *Louisiana and Others*, 108 U. S. 76, it was found that, in view of the Eleventh Amendment to the Constitution of the United States, declaring, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State," as matter of fact, under the pleadings and testimony, the suits were commenced and were prosecuted solely by the owners of the bonds and coupons, to collect which was the object of the suits, and it was accordingly held "that the evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States or aliens, without the consent of the

State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts, owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

In *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 286, the nature of the case and of the question involved was thus stated by Mr. Justice Gray, in delivering the opinion of the court:

"This action is brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State, as required by that statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court.

"The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the States of the Union, and the defendant a corporation of another of the States."

After citing and considering the cases, the justice expressed the following conclusions:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. . . . From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. . . . The statute of Wisconsin, under which the State recovered in one of her own courts the

judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. . . . This court, therefore, cannot entertain an original action to compel the defendants to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine."

And consequently judgment was entered for the defendant on the demurrer that had been interposed to the declaration.

Hans v. *Louisiana*, 134 U. S. 1, was an action brought in the Circuit Court of the United States for the Eastern District of Louisiana, against the State of Louisiana, by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State. The Circuit Court, on motion of the attorney general of the State, dismissed the case for want of jurisdiction. This court affirmed the judgment of the Circuit Court, and held that the judicial power of the United States did not extend to the case of a suit brought against a State by one of its own citizens.

In the course of the opinion, delivered by Mr. Justice Bradley, the following observations were made:

"The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Vesey, Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose by those articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be

necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 288, 289, and cases there cited."

The last case which we have had occasion to examine is that of *Louisiana* v. *Texas*, 176 U. S. 1, 16. The case was brought before us by a bill in equity, filed by the State of Louisiana against the State of Texas, her Governor and her health officer. The bill alleged that the State of Texas had granted to its Governor and its health officer extensive powers over the establishment and maintenance of quarantines over infectious and contagious diseases; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas, which were business rivals of the city of New Orleans, and prayed for a decree that neither the State of Texas, nor her Governor, nor her health officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce an embargo against interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, or the right to make discriminative rules affecting the State of Louisiana, or any part thereof, and different from and more burdensome than the quarantine rules and regulations applied to other States and countries; and the bill asked for an injunction restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. To this bill a demurrer was filed, assigning the following causes:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of the bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the States of Louisiana and Texas. Second. Because the allegations of the bill show that the only issues presented by said bill arise between the State of Texas or her officers, and certain persons in the city of New Orleans, in the State of Louisiana, who were engaged in inter-

state commerce, and which do not in any manner concern the State of Louisiana as a corporate body or State. Third. Because such bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the State of Louisiana, said State is in effect loaning its name to said individuals and is only a nominal party —the real parties at interest being said individuals in the city of New Orleans who are engaged in interstate commerce. Fourth. Because it appears from the face of said bill that the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the constitution and laws the said State possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose. Fifth. Because it appears from the face of the bill that no property rights of the State of Louisiana are in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

In the opinion of the court, delivered by Mr. Chief Justice Fuller, after a consideration of the cases hereinbefore mentioned and of others, it was said:

"In order then to maintain jurisdiction of this bill of complaint, as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals.

"By the Constitution the States are forbidden to enter into any treaty, alliance or confederation; grant letters of marque and reprisal, or, without the consent of Congress, 'keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'

"Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy,

though, with the consent of Congress, they may be composed by agreement. . . .

"In the absence of agreement it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court would be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a State in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives. . . .

"But in *Debs, Petitioner*, 158 U. S. 564, involving a case in the Circuit Court, in which the United States had sought relief by injunction, it was observed: 'That while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes its duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties.'

"It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian or respresentative of all her citizens. She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unncessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of in-

terstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained."

After quoting the provisions of the statute of the State of Texas regulating the subject of quarantine, the Chief Justice proceeded to say:

"It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government. . . . The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

"But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. Where there is no agreement, where breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

"In our judgment, this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.

"Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy 'between a State and citizens of another State.' Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States, and such a controversy, as we have said, is not presented."

Accordingly the demurrer was sustained and bill dismissed.

From the language of the Constitution, and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this court in controversies between two or more States?

From the language, alone considered, it might be concluded that whenever, and in all cases where one State may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant State, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining State, or to affect the rights of its citizens, the jurisdiction of this court would attach.

Chief Justice Marshall in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, 392, said:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions, as far as possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases

arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given, because a State is a party; and to include in the second those in which jurisdiction is given, because the case arises under the Constitution or a law."

But it must be conceded that upon further consideration, in cases arising under different states of facts, the general language used in *Cohens* v. *Virginia*, has been, to some extent, modified. Thus, in the cases of *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, *ut supra*, jurisdiction was denied to this court where the cause of action belonged to private persons, who were endeavoring to use the name of one State to enforce their rights of action against another. Though, perhaps, it may be said that jurisdiction was really entertained, and that the bills were dismissed, because the court found that, under the pleadings and testimony, the State's complainant had no interest of any kind in the proceedings.

So, too, in *Wisconsin* v. *Pelican Insurance Company*, *ut supra*, the court held that, notwithstanding the action was brought by a State against the citizens of another State and was thus within the letter of the Constitution, yet that the court had a right to inquire into the nature of the case, and, when it found that the object of the suit was to enforce the penal laws of one State against a citizen of another, to refuse to exercise jurisdiction.

In the case of *Louisiana* v. *Texas*, *ut supra*, the bill was dismissed because a controversy between the two States was not actually presented; that what was complained of was not any action of the State of Texas, but the alleged unauthorized conduct of its health officer, acting with a malevolent purpose against the city of New Orleans. Here again it may be observed that the court did not decline jurisdiction, but exercised it in holding that the facts alleged in the bill did not justify the court in granting the relief prayed for.

The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property

rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.

It is further contended, in support of the demurrer, that even if the State of Missouri be the proper party to file such a bill, yet that the proper defendant is the Sanitary District of Chicago solely, and that the State of Illinois should not have been made a party, and that, as to her, the demurrer ought to be sustained,

It can scarcely be supposed, in view of the express provisions of the Constitution and of the cited cases, that it is claimed that the State of Illinois is exempt from suit because she is a sovereign State which has not consented to be sued. The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the State of Illinois, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.

We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of—thus distinguishing this case from that of *Louisiana* v. *Texas*, where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.

The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant.

It is further contended that, even if this court has original jurisdiction of the subject-matter, and even if the respective States have been properly made parties, yet the case made out by the bill does not entitle the State of Missouri to the equitable relief prayed for.

This proposition is sought to be maintained by several considerations. In the first place, it is urged that the drawing, by artificial means, of the sewage of the city of Chicago into the

Mississippi River may or may not become a nuisance to the inhabitants, cities and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?

The bill charges that the acts of the defendants, if not restrained, will result in the transportation, by artificial means and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago and in the bed of the Illinois River, which will poison the water supply of the inhabitants of Missouri and injuriously affect that portion of the bed or soil of the Mississippi River which lies within its territory.

In such a state of facts, admitted by the demurrer to be true, we do not feel it necessary to enter at large into a discussion of this part of the defendants' contention, but think it sufficient to cite one or two authorities.

Attorney General v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361, was a proceeding in equity in the Supreme Judicial Court to enjoin the defendants from lowering the water in one of the public ponds of Massachusetts. It was claimed that the necessary effect of such lowering would be to impair the rights of the people in the use of the pond for fishing, boating and other lawful purposes, and to create and expose upon the shores of the pond a large quantity of slime, mud and offensive vegetation, detrimental to the public health. The defendants demurred, claiming that no case was stated which came within the equity jurisdiction of the court, and questioning the power of the attorney general, on behalf of the Commonwealth, to maintain the proceedings. Speaking for the court, the Chief Justice said:

"The cases are numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation exercising the right of eminent domain under a power delegated to it by the legislature, from any abuse

or perversion of the powers which may create a public nuisance or injuriously affect or endanger the public interests,"—citing many cases, and proceeding:

"The information in this case alleges not only that the defendant is doing acts which are *ultra vires* and an abuse of the power granted to it by the legislature, but also that the necessary effect of said acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one an information by the attorney general is the appropriate remedy. This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a public nuisance by partially draining the pond and exposing its shores, thus endangering the public health."

And replying to the claim that resort to equity was unnecessary, the court further said:

"The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment or by proceedings under the statutes for the abatement of a nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they now are. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

The nature of equitable remedy in the case of public nuisances was well described by Mr. Justice Harlan, speaking for the court in the case of *Mugler* v. *Kansas*, 123 U. S. 623, 673:

"The grounds of this jurisdiction, in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future; whereas courts of law

can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community."

In *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, it was said by this court, through Mr. Justice Harlan, after citing English and American cases:

"Proceedings at law or by indictment can only reach past or present wrongs done by appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphate deposits in the bed of Coosaw River."

It is finally contended that, if the bill was not prematurely filed, then it was filed too late; that, by standing by for so long a period, the complainant was guilty of such laches that a court of equity will not grant relief.

The inconsistency between these contentions is manifest, and on consideration, we are of opinion that the suggestion that the complainant's remedy has been lost by delay, is not founded in fact or reason.

In *Goldsmid* v. *Tunbridge Wells Commissioners*, L. R. 1 Eq. 161, answering a similar contention, it was said by Romilly, M. R.:

"If the plaintiff comes to the court and complains very early, then the evidence is that the pollution is not preceptible, it is wholly inappreciable, and you get evidence after evidence for the defendants, (the pollution being slight and perhaps only observable at some times and on some occasions,) saying you have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance. Then he waits for five or six years, until it is obvious to everybody's sense that the pollution is considerable, and then they say 'you have come too late, you have allowed this to continue on for twenty years, and we have acquired an easement over your property, and the right of pouring the sewage into it.' My opinion is that any person who has a water course flowing through his

land, and sewage which is preceptible is brought into that water course, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him. . . .

"This is a matter of very great importance, and it has been suggested to me in argument as a matter that ought to be regarded that private interests must give way to public interests; that the court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject, and I apprehend that the observations which were quoted to me of Vice Chancellor Sir William Page Wood, in the *Attorney General* v. *The Mayor of Kingston*, 13 W. R. 888, are perfectly accurate, and that private rights are not to be interfered with. But my firm conviction is that in this, as in all the great dispensations and operations of nature, the interests of the individuals are not only compatible with but identical with the interests of the public; and although in this case I have only to consider an injury to the private individual, the plaintiff in the present action, yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the people and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle and contagious diseases affecting human beings, such as cholera or typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance. I am of opinion

that Mr. Goldsmid was not bound to remain quiet until this stream had become such a nuisance that it was obvious to everybody near its banks; and the result is that in my opinion he is entitled to a decree for an injunction to restrain the defendants from causing or permitting the sewage and other offensive matters from the town of Tunbridge Wells to be discharged into the Calverly Brook, or stream, in such a manner as to affect the waters of the brook as it flows through the plaintiff's land."

This decree of the Master of the Rolls was subsequently affirmed on appeal. L. R. 1 Ch. App. 349.

Similar views prevailed in *Chapman* v. *Rochester*, 110 N. Y. 273, where a bill was filed to enjoin the defendant city from polluting, by the discharge of sewage by artificial means, a natural stream flowing through his lands.

In the opinion of the New York Court of Appeals, it was said by Danforth, J., after citing *Goldsmid* v. *Tunbridge Wells:*

"In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant against the judgment appealed from are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements, prepared by the city, and for which it is responsible. Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its sewerage system. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule, which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or corporation who causes that pollution."

Cases cited by defendants' counsel, where injunctions were refused to aid in the suppression of public nuisances, were cases where the act complained of was fully completed, and where

the nuisance was not one resulting from conduct repeated from day to day. Most of them were cases of purpresture, and concerned permanent structures already existing when courts in equity were appealed to.

The bill in this case does not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway. What is sought is relief against the pouring of sewage and filth through it, by artificial arrangements, into the Mississippi River, to the detriment of the State of Missouri and her inhabitants, and the acts are not merely those that have been done, or which when done cease to operate, but acts contemplated as continually repeated from day to day. The relief prayed for is against not merely the creation of a nuisance but against its maintenance.

Our conclusion, therefore, is that the demurrers filed by the respective defendants cannot be sustained. We do not wish to be understood as holding that, in a case like the present one, where the injuries complained of grow out of the prosecution of a public work, authorized by law, a court of equity ought to interpose by way of preliminary or interlocutory injunction, when it is denied by answer that there is any reasonable foundation for the charges contained in the bill. We are dealing with the case of a bill alleging, in explicit terms, that damage and irreparable injury will naturally and necessarily be occasioned by acts of the defendants, and where the defendants have chosen to have their rights disposed of, so far as the present hearing is concerned, upon the assertions of this bill.

We fully agree with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proofs must show such a state of facts as will manifest the danger to be real and immediate.

But such observations are not relevant to the case as it is now before us.

The demurrers are overruled, and leave is given to the defendants to file answers to the bill.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE WHITE, dissenting:

Controversies between the States of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences, can be invoked, it must appear that the States are in direct antagonism as States. Clearly this bill makes out no such state of case.

If, however, on the case presented, it was competent for Missouri to implead the State of Illinois, the only ground on which it can be rested is to be found in the allegation that its Governor was about to authorize the water to be turned into the drainage channel.

The Sanitary District was created by an act of the General Assembly of Illinois, and the only authority of the State having any control and supervision over the channel is that corporation. Any other control or supervision lies with the law-making power of the State of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which would bind the State of Illinois or control its action.

The Governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The Governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

Assuming that a bill could be maintained against the Sanitary

District in a proper case, I cannot agree that the State of Illinois would be a necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

The act complained of is not a nuisance, *per se*, and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the Sanitary District, if authorized by the State of Missouri.

My brothers HARLAN and WHITE concur with me in this dissent

In re DISTRICT OF COLUMBIA, No. 1.

In re DISTRICT OF COLUMBIA, No. 2.

APPEAL FROM THE COURT OF CLAIMS.

Nos. 13 and 14. Original. Argued January 21, 1901. — Decided February 11, 1901.

Section 1088 of the Revised Statutes relates to cases in which the Court of Claims is satisfied from the evidence that some fraud, wrong or injustice has been done the United States as matter of fact, and this is so in its application to the District of Columbia under the act of June 16, 1880.

The motions for new trial involved in these cases were grounded on error of law, to correct which the remedy was by appeal.

Resort cannot be had to motions under section 1088 simply because on appeals in other similar cases it had been determined by this court that the court below had erred.

THE case is stated in the opinion of the court.

Mr. Robert A. Howard for the District of Columbia, petitioner.

Mr. A. A. Hoehling, Jr., by leave of court, filed a brief in behalf of certain interested parties.

Opinion of the Court.

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

These are petitions for mandamus. The petition in No. 13 sets forth in substance that the Court of Claims rendered judgment in favor of Thomas Kirby and against the District, June 10, 1895, due and payable as of January 1, 1876, under the provisions of two acts of Congress, of June 16, 1880, 21 Stat. 284, c. 243, and of February 13, 1895, 28 Stat. 664, c. 87. No motion for new trial was made and no appeal was taken, and the judgment, principal and interest, was paid.

From the petition in No. 14, it appears that Henry L. Cranford and Lindley M. Hoffman obtained judgment November 15, 1895, under the aforesaid acts, payable as of January 1, 1876, which, principal and interest, was paid. No new trial was asked for, but an application for an appeal was made and withdrawn.

February 15, 1897, on an appeal by the District of Columbia from similar judgments in favor of other claimants, this court decided that no interest was recoverable on the amounts claimed until from the passage of the act of February 13, 1895. *District of Columbia* v. *Johnson*, 165 U. S. 330. Thereupon on February 25, 1897, the District filed motions for new trial in the cases involved here under section 1088 of the Revised Statutes, brought forward from the act of June 25, 1868, 15 Stat. 75, c. 71, which provides: "The Court of Claims, at any time when any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of the judgment, the same shall be payable and paid as now provided by law."

The ground of these motions was error in the allowance of interest from January 1, 1876, or except from the date of the judgments. The motions were denied for want of jurisdiction.

The act of June 16, 1880, provided for the settlement of all outstanding claims against the District of Columbia, including

claims arising out of contracts made by the board of public works, and conferred jurisdiction on the Court of Claims to hear the same, applying all laws then in force relating to the prosecution of claims against the United States, and giving the District of Columbia the same right to interpose counter-claims and defences, and a like power of appeal, as in cases against the United States tried in said court, and containing the express proviso that "motions for new trials shall be made by either party within twenty days after the rendition of any judgment." The jurisdiction so conferred was afterwards enlarged by the act of February 13, 1895, which authorized the court to allow on claims like these the rates established and paid by the board of public works, and added that whenever those rates had not been allowed in prior cases, the claimants should be entitled on motion made within sixty days after the passage of the act to a new trial thereof.

Applications for leave to file petitions requiring the judges of the Court of Claims to show cause why writs of mandamus should not be issued directing them to hear, try and adjudge the motions for new trial, having been presented to this court, leave was granted, and rules to show cause were entered thereon, to which the respondents made answer that the motions were overruled because the court had no jurisdiction to consider the same, as the statute required motions for new trials to be made within twenty days after the rendition of judgment.

In *Ealer's Case*, 5 C. Cl. 708, it was ruled that under the act of June 25, 1868, now section 1088 of the Revised Statutes, it could not be held that fraud, wrong or injustice had been done by an error of law when there existed an ample measure of redress by appeal, and Nott, J., delivering the opinion, said: "The judgment in this case was deliberately considered by the court after its merits had been elaborately argued by counsel. If the court committed an error of law, the defendants had a sufficient remedy, by appeal to the Supreme Court. If an error of fact was committed, arising from inadvertence or mistake, the court was willing to correct its oversight. But the motion now made is grounded on a supposed error of law, or

rather upon a decision of the Supreme Court, pronounced in another case since the judgment in this was rendered."

We concur in this view. It seems to us clear that the relief contemplated by section 1088 was in respect of matters of fact whereby some fraud, wrong or injustice had been done to defendants. Indeed the section provides that such new trials shall be granted "upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises had been done." *Ex parte Russell*, 13 Wall. 664; *Belknap* v. *United States*, 150 U. S. 588, 591. This being so, it is unnecessary to consider whether the twenty-day limitation of the act of 1880 operated in amendment of section 1088, for that section does not authorize motions for new trial on the grounds upon which those in question rested.

As the Court of Claims was right in denying the motions, the rules hereinbefore granted must be discharged and the petitions dismissed, and it is so ordered.

Mr. Justice Harlan concurred in the result.

ANSLEY *v.* AINSWORTH.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

No. 136. Submitted December 20, 1900.—Decided February 11, 1901.

The legislation in respect of the United States court in the Indian Territory considered: it is *held* that an appeal does not lie directly to this court from a decree of the trial court in the Indian Territory, although the suit in which the decree is rendered may have involved the constitutionality of an act of Congress. Whether an appeal lies to this court from the Court of Appeals of the Indian Territory in such cases is a question which does not arise on this record.

This was a bill filed in the United States Court in and for the Central District of the Indian Territory by W. H. Ansley, M. H. Gleason and R. O. Edmonds against N. B. Ainsworth,

L. C. Burriss, O. E. Woods, James Elliott and the Ola Coal and Mining Company, alleging: That Ansley was by blood a member and citizen of the Choctaw Nation of Indians; that Gleason and Edmonds were citizens of the United States by birth, who by intermarriage with members of the Choctaw Nation had become citizens of that nation; that Ainsworth was a citizen of the Choctaw Nation and Burriss a citizen of the Chickasaw Nation; that Woods and Elliott were citizens of the United States; and that the mining company was a corporation organized under the laws of Kansas, engaged in operating a mine in the Choctaw Nation, Elliott being president, and Woods general manager, thereof.

The bill averred that in November, 1890, Gleason and Edmonds and one Riddle, a citizen by blood of the Choctaw Nation, discovered coal, and acquired an exclusive and perpetual right to a coal claim to themselves and their assigns under section eighteen of article seven of the Choctaw constitution; the laws, usages and customs of that nation; and acts of the Choctaw Council; and that in February, 1898, Riddle conveyed his undivided one-third interest in the coal claim to Ansley.

That Gleason, Edmonds and Riddle, in 1896, contracted with Woods to work the mine, and that Woods contracted with the mining company for the working of the same, and that under the agreements Gleason, Edmonds and Riddle were to receive a royalty.

That Ainsworth and Burriss were coal trustees designated by the governors of the Choctaw and Chickasaw Nations, respectively, and appointed by the President, under the act of Congress of June 28, 1898, 30 Stat. 495, 510, c. 517, which act ratified an agreement with the Choctaw and Chickasaw Nations, known as the "Atoka Agreement," also afterwards ratified by the people of said nations, and operated to annul all individual leases and to prohibit the payment to or receipt by individuals of any royalty on coal, and provided that all royalties should be paid into the Treasury of the United States for the benefit of the tribes, to be drawn therefrom under such rules and regulations as should be prescribed by the Secretary of the Interior, and that all leases for the working of coal lands entered into by and

between persons or corporations desiring to mine coal and the mining trustees of the Choctaw and Chickasaw Nations should be approved by the Secretary of the Interior.

The bill was filed to enjoin Woods, Elliott and the mining company from entering into a lease with Ainsworth and Burriss, mining trustees of the Choctaw and Chickasaw Nations, and denied on various grounds the constitutionality and validity of the provisions of the act of Congress.

The United States Court for the Central District of the Indian Territory, Clayton, J., presiding, held that there was no equity in the bill, and sustained a demurrer thereto, and, complainants declining to plead further, dismissed the bill with costs, whereupon an appeal was allowed to this court.

Mr. Yancey Lewis and *Mr. J. H. Gordon* for appellants.

Mr. J. W. McLoud for appellees.

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

The objection of want of jurisdiction over this appeal meets us on the threshold.

By the act of March 1, 1889, entitled "An act to establish a United States Court in the Indian Territory, and for other purposes," 25 Stat. 783, c. 333, a court was established with a single judge, whose jurisdiction extended over the Indian Territory, and it was provided that two terms of said court should be held each year at Muscogee in that Territory, and such special sessions as might be necessary for the dispatch of business in said court at such time as the judge might deem expedient.

May 2, 1890, an act was passed "To provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes," 26 Stat. 81, 93, 94, c. 182, §§ 29, 30 and 31, which defined the Indian Territory; gave additional jurisdiction to the court in that Territory as therein set forth; and, for the purpose of holding terms of the court, divided the Territory into three specified divisions.

By section five of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, as amended, appeals or writs of error might be taken from the District and Circuit Courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

By section six, the Circuit Courts of Appeals established by the act were invested with appellate jurisdiction in all other cases.

The thirteenth section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States Court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act."

March 1, 1895, an act was approved entitled "An act to provide for the appointment of additional judges of the United States Court in the Indian Territory." 28 Stat. 693, c. 145. This act divided the Indian Territory into three judicial districts, to be known as the Northern, Central and Southern Districts, and provided for two additional judges for the court, one of whom should be judge of the Northern District, and the other judge of the Southern District, and that the judge then in office should be judge of the Central District. The judges were clothed with all the authority, both in term time and in vacation, as to all matters and causes, both criminal and civil, that might be brought in said districts, and the same superintending control over commissioners' courts therein, the same authority in the judicial districts to issue writs of *habeas corpus*, etc., as by law vested in the judge of the United States Court in the Indian Territory, or in the Circuit and District Courts of the United States. The judge of each district was authorized and empowered to hold court in any other district, for the trial of any case which the judge of such other district was disqualified from

trying, and whenever on account of sickness, or for any other reason, the judge of any district was unable to perform the duties of his office, it was provided that either of the other judges might act in his stead in term time or vacation. All laws theretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory, as defined by law, as to offences committed within the Territory, were repealed, and their jurisdiction conferred after September 1, 1896, on the "United States Court in the Indian Territory."

Section eleven of this act read as follows:

"SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said Supreme Court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory; and appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

"Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Cir-

cuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States. Said appellate court shall appoint its own clerk, who shall hold his office at the pleasure of said court, and who shall receive a salary of one thousand two hundred dollars per annum. The marshal of the district wherein such appellate court shall be held shall be marshal of such court. Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year, at such times and for such periods as may be fixed by the court."

The Indian Appropriation Act of June 10, 1896, 29 Stat. 321, 339, c. 398, in respect of the proceedings therein referred to, provided that "if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from said decision to the United States District Court: *Provided, however*, that the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It has been ruled that the court thus described as the "United States District Court" was the United States Court in the Indian Territory. *Stephens* v. *Cherokee Nation*, 174 U. S. 477.

By the Indian Appropriation Act of June 7, 1897, c. 3, 30 Stat. 84, provision was made for the appointment of an additional judge for the United States Court in the Indian Territory, who was to hold court at such places in the several judicial districts therein, and at such times, as the appellate court of the Territory might designate. This judge was to be a member of the appellate court and have all the authority, exercise all the powers, and perform the like duties as the other judges of the court, and it was "*Provided*, That no one of said judges shall sit in the hearing of any case in said appellate court which was decided by him."

By this act it was also provided:

"That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted,

and all criminal causes for the punishment of any offence committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

The Indian Appropriation Act of July 1, 1898, 30 Stat. 591, c. 545, contained the following:

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, it was held that the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or allotment of land in the Indian Territory.

Thus it is seen that the act of March 1, 1895, created a Court

of Appeals in the Indian Territory, with such superintending control over the courts in that Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof; and the act also provided that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States," which necessarily deprived that court of jurisdiction of appeals from the Indian Territory trial court under section 13 of the act of 1891.

Prior to the act of 1895, the United States Court in the Indian Territory had no jurisdiction over capital cases, but by that act its jurisdiction was extended to embrace them, and we held in *Brown* v. *United States*, 171 U. S. 631, that this court had no jurisdiction over capital cases in that court, the appellate jurisdiction in such cases being vested in the appellate court of the Indian Territory.

In *Stephens* v. *Cherokee Nation*, we thought it unnecessary to determine whether the effect of the act of 1895 was to render the thirteenth section of the act of 1891 wholly inapplicable, as the judgments of the United States courts in the Indian Territory in the cases there considered were made final below by the act of 1896, and the appeals were regarded as having been in terms granted from those judgments by the act of 1898.

But this case is not affected by the act of 1898, and we are of opinion that it does not come within the thirteenth section of the act of 1891. In accordance with the legislation subsequent to 1891, the appeal should have been prosecuted to the Court of Appeals in the Indian Territory. The question whether or not an appeal would lie to this court from that court does not arise on this record.

Appeal dismissed.

MONTOYA *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 43. Argued December 14, 17, 1900. — Decided February 11, 1901.

The object of the Indian Depredation Act is to enable citizens whose property has been taken or destroyed by Indians belonging to any band, tribe or nation, in amity with the United States, to recover a judgment for their value both against the United States and the tribe to which the Indians belong, and which by the act is made responsible for the acts of marauders whom it has failed to hold in check. If the depredations have been committed by the tribe or band itself, acting in hostility to the United States, it is an act of war for which there can be no recovery under the act.

Where a company of Apache Indians, who were dissatisfied with their surroundings, left their reservation under the leadership of Victoria, to the number of two or three hundred, became hostile, and roamed about in Old and New Mexico for about two years, committing depredations and killing citizens, it was *held* that they constituted a "band" within the meaning of the act; that they were not in amity with the United States, and that neither the Government nor the tribe to which they originally belonged, were responsible for their depredations.

THIS was a petition by the surviving partner of the firm of E. Montoya & Sons against the United States and the Mescalero Apache Indians for the value of certain live stock taken in March, 1880, by certain of these Indians, known as Victoria's Band.

The Court of Claims made the finding of facts set forth in the margin.[1]

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[1] *Finding of Facts.*

1. At the time of the depredation hereinafter found Estanislao Montoya, Desiderio Montoya, and Eutimio Montoya were partners, doing business in Socorro County, New Mexico, under the name and style of E. Montoya & Sons, and were at the time, and long prior thereto, citizens of the United States, residing at San Antonio, in said county and Territory.

Thereafter, and long prior to the passage of the act of March 3, 1891, 26 Stat. L. 851, the said Estanislao and Desiderio Montoya died, leaving the claimant herein surviving.

2. On the 12th of March, 1880, the said firm of E. Montoya & Sons were

Upon these findings of fact the court decided as a conclusion of law that the petition be dismissed. 32 C. Cl. 349. Claimant appealed.

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the owners of the horses, mules and other live stock described in the petition, then being herded and cared for by their agents at a place called Nogal, about 8 miles west of San Antonio, which were stolen by Indians in the manner set forth in finding 3. Said stock was at the time and place reasonably worth more than three thousand dollars ($3,000).

3. Prior to 1876 the Chiricahua Apache Indians were living on what was known as the Chiricahua reservation, in southeastern Arizona, and numbered from 300 to 500 warriors. They had been a terror to the community and surroundings, and had met with success in their engagements with the troops of the United States Army. Report Commissioner Indian Affairs, 1876, p. 10.

In 1876 an effort was made by the authorities having charge of Indian affairs to remove said Indians and locate them on the San Carlos reservation, where they could be more certainly restrained from hostile acts, but they resisted, and the result was that only 322 Indians, of whom 42 were men under Chief Taza, were removed thither. Of those remaining 140 went to the Warm Springs agency in New Mexico, and about 400, including Victoria, became hostile, and roamed about in Old and New Mexico, committing depredations and killing citizens. Report Secretary Interior, 1875, p. 711, and *ib.*, 1876, p. 4.

Later these Indians were aided in their acts of hostility by Apache Indians from the Warm Springs agency, (Report Secretary Interior, 1877, p. 416,) and from this time until December, 1878, they continued their hostile acts.

In February, 1879, Victoria, a Chiricahua, who had previously rebelled against being placed on the San Carlos reservation, came near the military post of Ojo Caliente with 22 followers and agreed to surrender on condition that Nama's band, then at Mescalero, be allowed to join him, but only a few of that band surrendered, and in April following, Victoria, with his followers, escaped and went to the San Mateo Mountains. Report Secretary Interior, 1879, p. 100.

The military forces pursued him into Arizona, where he recruited his forces from the members of his tribe then being held as prisoners of war at the San Carlos reservation, and he subsequently escaped into Old Mexico. Record of Engagements with Hostile Indians, by General Sheridan, p. 84.

On the 30th of June following, Victoria, with 13 men, came into the Mescalero reservation, where there were at the time a few Gila, Membres and Mogollen Apaches, known as Southern Apaches, and at his request the families of those Indians (Chiricahuas) who had been kept on the San Carlos reservation were sent for.

Victoria was soon thereafter indicted in New Mexico for murder and horse stealing, and he became fearful of arrest and conviction therefor and

Mr. William B. King and *Mr. William H. Robeson* for appellant.

Mr. Assistant Attorney General Thompson and *Mr. Kie Oldham* for appellees. *Mr. Lincoln B. Smith* was on the Assistant Attorney General's brief.

Mr. Justice Brown delivered the opinion of the court.

The first section of the act of March 3, 1891, c. 538, 26 Stat. 851, vests the Court of Claims with jurisdiction to inquire into

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suddenly left the reservation (in July), taking with him those he had brought and also all the Southern Apaches on that reservation. Report Secretary Interior, 1890, p. 100.

They went west and began marauding, destroying property, and killing citizens, and so continued during the latter part of winter and early spring of 1880 within 40 miles of the Mescalero reservation, Victoria in the mean time using his influence to induce the Mescaleros to join his forces, and by April, 1880, some 200 to 250, of whom 50 or 60 were men, left their reservation and joined him. Report Secretary of Interior, 1880, p. 251. They continued their warfare until driven by the troops under Colonel Hatch, United States Army, across the Rio Grande River into the San Andres Mountains in April, 1880, where he had a severe fight with them and several of his men were wounded and a number of Indians, including a son of Victoria, were killed. They finally retreated into Mexico.

Under the leadership of Victoria they again crossed and recrossed the line to and from the United States, but were driven out twice by the forces under Colonel Grierson, United States Army, and their forces diminished, until finally the few remaining were driven by General Buell some time after October 1, 1880, into Mexico, where Victoria and nearly all of his followers were killed. Report Secretary of War, 1880, pp. 86 and 118.

During all the period of hostilities as aforesaid Victoria had under him a *minority* of the Chiricahua tribe of Apache Indians. At his solicitation he was reënforced from time to time during said period by a *minority* of the Indians from the Mescalero and Southern Apache tribes; besides had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found.

These Indians were allied together under the name of Victoria's band for the purpose of aiding Victoria and his followers in their hostile and warlike acts against the citizens and the military authorities of the United States.

The alliance thus formed, as well as the hostile acts committed by the band, were without the consent of the several tribes from which the members of the band came and to which they had previously belonged.

and finally adjudicate "First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

To sustain a claim under this section, it is incumbent upon the claimant to prove that the Indians taking or destroying the property belonged to a band, tribe or nation in amity with the United States. The object of the act is evidently to compensate settlers for depredations committed by individual marauders belonging to a body which is then at peace with the Gov-

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From the reports referred to in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the latter officer for 1879 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed as aforesaid.

On the 12th of March, 1880, the property set forth in finding 2 was stolen and driven away or destroyed by the Mescalero Apache Indians, who were at the time allied with Victoria's band for the purpose of hostility and war as aforesaid, and that said band so constituted was not at the time of said depredation in amity with the United States.

But the Mescalero tribe, then on their reservation near Fort Stanton, about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

Said property was taken without any just cause or provocation on the part of the owners or their agents in charge, and has never been returned or paid for in whole or in part.

4. Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding 3 was committed by Indians belonging to a war party or hostile band, known as Victoria's band, of Apache Indians, which was at and long before that time known and recognized as a band, separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States at the date of said depredation.

5. The claim which is the subject of this suit was presented to the defendant Indians in council on or before June 8, 1880, by S. A. Russell, agent for the Mescalero Apache Indians, under the direction of the Commissioner of Indian Affairs.

ernment. If the depredation be committed by an organized company of men constituting a *band* in itself, acting independently of any other band or tribe, and carrying on hostilities against the United States, such acts may amount to a war for the consequences of which the Government is not responsible under this act, or upon general principles of law. *United States* v. *Pacific Railroad*, 120 U. S. 227, 234.

The North American Indians do not and never have constituted "nations" as that word is used by writers upon international law, although in a great number of treaties they are designated as "nations" as well as tribes. Indeed, in negotiating with the Indians the terms "nation," "tribe" and "band" are used almost interchangeably. The word "nation" as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word "nation" a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language or racial origin, and acting for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word "nation" as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.

We are more concerned in this case with the meaning of the words "tribe" and "band." By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action.

Whether a collection of marauders shall be treated as a "band" whose depredations are not covered by the act may depend not so much upon the numbers of those engaged in the raid as upon the fact whether their depredations are part of a hostile demonstration against the Government or settlers in general, or are for the purpose of individual plunder. If their hostile acts are directed against the Government or against all settlers with whom they come in contact, it is evidence of an act of war. Somewhat the same distinction is applicable here which is noticed by Hawkins in his Pleas of the Crown, and other ancient writers upon criminal law, as distinguishing a riot from a treasonable act of war. Thus it is said in Wharton on Criminal Law, section 1796, summing up the early authorities, (though never accepted as a definition of treason in this country): "That constructive levying of war, by the old English common law, is where war is levied for the purpose of producing changes of a public and general nature by an armed force; as where the object is by force to obtain the repeal of a statute, to obtain the redress of any public grievance, real or pretended; to throw down all enclosures, pull down all bawdy houses, open all prisons, or attempt any general work of destruction; to expel all strangers, or to enhance the price of wages generally;" but if these acts were directed against a particular individual they would amount to nothing more than an assault or riot.

While as between the United States and other civilized nations, an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe. In his concurring opinion in *Bas* v. *Tingy*, 4 Dall. 37, recognizing France as a public enemy, Mr. Justice Washington recognized war as of two kinds: "If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war all the members act under the general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers." Indian wars are of the latter class. We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the Government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war. *Marks* v. *United States*, 161 U. S. 297.

In determining the liability of the United States for the acts of Indian marauders, the fifth and sixth sections of the Indian Depredation Act should be considered as well as the first. By the fifth section "the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified." Of course, if the

tribe to whom the Indians belong cannot be ascertained, this will not prevent a judgment against the United States, but if their connection with a particular tribe can be established, judgment shall also go against the tribe. By section six "the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find the depredation was committed, and shall be deducted and paid" from annuities or other funds due the tribe from the United States, or from any appropriation for the benefit of the tribe.

It is not altogether easy to reconcile the language of these sections, which seem to contemplate that the government may be liable for depredations committed by a *tribe*, with that of section one under which the jurisdiction of the Court of Claims is limited to the acts of "Indians *belonging* to any band, tribe or nation, in amity with the United States;" but the main objects of sections five and six would seem to be to impose upon the tribes the duty of holding their members in check or under control, and for a failure so to do to fix upon the tribe the responsibility for the acts of individual members acting in defiance of the authority of their tribe or band, upon the same principle that, by sundry statutes in England and in several of the United States, the hundred or the municipality is made responsible in damages for the acts of rioters. Like the English statutes, too, many of the Indian treaties provide that if the property be restored or the guilty members be delivered up for punishment, no pecuniary indemnity shall be required. On the other hand, if the marauders are so numerous and well organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the tribe responsible for their acts. It can hardly be supposed that Congress would impose a liability upon tribes in amity with the United States, for the acts of an independent band, strong enough to defy the authority of the tribe, although it would not be inequitable to hold the tribe liable for individual members whom it was able, but had failed, to control.

Gauged by these considerations it is clear that the Court of

Claims was justified in its ultimate finding that Victoria's band was at and long before the occurrence complained of "known and recognized as a band, separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States." Conceding that the accuracy of this ultimate finding may be reviewed by this court by a reference to the special facts found as a basis for such finding, *United States* v. *Pugh*, 99 U. S. 265, in our opinion those facts amply support the finding.

It appears that prior to 1876 the Chiricahua Apache Indians, who numbered from three to five hundred warriors of a particularly savage type, were living on a reservation of their own in Arizona; and that during that year the department determined to remove these Indians and locate them upon another reservation, where they could be more easily restrained from hostile acts. A part of them resisted, and about four hundred, under the leadership of Victoria, began roaming about Old and New Mexico, committing depredations and killing citizens. These hostile demonstrations continued until December, 1878, soon after which Victoria made an offer of surrender on a condition that was not performed, and in the following spring he again took the field, pursued by the military forces into Arizona, and subsequently escaped into Mexico. Soon thereafter he was indicted in New Mexico for murder and horse stealing, when he went west and began marauding, destroying property and killing citizens, and so continued during the latter part of the winter and early spring of 1880. The operations against them continued until they were driven by the troops across the Rio Grande River, where a severe engagement ensued and a number of Indians, including a son of Victoria, were killed. The band appears to have been of sufficient strength and consequence to have been made the object of a military expedition, which operated upon both sides of the Mexican line, and finally resulted in a battle in Mexico in the autumn of 1880, where Victoria and most of his followers were killed. The Indians constituting this band seem to have belonged to different tribes of Apaches, and were about two

hundred in number at the time this depredation was committed. They were evidently carrying on hostile acts against the settlers and military authorities of the United States, and the court expressly finds that such acts were "without the consent of the several tribes from which the members of the band came and to which they had previously belonged;" that they were denominated in various reports of military officers to the Secretary of War as "Victoria's band," and under that name were pursued for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed. The property in question was stolen and driven away, or destroyed, by certain Mescalero Apache Indians, who were at that time allied with Victoria's band for the purpose of hostility and war as aforesaid, and the band so constituted was not in amity with the United States, although the Mescalero tribe, which was then upon its reservation about one hundred miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victoria's band, was in amity with the United States.

As it appears that the Mescaleros who committed the depredation were a part of Victoria's band, operating with them, and that such band was carrying on a war against the Government as an independent organization, we think they were the band—the unit, contemplated by the act, and not the Mescalero tribe then living in peace upon their reservation near Fort Stanton, although the particular marauders in question had belonged to that tribe before they joined Victoria's band. If the Mescalero tribe were held responsible for their acts it would follow that every tribe, members of which allied themselves with Victoria and shared in his acts of hostility, would be pecuniarily liable for all damages inflicted by a band over whom they could have no control. Such consequences would be so inequitable we cannot suppose them to have been contemplated by Congress.

The judgment of the Court of Claims is

Affirmed.

CONNERS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 44. Argued December 17, 1900.—Decided February 11, 1901.

Where a band belonging to the Cheyenne Indians became dissatisfied with their reservation, separated themselves from the main body of the tribe, started northward to regain their former reservation, were pursued by the troops, were defeated in battle, became hostile and committed depredations upon citizens, it was *held* that neither the Government nor the tribe to which they had originally belonged, were responsible for the value of property taken or destroyed by them.

THIS was also, as in the last case, a claim for live stock taken and destroyed in October, 1878, by certain bands of the Cheyenne and Arapahoe Indians, the suit being against the United States and Dull Knife's and Little Wolf's bands of Northern Cheyennes and the Northern and Southern Cheyennes and Arapahoe Indians. Defendants disclaimed responsibility upon the ground that the depredation was committed by an independent band of Indians, not then in amity with the United States.

The Court of Claims made a finding of facts, the material article of which is set forth in the margin.[1]

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[1] *Finding of Facts.*

In May, 1877, 937 Northern Cheyennes, men, women and children, were removed from the Red Cloud reservation at Fort Robinson, in Nebraska, to the Southern Cheyenne and Arapahoe reservation at Fort Reno, in the Indian Territory. The Cheyennes went voluntarily, though reluctantly, relying in part upon representations made to them that the southern reservation would be a desirable home, and in part upon what they understood to be assurances that, if dissatisfied with it, they should be brought back. The body of Indians was composed of subdivisions of the Cheyenne tribe known as the bands of Dull Knife, Little Wolf, Wild Hog and Old Crow. These so-called bands had no automony, and had not been recognized either by the Government or by the tribe as separate entities. They were natural segregations of civilized Indians, leading a nomadic life and living in groups in a widely extended habitat. The so-called chiefs were leaders

Upon these findings of fact the court decided as a conclusion of law:

The bands of Dull Knife and Little Wolf, at the time when

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or spokesmen, commonly called head men. The Indians so removed were about one half of the entire tribe.

On the reservation at Fort Reno, the Cheyennes of Dull Knife's and Little Wolf's bands lived apart from other Indians on the reservation. They were dissatisfied, and made repeated applications to the Government to be brought back to what they termed their native country in the Northwest. No notice being taken of their request, 320 of them broke away from the reservation on September 9, 1878. The commanding officer at Fort Reno sent a military force in pursuit. "The officer in command was particularly instructed if he could induce the Indians to come back without resort to force to do so."

The Cheyennes were overtaken at a point 120 miles distant from Fort Reno. The officer in command summoned them to yield and return to the reservation. Little Wolf, as spokesman for the Cheyennes, replied in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon the Cheyennes, who returned the fire, and then fled and escaped. They made their way across Kansas and Nebraska, twice fighting United States troops and likewise a body of armed citizens who attacked them. In the northern part of Nebraska they were intercepted by other troops, and after some fighting they surrendered on the 3d of October, and were taken to Fort Robinson. Shortly before this surrender, Little Wolf with about half of the party had separated from Dull Knife, and he and his party were not included in the surrender. Old Crow and Wild Hog, with some of their bands accompanied Dull Knife's party in this escape from the Indian Territory. The leading chief was Dull Knife, and the Indians, regarded as a military force, were under his command. The band at the time of the surrender consisted of 49 men, 51 women and 48 children.

Up to the time these Cheyennes were fired upon in the Indian Territory by the pursuing troops they had committed no atrocity and were in amity with the United States and desired to remain so. After they were fired upon, as before described, their flight was characterized by the usual characteristics of Indian warfare. During the period of this fighting—that is to say, between the 9th of September and the 3d of October, 1878—the Northern Cheyennes, both in the Indian Territory and on the northern reservations, were in amity with the United States.

On these specific facts the court finds the ultimate facts, that at the time when the depredation above set forth was committed the tribe of Northern Cheyenne Indians was in amity with the United States, with the exception of those who composed the bands of Dull Knife and Little Wolf, and that the bands of Dull Knife and Little Wolf were not in amity.

the depredation was committed, were independent bands of Indians within the intent and meaning of the Indian depredation act, 1891; and the tribe of Northern Cheyennes, the defendants herein, was not responsible for their acts of depredation, and the petition should be dismissed. 33 C. Cl. 317.

Mr. William H. Robeson for appellant. *Mr. William B. King* was on his brief.

Mr. Assistant Attorney General Thompson and *Mr. Kie Oldham* for appellees. *Mr. Lincoln B. Smith* was on *Mr. Thompson's* brief.

Mr. Justice Brown delivered the opinion of the court.

The opinion of the Court of Claims sets forth with more fullness than the findings the details of one of the most melancholy of Indian tragedies—a shocking story of nearly a thousand of the Northern Cheyenne tribe removed from the Red Cloud reservation in Nebraska to the Southern Cheyenne and Arapahoe reservation, at Fort Reno in the Indian Territory; of the profound dissatisfaction of Dull Knife's and Little Wolf's bands, who lived apart from the other Indians on the reservation, and made repeated applications to the Government to be returned to what they termed their native country in the Northwest; of no notice being taken of their request, when over three hundred of them broke away from the reservation; of a military force from Fort Reno sent in pursuit of them with particular instructions to induce the Indians to come back without resort to force, if possible; of their being overtaken one hundred and twenty miles from Fort Reno; of an order to return to the reservation and a reply in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon them; they returned the fire, fled and escaped; made their way across Kansas and Nebraska, twice fighting the troops as well as a body of armed citizens who attacked them. They were finally intercepted by other troops, and, after some fighting, surrendered on October 3,

1878, and were taken to Fort Robinson, their former reservation in Nebraska. It was two days before the surrender, October 1, 1878, that the property of the claimant is found to have been taken or destroyed by these Indians. Up to the time they were fired upon by the pursuing troops in the Indian Territory, they had committed no atrocity, were in amity with the United States and desired to remain so. After they were fired upon their flight was characterized by the usual excesses of Indian warfare. The leading chief was Dull Knife, who was accompanied by Old Crow and Wild Hog with some of their bands, but, regarded as a military force, they were under the command of Dull Knife. The band at the time of the surrender consisted of forty-nine men, fifty-one women and forty-eight children.

The main body of the Northern Cheyennes, to which these bands seem to have originally belonged, both in the Indian Territory and on the Northern Reservation, were in amity with the United States. Although these bands, under the leadership of Dull Knife, were evidently driven into hostility with the United States by the action of the troops in firing upon them pending a peaceful effort to induce them to return to their reservation, and thereby instituting an Indian warfare, the fact still remains that this was an independent band which had broken away from the main body of the Cheyennes, and was acting in hostility to the United States and to all the frontiersmen along their path of retreat. As stated in the opinion of the court: "They fought and fled, and scattered and reunited; they fought other military commands and citizens who had organized to oppose them, and in like manner they again and again eluded their opponents, making their way northward over innumerable hindrances. They had not sought war, but from the moment when they were fired upon they were upon the war path —men were killed, women were ravished, houses were burned, crops destroyed. The country through which they fled and fought was desolated, and they left behind them the usual well known trail of fire and blood."

While the facts of this case, which are set forth with much greater detail in the opinion of the Court of Claims, appeal strongly to the generosity of Congress to recompense those who

have suffered by the inconsiderate and hasty action of the troops in driving these Indians into hostility, they afford no ground whatever for a judgment against the tribes to which these Indians originally belonged, but from which they had separated and carried on independent operations. In fact, it would be highly unjust to add to their manifest sufferings the payment of these damages from their annuities, or from other funds standing to their credit. Nor does the claim make a case against the United States under the act vesting jurisdiction in the Court of Claims. We are not at liberty to consider the circumstances under which these Indians were driven into hostility to the United States. That the band was not in amity from the moment it was fired upon by the troops is entirely clear. That the band itself was beyond the control of the tribes to which it originally belonged is equally clear. As stated by the court below, "It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States; but it was the case of an entire body waging armed resistance, with all its might and with all the ferocity of Indian warfare, against whatever power the United States could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States on the assumption that they were escaping prisoners of war, refutes the idea of preëxisting amity and renders it preposterous." The fact that they were treated as prisoners of war also refutes the idea that they were murderers, brigands or other common criminals.

To constitute a "band" we do not think it necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings.

The opinions of the court below in both of these cases are so thorough and satisfactory that a prolongation of this opinion

would be but a mere repetition of those. The law which controlled the disposition of the case just decided is equally applicable here, and the judgment of the Court of Claims dismissing the petition is therefore

Affirmed.

LAMPASAS *v.* BELL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 115. Argued December 3, 1900.—Decided February 11, 1901.

The ruling in *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239, that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution and laws; and that it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground, is cited and followed.

The objection of the unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance.

As the city of Lampasas has no legal interest in the constitutional question which it raised, and upon which it claims the right to come directly to this court from the Circuit Court under the act of March 3, 1891, c. 517, to permit it to do so would make a precedent which would lead to the destruction of the statute.

THIS suit was brought to recover the amount of certain unpaid coupons for interest on "Lampasas City Water Work Bonds." The main controversy on the merits depends upon whether the plaintiff in error is the same municipal corporation which issued the bonds or is its successor in liability. There are minor questions turning upon the provisions of ordinances and the observance of their requirements. Besides, a question under the Constitution of the United States is claimed to have been raised

Statement of the Case.

in the Circuit Court by the plaintiff in error, and upon this is based the right to bring the case here rather than take it to the Circuit Court of Appeals. The facts are stipulated and are very voluminous, but the view we take of the constitutional question enables us to omit much detail.

The city of Lampasas was incorporated by special act of the legislature in 1873, under the name of the "corporation of the city of Lampasas," with boundaries containing an area of 553 acres. Its officers were to be elective, and consist of a mayor, a board of aldermen of eight members, five of whom should constitute a quorum. Their term of office was to be two years and until their successors should be elected and qualify. The act made no provisions for the dissolving of the corporation. The city was given power to construct water works, impose and collect taxes, not exceeding one per cent per annum, and to issue bonds for public improvements.

Officers were elected, and the municipal government was exercised by them from 1873 to 1876. In 1876 a mayor and aldermen were elected who favored abolishing the municipal government. They formally resolved to resign and did so, and abandoned their offices. What municipal government, if any, existed between 1876 and 1883 the record does not show. It is, however, stipulated that the city was the "county seat of Lampasas County and had a population in 1876 of about 800; that until the year 1882 the said town was without railroad facilities, when upon advent of a railroad it began to grow rapidly, and by April, 1883, had a population of about 4500 people with street railroad and other improvements. About 1884 the population began to decline, and continued to decline until about 1890." Until 1882 the business part of the city was generally confined to the court-house square and to streets laid out from it and were within the territorial limits as originally incorporated. In 1882 and afterwards business houses were built outside of said limits but inside the boundaries as incorporated in 1883, hereinafter mentioned, and business has been transacted there since.

In February, 1883, under the provisions of the general laws of Texas, Title XVII of the Revised Statutes, a petition of

more than fifty qualified voters, living in and around the limits of the city, was presented to the county judge who, in accordance with the prayer thereof, ordered an election to determine whether the persons living within the limits in the petition set out should incorporate as a city of more than 1000 inhabitants. The election was held, resulting in a majority vote for incorporation — persons voting who lived inside and outside of the limits of the special charter. Upon the return of the election the county judge declared the result, and declared the city duly incorporated within the limits petitioned for, which embraced practically all of the lands within the special charter, and extended nearly one half mile west, north and east thereof, to and including the railroad depot—an area of 1495 acres.

A municipal government was organized with the officers prescribed by the law—some of the aldermen residing outside of the limits contained in the special charter—and exercised all of the functions of a city of 1000 inhabitants organized under the general laws of the State, without any one contesting or disputing the validity of its lawful right to do so, until November 4, 1889, when proceedings in the nature of *quo warranto* were instituted to declare the incorporation of 1883 invalid on the ground that the special charter of 1873 had never been repealed.

The suit was instituted without the direction of the attorney general of the State or other executive officers, and without making any of the creditors of the corporation parties. The judgment of ouster was entered against the officers of the city, which was affirmed on appeal by the Supreme Court of the State. *Largen* v. *Texas*, 76 Texas, 323.

The ousted officers thereafter ceased to act, and, upon authority of the county judge, officers were elected on the 22d of March, 1890, as provided in the charter of 1873, and by persons living within the limits defined by said charter, and the mayor and aldermen so elected organized March 19, and on the 22d by unanimous vote resolved to accept the provisions of "Title XVII of the Revised Statutes of the State of Texas in lieu of the charter granted by the legislature." A copy of the resolutions was duly certified and recorded, as required by law,

and the city at once assumed to act under the general charter provided in Title XVII, and is now acting thereunder.

On December 26, 1890, there was added to the city by a vote of the citizens of the added territory a greater part of the lands west which were included within the limits of 1883, and one tier of blocks additional and the city assumed, and has since exercised jurisdiction over that part lying north and east of the limits of 1873, and which was included within the limits of 1883. The area added contained 428 acres, and embraced the greater part of the residence property of the city outside of the original charter limits of 1873. The property lying north and east of the original limits, and not included within the incorporation of 1890, contains seventy-seven residence houses, occupied by persons, ninety per cent of whom follow some kind of business within the town as defined by the limits of 1873.

The books and papers of the city government under the charters of 1873 and 1883 were lost, except the assessment rolls of 1889, from which it appears that the assessed value of all lands within the city limits of 1889 was $664,420, personal property about $400,000, and that the assessment was divided as follows: As to lands, no division being shown as to personal property, viz., within the limits of 1873, $452,444; within that part added in December, 1890, $157,915; and within the parts north and east, $68,970. The assessment roll also showed the names of 438 voters, divided as follows: Old limits of 1873, 175; part added in December, 1890, 167; parts north and east, 96.

In January, 1885, acting under the then charter, and not under the charter of 1873, the city, in good faith, upon the demand of the business men of the city for fire protection, and to furnish water to the city, then having a population of 4500, determined to build a system of water works, and to pay for the same by the sale of bonds, and to this end, after full and fair discussion, passed the ordinances under which the bonds in controversy were issued.

The other facts relate to the passage of the ordinance providing for the building of the water works for which the bonds were issued; the advertisement of bids under the ordinance; the inability of the city to get other than cash bids; the awarding, in

consequence, of the contract to a bidder who was willing to build a system for $40,000, whereas the actual cost of the work, allowing nothing for profits to the contractor, was $26,276; the location of the works, some portion being shown to be inside the limits of the new incorporation, and some portion outside such limits; the payment of interest on the bonds for 1889; the decision of the city in 1892 by vote to take charge of the public schools and maintain them, and in 1893 to build a school building, and the issuing of bonds therefor amounting to $18,000, bearing interest at six per cent, and by the proceeds of which a school building was erected, it being believed and the fact certified to the state comptroller that the city had no outstanding bonds; the form of the bonds and their indorsements, and the formalities of their execution, and what appeared as to their registration in the office of the state comptroller, and what appeared as to the assessed value of the property of the city.

It was also stipulated that the defendant in error is the owner and holder of 102 coupons, each for the sum of $35, maturing at different dates, which coupons except as to due date and number of bond are of the following form:

"$35. The City of Lampasas $35.
will pay the bearer thirty-five dollars at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office, in the city of Lampasas, on the 1st day of ——, 189–, being six months' interest on bond No. —.

"S. S. Potts, *Secretary.*"

And it was further stipulated that of those coupons, "forty-two in number, being numbers 9 to 15, inclusive, on bonds Nos. 8 to 13, inclusive, became due more than four years before the institution of this suit, and if plaintiff is entitled to recover in this action he is entitled to recover the sum of $2100 principal and $452.70 interest, due on the remaining sixty coupons mentioned in his petition."

From the facts the Circuit Court found the following:

"That within the city of Lampasas, as now organized and as it has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city

as it existed under the charter adopted in 1883 by vote of the people, and which was recognized and acted upon by them as a valid city government from its adoption until the *quo warranto* proceedings against Largen and his associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same."

And as conclusions of law found:

"1. The coupons in suit constitute a valid and existing liability against the present city of Lampasas, except that coupons Nos. 9 to 15, inclusive, being 42 in number, are barred by the statute of limitation, and the remaining 60 coupons sued upon, not being barred by the statute, are valid, and the defendant should be required to pay the same. *Shapleigh* v. *San Angelo*, 167 U. S. 646; *City of Lampasas* v. *Talcott*, decided by Circuit Court of Appeals, Fifth Circuit, on the — day of ——, 18—.

"2. Judgment is therefore rendered in favor of the plaintiff against the defendant, the city of Lampasas, for the sum of $2552.70, with interest thereon, at the rate of six per cent per annum, from the date hereof, and all costs of suit. To the judgment rendered and the additional conclusion of fact the defendant in open court excepts."

The Circuit Court then allowed this writ of error.

Mr. John C. Chamberlain and *Mr. J. C. Matthews* for plaintiff in error. *Mr. Clarence H. Miller*, *Mr. W. H. Browning* and *Mr. Franz Fiset* were on their brief.

Mr. Henry B. B. Stapler for defendant in error. *Mr. Robert G. West* and *Mr. T. B. Cochran* were on his brief.

Mr. Justice McKenna delivered the opinion of the court.

The principle and contention of the assignments of error,

which are based on the Constitution of the United States, are expressed in the fourth assignment, as follows:

"The court erred in its last conclusion of facts, its conclusions of law, and the judgment rendered thereon because the organization formed in 1883 under and by virtue of which the bonds, the coupons of which are sued on, were issued, was not only voidable, but wholly void, for the reason that such organization was attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, which general laws of the State of Texas then in force and embraced in Title XVII of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby, were in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation."

The same claim was made in substantially the same words in the answer of the plaintiff in error in the court below, and the specific injury alleged was "that the taxpayers residing within the boundaries fixed by said act of 1873 will be required to pay more than one half of the principal and interest due and to become due on said bonds, whereby they will be deprived of their property without due process of law."

This court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases, one of which is when "the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Sec. 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828. But the claim must be real and substantial. A mere claim in words is not enough. We said by the Chief Justice in *Western Union Telegraph Co.* v. *Ann Arbor Railroad*, 178 U. S. 239: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination

of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571."

It is contended that the residents of the territory incorporated in 1883, were not given an opportunity to be heard "whether they should or should not be included in or made subject to taxation in the proposed corporation." It is hence deduced that the incorporation of 1883 was wholly void and in consequence the bonds sued on were also wholly void, because the law of the State under which the incorporation was made, to wit, Title 17 of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby, was in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. But what concern is it of the plaintiff in error whether the residents of such territory were or were not given an opportunity to be heard? It had no proprietary right or interest in "territory proposed to be incorporated;" *it* was put to no hazard of taxation without a hearing, nor can it stand in judgment for those who had such interest or were put to such hazard. It was certainly the right of the residents of the territory to submit to incorporation and accept its burdens and its benefits. And the record shows that there was no question of its validity for six years. When questioned it was not on the ground that it was incorporated under an unconstitutional statute—not on the ground that it was imposed without a hearing on unwilling subjects—but on the ground that the prior incorporation of 1873 had not ceased to exist.

We said in *Clark* v. *Kansas City*, 176 U. S. 114, (quoting from Cooley's Constitutional Limitations, section 196,) that "'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and

who has therefore no interest in defeating it.'" That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. "To this extent only is it necessary to go, in order to secure and protect the rights of all persons, against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose." *Wellington, Petitioner*, 16 Pick. 87, 96.

It follows necessarily that the plaintiff in error has no legal interest in the constitutional question which it raised, and upon which it claims the right to come directly to this court from the Circuit Court under section 5 of the act of 1891, *supra*. To permit it to come here directly from the Circuit Court would make a precedent which would lead to the destruction of the statute. We repeat, the questions which can be raised under any of the subdivisions of section 5 of the act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked.

Writ of error dismissed.

HOLLY *v.* MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH.

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

No. 138. Argued December 21, 1900.—Decided February 25, 1901.

This is a case in which a court of equity is called upon to decide upon which of two innocent parties is to fall a loss occasioned by the dishonesty of a third person. On the facts as stated by the court, it appears that the relation that existed between Thompson, the executor of Dr. Saul who left a legacy to the Missionary Society, and that society was that of executor and legatee; that the relation between Thompson and Holly, the purchaser of the estate sold by the executor, was that of attorney and client; and that as between themselves, Holly and the society were absolute strangers. The court, on the facts, holds that the pleadings and evi-

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dence fail to show any such dereliction of duty or supine negligence on the part of the Missionary Society in demanding and enforcing payment of the Saul legacy as would show, or even tend to show, that the society knew, or had reason to believe, that Thompson was insolvent, or had been guilty of any misappropriation of the property or funds of the Saul estate; also that the evidence fairly showed that the Missionary Society had appropriated the money received by it to the purposes appointed by the testator, before any notice was given of the complainant's claim.

As against the Missionary Society Holly has no equities; and even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent.

This was the case of a bill in equity filed in January, 1891, in the Circuit Court of the United States for the Southern District of New York, by James Holly, a citizen of the State of Pennsylvania, against the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation of the State of New York, and E. Walter Roberts, treasurer of the same.

The case came to issue on bill, answer and replication. Evidence was adduced by the respective parties, and certain exhibits and stipulations were filed.

The principal facts disclosed by the pleadings and evidence were these:

On December 23, 1887, the last will of Rev. James Saul, D. D., was duly proved and letters testamentary thereon granted by the register of wills in and for the city and county of Philadelphia to Rev. Benjamin Watson, D. D., and Henry C. Thompson, executors named in said will. In and by said will the testator bequeathed the whole of his estate to "the following institutions and in the following proportions, viz., to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, three fourths of the whole of my said estate, conditioned that the amount thus bequeathed shall be appropriated by said society in equal proportions of one-third to domestic missions, one third to foreign missions and one-third to the benefit of the colored people in the Southern or formerly slave States for the support of schools and missions." The remaining one fourth of the whole of the

said estate he gave and bequeathed to the Theological Seminary near Alexandria, Virginia. By a codicil the bequest to the theological seminary was revoked, the testator having substituted therefor a donation of one hundred shares Pennsylvania Railroad stock, and which he had transferred to the trustees of the seminary; and by a later codicil, the testator further gave and devised to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America all the residue of his estate.

Neither the amount of the estate, nor the property of which it consisted, was mentioned in the will or codicils; but it appeared that, in addition to about $2493.03 cash, the testator was possessed of bonds of the North Pennsylvania Railroad Company and of the United Railroads of New Jersey, and in their account filed in the orphans' court of Philadelphia County the executors charged themselves with $17,268.03 as the amount of the estate. This account was confirmed on November 5, 1889, showing a balance in the hands of the executors of $14,927.54, which was awarded by the court to the Domestic and Foreign Missionary Society.

On June 19, 1890, the executor, Henry C. Thompson, called at the office of the defendant society in New York city, and handed to Roberts, the treasurer, a memorandum showing the above balance $14,927.54 awarded to the society by the decree of the orphans' court, from the Saul estate, and $650 dividends received since and not included in the account, making a total of $15,577.54. For this sum Thompson gave a check in the following words and figures:

"$15,577.54 PHILADELPHIA, June 19, 1890.

"THE UNION TRUST COMPANY,

"Nos. 715, 717, 719 Chestnut Street.

"Pay to the order of the Domestic and Foreign Miss. Soc. of the P. E. Church fifteen thousand five hundred seventy-seven $\frac{54}{100}$ dollars.

"No. 623. H. C. THOMPSON."

Roberts, the treasurer, handed Thompson a receipt, as follows:

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"NEW YORK, June 19, 1890.

"Received from executors estate of James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred seventy-seven $\frac{54}{100}$ dollars ($15,577.54).

"GEORGE BLISS, *Treasurer*,
"Per E. WALTER ROBERTS, *Assistant Treasurer*."

Thompson's check was deposited by Roberts, treasurer, in the Bank of New York, for general account of the Foreign and Domestic Missionary Society of the Protestant Episcopal Church in the United States of America, by which bank the check was forwarded for collection to the Bank of North America of Philadelphia, and was to that bank paid, on June 21, 1890, by the Union Trust Company of Philadelphia.

The proceeds of this check were deposited in the general bank account of the Missionary Society, and were applied, with other moneys of the society, to domestic, foreign and colored missions, before the society was notified of the claim asserted in the bill of complaint.

In May, 1890, James Holly, a resident of Philadelphia, bought at auction for $12,000 a house and lot situated upon North Fifteenth street in that city. He took the title papers to H. C. Thompson, who had previously been employed by him, and requested Thompson to have proper conveyances made. As some of those interested in the sale resided elsewhere there was some delay in getting the papers signed. Finally, on June 19, 1890, Holly called on Thompson, who told him that the papers were ready, and asked for a check to meet the purchase money. Thereupon Holly gave him a check in the following form:

"PHILADELPHIA, June 19, 1890.

"The Fidelity Insurance, Trust & Safe Deposit Co., pay to Henry C. Thompson, attorney, or order, twelve thousand dollars.

"$12,000. JAMES HOLLY."

And Thompson gave Holly a receipt, as follows:

"PHILADELPHIA, June 19, 1890.

"Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt for $200, to be applied to purchasing house, No. 643 North Fifteenth street.

"$12,000. (Signed) H. C. THOMPSON."

Holly never afterwards saw Thompson, but on July 15, 1890, was informed by Morgan, one of the vendors of the property purchased, that Thompson was lying at a hospital in Jersey City, where he had attempted suicide.

Taking alarm Holly consulted Mr. Burton, as an attorney, and it was discovered that Holly's check on the Fidelity Insurance, Trust & Safe Deposit Company in favor of Thompson for $12,000, dated June 19, 1890, had been by Thompson that day deposited in the Union Trust Company, Philadelphia, and that, by a check of June 19, 1890, in favor of the Domestic and Foreign Missionary Society of the P. E. Church in the United States of America, Thompson had drawn out $15,577.54, leaving a balance in his favor of $72.41.

According to the finding of the Circuit Court this check in favor of the Domestic and Foreign Missionary Society was, to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from Holly's check to Thompson; and that court decreed against the Missionary Society in favor of the complainant for that amount. 85 Fed. Rep. 249.

Upon appeal the decree of the Circuit Court was reversed by the Circuit Court of Appeals for the Second Circuit, and the bill directed to be dismissed, (92 Fed. Rep. 745,) and thereupon the case was brought to this court by a writ of certiorari.

Mr. John G. Johnson for Holly. *Mr. Matthew Verner Simpson* and *Mr. Cephas Brainerd* were on his brief.

Mr. Julien T. Davies for the Missionary Society. *Mr. Herbert Barry* was on his brief.

MR. JUSTICE SHIRAS, after making the above statement, delivered the opinion of the court.

This is a case in which a court of equity is called upon to de-

cide upon which of two innocent parties is to fall a loss caused by the dishonesty of a third person. The relation that existed between Thompson and the Missionary Society was that of executor and legatee; between Thompson and Holly, that of attorney and client. As between themselves, Holly and the Missionary Society were absolute strangers.

Our examination of the pleadings and evidence fails to show any such dereliction of duty or supine negligence on the part of the Missionary Society in demanding and enforcing payment of the Saul legacy as would show, or even tend to show, that the society knew, or had reason to believe, that Thompson was insolvent, or had been guilty of any misappropriation of the property or funds of the Saul estate. It is true that the legacy was not paid as promptly as the society had reason to expect, but there was nothing unusual about such a delay.

The very fact that Rev. Dr. Saul had selected Thompson to be one of his executors authenticated him to the society as a trustworthy person, and while it is true that Rev. Mr. Watson, who was a co-executor, in letters answering inquiries by the secretary of the society in April and May, 1890, admitted that Thompson was dilatory in settling the estate, there was nothing to justify suspicion on the part of either Mr. Watson or of the society that there was anything wrong in Thompson's dealings with the estate. Accordingly we are fully satisfied that, when Thompson called upon the society at the New York office, on June 19, 1890, and paid the amount shown to be due the society by the account of the executors in the orphans' court of Philadelphia County, approved November 23, 1889, together with the additional sum of $650 received after and not included in the account, there was nothing, either in the previous transactions, or in the form of the payment by Thompson's check, to put the society upon notice, or to have justified the treasurer in refusing to accept the payment. When Thompson's check was paid the following day and the proceeds had gone into the bank account of the Missionary Society, the matter was fully closed between the executors of Saul's estate and the society.

Beyond this, we think the evidence fairly shows that the Missionary Society had appropriated and expended the money so

received, to the purposes appointed by the testator, before any notice was given of the complainant's claim. While such use and application of the money might not exonerate the society from liability, if they had received the money in circumstances that visited them with notice of Thompson's dishonest conduct towards Holly, yet if the money, received in good faith by the legatee, had actually and *bona fide* been applied and expended for the use of the beneficial purposes appointed in the will, without knowledge of Holly's claim, or, indeed, that such a man existed, we think a court of equity would refuse to hold the society as a trustee *ex maleficio*.

The learned Judge of the Circuit Court, speaking of this aspect of the case, does indeed say:

"Some suggestion is made that this was received as a charitable bequest, and so applied that it had gone beyond reach, and cannot be recovered. But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in the furtherance of its objects, nor that any of this particular money was applied to any of its purposes."

If this statement is to be understood to mean that the money, bank notes or specie, actually received on Thompson's check, was not immediately and in form applied to the beneficial purposes named in Saul's will, it may be true; indeed, it appears that the proceeds of Thompson's check were paid into the Bank of New York for general account of the Missionary Society, and that thus the identity of the bank notes or specie was lost in the credit account of the society in that bank. But it is not perceived that such a state of facts disabled the society from having the advantage of showing that money to an equal amount was appropriated and applied by them, out of their general account, to the purposes appointed by the testator. To demand that such a society should make special deposits of legacies received, so as to be able to trace the application of such deposits into the hands of beneficiaries in the same form as when received, would be, in the highest degree, unreasonable.

If, however, the meaning of the learned judge was that it did not distinctly appear that the Missionary Society had ap-

propriated and applied an amount of money equal to that received from the Saul estate to the purposes appointed in the will, before any notice was received of Holly's claim, we are constrained to decidedly dissent from such a view.

In the bill of complaint the defendants were explicitly called upon to answer under oath whether, and in what circumstances, they had received money from Thompson, and particularly whether such money had been received as coming from the estate of James Saul, deceased, and whether they had not received a letter from plaintiff's attorney, on or about July 17, 1890, notifying them that the moneys so received by the defendants through Thompson's check came from moneys belonging to Holly. To these allegations and interrogatories the defendants answered, denying any knowledge or belief on their part of the transactions between Thompson and Holly "until long after the receipt by defendants and expenditure of the $15,577.54 referred to; and these defendants, further answering, allege that at the time of the notification hereinbefore referred to and the receipt by the defendant society of the letter from plaintiff's attorney, these defendants had expended, in the usual course of their business and according to the will of the said Rev. James Saul, the said sum of $15,577.54."

To this portion of the answer the plaintiff filed exceptions for insufficiency, as follows:

"In not stating how the defendants have expended the $15,577.54, what the items of expenditure were and the respective dates of such items of expenditure, and how and in what respect the said moneys were expended according to the will of the Rev. James Saul, deceased, and what was the usual course of business of defendant's society in making said expenditure of said moneys, whether the same was expended by standing order or special resolution of the board of managers of the society defendant, or otherwise."

Thereupon the defendants, responding to these exceptions, filed a supplemental answer, as follows:

"These defendants, further answering, allege that the moneys received as aforesaid from Henry C. Thompson, executor, were expended by the defendant society for domestic missions,

foreign missions and for the benefit of colored people in the Southern, or formerly slave, States, for the support of schools and missions, through its officers, acting partly under the general direction of the board of managers and partly under a resolution of said board passed on the tenth day of June, 1890, authorizing the treasurer to apply such legacies as might be received before September 1, 1890, to the payment of appropriations to September 1, 1890—of which resolution a copy is hereto annexed and marked 'P.'"

The copy of the resolution was as follows:

"Resolved, that the treasurer be instructed to apply so much of the gross amount received from domestic and general legacies to September 1, 1890, as may be required toward the appropriations for corresponding work to same date."

It was also made to appear that, on June 20, 1890, the balance in bank to the credit of the Missionary Society was $43,569.83. On that day the balance was increased by the proceeds of Thompson's check $15,577.54 and other money to $60,110.09; and that, by checks drawn between June 20 and July 18, the day on which the letter of Holly's attorney was received, the sum of $88,589.74 was drawn out; aggregating more than the sum of Thompson's check and the balance on hand when it was received, and it was shown that these payments were on account of domestic, foreign and colored missions and office expenses.

It is true that, owing to further receipts between June 20 and July 18, 1890, there was a balance on hand in bank on the latter day, but those receipts were themselves trust funds, contributed and held for the charitable purposes of the society. It need scarcely be said that a court of equity will not interfere with the proper application of such funds by constraining the society to divert them to relieve Holly. This, of course, was not the case of a running account between debtor and creditor, where the general rule is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. Here there was no relation of debtor and creditor between the

Missionary Society and Holly, and the latter cannot be heard to complain of the application by the society of the money received from Thompson, executor, to the purposes prescribed by the testator, nor to demand that moneys subsequently received by the society from third persons for specific charitable purposes shall be used to indemnify him from loss occasioned by trusting his money with his attorney.

From the numerous cases cited we think it sufficient to refer to two or three which resemble in their facts the case in hand, and in which were laid down principles now applicable.

Stephens v. *Board of Education*, 79 N. Y. 183, was a case where one Gill, who was a member of the board of education of the city of Brooklyn, had converted to his own use the money of the board, and so became indebted to it in the amount thus subtracted. Gill forged a mortgage upon the land of another and sold it to Stephens, receiving from him the proceeds and depositing them to his own credit. He then drew a check for the amount of his debt to the board of education, and with it paid that debt in full. The court held that Stephens could not recover the money from the board, saying:

"It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payer. Money has no earmarks. The purchaser of a chattel or a chose in action may by inquiry in most cases ascertain the right of the persons from whom he takes the title; but it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests a title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. 'Money,' said Lord Mans-

field in *Miller* v. *Race*, 4 Burr. 452, 'shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business.' "

In *Hatch* v. *National Bank*, 147 N. Y. 184, the agent of Hatch procured a loan upon stock which he had fraudulently converted. He then with the money thus procured paid an antecedent debt which he owed to the bank. The court said:

"This doctrine goes upon the ground that money has no earmarks, that in general it cannot be identified as chattels may be, and that to permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money and a recovery if shown to have been dishonestly acquired, would disorganize all business operations, and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances."

In *State Bank* v. *United States*, 114 U. S. 401, it was held that where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and to replace it pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the money to the bank.

The case made out for the appellant Holly does not require extended notice.

Let it be conceded that he was not, in the circumstances, estopped from following his money into the hands of the Missionary Society, by having entered an attachment against Thompson for a fraudulent conversion of his money; let it also be conceded that, by trusting his money with Thompson, who had theretofore been his attorney, and whose standing in the community was good, he was not guilty of conduct so reckless and negligent as to, of itself, deprive him of a remedy; yet his case fails in the essential particular that he has not shown that the Missionary Society, in receiving from Thompson, executor, the

money due from the estate of Rev. Dr. Saul, and in applying it in accordance with the appointments in the will, acted with any notice or knowledge, actual or imputable, that Thompson was misapplying funds intrusted to him by a third person with whom the society had no relations whatever. As against the Missionary Society, Holly, in the circumstances disclosed, has no equities; and even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent.

The decree of the Circuit Court of Appeals of the Second Circuit is

Affirmed.

MR. JUSTICE BREWER did not hear the argument, or take part in the decision.

ROBINSON *v.* SOUTHERN NATIONAL BANK.

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

No. 137. Argued December 20, 21, 1900. — Decided February 25, 1901.

The State National Bank of Vernon, Texas, having become insolvent, Robinson was appointed receiver, and the Comptroller made an assessment upon the stock and its owners. This action was brought to recover such assessment from the Southern National Bank. One hundred and eighty shares of the stock so assessed were the property of one Curtis. His certificates were deposited with the Southern Bank as collateral, but the stock remained in his name, and so continued till the commencement of this suit. *Held*, that the case was not one in which the bank was estopped by having assumed an apparent ownership of the stock.

By the mere act of bidding in this stock at a nominal price, the Southern National Bank is not to be regarded as having subjected itself to liability as the real owner thereof.

As between the Southern National Bank and Curtis and Thomas, the bank is under no legal or equitable obligation to assume or answer for the assessment made by the Comptroller on the stock.

California Bank v. *Kennedy*, 167 U. S. 362, and *Concord Bank* v. *Hawkins*, 174 U. S. 364, followed; but this court is not disposed, at present, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, when they have accepted, and hold stock of other

corporations as collateral security for money advanced (which is not decided).

There is a presumption in such cases against any intention on the part of the lending bank to become an owner of the collateral shares.

THIS was an action brought in the Circuit Court of the United States for the Southern District of New York by Robinson, as receiver of the State National Bank of Vernon, Texas, a national banking association, against the Southern National Bank of New York, likewise a national banking association, to recover the amount of an assessment made by the Comptroller of the Currency upon the stock of the State National Bank, of which the defendant bank was alleged to be the owner of one hundred and eighty shares.

The principal facts out of which the controversy arose were as follows:

On January 20, 1893, one W. G. Curtis was the owner of one hundred and eighty shares of the capital stock of the State National Bank, of the par value of $100 each, and which stood in his name on the books of the bank, and for which he held the usual certificates. On that day one A. U. Thomas and the said Curtis borrowed from the Southern National Bank the sum of $15,000, for which they gave their promissory note, payable four months after date. The note recited that the makers of the note had "deposited with said bank as collateral security for the payment of this or any other liability or liabilities of ours to said bank now due or to become due, or that may be hereafter contracted, the following property, viz.: One hundred and eighty shares of the capital stock of the State National Bank of Vernon, as evidenced by certificate No. 97, 150 shares; certificate No. 98, 30 shares—the market value of which is now $18,000."

The note contained the usual powers to sell, in case of default in payment, the securities at public or private sale, with the right on the part of the bank to become the purchaser thereof at such sale.

The note was not paid when due, and on August 1, 1893, the defendant bank notified Curtis and Thomas by telegraph that the stock would be sold on the 8th day of August, 1893. On

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August 7, 1893, it advertised in the New York papers that the stock would be sold at noon of August 8, at the public exchange in New York. The sale took place at public auction, and the stock was struck off to the defendant for the sum of $20, the defendant being the highest bidder. The defendant then paid the auctioneer the said sum of $20, and afterwards received back from him that sum less his fees. That was the place where and the way in which sales of collateral to such notes were then made in New York.

The certificates of stock at that time remained in possession of the defendant bank, but the stock was not transferred to the defendant bank upon the books of the State National Bank, but continued to stand in the name of Curtis. The defendant bank never voted upon the stock, nor received any dividends thereon.

The State National Bank suspended payment on or before July 21, 1893, and was in possession of the United States bank examiner until September, 1893, when it resumed and continued business as usual, until August 18, 1894, when it finally closed, and the plaintiff Robinson was subsequently appointed receiver.

On August 10, 1893, the Southern National Bank of New York brought an action in the district court of Wilbarger County, Texas, against Curtis and Thomas, in which the complaint recited the fact of the sale of the collateral securities, and that the proceeds of the sale, to wit, twenty dollars, had been applied as a credit on said note, and demanded judgment for the balance of the note remaining unpaid, with interest and costs.

Subsequently, Curtis and Thomas answered, and, among other things, claimed that the Southern National Bank had taken the stock that had been placed with it as collateral by purchasing the same at the sale, that the said stock was worth the sum of $18,000 at the date of said sale, and the same so taken at said sale was in full satisfaction for said note.

They likewise filed a cross petition, in which they alleged that the sale by the Southern National Bank of the collateral stock was made improperly and in fraud of the defendants, and was a conversion of said stock to the use of said bank, which operated not merely to discharge the said note, but to give the defendants Curtis and Thomas a right to be compensated to

the extent of the difference between the amount due on the note and the amount of the value of the stock, which they averred to be $18,000.

In an amended petition the Southern National Bank traversed the allegations of the cross petition, denied that they had, in effect or by operation of law, taken said collateral stock in full satisfaction of said note, and alleged that said stock had always been in its possession as collateral, that it had always been ready and willing, and was ready and willing, to return to said Curtis the said stock upon payment of said note, and thereupon tendered to said defendants the said stock upon payment of said note.

Subsequently, and while these proceedings were pending, the defendants Curtis and Thomas proposed to the Southern National Bank that if the bank would credit them with the value of the stock at the rate of sixty cents on the dollar they would confess judgment for the balance, some five thousand dollars. This offer was made on August 7, 1894, and on August 9, 1894, the Southern National Bank, by letter and telegram, stated that this proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed, and thereupon the Southern National Bank declined to stand by the proposal of the defendants to confess a judgment if credited with the stock at the rate of sixty cents on the dollar.

Whereupon the defendants Curtis and Thomas filed a further plea, or statement by way of cross petition, setting up said proposition and acceptance as an accord and satisfaction, and tendering judgment accordingly for amount sued for upon credit of $10,800 being given them, and they prayed that said agreement should be carried out, and for general relief.

The case then came on for trial, and was submitted, on all questions of law, as well as of fact, to the court without the intervention of a jury. The court found that the Southern National Bank was entitled to recover on said note the sum of sixteen thousand two hundred dollars, principal and interest on the note sued on up to August 9, 1894, the time the agreement of compromise was entered into by and between the plaintiff and defendants; that under said agreement said defendants

were entitled to a credit of ten thousand eight hundred dollars; and that the plaintiff was entitled to recover from the defendants the sum of five thousand seven hundred and fifty-one dollars, with interest thereon from date, and decreed accordingly.

The plaintiff, the Southern National Bank, was thereupon allowed an appeal to the Court of Civil Appeals of the Second Supreme Judicial District of Texas.

In that court the judgment of the trial court was reversed, and in the opinion the following statement was made:

"Did the compromise agreement prevent the further prosecution of the suit? Its terms were quite brief.

"August 7, 1894, one M. J. Tompkins wired appellant: 'Thomas says will confess judgment if you will allow sixty cents for stock;' to which appellant replied by letter and telegram on August 9, 1894, among other things requesting Tompkins to say to Thomas that his proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed. Then it was that appellant, soon after learning of the failure, declined to stand to the agreement; and, through other counsel, employed about that time, sought to avoid it. When the agreement was made the court at Vernon, though not in open session, had not adjourned for the term, and the cause was continued to the next term, without any confession of judgment. When it finally came to trial the court held appellant to the agreement, and, upon the offer of Curtis and Thomas to comply with its terms, rendered judgment accordingly, deducting $10,800 from the sum due on the note, and giving judgment for the rest.

"It is clear that there had been no conversion of the stock, as alleged by Thomas and Curtis. The sale thereof was regular, and in accordance with the terms of the contract of hypothecation, and the court so held. Besides, appellant tendered the stock in court for Thomas and Curtis, thereby waiving its right as purchaser thereof. We then have the case of an agreement on the part of a creditor to accept a judgment by confession for a less sum than is due, which agreement the creditor withdraws, and takes steps to avoid, before it had been in any respect performed or acted on by the debtor. Upon the sole

ground of such agreement on the part of the creditor, and the tender of performance by the debtor, judgment for the full amount of the debt is denied. We cannot distinguish this from an ordinary case of accord without satisfaction. Tender of performance in such a case will not defeat the recovery claimed. It is manifest that the agreement was not intended to be taken in lieu of the note sued on, or any part thereof. It was the confession of judgment thereon that was to entitle Thomas and Curtis to the reduction, and not their agreement to confess judgment. It is not the case of a compromise entered into by which a pending suit is to go off the docket, and the parties look to the terms of the compromise as a substitute for the original contract and preëxisting status. . . . We therefore adopt the trial court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered."

In the case in the Circuit Court of the United States, the plaintiff having offered in evidence the record of the case in the state courts, also offered in evidence a certificate from the clerk of the district court of Wilbarger County, Texas, in the following terms:

"I, W. B. Townsend, clerk of the district court of Wilbarger County, Texas, do hereby certify that, in the case of the Southern National Bank of New York against W. G. Curtis and W. U. Thomas, No. 688 on the docket of the said district court, the plaintiff, on the trial of said cause, tendered into court and to the said defendants the certificates of stock issued by the State National Bank of Vernon to W. G. Curtis, numbered 97 and 98 respectively, the first being for one hundred and fifty shares of the capital stock of said bank, and the other for thirty shares of the capital stock of said bank, which certificates of stock were filed by the clerk of said court on the 8th day of August, 1895, and have ever since remained on file in said cause in said court, and are on file at this time; that they have never been taken away by said Curtis and Thomas, or either of them, and that Curtis and Thomas, nor any one acting for them or

either of them, have not taken said stock away, . . . and that said stock now remains on file in said district court of Wilbarger County, Texas, as appears of record in said cause."

The plaintiff having rested, the defendant put in evidence a certified copy of the decree rendered by the Court of Civil Appeals, containing, among other things, the following:

"It is the order of this court that the appellant, the Southern National Bank of New York, do have and recover of and from the appellees, W. G. Curtis and A. W. Thomas, the sum of fifteen thousand dollars, with six per cent interest thereon from the 20th day of January, 1893, together with all their costs in this behalf expended. And it further appearing to this court that the said W. G. Curtis and A. W. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the note sued hereon, it is further ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment as per the tender of the appellant, and that in default of such payment said stock be sold as under execution, and the proceeds applied to the payment of this judgment."

The defendant bank further put in evidence two letters, dated respectively February 15 and September 27, 1894, written by the cashier of the Southern National Bank to A. W. Thomas and to R. P. Elliot, attorney for Curtis and Thomas, in the following terms:

"Feb. 15th, 1894.

"A. U. Thomas, Esq.,

"210½ Main Street, Houston, Texas.

"Dear Sir: I beg to acknowledge the receipt of your letter of Feb. 8th, and to inform you that a copy of it will be forwarded to our counsel, Mr. H. C. Thompson, with the request that he will make known to us the proposition submitted to him by you. You can rest assured that when this is received it will have our closest attention.

"We never had any disposition to oppress you. All that we wanted and now want is the money owed us by Mr. Curtis and

yourself. When that is paid under the terms of your note the collaterals will be surrendered by us. We manifested in every proper way a disposition to help you, and it was only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at seventy-five or eighty cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our board to accept it. The litigation must necessarily be tedious, and loss must certainly come to both of us by reason of counsel fees, costs, etc.

"I shall be glad to hear further from you.

"Respectfully yours,

(Signed) "J. D. Abrahams, Cashier."

"New York, Sept. 27th, 1894.

"R. P. Elliot, Esq.,

"Attorney at Law, Vernon, Texas.

"Dear Sir: I have seen our counsel and shown him your letter of the 14th. He agrees that we ought to have a copy of the amended answer setting up an alleged compromise. As soon as that comes I will show it to him and get his opinion then.

"At present I may say in reply to your question 'What do you want with the stock?' that we do not want the stock and never have wanted it. We attempted to sell the stock here after default of payment of the note, as the terms of the note permitted us to do, but we virtually bid in the stock ourselves and retained possession of it. We informed our former attorney at Vernon, and tried to impress it upon him, that we did not wish the stock and would give the debtors every benefit from it, notwithstanding the attempted sale. If we could have held the stock against the debtors we would not have done so, and we testified to that effect in the depositions now on file in your courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the courts. If the stock turned out to be worth anything we would get the benefit of it to the extent of our claim, and any balance would belong to the debtor.

Statement of the Case.

"The fact is, our counsel here thought the attempted sale did nor amount to a sale, for the reason that no officer of the bank was present with the auctioneer and that we simply hold the stock as collateral, as we did before the attempted sale. We were perfectly willing that the matter should so stand in the court at Vernon. Our attorney there seemed desirous of having the stock sent on there to be foreclosed, notwithstanding the attempted sale here. We saw no use in that procedure, for if the sale here was not a sale we had full power, under the terms of the note, to make such a sale here as would be absolutely valid. We got our counsel here to prepare a brief on the subject, a copy of which was sent to our former attorney at Vernon. We have since sent a copy of it to you. You will see by the authorities there cited that we have ability to make a perfect sale of the property here without going to the expense of selling it under foreclosure proceedings in Texas. Moreover, our counsel advises us that he sees no use in making any sale of the stock at all. We are in just as good position in holding the stock as collateral as we would be by holding it by legal title. Upon reflection you will doubtless agree with us and our counsel here. We have not considered that we hold the stock under the alleged compromise, for no compromise was perfected.

"We would like to have you tell us what you think of that defence when you send us the amended answer containing it. We will then get our counsel here to give us his opinion.

"We knew nothing of the fact stated by you that Tompkins stood in with Thomas all the time. Do you think there was a conspiracy between Thomas and Tompkins to effect a compromise with us?

"As to whether the stock will be assessed, will depend upon the action taken by the Comptroller of the Currency. If the bank resumes, perhaps he will permit it to do so by reduction of capital without assessment. Nobody can form any opinion as to the probability of an assessment until it is known what action the Comptroller will take, and whether the directors of the bank will be able to meet his terms.

"Very truly yours,

(Signed) "J. D. Abrahams, Cashier."

The defendant bank then called as a witness Jesse D. Abrahams, who testified that he was cashier of the Southern National Bank of New York during the years 1893 and 1894; that he was familiar with the transactions connected with the loan to Curtis and Thomas upon the State National Bank of Vernon, Texas; that the stock was put up and sold at auction for the nominal sum of $20, and bid in by the bank; that it was never transferred on the books of the State National Bank; and, under objection and exception by the plaintiff's counsel, the witness further testified that, at the time of the sale of the collateral security and its nominal purchase by the defendant bank, it was not the intention of the officers of the bank to take title adversely to the pledgors, but that the purpose of the sale was to make it the introduction to the suit for the amount due on the note.

The plaintiff then asked the court to direct a verdict for the plaintiff, which the court refused to do, and plaintiff excepted. The plaintiff then asked to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint, which the court refused, and plaintiff excepted. The plaintiff then asked to go to the jury on the issues in the action, which the court refused, and plaintiff excepted.

In obedience to the direction of the court the jury then rendered a verdict for the defendant, and plaintiff excepted.

The case was then taken to the United States Circuit Court of Appeals for the Second Circuit, and the judgment of the Circuit Court was affirmed. 94 Fed. Rep. 964. A writ of error by the direction of the Comptroller of the Currency was then allowed, and the case brought to this court.

Mr. Chase Mellen for plaintiff in error.

Mr. William B. Hornblower for defendant in error.

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

By section 5139 of the Revised Statutes of the United States,

it is provided that the capital stock of banking associations shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; that every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and that no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.

By section 5151 it is provided that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and by section 5234 the Comptroller of the Currency is authorized to appoint a receiver of an insolvent national bank, who shall, if necessary to pay the debts of such association, enforce the individual liability of the stockholders.

In the present case the State National Bank of Vernon, Texas, having become insolvent, Robinson, the plaintiff in error, was appointed receiver thereof on September 24, 1894; on February 1, 1895, the Comptroller made an assessment upon the capital stock and the owners of the same equal to the par value of the stock; and on October 26, 1898, the receiver brought an action in the Circuit Court of the United States for the Southern District of New York against the Southern National Bank of New York as an alleged shareholder liable to pay its proportionate share of such assessment.

The reported decisions show that there are two classes of cases of this character—one, wherein the liability has been enforced against a party defendant in whose name the stock was registered on the books of the bank, regardless of the question whether he was, in point of fact, the owner of said stock; and the other, where the liability has been enforced against the real owner of the stock, although the stock stood registered on the books in the name of a third person.

In the former class, the liability is said to be created by the act of the party in whose name the stock is registered, in holding himself out as a stockholder, and thus inviting others to deal with the bank and become creditors, relying on the reputation and financial strength of the nominal stockholders.

Cases are also to be found in the books where transfers, made by shareholders in anticipation of a bank's insolvency, to irresponsible persons, have been held to be a fraud on the statute, and inefficacious to relieve the original holder from liability. *Bowden* v. *Johnson*, 107 U. S. 251; *Richmond* v. *Irons*, 121 U. S. 27; *Pauly* v. *State Loan Co.*, 165 U. S. 619; *Matteson* v. *Dent*, 176 U. S. 521.

The conceded facts in the case are that the one hundred and eighty shares of the stock embraced in the assessment were the property of W. G. Curtis, in whose name they were registered on the books of the bank, and who held the certificates therefor; that the certificates were deposited with the defendant bank as collateral; but that the stock remained in the name of Curtis, and so continued to be at the time of the bringing of this suit. It, therefore, follows that the case is not one in which the defendant bank is estopped by having assumed an apparent ownership of the stock.

The important inquiry is whether, by the mere act of bidding in the stock at a nominal price, the Southern National Bank of New York must be regarded as having subjected itself to liability as the real owner thereof.

The facts to be considered in connection with this question are as follows:

On January 20, 1893, Curtis and Thomas borrowed from the Southern National Bank of New York the sum of $15,000, giving therefor their joint note for that amount, payable four months after date, and as collateral security, two certificates for one hundred and eighty shares of the capital stock of the State National Bank of Vernon, standing in the name of Curtis. The note was not paid at maturity. On July 21, 1893, the State National Bank suspended, and was in possession of the United States bank examiner from that date until September 14, 1893, when it reopened for business and continued to

transact business as usual until August 18, 1894, when it finally suspended. The fact of such suspension and that the bank examiner was in charge was known to the Southern National Bank on July 26, 1893.

On August 1, 1893, the defendant bank notified Curtis and Thomas by telegraph that the stock would be sold on August 8, 1893, and it was so sold. On August 10, 1893, the Southern National Bank brought suit against Curtis and Thomas in the district court of Wilbarger County, Texas. Curtis and Thomas filed pleas, and also a cross petition, averring that the sale by defendant bank of the stock pledged was not made in pursuance of the powers granted in the written pledge and was a fraud of the rights of the defendants; that by reason of said fraudulent sale the defendants had suffered damage to the amount of fifteen thousand dollars, which they asked to be set off against the note sued on, and also that it should be adjudged that they had a right to recover the difference between the amount of the note and the value of the pledged stock, etc.

Subsequently Curtis and Thomas filed an additional plea or statement by way of cross petition, in which they allege that since the filing of their first cross petition the Southern National Bank had agreed to credit them with the amount of $10,800 for the stock at the rate of sixty cents on the dollar, and that, in consideration thereof, they, Curtis and Thomas, had agreed to confess judgment for the balance due on the note, which they averred they were willing and ready to do.

In and by amended petitions the Southern National Bank claimed that the said bank stock had been, at all times since the execution and delivery of the note sued on, in its possession and under its control, and that it had always been ready and willing to return said bank stock upon payment of said note, and tendered in open court said bank stock upon payment of said note. At the trial in the district court of Wilbarger County that court held that the alleged agreement by the Southern National Bank to credit the defendants with the stock at the rate of sixty cents on the dollar was binding, and entered judgment accordingly in favor of the Southern National Bank in the sum of $5751. On appeal by the Southern

National Bank to the Court of Civil Appeals of Texas, the judgment of the district court was reversed, and judgment was entered in favor of the bank for the full amount claimed, and decreeing the bank stock to Curtis and Thomas as tendered. A portion of said decree was in the following terms:

"And it further appearing to the court that the said W. G. Curtis and A. W. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the notes sued hereon, it is therefore ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment, as per the tender of the appellant, and that in default of such payment said stock be sold as under execution, and the proceeds applied to the payment of this judgment."

It further appears that said certificates of stock remain on file in the said district court of Wilbarger County, not having been taken away by said Curtis and Thomas.

It has therefore been finally adjudicated between the Southern National Bank and Curtis and Thomas that there had been no conversion of the stock as alleged, and that the Southern National Bank, having waived its right as purchaser thereof, the stock has been decreed to be the property of Curtis and Thomas, subject to the payment by them of the judgment in favor of the bank. As between those parties, then, it cannot be pretended that the Southern Bank is under any legal or equitable obligation to Curtis and Thomas to assume or answer for the assessment made by the Comptroller on the stock. Having denied the validity of the auction sale, and forced an issue on that question, they cannot now, after a decision in their favor as respects the ownership of the stock, be heard to allege that the stock is really owned by the Southern National Bank, and that Curtis has been released from his liability as a shareholder.

If this be so, what foundation is there on which to base a recovery against the Southern National Bank in favor of the receiver of the State National Bank?

It is admitted that Curtis has always been and is liable as the

registered owner of the stock; that, at no time, nor in any way, has the Southern National Bank held itself out to the State National Bank, or to its creditors, as a shareholder therein; and it is admitted that the Southern National Bank never received dividends and never voted on said stock.

It was held in *Pauly* v. *State Loan & Trust Company*, 165 U. S. 606, that where stock was transferred in pledge, and the pledgee, for the purpose of protecting his contract, caused the stock to be put in his name on the books as pledgee, such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so. When, therefore, it was decided, in the suit on the note, that the bank did not, by bidding in the stock at the auction sale for a nominal price, cease to be the pledgee, and that the stock remained the property of Curtis, how can it be said that the receiver, as respects that question, is in any better position? It may be said, indeed, that he was not a party to that suit, and is therefore not bound by the judgment; and it may be conceded that there might be cases where, by reason of fraud or collusion between the nominal shareholder and the real owner, the receiver would not be precluded, but might maintain his suit independently.

But, plainly, this is no such case. Indeed, the record of the Texas suit was put in evidence by the receiver, the plaintiff in error, and there is no effort to impeach the good faith of the bank in bringing that suit or in tendering the stock, nor can any objection be made to the soundness of the conclusions reached by the Court of Civil Appeals.

This court has held in *California Bank* v. *Kennedy*, 167 U. S. 362, and *Concord National Bank* v. *Hawkins*, 174 U. S. 364, that it is not competent for national banking associations to invest any portion of their capital permanently in the stock of another corporation, and that they are not estopped from setting up such want of power against suits to enforce liability for assessments made by the Comptroller of the Currency. While not disposed, as at present advised, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, where they have accepted and hold stock of other corporations as collateral security for money advanced,

(a proposition which we withhold from decision,) we think there is a presumption in such cases against any intention on the part of the lending bank to become an owner of the collateral shares. This was the view taken in the case of *Frater, Receiver*, v. *Old Nat. Bank of Providence*, 86 Fed. Rep. 1006, and 103 Fed. Rep. 391, where it was held, after full consideration, that it is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national bank stock, instead of the owner, upon whom the legal obligation rests; and that where stock stood upon the books of a bank in the name of a person as cashier of another national bank, the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.

Exception was taken in the Circuit Court to a question allowed to be put to the cashier of the defendant bank, whether at the time of the sale of the collateral security, and at the time of the nominal purchase for $20, it was the intention of the officers of the bank to take title adversely to the pledgors?

Whether it was competent to get at the intention of the bank officers in bidding in this stock at a nominal price, by examining one of such officers, might not be clear, if this were a contest between pledgor and pledgee. But that question was, as between them, closed by the record in the Texas suit.

In the present case the question was an immaterial one, particularly as the case was not submitted to the jury, and as the other undisputed facts of the case showed that, as matter of law, the Southern National Bank was not, in any proper sense, the real owner of the stock. We agree with the courts below in thinking that the pledgee was at liberty to waive the nominal title thus acquired and to notify the pledgors, as it did, that it still held the stock merely as collateral. We think that it is clear that the transaction, as it is admitted to have occurred, did not deceive or injure the insolvent bank or its creditors.

The judgment of the Circuit Court of Appeals is

Affirmed.

McDONALD v. MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Submitted January 25, 1901.—Decided February 25, 1901.

The statute of Massachusetts of 1887, c. 435, by which "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years," is constitutional.

THE case is stated in the opinion.

Mr. Francis P. Murphy for plaintiff in error.

Mr. Hosea M. Knowlton and *Mr. Arthur W. DeGoosh* for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

The plaintiff in error was indicted at August term, 1898, of the Superior Court in the county of Suffolk and State of Massachusetts, on the statute of Massachusetts, of 1887, chapter 435, section 1, by which "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years: provided, however, that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act."

Section 2 provides that when it appears to the Governor and Council that the convict has reformed, they may release him conditionally from the rest of his sentence.

The indictment contained four counts, two charging the defendant with forging an order for money, and two with uttering as true a forged order for money; and further alleged that in April, 1890, he had been convicted in Massachusetts of perjury, and therefor sentenced and committed to the State prison for three years; and also in January, 1894, had been convicted in New Hampshire of obtaining property by false pretences, and therefor sentenced and committed to the State prison for four years.

The defendant pleaded not guilty, and was tried by a jury, who returned a verdict that he was guilty of the whole indictment; and the court thereupon adjudged him to be an habitual criminal, and sentenced him to be punished by imprisonment in the State prison for the term of twenty-five years.

The defendant sued out a writ of error from the Supreme Judicial Court of Massachusetts, which affirmed the judgment. 173 Mass. 322. He then sued out this writ of error from this court to the Superior Court, in which the record remains.

The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another State, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the statute of 1827, c. 118, § 19, and by the Revised Statutes of 1836,

c. 133, § 13. It is within the discretion of the legislature of the State to treat former imprisonment in another State, as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not *ex post facto*. It affects alike all persons similarly situated, and therefore does not deprive any one of the equal protection of the laws. *Moore* v. *Missouri*, 159 U. S. 673; *Ross's Case*, 2 Pick. 165; *Commonwealth* v. *Graves*, 155 Mass. 163; *Sturtevant* v. *Commonwealth*, 158 Mass. 598; *Commonwealth* v. *Richardson*, 175 Mass. 202.

The statute does not impair the right of trial by jury, or put the accused twice in jeopardy for the same offence, or impose a cruel or unusual punishment. There is therefore no occasion to consider whether any of the provisions of the Constitution of the United States on these points can apply to the courts of the several States. *In re Kemmler*, 136 U. S. 436; *Brown* v. *New Jersey*, 175 U. S. 172; *Maxwell* v. *Dow*, 176 U. S. 581.

The suggestion of misjoinder of counts in the indictment, and the objection that instructions on the habitual criminal charge were first given by the court to the jury after they had said that the defendant was guilty of the specific offences charged, present no Federal question.

Judgment affirmed.

MARX *v.* EBNER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 126. Argued January 22, 1901. — Decided February 25, 1901.

Under section 56 of the Oregon Code referred to in the opinion of the court as in force in the District of Alaska, when an affidavit shows that the defendant is a non-resident of the district, and that personal service cannot be made upon him, and the marshal or other public officer to whom the summons was delivered returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question of foreclosure of a mortgage on real estate of the defendant situated in that district.

In such a case facts must appear from which it will be a just and reasonable inference that the defendant could not, after due diligence, be found, and that due diligence has been exercised; and such an inference is reasonable when proof is made that the defendant is a non-resident of the State, Territory or district, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal to the effect of the one which appears in this case.

THE appellant has appealed from a judgment of the District Court of the United States for the District of Alaska dismissing his complaint. Both parties claim the property in dispute from a common source of title, which is the Takou Mining and Milling Company. The property consists of mining land in the Territory of Alaska, of which the defendants are in possession, and they claim title through a sale under a decree of foreclosure of a mortgage of the property by the Takou Company, which mortgage was executed at a time when the company was the owner of the property.

After the execution of the mortgage the company conveyed some, but not all, of the property covered by it to one Sylvester Farrell, subject to the mortgage, and after the foreclosure and sale under the mortgage Farrell and wife and the Takou Company sold and conveyed all of the property to the plaintiff, who claims to own the same subject to whatever may be

due on the mortgage. He contends that the foreclosure proceedings under which the defendants claim title to the property were totally void, because the court in which they were conducted never obtained jurisdiction by valid service of process on the mortgagor company or upon Farrell. The facts upon which the allegation of a lack of jurisdiction was based are set out in full in the complaint, and the plaintiff asks that the defendants be decreed to be mortgagees in possession; that an accounting may be had to ascertain the exact amount due on the mortgage, which is alleged to be about $1000, and that the defendants vacate the property and surrender the possession thereof to the plaintiff, and that the pretended decree of foreclosure be annulled.

The defendants demurred to the complaint, the court sustained it, and upon the plaintiff refusing to amend, a decree was entered finally dismissing his complaint, and from that decree he has appealed to this court.

Mr. Scott Beebe for appellant.

Mr. Henry E. Davis for appellees. *Mr. William W. Dudley*, *Mr. L. T. Michener* and *Mr. R. A. Friedrich* were on his brief.

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

Counsel for the appellant admits that if the foreclosure proceedings operated to pass the title to the property mortgaged, this decree must be affirmed. He contends, however, that it appears on the face of the complaint that there was a want of jurisdiction in the court to render any judgment whatever in the foreclosure action, and that hence no title was conveyed to the defendants by virtue of the foreclosure decree and the sale thereunder. The record of the foreclosure action is set out in the complaint, and the ground upon which the allegation of a lack of jurisdiction is founded is the alleged defective character of the proof of the service of process by publication.

Section 56 of the code under which this service was made reads as follows:

"When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the State, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or justice of the peace, in an action in a justice's court; and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this State, the court or judge thereof, or a justice of the peace in an action in a justice's court, shall grant an order that the service be made by publication of a summons in either of the following cases."

Here follows a list of the cases in which an order for publication may be made, and it is not disputed that the case of the foreclosure of a mortgage of land within the Territory was one in which such publication could be ordered.

From the record in the foreclosure action it appears that process was issued to the marshal in Alaska on the 21st of December, 1893, and that it was returned by him to the clerk's office January 2, 1894, with the following indorsement by him:

"United States of America, } ss:
District of Alaska, }

"I hereby certify that the within summons came into my hands for service on the 22d day of December, 1893, and that after due and diligent search neither of the within-named defendants nor their agents could be found within this district.

"Dated at Juneau, Alaska, this 2d day of January, 1894."

With such summons and the return made thereon by the marshal was an affidavit made by the attorney for the plaintiff, which, among other things, stated that the defendant, the Takou Mining and Milling Company, was a foreign corporation organized and existing under the laws of the State of Oregon, and that the defendant Farrell was not a resident of the District of Alaska, but resided in the city of Portland in the State of Oregon; that the defendant corporation was the mortgagor, and that Farrell purchased from the mortgagor some of the property subsequent to the execution of the mortgage.

It also appeared from the affidavit that no officer of the de-

fendant corporation resided within the District of Alaska, and that the corporation had no managing agent or representative within that district; that the post office address of its president was No. 246 Washington street, Portland, Oregon, and that Portland, Oregon, was also the post office address of the defendant Farrell; that the summons was duly issued out of the court to the United States marshal for the District of Alaska, with directions to the marshal to serve the same upon the defendants; that personal service of the summons could not be made on the defendants, and the plaintiff therefore asked an order that the service of the same might be made by publication. Upon this proof an order was made by the judge of the court, which, after reciting that it satisfactorily appeared to him that the defendants resided out of the district and could not, after due diligence, be found therein, directed the publication of the summons in a newspaper published at Juneau, Alaska, at least once a week for eight weeks. The order was dated January—, 1894, and signed by the judge. The summons was thereafter published as required by the order and a copy of the complaint was sent by mail to each of the defendants at their post office address, as directed, and as the defendants did not appear, judgment of foreclosure and sale was given, and under the decree the premises were sold and the defendants have the title which passed by the sale. The objection is made by the appellant that there was no sufficient proof that the defendants, after due diligence, could not be found, and therefore the court ordering the publication had no jurisdiction to make the order; that the simple statement of the marshal that defendants could not be found after due and diligent search was no proof that any such search had been made, and that it was necessary to show what had been done in the way of searching for defendants, so that the court could itself judge whether due diligence had been exercised. Taking the return of the officer, with the other facts proved, we think this contention not well founded.

As to the case of the corporation, it appeared that it was a foreign corporation organized under the laws of Oregon, that none of its officers resided within the District of Alaska, and that it had no managing agent or representative therein, and

that its president resided in Portland, Oregon. There is also a distinct allegation in the affidavit of the attorney for the plaintiff, used to procure the order for publication, that the defendant Farrell was not a resident of the District of Alaska at the time of the making of the affidavit, and that he resided in the city of Portland, in the State of Oregon, and that personal service of the summons could not be made on him, and then there is the return of the marshal stating that the summons came into his hands on December 22, 1893, and that after due and diligent search neither of the defendants or their agents could be found within the district, and that certificate was dated January 2, 1894.

We think on these facts there was sufficient proof to give the judge jurisdiction to determine the question before him, and consequently his order for publication was valid. The order was not alone based on the statement that the defendants could not after due and diligent search be found, but there were the other facts showing the non-residence of both parties; that there was no managing agent or representative of the corporation defendant within the district; and that neither could be personally served with process therein.

The cases referred to by the appellant are not opposed to these views. There is nothing to the contrary in *McCracken* v. *Flanagan*, 127 N. Y. 493, cited by the appellant. At the time of that decision, section 135 of the Code of Procedure of that State provided that where the person on whom the service of summons is to be made cannot after due diligence be found within the State, and that fact appears to the satisfaction of the court or a judge thereof, etc., an order for publication may be made in the cases mentioned. The affidavit which in the above case was held insufficient stated "that defendant is a non-resident of this State nor can be found therein," leaving out the statutory words "after due diligence," and for want of those words, or of language substantially like them, the affidavit was held fatally defective, no proof of any effort to serve being given.

The case of *Kennedy* v. *New York Life Insurance &c. Company*, 101 N. Y. 487, was cited in the opinion, and the affidavit

in that case stated that the defendants "cannot after due diligence be found within this State," and that they were residents of other States named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." This affidavit was held to be sufficient, and the court said: "The statement as to due diligence is not absolutely an allegation of a conclusion of law or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used."

In *McDonald* v. *Cooper*, 32 Fed. Rep. 745, the Circuit Court of the District of Oregon held that the affidavit to obtain the order for publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the State after due diligence, and the mere assertion of the fact was insufficient, but it was also held that a statement of the facts as to the residence and actual abode of the defendant, which shows beyond a peradventure that a search for him within the State would be unavailing, is sufficient. "Beyond a peradventure" is stronger language than is necessary. It is seldom that such certainty of proof is possible.

We think where the affidavit shows that the defendant is a non-resident of the district and that personal service cannot be made upon him, and the marshal or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. It is not to be expected that positive proof that the defendant cannot be found within the State or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the State, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is, too, some presumption that the public officer who has received

the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of official duty.

Within this rule the proof in this case was enough to give jurisdiction to the judge who granted the order to decide the question.

We have not overlooked the other objections made by the appellant relating to the invalidity of the decree, but we do not regard it necessary to notice them further than to say that we think they are not well founded.

The judgment of the court below is, therefore,

Affirmed.

NEW ORLEANS DEBENTURE REDEMPTION COMPANY *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 129. Argued December 13, 14, 1900. — Decided February 25, 1901.

For the purpose of procuring a decree enjoining a corporation from acting as such on the ground of the nullity of its organization, it is not necessary that the individual corporators or officers of the company be made defendants, and process be served upon them as such; but the State by which the corporate authority was granted is the proper party to bring such an action through its proper officer, and it is well brought when brought against the corporation alone.

The State has the right to determine, through its courts, whether the conditions upon which a charter was granted to a corporation have been complied with.

THIS is a writ of error to the Supreme Court of the State of Louisiana, brought for the purpose of reviewing a judgment of that court affirming a judgment of the Civil District Court for the parish of Orleans, decreeing the charter of the corporation plaintiff in error, under color of which it claimed corporate

existence, to be null, void and of no effect. The suit was in the nature of a *quo warranto*. The attorney general of Louisiana, pursuant to statute, filed a petition in the trial court against the New Orleans Debenture Redemption Company of Louisiana, Limited, as sole defendant, and in that petition alleged that the defendant was not organized for any purpose for which the law authorized the formation of corporations in the State of Louisiana; that it was a debenture company formed for the sole purpose of selling or borrowing money upon its own obligations or debentures, to be paid for in monthly instalments, the company binding itself to pay the holders of debentures a profit of fifty per cent upon the amount invested. A description of the manner in which the business was to be conducted was given in the petition, and it was alleged that the whole system amounted to a mere gambling venture, demoralizing as such, and was unlawful. It is also alleged that the company in its modes of organization had not complied with the requirements prescribed for corporations of any of the classes authorized by law, and that the act (No. 36 of the Laws of 1888), under which it claimed to have been incorporated did not authorize the business which the company was doing. It was also alleged that the company and its officers, agents, managers, directors and stockholders were unlawfully exercising a corporate franchise, and were acting as a corporation in the State without having been legally incorporated, and in violation of law, and that the public interest and common justice required that the company be enjoined from declaring forfeited or lapsed the rights of any debenture holder who did not continue paying his monthly instalments during the pendency of the suit, and the prayer was that the affairs of the company be liquidated according to law under the direction of the court for the common benefit of all creditors and other persons interested according to their respective rights. The attorney general further prayed that if it should be held that the organization of the company was authorized by law, that then the charter be forfeited on account of the subsequent violation of law by the company in not insisting upon cash in payment for its shares of stock. A preliminary injunction was asked and granted, enjoining the

defendant from forfeiting or declaring lapsed the rights of any debenture holder during the pendency of the suit. This preliminary injunction was, upon an order to show cause, subsequently dissolved.

Process was served upon the president of the company in accordance with its charter. The defendant appeared and filed "peremptory exceptions to the petition, founded on law," which were overruled by the court. The defendant thereupon answered denying the material allegations in the complaint, and alleging that it was a duly and legally constituted private corporation, organized in conformity with the laws of the State, and expressly authorized by act No. 36 of the Laws of the year 1888, for the pursuit of the private enterprise and purposes set forth in its charter, and that stock had been issued to the extent of $50,000 and paid for to it, and that in doing business it had made many legal contracts which were outstanding, and that its debenture holders wished the company to keep on doing business, and it denied any gambling or wagering feature in connection with its contracts.

By supplemental answer it alleged that the purpose of the suit was to deprive the defendant, a duly and legally organized corporation under the laws of the State, of the legal right to engage in or pursue its business in any manner, and that the suit as instituted and prosecuted had for its object one which was in violation of the constitution of the State of Louisiana and of the Constitution and laws of the United States, in that it deprived the defendant of its property without due process of law, and denied to it the equal protection of the laws of the State of Louisiana and of the United States, and that it violated the laws of the United States in that the purpose of the suit was to deprive the defendant of its lawful right to pursue a lawful business, and was an unlawful discrimination against the defendant and a denial to it of the equal protection of the laws in the pursuit of its business.

The parties went to trial and evidence was given in support of the petition as to the character of the business, and also that the stock which had been issued by the defendant to shareholders had not in fact been paid for in cash as required by the

statute. The charter was put in evidence, from which, together with testimony taken in the case, it appeared that in all probability the company would be unable to perform its contracts with those who remained debenture holders until the maturity of their debentures, without the benefit which the company was to receive from lapses and forfeitures on the part of other debenture holders, resulting in a forfeiture to the company of all prior payments made by such holders. Ability to pay was even then claimed to be a matter of great doubt. It was stated by the trial court that with fair management and in the five years of its existence the company had more liabilities than assets. Much evidence was given on the trial of the case for the purpose of showing the general character of the business transacted by the company, and that it was, as alleged in the petition, of a gambling nature, and hence against the public policy of the State, and illegal.

There was no contradictory evidence on the trial regarding the facts as to the manner and plan of conducting the business of the defendant. Whether that business as thus conducted by it as a corporation and under its charter was or was not illegal, became a simple question of law. The trial judge held in favor of the State, deciding that the business done by the defendant was an unlawful business, not permitted to be pursued by any corporation, and that defendant was illegally doing business as a corporation, and decreed that the pretended charter under color of which the defendant claimed corporate existence was null and of no effect. A decree was thereupon entered adjudging that the president, secretary and general manager, as also the agents, directors, stockholders and members of the so-called corporation, were and had ever been without legal authority to act in a corporate capacity in the name of the defendant or under color of its pretended charter. It was also decreed that the injunction theretofore issued prohibiting and restraining the company, its officers, directors, agents and representatives, from removing the assets and funds of the company from the State or beyond the jurisdiction of the court, and from receiving any money or instalments from its debenture holders, and from paying out any money on surrenders or withdrawals, or in redemp-

tion of debentures, and from making loans on and from forfeiting any of said debentures, or the rights of any of the holders thereof, should be and was thereby confirmed and made absolute, and the company and its officers, representatives and members were perpetually enjoined and restrained from acting in a corporate capacity.

A motion for a new trial was made and the constitutional objections again advanced, but the motion was denied.

After the entry of the final decree and the denial of the motion for a new trial, one August M. Benedict, a resident of the parish of Orleans, presented his petition to the trial court, in which he alleged that he had been appointed by the Governor of the State the liquidator of the defendant, after the Governor had been officially informed of the judgment rendered by the court, and he asked to be recognized as such liquidator. The trial court upon the presentation of the petition, with the annexed commission of the Governor, made an order recognizing Benedict as liquidator upon his taking oath and furnishing bond in the sum of $10,000; the court further ordered that the officers of the defendant transfer and turn over to the liquidator all the assets, books and other property of whatever nature or kind belonging to the defendant corporation. The liquidator duly filed his bond, which was approved, and letters were granted him by the judge of the trial court. Thereupon the defendant corporation prayed for a suspensive and devolutive appeal to the Supreme Court, which was granted. Upon the same day a petition under the Louisiana practice was duly presented by the individual stockholders and the board of directors of the company to the court for leave to intervene in the suit, and in the petition they alleged the giving of judgment in the case against the company, which was the sole defendant therein, and that none of the individual incorporators or other persons interested were ever in any manner made parties to the suit, and that the sole issue in the suit was in regard to the legality of the business done by the company and the legality and validity of the charter adopted and executed by the corporators, and they represented that the right to be a corporation or the right to legal existence as such was not a franchise of the corpora-

Counsel for Parties.

tion itself, but belonged to the corporators solely and exclusively. The petitioners further represented that they and each of them felt aggrieved by the judgment and by the injunction which had been issued and by the order for the appointment of a liquidator, and the order for the transfer of the property to his possession, all of which they alleged had been highly prejudicial to their legal rights, and they therefore asked to intervene in the cause for the purpose of taking and prosecuting an appeal, devolutive and suspensive, from the final judgment, and from all orders, decrees or proceedings had in the cause, including the order and proceedings under the writ of injunction therein ordered or issued, and including all orders, decrees and proceedings made or had therein for the appointment of a receiver or liquidator for said company, to the end that on said appeal they might be enabled to be heard and to obtain a reversal of all such proceedings.

Service of the petition was made on the attorney general, who accepted the same, waived citation, and acquiesced in the order granting the petitioners leave as asked for. Thereupon the directors and stockholders duly appealed to the Supreme Court from the final judgment and also from the various orders in regard to the liquidator. All of these appeals were heard in the Supreme Court and the decree of the court below was affirmed, but the separate appeal taken by the shareholders from the order recognizing Benedict as liquidator under the Governor's appointment was sustained, reserving to the State of Louisiana and all other parties in interest the question whether the appointment of a liquidator lies with the Governor, or of a receiver with the court, or with the parties in interest; such question to be thereafter determined by the court below as an open question. The company and the stockholders sued out writs of error to bring up the final decree of the state court for review.

Mr. J. F. Pierson for plaintiff in error.

Mr. Frank E. Rainold for defendant in error. *Mr. Walter Guion* and *Mr. Milton J. Cunningham* were on his brief.

MR. JUSTICE PECKHAM, after stating the foregoing facts, delivered the opinion of the court.

This suit was brought against the defendant corporation alone, to obtain, among other things, a decree enjoining the company and its officers from acting as a corporation on the ground that its alleged charter was a nullity. It was also brought to forfeit the charter in case it should be held that it had been legally organized, and such forfeiture was prayed on the ground that the company had violated the law by not receiving cash on payment of its shares.

It is now claimed that the company defendant could not properly have been made a sole defendant in an action to declare null its charter to be a corporation, and that therefore a decree in such suit declaring the company not to be a corporation (while making no decree upon the question of a violation of the charter by not taking payment for its stock in cash) condemns the corporators and takes away their property without a hearing from them and is not due process of law, they claiming that the franchise to be a corporation was their property exclusively and did not belong to the corporation as such.

It is also asserted that the State was not rightfully or properly a plaintiff in the suit, and that the institution of the suit in the name of the State was without authority of law and was therefore null and void, and did not constitute due process of law. What is meant by this latter claim is stated by the plaintiff in error as follows:

"We do not wish to be understood as dissenting from the doctrine of the plenary power of the State over the subject-matter of creating or authorizing such corporations, and we concede that her power to grant or withhold charters, as well as to grant or withhold authority to others, to constitute such corporations is unlimited. What we here insist is, that where the State has acted through her legislature and authorized the organization of the corporation, and such corporation has been constituted under her authority, that, in common with other persons, it cannot, after its creation, be denied the common right to pursue any lawful business or enterprise not inconsist-

ent with the objects and purposes of its creation; and that is precisely what the State is attempting by this suit to do in relation to the company, plaintiff in error, in this cause."

The first inquiry which presents itself is as to whether it was proper and legal to make the company alone a defendant, and as to the sufficiency of the means by which it was brought into court in an action where the relief sought was to declare the pretended charter of the company a nullity from the beginning, and where an injunction was sought to prevent the further action of the defendant corporation.

The company claimed as a fact to be organized under the act No. 36 of the Laws of Louisiana of 1888. The first and third sections of the act read as follows:

"SEC. 1. That it shall be lawful for any number of persons, not less than three, upon complying with the provisions of the laws of this State governing corporations in general, to form themselves into and constitute a corporation for the purpose of carrying on any lawful business or enterprise, not otherwise specially provided for, and not inconsistent with the constitution and laws of this State, . . . provided, no such corporation shall engage in stock jobbing of any kind."

"SEC. 3. That no stockholder of such corporation shall ever be held liable or responsible for the contracts or defaults of such corporations in any further sum than the unpaid balance due to the company on the shares owned by him."

In the answer of the company it is alleged that it was organized by the authority of this statute and that it duly filed its articles of association, stating therein at large the character of its business. It was provided in that charter that all legal process should be served upon the president of the company. The evidence showed that the company in fact did business under its charter and amendments for several years as a corporation, and claimed to be legally organized as such. It also appeared from the evidence that its stock was subscribed for by various individuals, and was issued to such subscribers or their assigns. It also issued its debentures and did business in accordance with the charter, and, as claimed, under and by the authority of the act of the legislature above mentioned. It made contracts and

it elected officers who thereafter acted as such and assumed to represent the company as a corporation doing business under the laws of the State. It was thus a *de facto* corporation, and those who contracted with it as such could not set up as a defence, when sued by it upon those contracts, that it was not a corporation or that its organization was a nullity. None but the State could call its existence in question. *Chubb* v. *Upton*, 95 U. S. 665; *Baltimore & Potomac Railroad Company* v. *Fifth Baptist Church*, 137 U. S. 568, 571. The Supreme Court of Louisiana, in this case, holds that by the laws of that State the defendant as a *de facto* corporation was properly brought into court by the service of process on its acting president. The State can therefore treat this *de facto* corporation as such, for the purpose of calling it into court and asking for a decree enjoining it from acting as a corporation, on the ground of the nullity of the organization; in other words, on the ground that it has no right to be a corporation, and that it is not a corporation *de jure*. For that purpose it is not necessary that the individuals who were corporators or officers of the company be made defendants and service of process be made upon them. The company itself may be brought into court by service upon its officer appointed pursuant to the charter under which it assumed to act, and in which it is provided that the president shall be served with process against the corporation.

Section 2593, Revised Statutes of Louisiana, provides:

"An action by petition may be brought before the proper district court or parish court by the district attorney or district attorney *pro tempore*, and for the parish of Orleans by the attorney general, or any other person interested, in the name of the State upon his own information, or upon the information of any private party, against the party or parties offending in the following cases:

"First, when any person shall usurp, intrude into or unlawfully hold or exercise any public office or franchise within this State; or . . . Third, when any association or number of persons shall act within this State as a corporation without being duly incorporated."

"SEC. 2595. Service shall be made in such cases . . . the same as in other civil suits. . . ."

"SEC. 2602. When defendant, whether a person or corporation against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant and such damages as are proven to have been sustained."

The state court has held that under these provisions, in such a case as this, the service of process upon the defendant company is sufficient to bring that company into court as a *de facto* corporation, even though not legally organized. If the company actually appear pursuant to such service, it surely must be enough so far as the corporation is concerned.

Pursuant to the service of process upon its president the company appeared in court, put in pleadings, set up as a defence that it was a legal and valid corporation under the act already cited, and claimed judgment in its favor. All this gave jurisdiction to the court to proceed with the case and try the issues, whether the defendant were or were not a valid corporation. But it is said that in such suit even that question cannot be decided, and that the presence of the individual corporators is indispensable because, as is stated, the franchise, to be a corporation, belongs to them and not to the corporation itself, and the case of *Memphis & Little Rock Railroad Company* v. *Railroad Commissioners*, 112 U. S. 609, 619, is cited as authority for the purpose of showing that such franchise cannot be taken away without making the corporators parties.

In a certain sense the franchise to be a corporation does belong to the corporators in so far as that it does not pass by a mortgage by the company of its charter and franchises, and a sale under the foreclosure of the mortgage does not confer on the purchaser the right to be a corporation. This was held in above case. The right to be a corporation was conferred upon certain individuals, and the court held could not by the language used pass to purchasers on a foreclosure, the franchise not in

fact having been mortgaged, and the law not providing for such a mortgage. But a proceeding by the State against a *de facto* corporation to forbid its acting any longer as such on the ground that no legal right exists for it to be a corporation, we have no doubt is well brought against the company alone, treating it as such *de facto* corporation, and serving process upon its officers in accordance with the charter or law under which it assumes to be acting as such corporation. And as we remark, in another connection below, the shareholders or corporators by their action in making themselves parties to the suit, appealing from the decree and arguing their objections before the Supreme Court, have cured any possible defect which might otherwise have existed, founded upon an alleged defect of parties.

The injunction which was issued as part of the judgment was simply a means of carrying out what the court decreed, and whether an injunction prior thereto and preliminary in its nature had been granted *ex parte* or not was immaterial. The final injunction was part of the relief sought by the action, and when the court decided such action in favor of the plaintiff the injunction was to follow as matter of course. We are of opinion that for the purpose of obtaining a decree declaring the charter void and restraining the officers from acting as a corporation, the State through its attorney general was a proper party to bring the action, and for the reasons stated it was well brought against the corporation alone and the final injunction was properly issued.

Nor do the facts in this case furnish any foundation for the claim on the part of the plaintiffs in error that the State after having granted the right to be a corporation could not, after the corporation was created, deny to it the common right to pursue any lawful business or enterprise not inconsistent with the object and purposes of its creation. The claim rests upon the proposition that the State cannot deny to the company the common right to pursue any *lawful* business or enterprise. If the business or enterprise be not lawful, the whole argument fails. If not created for a lawful purpose the company was not created at all. It is not a question of the right to do certain business after it was authorized by the State to organize as such

corporation. Its legal creation depended upon the lawful character of the work it was organized to do. Whether the business be lawful is, in a case like this, a question of local law, and a decision by the state court upon that question is not reviewable here. The right to be a corporation was given by the State upon the terms that the business transacted should be lawful, and it certainly must rest with the State to determine whether the business thus transacted by a corporation is or is not lawful. Whether such business could be done by individuals without the intervention of a corporation is not to the point. The State having the right to say upon what terms and upon what conditions it will grant the right of incorporation, it must have the right to determine through its courts whether those conditions have been complied with. It granted the right by the act of 1888 to transact any lawful business, as a corporation, upon filing articles, etc. It rests with its own courts to say whether the business transacted by such assumed corporation, by virtue of that act, is or is not lawful. Having decided that it was unlawful, the court had the right, under the state law, to declare the charter null.

Then as to the rights of the individual corporators. Has their property been in any way taken without due process of law by this decree? Clearly it has not. Nor have they been denied the equal protection of the laws. As already stated, the decree adjudges the charter, under color of which the defendant company claimed corporate existence, to be null and void, and it enjoins the officers and stockholders from acting as a corporation, in the terms already set forth. This simply holds the property until it can be properly disposed of according to law.

The original decree was entered after a trial upon the merits, and the record shows that the officers and many of the stockholders were present at the trial, and were witnesses and examined by the counsel for the company, and that in truth they made the whole defence. There was no dispute in regard to the facts, and the whole question was resolved into one of law, whether the business which was confessedly conducted by the corporation was or was not a lawful one under the laws of

Louisiana. The court refused to hear evidence that the defendant's officers acted in good faith, believing they were acting lawfully. That also was a question of local law, whether such facts constituted any defence, and the decision of the court on that subject is not reviewable here. As a result of all the evidence, the trial court held the business transacted by the company was unlawful for a corporation under the laws of Louisiana, and decreed accordingly. The shareholders then, pursuant to the law of Louisiana, petitioned the court to permit them to intervene in the case and to appeal from the decree, because they were interested therein; and leave being given, they appealed to and were heard in the Supreme Court, and that court, while affirming the final decree, at the same time reversed the order appointing a liquidator, and left the whole question open in regard to such appointment. The corporators have not in any manner been impeded or embarrassed in the presentation of their defence by not being formal parties to the record at the trial in the court of first instance. Many were present, as a matter of fact, and the defence which they interpose is one of law upon undisputed facts. There has been no taking of any property belonging to shareholders, and whatever may be done hereafter, whether by liquidator or receiver, can only be done upon notice to them, as parties to the action and after full hearing of their claims.

It is certain, therefore, that their rights have not been improperly interfered with or their property taken under or pursuant to the decree of the trial court. We are of opinion that the judgment of the Supreme Court of Louisiana must be

Affirmed.

BLYTHE *v.* HINCKLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 347. Submitted January 14, 1901.—Decided February 25, 1901.

The motion to dismiss this case for lack of jurisdiction must be denied, because the question was duly raised, and its Federal character cannot be disputed; but the motion to affirm is granted, because the assignments of error are frivolous and evidently taken only for delay.

THIS case comes here on writ of error to the Supreme Court of California to review the judgment of that court affirming a judgment of the Superior Court of California for the county of San Francisco sustaining a demurrer to the complaint. The case involves a large amount of real property belonging in his lifetime to one Thomas H. Blythe, who was a naturalized citizen of the United States, and died intestate on the 4th of April, 1883, a resident of the city and county of San Francisco. Questions relating to the title to this property have been in litigation for over fifteen years, and various suits have been instituted in the state and Federal courts in California during that time, all of which have resulted favorably to the interests of the defendant in error herein, who claims to be the owner of the property. Three suits have been before this court upon a writ of error or by appeals brought by some of the parties interested, and have been dismissed for want of jurisdiction. *Blythe* v. *Hinckley*, 167 U. S. 746; *Blythe Company* v. *Blythe*, 172 U. S. 644; *Blythe* v. *Hinckley*, 173 U. S. 501.

The sole question which plaintiff in error herein seeks to have decided is whether the defendant in error was capable of taking the property of the intestate under the laws of California, the plaintiff in error claiming as one of the next of kin and heirs at law of the intestate, and objecting that the defendant in error could not take the property because she was an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland at the time of the death of the intestate,

and that in the absence of a treaty between the United States and Great Britain, permitting and providing for such taking on the part of an alien, there was no power in the State of California to legislate upon the subject, and the statute of that State assuming to permit such alien to take was a violation of that part of section 10 of article 1 of the Constitution of the United States, which provides that "no State shall enter into any treaty, alliance or confederation; . . ." and the attempt of the State of California to legislate upon this subject was therefore an invasion of and an encroachment upon the treaty-making power of the United States.

The facts upon which the question arises are set forth in the complaint, which stated in substance that the defendant in error was an alien and illegitimate daughter of an unmarried woman, and that prior to the death of the intestate neither the defendant nor her mother had ever been outside of Great Britain, and that she was incapable by the common law of England and of California and by the Constitution of the United States, section 10, article 1, and by section 1928 of the Revised Statutes, of inheriting the real property described in the complaint; that there was at the time of the death of the intestate no treaty between the United States and Great Britain which provided for the inheritance of aliens in the United States. After the death of the intestate the defendant in error came to the United States and claimed (falsely as alleged,) that she had been adopted by the intestate as his daughter in his lifetime under the provisions of section 230, Civil Code of California; also that he had adopted her as his heir under the provisions of section 1387 of that Code. Some time in 1885 she therefore instituted by her guardian, under section 1664 of the same Code, a proceeding for the purpose of establishing her claim as such adopted daughter or as such heir to succeed to the estate left by the intestate. Upon the trial it was made to appear that the defendant in error was an illegitimate child and an alien, and the complaint herein then alleges that it was the duty of the court before which the trial was going on to dismiss the proceeding for want of jurisdiction to decree that defendant in error was an heir to the real estate or capable of

taking by descent. The court, however, as the complaint alleged, decided otherwise, and upon the evidence determined and adjudged that the defendant was the natural heir of the intestate and that in his lifetime he had adopted her as his daughter under section 230 of the California Civil Code, or had instituted her as his heir under section 1387 of that Code.

It was further alleged that the seventeenth section of article 1 of the new constitution of California, permitting aliens to acquire, possess, enjoy, transmit and inherit property the same as native born citizens, was void as an attempt by the people of the State of California to encroach upon the treaty-making power of the United States, and was in violation of section 10 of article 1 of the Federal Constitution. It was then alleged that the court in the proceeding mentioned did not in legal effect determine the question of heirship, title or interest in the real estate for want of jurisdiction, and that the legislature of the State had no power or authority to enact any law which gave to the defendant in error the right to inherit the real estate of the intestate.

The complaint further stated that an appeal was taken to the Supreme Court of the State and that all of the above matters were made to appear to that court, which nevertheless affirmed the judgment. The same averments of the lack of jurisdiction to make such decree were made with regard to the Supreme Court as were set forth regarding the lower court, and the plaintiff in error alleged that the judgment of the Supreme Court was void for lack of jurisdiction. It was also alleged that after this affirmance of the decree of the lower court, by which the rights of the defendant in error to take the property were formally determined, she instituted a proceeding pursuant to the provisions of the California Code, in the Superior Court in San Francisco, where the administration of the estate of the intestate was pending, to have distributed the estate of the intestate in accordance with the judgments of the Superior and the Supreme Courts in the proceeding already mentioned. This was opposed by the parties interested adversely to the defendant in error upon the same grounds which had been set up as a defence in the former suit. Upon the trial of the latter proceeding the

record in the former suit was offered in evidence and objected to as void for want of jurisdiction, but it was received by the court and held by it to be conclusive evidence of the rights of the parties, and the court then made a decree of distribution in favor of the defendant in error. An appeal was taken to the Supreme Court where the judgment was affirmed, although, as alleged, the court was without jurisdiction. Pursuant to that decree the defendant in error obtained possession of the real property in December, 1895.

It was further alleged that all the claims of the defendant in error to inherit or to hold the real property were groundless and unfounded in fact or in law, and judgment was asked declaring the claims of the defendant to any of the property to be illegal and unfounded, and that plaintiff, as against her, was the lawful owner in fee of the real property mentioned, and was entitled to the income and profits thereof, and decreeing that his title thereto and estate therein should be quieted and the defendant perpetually enjoined from setting up any claim whatever to the property, and that the possession and accumulated rents of the property in the hands of the receiver be delivered to the plaintiff.

The portions of the Federal and state constitutions and the various statutes referred to in the complaint are set forth in the margin.[1]

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[1] Section 10, article 1, of the Federal Constitution:

"No State shall enter into any treaty, alliance or confederation; . . ."

Section 1, article 2:

"No State shall, without the consent of the Congress, . . . enter into any agreement or compact with another State or with a foreign power. . . ."

Section 17 of article 1 of the constitution of California:

"Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property as native-born citizens."

Civil Code of California:

"SEC. 230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate

Opinion of the Court.

The defendant demurred to this complaint on the grounds, among others, (1) that the complaint stated no cause of action; (2) that the judgment of distribution set forth in the complaint was a conclusive bar and estoppel against the plaintiff and prevented him from maintaining the action. The demurrer was sustained and judgment entered in favor of the defendant on the merits, and upon appeal it was affirmed by the Supreme Court of California. A writ of error has been allowed by the Chief Justice of the Supreme Court of that State. A motion is now made to dismiss the writ of error for lack of jurisdiction or to affirm the judgment.

Mr. William H. H. Hart, *Mr. Robert Y. Hayne* and *Mr. Frederic D. McKenney* for the motions.

Mr. S. W. Holladay, *Mr. E. Burke Holladay*, *Mr. Jefferson Chandler* and *Mr. L. D. McKisick* opposing.

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

The motion to dismiss the writ of error in this case, for lack of jurisdiction, must be denied.

The objections raised by the complaint to the validity of the judgments mentioned therein were that they were void for want

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child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth."

"Sec. 671. Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this State.

"Sec. 672. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title VIII, Part III, Code of Civil Procedure."

"Sec. 1387. Every illegimate child is an heir of any person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child."

Revised Statutes of the United States:

"Sec. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

of jurisdiction in the courts which rendered them over the questions decided, because of the provisions of the Federal Constitution above recited. Although the claim may not be well founded, the question, nevertheless, was duly raised, and its Federal character cannot be disputed. This necessitates the denial of the motion to dismiss.

But the motion to affirm should be granted because the assignments of error are frivolous and we are convinced the writ was taken only for delay. This is the ground for the decisions in *Chanute City* v. *Trader*, 132 U. S. 210, 214, and *Richardson* v. *Louisville & Nashville Railroad Co.*, 169 U. S. 128, 132.

The original judgment in the Superior Court of California, which was affirmed by the Supreme Court of that State, determined the rights of the defendant in error, and conclusively adjudged her to be the owner of the property in question, unless the judgment was reversed upon appeal. The state courts had jurisdiction over the whole question, including the defence founded upon the Federal Constitution, and if that objection had been properly raised, and appeared in the record, an appeal to this court from the Supreme Court of California could have been taken, if the defence had been overruled. The allegation of the plaintiff in error that the state courts had no jurisdiction to determine the question, because of the facts set forth by him in the complaint herein, is therefore not well founded, and being a mere conclusion of law is not admitted by the demurrer.

This court has already decided the question of jurisdiction of the state courts in *Blythe* v. *Hinckley*, 173 U. S. 501, 508, where it was said by Chief Justice Fuller, speaking for that court, that—

"The state courts had concurrent jurisdiction with the Circuit Courts of the United States, to pass on the Federal questions thus intimated, for the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and constitution, and if the state courts erred in judgment it was mere error, and not to be corrected through the medium of bills such as those under consideration."

If the Federal question which plaintiff in error claimed existed in the suits in the state court were not plainly enough presented

by him to those tribunals so as to permit of their review by this court, that is no answer to the proposition that those judgments are conclusive of the matters therein decided, unless reviewed by this court and reversed in a proper proceeding in error to the state court.

Litigation in regard to the merits of the claim of the defendant in error to this property has been continued by her opponents since the judgments of the state courts, just as if the whole merits of the case had not been decided by the state courts in her favor several times. This court has been asked to review a judgment dismissing the complaint filed in a separate action, brought in the Federal Circuit Court to set aside the state judgments, and this we refused to do on the grounds stated in the report. *Blythe* v. *Hinckley*, 173 U. S. *supra*. It was said in that case:

"The Superior Court of San Francisco was a court of general jurisdiction, and authorized to take original jurisdiction 'of all matters of probate,' and the bill averred that Thomas H. Blythe died a resident of the city and county of San Francisco, and left an estate therein; and that court repeatedly decreed that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the Supreme Court of the State. So far as the construction of the state statute and state constitution in this behalf by the state courts was concerned, it was not the province of the Circuit Court to reëxamine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees, that Florence did inherit, and that judgment covered the various objections in respect of section 1978 of the Revised Statutes, and the tenth section of article one of the Constitution of the United States, and any treaty relating to the subject."

In the same case it was said: "We are not to be understood as intimating in the least degree that the provisions of the California Code amounted to an invasion of the treaty-making power or were in conflict with the Constitution of the United States, or any treaty with the United States." This decision conclusively determined that the Superior Court of California and the Supreme Court of that State, upon appeal therefrom,

had full jurisdiction to determine the whole case and give the judgments that they have given. Notwithstanding which it is now again argued that those judgments were void for want of jurisdiction.

There must be an end to these claims at some time, and we think that this is a proper occasion to terminate them.

The sole question now remaining before us arises as to the claim made by plaintiff in error under the Constitution of the United States, already referred to, and although it was not in terms decided in the above case, we now say that the provision of the Federal Constitution had no bearing in this case, and that the question is, in our opinion, entirely free from doubt.

Plaintiff urges that never before has the question been directly passed upon by this court. If he means that it has never heretofore been asserted, that in the absence of any treaty whatever upon the subject, the State had no right to pass a law in regard to the inheritance of property within its borders by an alien, counsel may be correct. The absence of such a claim is not so extraordinary as is the claim itself.

Questions have arisen as to the rights of aliens to hold property in a State under treaties between this Government and foreign nations which distinctly provide for that right, and it has been said that in such case the right of aliens was governed by the treaty, and if that were in opposition to the law of the particular State where the property was situated, in such case the state law was suspended during the treaty or the term provided for therein. Counsel cite *Geofroy* v. *Riggs*, 133 U. S. 258, a case arising, and affecting lands, in the District of Columbia, in regard to which Congress has exclusive jurisdiction, and in that case Mr. Justice Field, in delivering the opinion of the court, said at page 266:

"This article, by its terms, suspended, during the existence of the treaty, the provisions of the common law of Maryland and of the statutes of that State of 1780 and 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein."

But there is no hint in that case that in the absence of any

treaty the State itself could not legislate upon the subject and permit aliens to hold property, real and personal, within its borders according to its own laws. This court has held from the earliest times in cases where there was no treaty that the laws of the State where the real property was situated governed the title and were conclusive in regard thereto.

The latest exposition of the rule is found in the case of *Clarke* v. *Clarke*, 178 U. S. 186. *De Vaughn* v. *Hutchinson*, 165 U. S. 566, 570, is another illustration of the same rule. The right of the State to make this determination by her own laws, in the absence of a treaty to the contrary, is distinctly recognized in *Chirac* v. *Chirac*, 2 Wheat. 259, 272, where the court said:

"John Baptiste Chirac having died seized in fee of the land in controversy; his heirs at law being subjects of France; and there being, at that time, no treaty in existence between the two nations; did this land pass to these heirs, or did it become escheatable? This question depends upon the law of Maryland."

In *Lessee of Levy* v. *McCartee*, 6 Pet. 102, the question was in regard to the law of New York and the right of an individual to inherit through an alien title to real estate in that State. Mr. Justice Story delivered the opinion of the court, in which he stated that the question resolved itself into "whether one citizen can inherit in the collateral line to another, when he must make his pedigree or title through a deceased alien ancestor. The question is one of purely local law, and, as such, must be decided by this court."

It was not claimed that the State of New York had no power to permit an inheritance through an alien or an inheritance by an alien himself of land situated in that State in the absence of a treaty upon the subject.

There has not been cited a single case where any doubt has been thrown upon the right of a State, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders. The treaties have always been for the purpose of enabling an alien to take even though the particular State may not have expressly permitted it. But no case has arisen where it was asserted or

claimed that a State in the absence of a treaty might not itself permit an alien to take property within its limits.

Again in *Hauenstein* v. *Lynham*, 100 U. S. 483, where the question depended upon a consideration of the treaty between the United States and the Swiss Confederation of November 25, 1850, it was said by Mr. Justice Swayne, in delivering the opinion of the court, that "The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sec. 114. In our country, this authority is primarily in the States where the property is situated." And it is also said in that case, if a law of a State is contrary to a treaty, the treaty is superior under the Federal Constitution, but there is no intimation that when there is no treaty the right of the State does not exist in full force. The treaty, it will be observed, only permitted the alien to take the land, sell it and withdraw and export the proceeds thereof, but might take and hold the same as if he were a citizen on declaring his intention to reside in the State. See also *Hanrick* v. *Patrick*, 119 U. S. 156. The question of the extent of the power of the United States to provide by treaty for the inheriting by aliens, of real estate, in spite of the statutes of the State in which the land may be, does not arise in this case, and we express no opinion thereon.

The claim which the plaintiff in error founds upon the section of the Federal Constitution is too plainly without foundation to require further argument. The right of the defendant in error to this property has been in litigation for more than fifteen years, and many years after courts of competent jurisdiction have decided all the questions in her favor, and we think this writ of error, judging by the character of the question sought to be raised under it, has been taken for delay only. The judgment must be

Affirmed.

UNITED STATES *v.* BEEBE.

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

No. 71. Argued November 6, 7, 1900.—Decided February 25, 1901.

It is entirely plain that there was no fraud in this case, and therefore this ground for the complainant's relief cannot be sustained.

A district attorney of the United States has no power to agree upon a compromise of a claim of the United States in suit, except under circumstances not presented in this case.

An attorney, by virtue of his general retainer only, has no power to compromise his client's claim; and a judgment entered on a compromise made under such circumstances, is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise on which the judgment rests.

Generally speaking the laches of officers of the Government cannot be set up as a defence to a claim made by the Government.

When an agent has acted without authority, and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken.

On the tenth day of March, 1890, the United States brought suit in the Circuit Court of the United States for the Middle District of Alabama, against Eugene Beebe and the heirs at law of one Ferris Henshaw, deceased, praying that two separate judgments in favor of the United States (one against Beebe and the other against the administrator of Henshaw) should be set aside and vacated; for the removal of the administration of the estate of Henshaw into that court; for an accounting by Beebe and the other defendants by reason of the liability of Beebe and Henshaw on the bond of Francis Widmer, late collector of internal revenue in the second district of Alabama, and that the amount found due on the accounting should be made a prior lien on the land described in the bill, and for other relief.

The defendants demurred to the bill and the court sustained the same, after which the bill was amended and again demurred

to. The defendant Beebe died August 24, 1894, and the complainant revived the suit against his heirs at law, and subsequently the court sustained the demurrers to the amended bill, and the judgment dismissing the bill was upon appeal affirmed by the Circuit Court of Appeals for the Fifth Circuit, and from that judgment of affirmance the United States has appealed to this court.

The following facts were set forth in the bill: Some time in 1873 one Francis Widmer was appointed collector of internal revenue for the second district of Alabama, and Eugene Beebe and Ferris Henshaw became sureties on his bond in the sum of fifty thousand dollars. Widmer defaulted and failed to account for and pay over to the Government the sum of $28,158.56 public moneys that had come into his hands as collector, which sum was due the United States, with interest thereon from January 1, 1874. Beebe and Henshaw had for many years been partners in business, and were joint owners in fee of certain real estate described in the bill and situated in the county of Montgomery and State of Alabama. Henshaw died there, intestate, April 19, 1879, leaving certain of the defendants named in the suit as his heirs at law. The administrator of the estate of Henshaw reported to the court that his estate was insolvent, and in accordance with that report the estate was on July 2, 1880, declared to be insolvent, and no settlement of the estate has since been had. Beebe before and since July 2, 1880, was and has been insolvent, without sufficient property to pay his debts. Ferris Henshaw was also insolvent at the time of his death. By reason of the insolvency of Eugene Beebe and Ferris Henshaw and the insolvency of the latter's estate the United States became and was entitled to priority of payment over any and all other creditors of Beebe and Henshaw out of their property and estate, of the full amount collected, withheld and appropriated by Widmer, the collector, and due to the United States. It is averred that the land above described is liable for such debt, and also that the complainant has a prior lien upon it therefor.

On June 3, 1880, separate actions in the Circuit Court of the United States for the Middle District of Alabama were commenced, one against Beebe and the other against the adminis-

trator of the estate of Henshaw, for the recovery of the sums for which Widmer, collector, was in default, and amounting, as stated, to over $28,000, with interest, and those suits were continued from time to time, at the request of the defendants, until February 6, 1885, when judgments were severally entered in that court against Beebe, and also against Hatchett, as administrator of Henshaw, for $100 and costs, and Beebe on July 1, 1886, paid into the Treasury of the United States the sum of $109.85 as the amount of the judgment and costs rendered against him, but the judgment against Hatchett, as administrator, remained unsatisfied to the date of the filing of the bill in this suit.

The bill then proceeds as follows:

"That said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferris Henshaw were poor men, and that said Beebe and the estate of Ferris Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates, by execution, but that if the court would allow a jury and verdict to be entered against them for one hundred dollars they, and each of them, would pay said judgments and costs; that no evidence or proof was or had been introduced in said causes, or either of them; the indebtedness of said Beebe and Henshaw to the United States then being twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents ($28,158.56), and interest, or other large sum; and the statements and representations aforesaid only were before the said Circuit Court at time of the entry of said judgments; and no hearing or determination upon the law or the facts involved in said cases was ever had in said court; whereupon the court remarked that unless the district attorney of the United States objected, the causes might be disposed of as suggested aforesaid; said district attorney did not object, and said judgments for one hundred dollars and costs were entered in each of said causes. And orator

avers and charges that said statements and representations made as aforesaid by and on behalf of, and for, said Beebe and said Ferris Henshaw, and the estate of said Ferris Henshaw, were wholly untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States. Orator further avers and charges that said court and United States attorney had no authority in law to accept said statements and representations, which were not made under oath nor in the course of any judicial proceeding, and were not supported nor verified by evidence or proofs; and that said acts of said court and United States attorney amounted in law and in fact to, and was, and was intended to be, a mere naked compromise of the claim and demand of the United States against said Eugene Beebe and Ferris Henshaw, and the estate of said Ferris Henshaw, which said court and the United States attorney had no authority, but were inhibited by law, to make, entertain and consummate; that said court was without jurisdiction and power to determine said causes in the manner aforesaid; and that said alleged judgments for one hundred dollars and costs are null and void *ab initio*, and of no effect, and should be vacated and held for naught in this court of equity."

The bill then asks for the appointment of an administrator *ad litem* of the Henshaw estate to represent it in the proceeding. It alleges that several of the defendants, naming them, assert some claim against the property described in the bill, which claims are alleged to be subordinate to the rights of the United States to condemn and subject the land already mentioned to the satisfaction of the indebtedness of Beebe and Henshaw as sureties on the bond of Widmer, as collector, by reason of the default of the latter; and it is alleged that if any conveyance of the land has been made by Beebe or Henshaw, or the heirs of the latter, such conveyances were void and ought to be vacated and set aside. It is further stated that the facts and circumstances set out in the bill as the basis of the relief asked for only recently came to the knowledge of the complainant, to wit, on or about March 5, 1890. The bill also set forth that on March 22, 1877, Beebe conveyed by deed to Ferris

Henshaw, then his partner in business, all his interest and estate in the property described in the bill for certain purposes therein set forth, and this deed complainant alleges was without consideration and fraudulently made to hinder, delay and defraud the existing creditors of Beebe and was void, and all the property described in the bill was bound even in the hands of the heirs at law of Henshaw for the payment of the debts due the United States from Beebe. The complainant prayed that the judgments might be set aside and vacated, and the property sold and the proceeds thereof applied to the payment of the debts above mentioned.

The defendants severally demurred to the bill on various grounds, (1) for want of equity; (2) that the bill showed that the matters complained of against Beebe and Henshaw, by reason of their being sureties for Widmer, the collector, had been adjudicated in the Circuit Court of the United States for the Middle District of Alabama, in a suit commenced by the complainant against them, and that no sufficient ground was shown for vacating and setting aside the judgments therein rendered; (3) that it appeared from the allegations in the bill that the judgment against Beebe had been paid by him, and had been received and accepted by the complainant, the United States, and the bill contained no offer to refund the money, and it does not show that the same had ever been tendered to Beebe. Other grounds were stated in the demurrers.

Upon the hearing the court sustained the demurrers and granted leave to amend the bill. On January 5, 1891, the complainant amended its bill, the amendment alleging that Beebe had executed another official bond as surety for one Dustan, deputy postmaster at Demopolis, Alabama; that a default had occurred and judgment been recovered against Beebe for $579.45 in 1878, and the judgment was still due and unpaid, and execution thereon having been issued was duly returned "no property."

The amended bill also contains an averment that there was in fact no jury drawn in the cases in which the two judgments were obtained and no verdicts rendered therein, although the records of these judgments show a jury trial and a verdict in each case.

To this bill as amended the defendants demurred, setting up the same grounds of demurrer as to the original bill, and also the additional grounds, (1) that the bill made a new case; (2) that the matters stated in the amendment were not germane to the purposes and object of the original bill, and stated new matter; (3) that the bill as amended was multifarious.

The demurrers to the amended bill were sustained, and the bill was finally dismissed.

Mr. W. S. Reese, Jr., and *Mr. Robert A. Howard* for appellants. *Mr. Solicitor General* was on their brief.

Mr. Alexander Troy and *Mr. Henry S. Cattell* for appellees, except the Henshaw heirs. *Mr. W. A. Gunter* filed a brief for the Henshaw heirs.

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

The principal claim against the defendants is based upon the manner in which the two separate judgments were obtained against the defendant Beebe, and the administrator of Henshaw, in the Circuit Court of Alabama on February 6, 1885. The amount due on one of those judgments (that against Beebe) was paid into the United States Treasury on July 1, 1886, and this suit was commenced in March, 1890.

The grounds upon which the court is asked to set aside the judgments so entered are (1) fraud in procuring them, and (2) the absence of power on the part of the district attorney to make the compromise, and the consequent invalidity of the judgments entered thereon.

The only ground which the allegation of fraud in relation to the judgments is based consists in the averment in the bill that the defendants came into court and represented that they were poor men; that Beebe and the estate of Henshaw were without property out of which any judgment could be collected or paid; that no part of any judgment could be collected by due process of law; that nothing could be made out of them or

either of them or their estates by execution, but that if the court would allow a jury and a verdict to be entered against them for $100 they and each of them would pay said judgments and costs. Accordingly judgments were so taken without any evidence given or hearing had upon the merits of the claim.

It is manifest that these allegations would furnish no defence to the cause of action on the part of the United States against the defendants as sureties on the bond of Widmer. The statements had no tendency to prevent full preparation for trial on the part of complainant, nor did they tend in any way to obstruct the full presentation of the cause of action against the defendants on the trial. It is plain, therefore, that the representations, assuming them to have been false, could not constitute such a fraud as upon well settled principles a court of equity will relieve against by setting aside a judgment in a case where such representations were made. *United States* v. *Throckmorton*, 98 U. S. 61; *Ward* v. *Town of Southfield*, 102 N. Y. 287, 292. The first case has also been cited with approval in *Moffat* v. *United States*, 112 U. S. 24, 32, although a distinction is therein made taking it out from the rule recognized in *Throckmorton's* case.

But in fact there was no deception in the case. The bill itself avers that the estate of Henshaw had been declared insolvent upon a report of the administrator in 1880, and there is no allegation that the estate was not insolvent at that time. There is on the contrary a distinct allegation that the defendant Beebe, at, before and since July 2, 1880, had been insolvent and without sufficient property to pay his debts, including his indebtedness to the United States, and also that Ferris Henshaw at the time of his death was insolvent and without sufficient property to pay his debts, and that by reason of the insolvency of Beebe and Henshaw and the estate of Henshaw, the Government was entitled to priority of payment. Section 3466, Revised Statutes of the United States.

The insolvency of Beebe and the estate of Henshaw was thus made a material averment of the bill in order to base the demand upon the part of the United States for priority of payment of its debt of more than $28,000, which would exist, as

was alleged, upon the setting aside of these judgments. It is obviously impossible to found an allegation of fraud upon a representation made by and for the defendants in open court, which simply states as a fact that which the bill of the complainant itself distinctly avers was a fact. It is true the defendants, as the bill alleges, based their application for reduced judgments upon this fact of insolvency, but whether the application were or were not meritorious is quite immaterial upon the issue of fraud, so long as the statements upon which it was made were neither fraudulent nor even false.

It is entirely plain there was no fraud in the case, and therefore this ground for complainant's relief cannot be sustained.

But a very different question arises from the alleged absence of power on the part of the district attorney to make the compromise and the consequent invalidity of the judgment entered thereon.

By demurring to the amended bill it is admitted that in former suits commenced by complainant against the defendants Beebe and the administrator of the estate of Henshaw, upon a claim to recover some twenty-eight thousand dollars with interest for a number of years, based upon the liability of the defendants upon a bond to the United States executed by them as sureties, two separate judgments were entered in favor of the United States at a term of the United States Circuit Court for the Middle District of Alabama, each judgment being for the sum of only $100 and costs, and that although the judgment records showed a regular trial before a jury and a verdict in each case, yet in truth there had been no jury, no witnesses, no evidence and no verdict, and that the judgments were simply the result of a compromise of the claim in each of the two suits as agreed upon by the district attorney on the one side and the defendants upon the other. Upon these facts the appellant claims that the judgments were wholly void for want of jurisdiction in the court to authorize them.

The appellants also claim that if not void, the judgments were at least irregular, and upon the facts averred in the bill ought to be set aside.

We do not think that they were void as if rendered by a

court having no jurisdiction of the person or of the subject-matter, as confessedly the court had jurisdiction over both; but the facts just stated and which are admitted by the demurrers are enough in our opinion to call for the setting aside of those judgments. It is enough, without alleging fraud in their entry, that they simply carry out and represent a compromise made by the district attorney which he had no power to enter into, and which rendered the judgments so far unauthorized as to permit a suit to set them aside.

We think there can be no serious question that a district attorney of the United States has no power to agree upon a compromise of a claim in suit except under circumstances not present in this case. There is no statute of the United States and no regulation has been called to our attention giving a district attorney any such power, but, on the contrary, it is provided in paragraph 7 of the regulations established by the Solicitor of the Treasury, and approved by the Attorney General, pursuant to section 377 of the Revised Statutes of the United States, that no district attorney shall agree to take a judgment or decree for a less amount than is claimed by the United States, without express instructions from the Solicitor of the Treasury, unless circumstances exist which do not obtain in this case. The power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to compromise a private suit between individuals rests with the attorney of either party, and that such an attorney has no power to compromise a claim in suit has been frequently decided. *Holker* v. *Parker*, 7 Cranch, 436. In that case it was remarked by Marshall, Chief Justice, that—

"Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being un-

authorized and being therefore in itself void, ought not to bind the injured party."

The same has been held in Massachusetts in *Lewis* v. *Gamage*, 1 Pick. 347; and in New York in *Barrett* v. *Third Avenue Railroad Company*, 45 N. Y. 628, 635, and *Mandeville* v. *Reynolds*, 68 N. Y. 528, 540. And see *Kilmer* v. *Gallaher*, Supreme Court of Iowa, December 22, 1900, 52 Cent. L. J. 150, and note; *Bigler* v. *Toy*, 68 Iowa, 688. Indeed, the utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed.

A judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests. *Prima facie*, the act of the attorney in making such compromise and entering or permitting to be entered such judgment is valid, because it is assumed the attorney acted with special authority, but when it is proved he had none, the judgment will be vacated on that ground. Such judgment will be set aside upon application in the cause itself if made in due time or by a resort to a court of equity where relief may be properly granted.

In *Robb* v. *Vos*, 155 U. S. 13, it was held that although the judgment was on its face valid and regular, yet inasmuch as the attorney who appeared on behalf of one of the defendants did so without the consent of his principal, the remedy of the principal, when the facts came to his knowledge, was in equity, where the judgment might be set aside as to him. So, if the judgment be in fact entered upon a compromise made by the attorney who had no authority to make it, the judgment may be attacked and set aside in an equitable action upon proof of the necessary facts. Although the judgment is not void for want of jurisdiction in the court, it will yet be set aside upon affirmative proof that the attorney had no right to consent to its entry.

It is said that the judgment being valid on its face, evidence to contradict its recitals is not admissible unless in case of such a fraud as will be relieved against in a court of equity. Fraud under certain circumstances is a ground upon which a judgment may and will be set aside; but in addition to such ground,

where, as in this case, the judgment is entered upon a compromise made by an attorney, entirely unauthorized, and without any trial, we have no doubt that such fact may be proved in order to lay the foundation for an application to a court of equity to set the judgment aside, although the proof contradicts the record of the judgment itself and shows that in fact there was no jury, no trial and no verdict.

It is however urged that the Government has lost its right to assail these judgments because of the lapse of time and because one of the judgments was paid before the commencement of this suit. The bill shows that they were entered on February 6, 1885, and that on July 1, 1886, Beebe paid the amount of the judgment against him into the Treasury of the United States. The bill was not filed until March 10, 1890, and it is therefore said that the Government has ratified the action of the district attorney by a failure to proceed to set the judgments aside at an earlier date than it did.

It is not averred in the bill to whom Beebe paid the amount of the judgment, but there is simply a statement that it was paid into the Treasury of the United States. We must probably assume from such averment that the payment was made to an officer who had the right to receive the money, but it is not charged that such officer received it with knowledge of the facts preceding the entry of the judgment and by virtue of which such judgment was entered. There would be nothing in the record of the judgment itself which would show anything other than a regular trial of the case and a verdict of a jury upon which the judgment was entered; consequently there would be nothing in the record which would charge the officer with knowledge that the judgment was only the result of and represented a compromise made by the district attorney, which he had no power to make.

In addition to this want of notice there is an averment in the bill that the facts and circumstances set out therein as the basis of the relief asked for by the bill had only come to the knowledge of the complainant on or about March 5, 1890. From 1885, when the judgments were entered, no one having authority to act in the premises for the Government had any knowledge of these facts until March, 1890, and this the demurrers

admit. Generally speaking, the laches of officers of the Government cannot be set up as a defence to a claim made by the Government. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Vanzant*, 11 Wheat. 184; *Dox* v. *The Postmaster General*, 1 Pet. 318, 325; *Hart* v. *United States*, 95 U. S. 316; *Gaussen* v. *United States*, 97 U. S. 584.

But we fail to see wherein the officers of the Government have been guilty of laches. There has been no ratification of any unauthorized act of the district attorney by reason of any delay on the part of the Government after knowledge of the facts, and without that knowledge there can be no ratification and in this case no laches.

Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the Government as in that of an individual. Knowledge is necessary in any event. Story on Agency, 9th ed. sec. 239, notes 1 and 2. If there be want of it, though such want arises from the neglect of the principal, no ratification can be based upon any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them. Here, it is denied by an express averment in the bill to that effect, and must be taken as a fact. There being no knowledge of the facts on the part of the Government until March, 1890, we think there were no laches on its part which would bar the maintenance of this suit. We think it cannot be said that a failure to earlier obtain knowledge was evidence of neglect upon the part of the officers of the Government, even though neglect would affect the Government in its right to maintain this suit.

Nor do we think the omission to make in the bill an offer to repay the hundred dollars and costs paid into the Treasury of the United States constituted a fatal defect in the pleading. It was a payment of money only, and the amount might be properly credited to the representatives of Beebe upon the trial of the action, and constitute by that amount a reduction of the claim of the Government; or if, upon the trial, the compromise

being set aside and the cause tried on its merits, it should appear there was nothing due to the Government on its claim, the amount paid by Beebe into the Treasury together with interest thereon might be the subject of judgment against the Government. At any rate, no payment has been made upon the judgment against Henshaw's estate, and the payment made by Beebe did not operate as a payment of the judgment against that estate, because by the terms of the agreement as set forth in the bill the compromise consisted in a promise to pay by each the amount of each judgment of a hundred dollars and costs. The amended bill is not therefore defective so as to be demurrable as not containing facts sufficient to constitute a cause of action. And we do not think it is multifarious. The amendment but added another claim to those already made which were averred to be prior liens upon the lands in the hands of the Henshaw heirs at law. If the lands described in the bill, or any portion of them, have been conveyed to *bona fide* grantees for value, nothing in this opinion can be taken as in any way passing upon the question of their right to insist that they took the lands free and clear of any lien in favor of the Government, other than the $100 judgments.

To conclude, we are of opinion that the district attorney had no authority to compromise the claim of the Government by consenting to the entry of the judgments in question and as that unauthorized act on his part has never been ratified by the Government, with knowledge of the facts, and no laches are in reality attributable in this case to the Government, which proceeded at the earliest moment after the discovery of the facts to file this bill, we are of opinion that a cause of action was set forth in the amended bill and that the demurrers to such amended bill should be overruled.

The judgments of the United States Circuit Court of Appeals for the Fifth Circuit and of the Circuit Court of the United States for the Middle District of Alabama are therefore reversed and the case remitted to the latter court with directions to overrule the demurrers, with leave to the defendants to answer, and for such further proceedings as are consistent with this opinion. So ordered.

Syllabus.

BIRD *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 278. Argued January 21, 1901.—Decided February 25, 1901.

Bird was indicted for murder. The killing was admitted, but it was claimed to have been done in self-defence. At the trial a government witness testified "that in the month of August, when the defendant, in company with the deceased Hurlin, R. L. Patterson, Naomi Strong and witness, were going up the Yukon River in a steam launch, towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand bar he would curse them; he would say: 'The Dutch sons of bitches don't know where to run it.' On one occasion they were getting wood on the bank of the river, and Bird got out and wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson a 'son of a bitch,' and told him he would 'hammer the devil out of him,' and witness and the others would not let them fight. And if anything would go wrong, he, defendant, would not curse in front of the witness, and the others' faces, but defendant would be disagreeable all the way along, and would make things very disagreeable." This evidence was excepted to and the court *held* that its only doubt was whether the evidence, though improperly admitted, was of sufficient importance to call for a reversal of the judgment, but it sustained the exception. Afterwards the Government, to maintain the issues on its part, offered the following testimony of the witness Scheffler: That in the latter part of March, 1899, after Patterson had been carried to Anvik, Bird made a trip up the river and came back with a man by the name of Smith; that Smith left and the next day after that Bird was very disagreeable and tried to pick a fight with the woman, Naomi Strong; he acted very funny, you had to watch him and be careful. He got awful good after that and everything was just so. It was "Charles this," and "Naomi this." To which testimony defendant excepted, and the exception was sustained.

The court at the request of the Government instructed the jury that "if they believe from the evidence beyond a reasonable doubt that the defendant Bird, on the 27th day of September, 1898, at a point on the Yukon River about two miles below the coal mine known as Camp Dewey, and about 85 miles above Anvik, and within the District of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and willful, and that said killing was not in the necessary defence of the defendants's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment." *Held* that this was substantial error.

Opinion of the Court.

At a term of the United States District Court in and for the District of Alaska, Homer Bird, the plaintiff in error, was tried on a charge of having murdered one J. H. Hurlin on the 27th day of September, A. D. 1898. On December 6, 1899, the jury found the defendant guilty as charged in the indictment, and on December 13, 1899, a motion for a new trial having been overruled, a sentence of death by hanging on February 9, A. D. 1900, was pronounced. A bill of exceptions was settled and signed by the trial judge on February 8, 1900, and a writ of error from the Supreme Court of the United States was allowed. The evidence contained in the bill of exceptions shows that a party of five persons, composed of Homer Bird, J. H. Hurlin, Robert L. Patterson, Charles Scheffler and Naomi Strong, sailed up the Yukon River, in the latter part of July, 1898, on an adventure in search of gold. They traveled on a small steam launch, towing a scow laden with an outfit of clothes and provisions sufficient to last them about two years. In the latter part of September, 1898, they reached a point on the river about 600 miles from St. Michaels, at the mouth of the Yukon, when they determined to go into winter quarters, and there began the construction of a cabin on the banks of the stream. On September 27, 1898, in a quarrel that had arisen about a partition of the supplies, Hurlin was shot and killed by Bird. At the trial in December, 1899, there were three witnesses who had been present at the time of the homicide, Scheffler, Strong and Bird, the accused. As the fact of the killing of Hurlin by Bird was not denied, the trial turned on the question whether the killing was malicious and willful or was in self-defence.

Mr. L. T. Michener for plaintiff in error.

Mr. Assistant Attorney General Beck for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

The assignments of error are twenty-five in number, but of these we think it sufficient to consider only the tenth, the fourteenth and twenty-third.

The homicide, as alleged in the indictment, occurred on September 27, 1898, at a point on the Yukon River about eighty-five miles above Anvik, and about two miles below a coal mine known as Fort Dewey.

At the trial the Government called as a witness for the prosecution one Charles Scheffler, who testified, among other things—

"That in the month of August, when the defendant, in company with the deceased, Hurlin, R. J. Patterson, Naomi Strong and witness, were going up the Yukon River in a steam launch, towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand bar, he would curse them; he would say 'the Dutch sons of bitches don't know where to run it.' On one occasion they were getting wood on the bank of the river, and Bird got out and wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson a 'son of a bitch,' and told him he would 'hammer the devil out of him,' and witness and the others would not let them fight. And if anything would go wrong he, defendant, would not curse in front of witness and the others' faces, but defendant would be disagreeable all the way along, and would make things very disagreeable."

To this testimony the defendant, by his counsel, objected "as immaterial and irrelevant, and too remote from the time the offence is charged to have been committed;" but this objection was by the court overruled, and said testimony permitted to go to the jury; to which ruling of the court he then and there excepted. This testimony, the objection and the ruling are set forth in the bill of exceptions, and form the subject of the tenth assignment of error.

As it was not denied that Hurlin died immediately from a wound intentionally inflicted by the accused, the issue to be determined by the jury was whether the accused was actuated by a malicious motive or acted in self-defence.

As the testimony in this issue was conflicting, or, rather, the defendant's evidence not yet having been given, as it might well have been anticipated that the testimony would be conflicting, it seems to have been the theory of the prosecution

that the evidence in question in the tenth assignment tended to show such a state of enmity on the part of the accused towards the deceased as to warrant the jury in finding that the act of the accused in shooting the deceased was the result of a pre-existing unfriendly feeling.

The general rule on the subject of permitting testimony to be given of matters not alleged is that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. And it was said by Mr. Best in the ninety-second section of "Principles of Evidence," that whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty.

In the proof of intention it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged; for the unlawful intent in the particular case may well be inferred from a similar intent, proved to have existed in other transactions done before or after that time. Thus, upon the trial of a person for maliciously shooting another, the question being whether it was done by accident or design, evidence was admitted to prove that the prisoner intentionally shot at the prosecutor at another time, about a quarter of an hour distant from the shooting charged in the indictment.

So, also, in cases of homicide, evidence of former hostility and menaces on the part of the prisoner against the deceased are admissible in proof of malice. 3 Greenleaf, sec. 15, Redfield's edition.

But in the case of *Farrer* v. *State*, 2 Ohio St. 54, it was held, upon full consideration, that on an indictment charging the prisoner with poisoning A, in December, 1851, it is error to permit evidence in chief to show that she poisoned B in the month of August previous.

So, in *Commonwealth* v. *Horton*, 2 Gray, 354, it was held by the Supreme Judicial Court of Massachusetts that, under an indictment charging one act of adultery at a particular time and place, evidence of other acts of a similar character at other times and places is inadmissible, the court saying:

"It is a universal rule, in the trial of criminal cases, that nothing shall be given in evidence which does not directly tend to the proof or the disproof of the matter in issue. The prosecuting officer is not, therefore, allowed to give evidence of facts tending to prove a similar, but distinct offence, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged."

But even if it be conceded that prior conduct of the accused may be put in evidence in order to show that he had feelings of enmity towards the deceased, we are clear that the testimony was wrongfully admitted in the present case, because the time of the incident testified to, more than a month before the homicide, was too remote, and because the incident itself did not tend to prove any feeling of enmity on the part of Bird to the deceased, such as to warrant the jury in inferring that the subsequent homicide was malicious and premeditated. The particular violence threatened was not against the deceased, but against another member of the party; and the vulgar language attributed to the accused was of a character not unusual among coarse men engaged in such an adventure.

The only doubt we feel is whether the evidence, though improperly admitted, was of sufficient importance to call for a reversal of the judgment. However, we cannot say that the testimony did not suffice to turn the scale against the prisoner. And we are the more inclined to sustain this exception, because the error was immediately followed by another and similar one, appearing in the fourteenth assignment of error.

The bill of exceptions discloses that, over objection, Scheffler was permitted to testify as follows:

"That in the latter part of March, 1899, after Patterson had been carried to Anvik, Bird made a trip up the river and came back with a man named Smith; that Smith left, and the next day after that Bird was very disagreeable and tried to pick a fight with the woman Naomi Strong; he acted very funny. You had to watch him and be careful. He got awful good after that, and everything was just so. It was 'Charles this' and 'Naomi that.'"

The matters so testified to took place six months after the

alleged murder, and would seem to have no bearing, direct or remote, upon the guilt of the accused, but still may have tended to persuade the jury that Bird was a dangerous man and likely to kill any one who excited his anger.

We think there was substantial error in the first paragraph of the instructions given the jury by the court at the request of the Government, and which was as follows:

"The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the defendant Homer Bird, on the 27th day of September, 1898, at a point on the Yukon River, about two miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the District of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and willful, and that said killing was not in the necessary defence of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment."

The bill of exceptions shows that to "this instruction the defendant then and there excepted for the reason that the same is erroneous because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defence of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty."

It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol. 3, sec. 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.

It has sometimes been said that if the judge omits something and is not asked to supply the defect, the party who remained voluntarily silent cannot complain. But such a principle can-

not apply to the present case, because the judge's attention was directly called by the Government's request to the question of self-defence, and because the defect in that request was then and there pointed out by the defendant's counsel in their exception. The question involved in that instruction was a fundamental one in the case; indeed, it may be said that the defendant's sole defence rested upon it. The defendant, as shown in the bill of exceptions, had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury were left to pass upon the vital question without reference to the defendant's evidence. *Beard* v. *United States*, 158 U. S. 550, 554, 559.

As the trial judge allowed and signed a bill of exceptions to his instruction in this behalf, it cannot be fairly presumed that the error was healed by any modification or correction made in some other and undisclosed part of his charge.

The judgment of the District Court of the United States for the District of Alaska is reversed, and the cause is remanded to that court with directions to set aside the verdict and award a new trial.

GARDNER *v.* BONESTELL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 143. Argued January 17, 18, 1901. — Decided February 25, 1901.

It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding.

The determination of the Land Department, in a case within its jurisdiction, of questions of fact depending on conflicting testimony is conclusive, and cannot be challenged by subsequent proceedings in the courts.

In proceedings in this court to review the action of state courts, this court does not enter into a consideration of questions of fact.

In 1834 Juan Reed applied to and received from the Mexican

governor of California a grant of a tract of land. In 1854 his heirs petitioned the commission created by the United States for a confirmation of that grant. It was confirmed, the order therefor being in these words:

"In this case on hearing the proofs and allegations, it is adjudged by the commission that the said claim of the petitioners is valid, and it is therefore hereby decreed that the same be confirmed.

"The land of which confirmation is hereby made is the same on which said Juan Reed resided in his lifetime; is known by the name of Corte de Madera del Presidio, is situated in Marin County and bounded as follows, to wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presidio, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holon where is another forest of redwoods called Corte de Madera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the north of the canada and the point of the 'sausal' which is near the Estero lying east of the house on said premises which was occupied by said Juan Reed in November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Reed under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the expediente, a traced copy of which is filed in the case, reference is to be had."

An appeal was taken therefrom to the District Court of the United States, and the following order of confirmation was made on January 14, 1856:

"This cause came on to be heard at a stated term of the court on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the State of California under the act of Congress approved on the 3d of March, A. D. 1851, upon the transcript of the proceedings and decision of the board of commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the court that the said transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby, in all things affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the appellees is a good and valid claim, and that the said claim be, and the same is hereby, confirmed to the extent and quantity of one square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided, that the said quantity of one square league now confirmed to the claimants be contained within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the claimants that less quantity."

No appeal was taken from this order of confirmation, and it, therefore, became final. In 1858 a survey was ordered by the Land Department, and was made by a surveyor, named Mathewson, who surveyed one square league as being the full amount of the tract confirmed to the petitioners. The petitioners claimed that their grant was of a tract described by metes and bounds and not of a given quantity within exterior boundaries, and after some controversy between them and the Land Department the latter recognized their claim, set aside the Mathewson survey and ordered a new survey. This was made in 1871. It was confirmed by the Land Department, and has never been questioned therein. Thereupon a patent was issued to the petitioners, conveying the tract by metes and bounds as described in the order of the commission and shown by the last survey.

The tract in controversy is outside the limits of both surveys. Prior to the last survey Ebenezer Wormouth, the testator of

defendant in error, settled upon the tract in controversy, and thereafter made application to enter the tract as public land of the United States. A contest was had between such testator and one Samuel R. Throckmorton, claiming title from the heirs of Reed, the original grantee, first in the local land office, thence carried by appeal to the General Land Office, and thereafter to the Secretary of the Interior. The right to enter was sustained and a patent issued. Thereafter this action against the plaintiffs in error holding under Throckmorton was instituted in the Superior Court of the county of Marin, California, which, at first a mere action in ejectment, became by the pleadings subsequently filed a suit in equity to try title. The decree in the trial court was in favor of Wormouth, which was affirmed by the Supreme Court of the State, 125 California, 316, and thereafter this writ of error was sued out.

In the trial court the question of title was submitted to the court and findings of fact made. Among them were the following:

"2d. That one of the questions decided by the United States register and receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of *Throckmorton* v. *Wormouth*, mentioned in the twentieth paragraph of said cross complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

"3d. That the officers of the United States Land Department, to wit, the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said register and receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican government to Juan Reed."

"6th. That the officers of the United States Land Department, to wit, the United States register and receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of *Throckmorton* v. *Wor-*

mouth, in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns.

"7th. This court further finds as follows: That the rancho granted by the governor of California, under the government of Mexico, to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach *et al.* to Julius C. McCeney of February 14, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed *et al.* That the grant mentioned in the first paragraph of said cross complaint did not include any part of the land in controversy in this action. That no grant ever made by the Mexican government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the twenty-second paragraph of said cross complaint.

"8th. That the land described in said deed of T. B. Deffebach *et al.* to Julius C. McCeney, or any part thereof, except as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant."

"12th. That none of the grantees named in the deeds mentioned or referred to in the eighteenth paragraph of said cross complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and right of the plaintiff, as alleged in his complaint in this action.

"That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

"13th. That the evidence introduced in the matter of the application and contest mentioned in the nineteenth paragraph of said cross complaint did not show without conflict, or show

at all, that all of the facts set forth in the preceding paragraphs of said cross complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross complaint was not true.

"That the register and receiver of the land office at San Francisco did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross complaint, or upon evidence without conflict; that the said register and receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law or under the law entitled to purchase the said land.

"That the Commissioner of the General Land Office, on appeal from the decision of the register and receiver, did not base his decision upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

"That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

"That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton* v. *Wormouth*, that said Throckmorton was not a *bona fide* purchaser from Mexican grantees or their assigns of the lands described in paragraph sixteen of said cross complaint.

"14th. That the said Throckmorton did, claiming to be a *bona fide* purchaser from Mexican grantees, make said application (to purchase) to the register and receiver of the United States land office at San Francisco, under section 7 of the act of Congress entitled, 'An act to quiet land titles in California.'

"That the said Throckmorton was not a *bona fide* purchaser

from Mexican grantees or their assigns and was not entitled to purchase the said land or any part thereof under said act of Congress."

The opinion of the Supreme Court rested upon the single proposition that the Land Department had jurisdiction of the controversy, and that its judgment was founded upon disputed questions of fact, and, therefore was not subject to review in the courts.

Mr. George W. Monteith for plaintiffs in error.

Mr. C. K. Bonestell for defendant in error. *Mr. Alfred L. Black* was on his brief.

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

The plaintiffs in error base their right to the land in controversy upon this provision of the act of July 23, 1866, c. 219, 14 Stat. 218, 220:

"That where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant; and have used, improved and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same."

Every branch of the Land Department, from the register and receiver of the local land office up to the Secretary of the Interior, decided against the contention of Throckmorton, (under whom the plaintiffs in error claim,) holding that the land was not within the exterior boundaries of the grant, and that Throckmorton was not a purchaser in good faith from the grantee, or his assigns. The trial court, referring to the decision of the Land Department, found that it was not based upon any matter of law, but upon questions of fact in respect to which there was

conflicting testimony. Further, that court upon the testimony adduced before it found in accord with the conclusions of the Land Department, and the Supreme Court of the State has sustained such finding.

Certain propositions may be stated which compel an affirmance of the judgment of the Supreme Court of the State. And first, "it is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding." *Knight* v. *United States Land Association*, 142 U. S. 161, 176.

The grant was one not of quantity but by metes and bounds, and the final survey, approved by the Land Department, determined conclusively the exterior boundaries of that grant. The land in controversy was not within those boundaries. Counsel for plaintiff in error assumes that the correctness of this survey may be litigated in an action between private parties. He insists that the last survey, which he says was a mere compilation and not an actual resurvey, included a large body of lands on the one side which were not, in fact, within the boundaries of the tract of which juridical possession had been given, and excluded on the other side a large body which were within such boundaries and which included the lands in controversy. If his contentions were sustained to the full extent the result would be to enlarge the boundaries of the grant on the one side without reducing them on the other, and so increase the area of the grant several hundred acres above its admittedly true size. In other words, the United States, which obtained by the treaty of cession full title to all lands not subject to private grant, would be deprived of these extra acres, undoubtedly their property. He has mistaken his remedy. It was by application to the Land Department to correct the survey, and failing to secure correction there, a direct proceeding in the courts in which the Reed heirs should have been parties, and in which they could have been heard to defend the survey and patent.

Again, the determination of the Land Department in a case within its jurisdiction of questions of fact depending upon con-

flicting testimony is conclusive, and cannot be challenged by subsequent proceedings in the courts. *Burfenning* v. *Chicago, St. Paul &c. Railway*, 163 U. S. 321, 323, and cases cited in the opinion; *Johnson* v. *Drew*, 171 U. S. 93–99.

The Land Department found and adjudged not only that the land in controversy was outside the exterior boundaries of the grant, but also that Throckmorton was not a purchaser in good faith. Both of these findings were matters of fact and based upon the testimony. No proposition of law controlled such findings, and no error of law is apparent. Both questions of fact were determined by the Land Department adversely to the plaintiffs in error, and that determination concludes the courts. Counsel insists that there was no conflicting testimony. He ignores the survey which is in itself evidence, and that of a most persuasive kind. There are many things which a surveyor sees and finds in making a survey which are not and cannot be reproduced on paper, and which yet guide him, and wisely guide him, in the lines he runs. So that even in a case in which a survey is a proper subject of attack, it can be overthrown only upon satisfactory evidence of mistake. It cannot be ignored and the only matter considered be the tendency and significance of the oral testimony of witnesses as to lines, metes and bounds.

The trial court, in addition to its findings in reference to the proceedings in the Land Department, found, as independent matters of fact, that the land in controversy was outside the exterior boundaries of the grant, and that Throckmorton was not a *bona fide* purchaser. The Supreme Court of the State sustained those findings. Now, in proceedings in this court to review the action of state courts we do not enter into a consideration of questions of fact. We accept the determination of those courts in such matters as conclusive, and inquire simply whether there have been errors of law. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Hedrick* v. *Atchison, Topeka &c. Railroad Co.*, 167 U. S. 673, 677.

For these reasons the judgment of the Supreme Court of California is

Affirmed.

RICE *v.* AMES.

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

No. 420. Submitted December 17, 1900.—Decided February 25, 1901.

An appeal lies directly to this court from a judgment of the District Court in a *habeas corpus* case, where the constitutionality of a law of the United States, or the validity or construction of a treaty is drawn in question.

A complaint before a commissioner in a foreign extradition case, if made solely upon information and belief, is bad; but it need not be made upon the personal knowledge of the complainant, if he annex to such complaint a copy of the indictment found in the foreign country, or the deposition of a witness having personal knowledge of the facts, taken under the statute.

Where the first count of a complaint charged the offence solely upon information and belief, and the subsequent counts purported on their face to aver offences within the personal knowledge of complainant, it was held that the insufficiency of the first count did not impair the sufficiency of the others, and that the complaint vested jurisdiction in the commissioner to issue his warrant.

Continuances of the examination may be granted in the discretion of the commissioner, and, in this particular, he is not controlled by a state statute limiting such continuances to ten days.

The act of Congress authorizing Circuit Courts to appoint commissioners is constitutional.

THIS was an appeal by Fred Lee Rice, Frank Rutledge and Thomas Jones from an order of the District Court for the Northern District of Illinois, denying their application for a discharge upon a writ of *habeas corpus*, the object of which writ was to test the validity of certain proceedings against the appellants, taken before a commissioner for that district, specially authorized to take jurisdiction of proceedings for the extradition of persons charged with crimes, under treaties with foreign governments.

The proceedings before the commissioner are set forth in a bill of exceptions, signed by the district judge.

Statement of the Case.

The first warrant for the arrest of the appellants was issued June 2, 1900, upon complaint made upon information and belief, by "a police officer of the city of Chicago," and an affidavit of a police detective of the city of Toronto, Canada, also upon information and belief, charging defendants with sundry crimes committed both at Aurora and at Toronto, in the Province of Ontario. Pursuant to this warrant appellants were taken by the respondent, Ames, as United States marshal, out of the custody of the city police, by whom they had been arrested the day before, and brought before the commissioner. Proceedings were adjourned until June 4, when the case was dismissed, and a new warrant issued upon the complaint of Albert Cuddy, police detective of the city of Toronto, also upon information and belief. Defendants moved to quash this complaint and warrant by reason of the fact that the complaint was made upon information and belief, which was denied, and the proceedings adjourned until June 14. Defendants were committed for further hearing. Upon that day, it appearing that the proceedings had been taken only for the purpose of provisional apprehension and detention, the case was dismissed, and a new and final complaint made by William Greer, a government detective for the Province of Ontario, duly authorized by the Attorney General of the province to act as the agent of the government in the prosecution of extradition proceedings.

This complaint contained four counts, the first of which charged the defendants, upon information and belief, with stealing from the post office building, in the town of Aurora, a quantity of Canadian postage stamps, $55 in money and certain certificates in mining stock. The other three counts, in which the charge was made absolutely and not upon information and belief, charged the defendants first, with stealing a horse, cart and harness; second, with breaking and entering a private bank in the town of Aurora with intent to steal, and also with the larceny of certain money in the bank; and third, with breaking into a shop on Queen street in the city of Toronto. A new warrant was issued upon this complaint, and the examination adjourned until June 25, at which time defendants were brought before the commissioner and motion made for their discharge

for want of jurisdiction, and for insufficiency of the complaint. This motion being denied, the case went to a hearing upon certain documents certified by the American consul, and a large number of depositions of witnesses which were not sent up with the record. The examination was continued for several days, and finally upon July 10 the commissioner found there was probable cause to believe the defendants guilty, and ordered them to stand committed to await the action of the proper authorities.

Whereupon, and upon the same day, petitioners sued out this writ of *habeas corpus* from the District Court, and from the order of that court, denying their discharge, they took an appeal directly to this court.

Mr. S. H. Trude for appellants.

Mr. Lynden Evans for appellee.

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

1. Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the Court of Appeals act of 1891, provision was made for an appeal to the Circuit Court in *habeas corpus* cases "from the final decision of any court, justice or judge inferior to the Circuit Court." Rev. Stat. sec. 763; and from the final decision of such Circuit Court an appeal might be taken to this court. Rev. Stat. § 764, as amended March 3, 1885, c. 353, 23 Stat. 437.

The law remained in this condition until the Court of Appeals act of March, 1891, was passed, the fifth section of which permits an appeal directly from the District Court to this court "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of *Bucklin* v. *United States*, 159 U. S. 680, in which

the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an *appeal* was allowed in *habeas corpus* cases. The observation made in the *Bucklin* case that "there was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error," may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued. *In re Lennon*, 150 U. S. 393; *Ekiu* v. *United States*, 142 U. S. 651; *Gonzales* v. *Cunningham*, 164 U. S. 612. As a construction of the extradition treaty with Great Britain is involved, the appeal was properly taken to this court.

2. The first assignment of error is to the effect that the commissioner issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty, or by section 5270 of the Revised Statutes. The first two complaints, which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. Nor is it saved by the fact that Greer described himself as government detective for the Province of Ontario, and duly authorized by the Attorney General to act as the agent of the government to prosecute extradition proceedings. *Ex parte Smith*, 3 McLean, 121, 135; *Ex parte Lane*, 6 Fed. Rep. 34; *In re Young Mfg. Co.* (1900), 2 Ch. 753.

A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. While authorities upon this

subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor. *Smith* v. *Luce*, 14 Wend. 237; *Matter of Bliss*, 7 Hill, 187; *Proctor* v. *Prout*, 17 Mich. 473. So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts. *Waddell* v. *Bruen*, 4 Ed. Chan. 671; *Armstrong* v. *Sanford*, 7 Minnesota, 49.

We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offence charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the government for that purpose, and Rev. Stat. sec. 5271, makes special provision that "in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence," of which authentication the certificate of the diplomatic or consular officer of the United States shall be sufficient. This obviates the necessity which might otherwise exist of confronting the accused with the witnesses against him. Now, it would obviously be inconsistent to hold that depositions, which are admissible upon the hearing, should not also be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant. Indeed, the words of the statute, "in every case of *complaint*," seem to contemplate this very use of them. If the officer of the foreign government has no personal knowl-

edge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant.

But while, as already observed, the first count is bad, by reason of its unsupported allegations upon information and belief, the second count contains a wholly different charge of larceny of a horse, cart and harness; the third, of breaking and entering a private bank in Aurora; and the fourth, of breaking and entering a building in Toronto. Each of these counts charges a distinct offence, and each purports on its face to be made upon the personal knowledge of the complainant. While it is possible that he may have intended to make all these charges upon information and belief, the natural intendment of the last three counts is that the affiant swore to facts within his personal knowledge. If it be true, as stated by writers upon criminal procedure, (Bishop, Crim. Proced. § 429,) that each count must be sufficient in itself, and averments in one cannot aid defects in another, it would seem to follow by parity of reasoning that defects in one ought not to impair the sufficiency of another. Upon the whole we think the complaint is sufficient.

3. By the second assignment, petitioners insist that the commissioner lost jurisdiction in the premises by continuing the proceedings from June 14 to June 25, a period of eleven days, in supposed violation of section 67, article 7 of chapter 79 of the Revised Statutes, of Illinois, governing continuances by justices of the peace and examining magistrates, which enacts that "the justice before the commencement of the trial may continue the case *not exceeding ten days* at any one time on consent of the parties or on any good cause shown." It is insisted that this statute controls proceedings before commissioners of the United States in extradition cases, by virtue of the treaty and of the several acts of Congress prescribing the duties of com-

missioners. The treaty only provides in article 6, (26 Stat. 1508, 1510,) that "the extradition of fugitives under the provisions of this convention and of the said Tenth Article" (of the treaty of August 9, 1842) "shall be carried out in the United States and in Her Majesty's dominions respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering States." This evidently contemplates the laws of the United States regulating extradition, and has no reference whatever to the laws of the particular State within which the proceedings are taken.

Provision is made by Rev. Stat. sec. 627 for the appointment of commissioners of the Circuit Court, now called United States Commissioners, act May 28, 1896, c. 252, sec. 19, 29 Stat. 140, 184, who shall exercise such powers as may be conferred upon them. By Rev. Stat. sec. 727, they are vested with such authority "to hold to security of the peace and for good behavior in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them." This evidently defines the extent of their powers and not the mode in which such powers are to be exercised. By section 1014, they are vested with the power to arrest, imprison or bail offenders "for any crime or offence against the United States" "agreeable to the usual mode of process against offenders in such State," that is, the State wherein the offender "may be found." That this has no application to continuances before commissioners in extradition proceedings is evident, first, by the fact that the section is confined to crimes or offences against the United States, and, second, because it refers only to the usual mode of *process* against offenders in such State, and not to the incidents of the examination. To hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular State would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses, or the procurement of properly authenticated depositions for use upon the examination. Clearly there is nothing either in the treaty or the stat-

utes requiring commissioners to conform to the state practice in that regard. The only requirement seems to be that arising from the tenth section of the Ashburton Treaty, that the fugitive shall only be surrendered "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."

4. The fifth assignment questions the constitutionality of Rev. Stat. sec. 5270, first, because it does not provide for any mode of procedure relating to continuances, change of venue, bail, etc., before commissioners appointed in extradition matters; second, because Congress had no power to confer upon a District Judge of the United States authority to create such inferior courts; third, because Congress has not created such court and established its jurisdiction. We are unable to appreciate the force of this objection. Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under article 2, section 2, paragraph 2 of the Constitution, to invest the District or Circuit Courts with the power of appointment. The only qualification required of a commissioner to act in extradition cases is that suggested by Rev. Stat. section 5270, that he shall be "authorized so to do by any of the courts of the United States." We know of no authority holding that Congress may not vest the courts with this power, and we are reluctant to create one.

The other assignments question the power of the commissioner to deny bail, which becomes immaterial here, as well as the finding of the District Judge upon the facts, which is not examinable upon a writ of *habeas corpus*. There is nothing, too, in the additional assignment that the commissioner took the matter under advisement and abused his discretion in the matter of continuance, of which we see no evidence.

There are also noticed in appellants' brief certain objections to the complaint, which might have been successfully urged against a formal indictment for the same offence, but which do not constitute "a plain error not assigned or specified," of which, under rule 21 of this court, subdivision 4, we may take notice

at our option in the absence of a special assignment. The technicalities of an indictment are not requisite in a complaint. *State* v. *Holmes*, 28 Connecticut, 230; *Commonwealth* v. *Keenan*, 139 Mass. 193; *Rawson* v. *State*, 19 Connecticut 292; *Keeler* v. *Milledge*, 24 N. J. Law, 142; *Williams* v. *State*, 88 Ala. 80; *State* v. *McLaughlin*, 35 Kan. 650.

Petitioners have no just reason to complain of the action of the District Court in remanding them to the custody of the marshal, and its judgment is therefore

Affirmed.

WHELESS *v.* ST. LOUIS *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 161. Argued and submitted January 31, February 1,1901.—Decided February 25, 1901.

When owners of lots in a city file a bill to restrain the assessment against them of the costs and expenses of improving a public street, on which the lots abut, the matter in dispute is the amount of the assessment levied, or which may be levied, against the lot or lots of each of the complainants respectively.

And in such circumstances no distinction can be recognized between a case where the assessment has not in fact been made, and a case where it has already been made.

As neither one of these complainants will be required to pay two thousand dollars in respect of lots involved, the decree of the Circuit Court dismissing the bill for want of jurisdiction is affirmed.

In this case the jurisdiction of the Circuit Court was in issue, and the question of jurisdiction was certified.

The question was whether the matter in dispute exceeded, exclusive of interest and costs, the sum of two thousand dollars. The Circuit Court held that jurisdiction did not exist, and dismissed the bill. 96 Fed. Rep. 865.

The suit was brought by Joseph Wheless and others against the city of St. Louis, the president of the Board of Public Im-

provements of that city, and the Gilsonite Roofing and Paving Company, to restrain the city and the board from levying or assessing the costs and expenses of improving a public street whereon complainants' property abutted, against the property, and to enjoin the paving company from demanding or receiving from the city any special tax bills issued therefor. The certificate of the Circuit Court states the facts thus:

"That the above entitled cause came on to be heard by the court at, to wit, the September, 1899, term of the court, upon the application for a temporary injunction, as prayed in the bill, it being alleged in said bill that complainants are severally the owners of certain and nearly all the lots of land abutting on Whittier street, between Washington boulevard and Finney avenue, in the city of St. Louis; that the defendant city, acting under the provisions of its charter and ordinances, had entered into a contract with the defendant paving company to improve said street in front of complainants' property, and said company was engaged in doing the work, which was a public improvement; that the cost of making said improvement is, according to the terms of said charter, ordinance, and contract, a charge upon complainants' abutting property, and is about to be levied and assessed against it as a special tax, according to the frontage of said lots on said street, and special tax bills are about to be issued separately against each lot of complainants, which would be liens upon their said property and subject the same to being sold to satisfy said special assessment; which assessment and levy, it is averred, are in violation of complainants' rights under the Federal Constitution. Wherefore an injunction was prayed to restrain said city from levying and assessing the cost of said public improvement against complainants' property and from issuing special tax bills against them for the same, and for a decree declaring said charter, ordinance, and contract provisions void; that the cost of said improvement, which was about to be assessed and levied against all the abutting property, is largely in excess of the sum of $10,000.

"Defendants filed a plea to the jurisdiction of the court, supported by an affidavit showing that the amount of special tax which would be assessed and levied against the property of any

one of the complainants severally would not exceed $1400, and would not be an amount equal to $2000, and that hence the matter in dispute between the parties was not of the sum or value necessary to give jurisdiction to the Circuit Court of the United States, and that the bill should be dismissed for want of jurisdiction.

"Complainants demurred to the said plea and submitted the question of jurisdiction thus raised to the determination of the court, and thereupon the court, after due hearing and consideration, did overrule said demurrer, the court being of the opinion, as set out in the written opinion filed in said cause and accompanying this appeal, that the court was without jurisdiction of said cause in respect of the sum or value in dispute, and upon complainants confessing the matter of the plea in point of fact and refusing to plead further, their said bill was by the court dismissed for want of jurisdiction."

Mr. Joseph Wheless for appellants. *Mr. Minor Meriwether* was on his brief.

Mr. B. Schnurmacher and *Mr. Charles Claflin Allen* on behalf of St. Louis and the President of its Board of Public Improvements, and *Mr. Edward C. Kehr*, on behalf of the Gilsonite Roofing and Paving Company, appellees, filed a brief; but the court declined to hear counsel for appellees.

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

The bill alleged that defendants were about, under the charter of the city of St. Louis, and the ordinance authorizing and directing the improvement in question, to impose the cost thereof upon the several lots of ground adjoining the improvement, in the proportion that the frontage of each lot bore to the total frontage thereon. And it was admitted that the various lots of land threatened with assessment were owned in severalty; that no one complainant was interested in the lot of any other; and that the assessment against no one lot would amount to

two thousand dollars. We think that the Circuit Court rightly held that it was without jurisdiction under the circumstances. The general rule was thus stated by Mr. Justice Bradley in *Clay* v. *Field*, 138 U. S. 464, 479: "The general principle observed in all is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

Accordingly it has often been held that the distinct and separate interests of complainants in a suit for relief against assessments cannot be united for the purpose of making up the amount necessary to give this court or the Circuit Court jurisdiction. *Ogden City* v. *Armstrong*, 168 U. S. 224; *Russell* v. *Stansell*, 105 U. S. 303; *Walter* v. *Northeastern Railroad Company*, 147 U. S. 370.

The "matter in dispute" within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied, or which may be levied, as against each of the complainants separately. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected, or relieved, in a certain sum, and not in the whole amount of the assessment. If a decision on the merits were adverse to the assessment, each of the complainants would be relieved from payment of less than two thousand dollars. If the assessment were sustained, neither of them would be compelled to pay so much as that.

It is true that the assessment has not been made, but the charge is that it is threatened to be made, and the purpose of

the bill is to enjoin proceedings about to be taken to that end. We agree with the Circuit Court that in these circumstances there is no force to the suggested distinction between a case where the assessment has not in fact been made and a case where it has already been made. When made, neither one of these complainants will be called upon to pay a sum equal to the amount of two thousand dollars, nor will any one of the lots be assessed to that amount.

Decree affirmed.

HOBBS *v.* BEACH.

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

No. 139. Argued January 16, 17, 1900.—Decided March 5, 1901.

The first three and sixth claims of reissued letters patent No. 11,167 to Fred H. Beach for a machine for attaching stays to the corners of boxes, were not anticipated by prior devices, and are valid.

It is within the jurisdiction of the Commissioner of Patents to order a patent to be reissued to correct an obvious error in one of the drawings.

The claims of the Beach patent were not unlawfully expanded pending the litigation of interferences in the Patent Office.

A patent is not terminated by the expiration of a foreign patent for the same invention, unless such patent were obtained by the American patentee, or by his consent, connivance or authority.

The first three and sixth claims of the Beach patent *held* to be infringed by defendant, manufacturing under a patent to Horton of December, 1890.

The fact that a claim contains the words "substantially as described" does not preclude the patentee from insisting that his patent has been infringed by the use of a mechanical equivalent. These words are entitled to but little weight in determining the question of infringement, although, if a doubt arose upon the question whether an infringing machine is the mechanical equivalent of a patented device, that doubt might be resolved against the patentee, where the claims contain the words "substantially as described, or set forth."

THIS was a bill in equity by Fred H. Beach against Clarence W. Hobbs and Richard Sugden, now deceased, (whose estate is

represented by his executors,) doing business under the name of the Hobbs Manufacturing Company, for an injunction and a recovery of damages for the infringement of reissued letters patent No. 11,167, dated May 26, 1891, for a "Machine for attaching Stays to the Corners of Boxes."

In his specification the patentee makes the following statements:

"That it has been customary heretofore in making paper or straw-board boxes to apply a stay or fastening strip over the joints at the corners of the boxes, which strip is pasted down on the outside of the box or is folded over the edge of the box and secured by paste both outside and inside of the corner; and such work, as far as I am aware, has heretofore been done by hand."

"My invention relates to a machine for doing this work; and it consists in the matters hereinafter set forth, and pointed out in the appended claims."

Following are fifteen drawings of the machine and distinct portions thereof, and a minute description of the same. The patentee continues:

"The machine herein shown is, as hereinbefore stated, constructed to turn into the inside of the box the projecting end of the stay, and for this purpose the stay-strip is made of such width, and its guides are so arranged that the inner edge of the strip extends over or past the edge of the box-wall, so that when the stay is pasted down on the outside of the box corner, a loose or free end projects outward beyond the inner edge of the box. After the plunger G has pressed the stay upon the box the secondary plunger or strip-bender H then descends and bends or turns this loose end vertically downward."

"In many boxes the stay is simply pasted against the exterior surface of the box-corner, and is not turned in or over the edge of the same; in which case the work can be done by using a non-reciprocating angular lower die, or anvil, and a single upper die or plunger. In such case the form B will obviously be not necessary as a part separate from the die; or, in other words, a single lower die or form will take the place of the form B and movable lower die I."

Statement of the Case.

"As far as the main features of my invention are concerned, forms other than those illustrated of the several parts of the machine may be employed without departure from my invention—as, for instance, in place of the particular mechanism shown for feeding or delivering fastening-strips or stay-strips to and between the clamping dies, or for applying paste or glue to the said stay-strips—other forms of strip feeding and pasting devices may be used in practice with the same general result, as above described."

The following are the claims alleged to have been infringed by the defendants:

"1. The combination, with opposing clamping-dies, having diverging working faces, of a feeding mechanism constructed to deliver stay-strips between said clamping-dies, and a pasting mechanism for rendering adhesive the stay-strips, said clamping-dies being constructed to coöperate in pressing upon interposed box-corners the adhesive stay-strips, substantially as described.

"2. The combination, with opposing clamping-dies, having diverging working faces, said clamping-dies being arranged to coöperate in pressing adhesive fastening strips upon interposed box-corners, a feeding mechanism constructed to feed forward a continuous fastening-strip, and a cutter for severing the said continuous strip into stay-strips of suitable lengths, substantially as described.

"3. The combination, with opposing clamping-dies, having diverging working faces, said clamping-dies being arranged to coöperate in pressing an adhesive fastening-strip upon the corner of an interposed box, a feeding mechanism constructed to feed between the dies a continuous fastening-strip, a pasting mechanism for applying adhesive substance to the strip, and a cutter for severing the strips into stay-strips of suitable lengths, substantially as described."

"6. The combination of opposing clamping-dies having diverging working faces constructed to coöperate in pressing an adhesive stay-strip upon an interposed box-corner, one of said clamping-dies being constructed to act with an elastic or yielding pressure to enable the dies to operate upon the box-corners of different thicknesses, substantially as described."

Upon a hearing, upon pleadings and proofs, the case resulted in a decree in favor of the plaintiff Beach upon the sixth claim, and a further finding that the first, second and third claims had not been infringed. 82 Fed. Rep. 916.

Both parties appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court with respect of the first three claims of the patent, and affirmed it as to the sixth claim, and remanded the case for further proceedings in conformity with the opinion. 92 Fed. Rep. 146.

Mr. Samuel T. Fisher for Hobbs. *Mr. Edward S. Beach* was on his brief.

Mr. John Dane, Jr., for Beach.

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

The art of making paper boxes requires that the better class, of square or other angular shapes, be stayed or reinforced at the corners, where a union of the sides and ends is to be brought about by the application of adhesive strips of paper or muslin placed upon the joints, and the corners thereby strengthened, before receiving their final covering of paper. Prior to the Beach invention, the work of thus strengthening the corners of paper boxes by these adhesive strips had always been performed in a tedious and irregular way by hand.

The Beach machine and its operation are thus described by the plaintiff's expert:

"The machine consists of an anvil or lower die, having at the uppper portion two working faces, which diverge downward from one another at a right angle. Working in connection with this anvil or die, and above it, is a vertical movable die or plunger, having also two diverging working faces, the working faces of the plunger forming a notch therein, which notch co-operates with the upper portion of the lower anvil or die, the dies being adapted to operate upon the right-angle corner of a box to compress the said corner between the working faces of

the opposing dies. A strip of paper suitable for the stay is fed by automatically moving mechanism over a pasting device, and between a pair of shears, and thence between the upper and lower die when separated. The operation of the machine briefly described is as follows: A box whose corner is to be strengthened by the addition of a stay strip is placed upon the lower anvil or die, the inside of the corner of the box resting upon the apex of the lower die. The machine as it is revolved then feeds forward the stay strip which has the paste upon it, and as the upper die descends the shears also operate, severing from the continuous stay strip a portion sufficient for the stay. As the cutting operation is completed the upper die or plunger is descending, and forces the gummed stay strip into position upon the outside of the box corner, and the stay strip and box corner are pressed between the working faces of the two opposing dies, and thus the stay strip is caused to conform to, and be stuck upon, the corner of the box. When the upper die or plunger rises, the box with its attached stay strip can be removed and another corner presented, when the operation will be repeated. The upper die or plunger is provided with a spring of rubber or metal, so that it may yield slightly in the direction of its motion, so that it may give an elastic pressure upon the box, and also be made to operate upon different thicknesses of box or stay-strips."

"Briefly, this description describes the machine, so far as it is necessary to describe the same for the purposes of this case. I must state, however, that the machine is also arranged to fold in the end of the stay strip within and into the interior of the box, and this it accomplishes by having the lower die longitudinally movable, and by supporting the box upon both the working faces of the lower die and upon the faces of the block within which the lower die can move. The faces of the upper portion of the die and of the block are arranged so that they form two planes at right angles to one another, the planes of the upper working faces of the die corresponding with the planes of the upper faces of the block. I refer to this capacity of the machine merely for the purpose of showing that I have considered the same, but such capacity, that is, the ability to turn the end of

the stay strip in and over the edge of the box, is not a feature of the machine which need always be present. I quote as follows from the specification of the patent:

"'In many boxes, the stay is simply pasted against the exterior surface of the box corner, and is not turned in or over the edge of the same, in which case the work can be done by using a non-reciprocating angular lower die or anvil, and a single upper die or plunger.'

"From the above quotation, it will be clearly evident that the patentee contemplated using his machine in the simple form in which I have described it, and divested of that mechanism which is involved when the stay strip is turned over the edge of the box and into the same. As the issue in this case involves a mechanism which does not turn the stay strip over and into the box, I have deemed it best not to put into the record a description of the mechanism necessary to accomplish that result."

The first claim of the patent is for (1) two opposing clamping dies, having diverging working faces; (2) a feeding mechanism which delivers the stay strip between the clamping dies, when the upper die is raised; and (3) a pasting mechanism. The clamping dies are so constructed as to coöperate with one another in pressing upon interposed box corners the adhesive stay strips, substantially as described.

The second claim also includes the opposing clamping dies with diverging working faces; the same feeding mechanism, and a cutter for severing the continuous strip into stay strips of suitable length, substantially as described.

The third claim includes the same dies, the feeding mechanism, the pasting mechanism and the cutter; in short, a combination of all the elements of the two preceding claims.

The sixth claim includes the same clamping dies having the diverging working faces, one of which clamping dies is constructed to act with an elastic or yielding pressure, to enable the dies to operate upon box corners of different thicknesses.

1. The three first claims were vigorously assailed by the defence upon the ground that, in view of the prior state of the art, they involved no invention. Unfortunately, however, this

defence comes to us so loaded down with adverse decisions that we should hesitate to sustain it, unless it were made clear that, through some misunderstanding or omission, it had not been fully presented to the various tribunals which had passed upon it, or that their rulings had been based upon a misapprehension of the facts.

The proofs show that Mr. Beach made application for his patent in June, 1885; that while pending in the Patent Office it was placed in interference with five other claims, and that the patentee was awarded priority of invention by the examiner of interferences, by the board of examiners-in-chief on appeal, and finally by the Commissioner of Patents. It also appears that, in a suit in the Northern District of New York, defended by two of the contestants in the interference proceeding, these three claims were sustained by the Circuit Court, *Beach* v. *American Box Machine Co.*, 63 Fed. Rep. 597, and on appeal, by the Circuit Court of Appeals for the Second Circuit. *Inman Manufacturing Co.* v. *Beach*, 71 Fed. Rep. 420; *S. C.*, 35 U. S. App. 667. Nor do we understand that in the case under consideration the Circuit Court for the District of Massachusetts differed from the New York courts as to the validity of the first three claims. Indeed, the learned Circuit Judge says expressly: "On the questions of anticipation and the state of the art, we therefore follow the conclusions of the Circuit Court of Appeals for the Second Circuit." The difference between him and the Circuit Court of Appeals, to which this case was carried, related to the proper construction of these claims, and to the question of their infringement. Of course, we are bound to give to this question of anticipation an independent consideration. At the same time, we feel ourselves bound to defer somewhat to this unanimity of opinion upon the part of so many learned and distinguished judges, whose lives have been largely devoted to the examination of patent causes.

Taking up these prior patents, our attention is at once challenged to the fact that none of them covers a machine for attaching paper or muslin stays to the corners of boxes; and the question arises whether the uses to which these machines are adapted are so nearly analogous to the use made of them by

Beach that the applicability of the old device to the new use would occur to a person of ordinary mechanical skill, within the case of *Potts* v. *Creager*, 155 U. S. 597, in which we said (p. 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, but if the relations between them be remote, and especially if the use of the old device produces a new result, it *may* at least involve an exercise of the inventive faculty."

It is sufficient to observe of the patents to Cohn of 1874, to Lieb of 1880, and of the English patent to Hadden of 1884, that they cover machines for stitching wire or attaching metallic stays, and that, while all three of them have the clamping dies with diverging faces, they lack most of the other elements of the first three claims of the Beach patent. The possibility of adapting these devices to the attaching of gummed strips to the corners of paper boxes might occur to an ordinary mechanic, but could scarcely be carried into effect without the employment of something more than mechanical skill.

Most of the other prior patents relate to machines for making paper tags, wherein a piece or patch is gummed or cemented to the side of the tag to strengthen it; to preparing paper for covering paper boxes; to covering such boxes with pasted paper; to machines for making match or other paper boxes; forming heel stiffeners; shaping or working sheet metals, or addressing machines.

The only patents requiring special notice are the Maxfield and Terry patents for making paper boxes, which relate to mechanism for pressing a strip of glued paper upon the edge of circular collar boxes at the junction of the bottom and sides, or rim, so as to form a union of the circular end with the cylindrical side of the box. The operation of the machines seems to be only partly mechanical, and differs so widely from the Beach patent that they can hardly be seriously insisted upon as anticipating it. It would seem from the specifications that a great part of the work is done by hand; indeed, in the Terry patent, it is said "that the invention connects the circular parts with the strips, said parts forming the tops and bottoms and

sides of boxes; the remaining work, such as the pasting of the strip in one part, being done by hand, as also the covering of the boxes, if desired, with colored paper." The machine is in no sense automatic, and if it were, its functions are so different from those of the Beach device it is clearly no anticipation.

None of these patents approximates so nearly to the Beach patent as that of Dennis and York's addressing machine, which was the only one deemed worthy of special notice in the courts below. This relates to "addressing machines in which a strip of paper, with the addresses printed thereon, is run through the machine, the addresses cut off in slips, and automatically affixed to the newspapers, envelopes, or other articles by a descending knife and platen." The object of the invention is stated to be "to change or adjust the feed automatically by the running of the machine itself so that addresses of greater or less width can be cut accurately without attention of the operator, the machine adjusting itself accurately to the work to be done; and, second, to enable the addresses to be affixed to single sheets beneath the platen." The machine has a feeding, pasting and cutting mechanism, combined with a vertical reciprocating plunger, armed at its lower end with a knife to cut off the addresses, and descending with a flat head upon a flat platen, a newspaper being interposed between. The bed on which the papers rest is called a "follower," and instead of being rigid, is supported upon light coiled springs and by lever action, so that it will move up and down freely and produce just enough pressure under all circumstances to receive the pasted slip upon the upper sheet. Being designed for light work it is not built with the solidity required for pasting strips upon boxes, and in other particulars differs from the Beach device.

In its operation, it approaches much more nearly to the Beach device than any other which has been put in evidence, and we agree with the Circuit Court of Northern New York that if this be not an anticipation, none of the others are. By changing the flat head and the flat platen to clamping dies with diverging faces, and strengthening and changing the machine in some minor particulars, it could be used to fasten stay strips

to box corners. Indeed, a model of the Dennis and York machine, so altered, was put in evidence, and shown to be capable of doing the work of the Beach patent, though somewhat crudely and imperfectly. It is insisted that, as the only material change in the Dennis and York machine is the substitution of dies with diverging faces for the flat head and platen of that structure, this involves no invention, and that it would at once occur to a mechanic of ordinary skill.

It appears from the testimony that several of these addressing machines, of which that of Dennis and York is a type, and which are now claimed to have inspired the Beach patent, had been upon the market for many years, and yet it never seems to have occurred to any one engaged in the manufacture of paper boxes that they could be made available for the purpose of attaching strips to the corners of such boxes. This very fact is evidence that the man who discovered the possibility of their adaptation to this new use was gifted with the prescience of an inventor. While none of the elements of the Beach patent—taken separately or perhaps even in a somewhat similar combination—was new, their adaptation to this new use and the minor changes required for that purpose resulted in the establishment of practically a new industry, and was a decided step in advance of any that had theretofore been made.

We agree that if the Dennis and York machine were designed for the purpose of attaching together the edges of paper boxes, where each surface was in line with the other, with the aid of flat dies and platen, it would require no invention, in view of other anticipating devices, to change this to dies with diverging faces for gluing boxes at their corners. But that is not all. Beach did not have before him a machine for attaching strips to the corners of paper boxes, but a machine for attaching addresses to newspapers, and while there is an analogy, there can scarcely be said to be a similarity in these functions. We agree with the courts below that it did involve invention to see that a machine of the Dennis and York type was adaptable to the work of the Beach device, and, second, to make such changes as were necessary to adapt that device to its new function. With all the anticipating devices before us, it is apparent that

the mere change in the shape of the dies was a minor part of the work involved in so changing the Dennis and York machine as to make it perform a wholly different function, the invention consisting rather in the idea that such change could be made, than in making the necessary mechanical alterations. As stated by Judge Coxe in his opinion in *Beach* v. *American Box Machine Co.*, 63 Fed. Rep. 597, "the question is whether a mechanic before any one had thought of pasting stay strips to the corners of boxes by machinery, would construct the Beach machine after seeing the labeling machine. Would the latter suggest the idea and the embodiment of the idea? Would the thought enter the mind of the skilled mechanic with the Dennis and York device before him on his work bench; and if it did, would it not be a creative thought whose presence would convert the mechanic into an inventor?"

In passing upon the question of novelty we feel at liberty to consider the fact that the Beach machine and its congeners have completely supplanted the former method of applying strips by hand; that no manufacturer can successfully compete for the trade without adopting such machine; that it not only applies these strips with much greater rapidity than is possible by hand, but the work done is stronger, cheaper, cleaner and more uniform; that the machine attaches the strip more rigidly about the corner, and that by reason of its greater compression forces out the moisture and dries the box for immediate use; that there is also a saving of material by cutting the strips of the proper length instead of tearing them, and that by reason of the greater compression heavier and stronger material may be employed than was possible when the work was done by hand. We find no difficulty in holding that the first three claims of this patent were not anticipated by any prior devices.

What we have said regarding these claims applies with even greater potency to the sixth claim, which introduces a new feature of a clamping die constructed to act with an elastic or yielding pressure, to enable the dies to operate upon box corners of different thicknesses. While the mere introduction of springs to enable the plunger to act with an elastic pressure may not of itself have been a novelty, its introduction into a machine

which was itself novel certainly did not destroy its novel character. The claim does not cover simply a die constructed in this manner; but the elastic feature introduced into one of opposing clamping dies, having diverging working faces, constructed to coöperate in pressing an adhesive stay strip upon an interposed box corner, was clearly novel; and while the introduction of this feature into an old and non-patentable machine may not itself involve invention, in this case it is merely an additional element introduced into a machine which did itself involve invention. This feature was introduced into Beach's claim as early as May 4, 1886, by an amendment to his specification, before the patent was issued, and hence could not have been inserted to cover the Horton patent used by defendants, which never was known to the trade before 1889 or 1890.

2. The validity of the reissue is attacked upon the ground that the original patent was neither "inoperative nor invalid by reason of a defective or insufficient specification," as required by statute, (Rev. Stat. sec. 4916,) to justify a reissue. The reissue was applied for April 9, 1891, but a few weeks after the original patent was issued, merely to correct, as it would seem, an obvious error in one of the drawings. Possibly the error was such as would not have impaired the patentee's rights under his original designs; but he was entitled to the full scope of his invention, and if he were dissatisfied with the drawings as they stood, and the error was purely an inadvertent one, we think it was within the jurisdiction of the Commissioner of Patents to order the patent to be reissued. The defence is purely a technical one. There was no attempt to enlarge the claims or to alter the specifications. There is no evidence that any one could have been prejudiced by the reissue, and we see no reason to doubt that it was applied for in good faith, and with a design only of securing to the patentee what he had actually invented. To justify a reissue it is not necessary that the patent should be wholly inoperative or invalid. It is sufficient if it fail to secure to the patentee all of that which he has invented and claimed. The reissue was applied for so promptly that no question can arise upon the facts of this case of an attempt to cover devices which had been pat-

ented or mean time had come to the knowledge of the patentee. As was said in *Topliff* v. *Topliff*, 145 U. S. 156, 171: "This court will not review the decision of the Commissioner upon the question of inadvertence, accident or mistake, unless the matter is manifest from the record." The only alternative of a reissue was a suit upon the original patent, in which the patentee would be compelled to take his chances of success, notwithstanding the error in his drawing, when in case of defeat the time in which to obtain a reissue might have expired. We do not think he should be driven to this expedient.

3. The defence that the claims of the Beach patent were unlawfully expanded pending the litigation in the Patent Office and before the final issue of the patent by omitting the secondary plunger or strip bender H, was considered by the courts in both the First and Second Circuits, and was held to be unsupported by the facts. In his first application, made June 10, 1885, Beach claimed not only a plunger coming down "to press the stay upon the box," but a secondary plunger coming down "to turn the projecting end of the stay down at right angles," although in the third claim the secondary plunger is not mentioned as an element; and in his specification he says "in some kinds of work the stay can be applied and the projecting edge turned under without the use of the secondary plunger H; but in ordinary work it is necessary." In his first amendment, filed May 4, 1886, he states that "in some cases, with the use of thin stays, the edge that projects beyond the edge of the box will be turned down sufficiently by the action of the plunger G, and without the use of the secondary plunger H;" and that "in many boxes the stay is simply pasted down over the corner of the box, and is not turned under, in which case the work can be done by using the angular form and one plunger with a corresponding angular notch." He also amended his first claim to fit this contingency, by omitting mention of the secondary plunger, and adding a fourth claim, in which he describes the plunger as "formed with an elastic or yielding foot."

All this was prior to the invention of the Horton machine, which was first put into use in September, 1889. Of course, the amendment of May, 1886, could not have been made with

reference to this device. It is true that, in November, 1890, after application had been made for the Horton patent, new specifications and claims were filed, in which the invention was stated much more in detail, and with much fuller and more accurate language than before. But there appears to have been no attempt to expand the original claims for the purpose of including the Horton patent.

The patent had been the subject of an earnest contest in the Patent Office for four years; had been put in interference with five other devices, and it was scarcely possible that, after this long litigation, the patentee should not have detected defects in his original application, and have taken this opportunity of correcting them. His experience in this litigation had doubtless apprised him of the weak points in his prior specification and claims, and it was perfectly competent for him to restate them, provided his patent was not essentially broadened to cover intervening devices.

In *Railway Co.* v. *Sayles*, 97 U. S. 554, 563, application for patent was made in June, 1847, and rejected. The application remained unaltered until 1852, when it was amended, and a patent granted with considerable modifications. In the mean time other devices were introduced, including that used by the defendant. It was with reference to this state of facts that the court observed: "If the amended application and model, filed by Tanner five years later, embodied any material addition to or variance from the original—anything new that was not comprised in that—such addition or variance cannot be sustained on the original application. The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the mean time, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the mean time, gone into public use."

Had there been any expansion of the original specification

and claims subsequent to the introduction of the Horton machine, especially if made with reference thereto, we should not have hesitated to apply the doctrine of that case, but we see no evidence of an intent to cover that machine, unless it were already covered, and agree with Judge Lacombe, that "the original drawings and specifications suggest the claims finally made, which recognize and claim the two different operations of outside and inside applications."

4. The assignment that the court erred in holding that the reissue expired April 5, 1892, in consequence of the expiration on that date of the British Reed-Jaeger patent of April 5, 1888, for the same invention, is not supported by any evidence that this patent was obtained by Beach, or that the application for the same was authorized, directly or indirectly, by him. It is true that by Rev. Stat. sec. 4887, "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent;" but this obviously presupposes that the foreign patent shall have been obtained by the American patentee or with his consent. This is evident from the somewhat awkward phraseology of the first clause of the section, which declares that "No person shall be debarred from receiving a patent for his invention, . . . by reason of its having been first patented or *caused to be patented* in a foreign country," which evidently means that the patentee shall not be debarred from his patent by reason of *his* having first patented, or caused his invention to be patented, in a foreign country. Indeed, it would be so manifestly unjust that a patentee should lose the full fruits of his patent by the fact that some intermeddler had caused the invention to be patented abroad, that we could not give that construction to the section, unless its phraseology imperatively demanded it. This construction would suggest an excellent device to an enemy to bring about the termination of an inconvenient patent. It seems that this patent was applied for by Reed April 5, 1888, at the instigation of Jaeger, (who was one of the contestants in the interference proceedings before the Patent Office,) and was allowed to expire April 5, 1892, through non-payment of the renewal fee required by British law. The

fact that this patent was obtained through the instigation of one who was at that very time contesting Beach's right to the patent before the Patent Office, indicates almost conclusively that it was not obtained by Beach's authority.

This reply to defendants' assignment is so conclusive that we have not thought it worth while to inquire whether the Jaeger British patent and the Beach patent were for substantially the same invention. Nor do we find it necessary to express an opinion whether the lapsing of a foreign patent by the failure of a patentee to pay a renewal fee required by British law would shorten the term of his patent here. *Bate Refrigerating Co.* v. *Hammond*, 129 U. S. 151; *Pohl* v. *Anchor Brewing Co.*, 134 U. S. 381; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36.

5. The most important question in the case is that of infringement. Defendants are manufacturing under a patent to James A. Horton of December 9, 1890, in the specification of which the patentee declares that his "invention relates to that class of machines for applying stays to the corner of boxes and box covers, in which a rectangular mandrel is employed to support the box or cover internally, while a reciprocating plunger, having a reëntrant angle in its operating face, descends and bends the stay into angular form, and presses it upon the corner of a box body or cover while the same is supported by the mandrel." Substitute for the word "mandrel" the "lower die or anvil" of the Beach patent, and for "a plunger having a reëntrant angle in its operating face," a "clamping die having a diverging working face," and these elements of the two machines are identical. There is also a reel attached to the frame of the machine for carrying a continuous stay strip, a pasting mechanism consisting of a wheel rolling in a trough of water which moistens the gummed strip, a feeding mechanism by means of which a sufficient length of the stay strip is pushed forward at each revolution, and a cutting device for severing the stay strip when it is fed in between the opposing dies.

The blade of the cutting mechanism consists of the inner edge of the plunger operating in connection with a portion of the frame of the machine. As the Horton machine is only intended

to apply stay strips to the exterior of a box, all the mechanism shown in the patent which specifically relates to the turning in of the stay strip within the box is absent. The principal difference between the two devices consists in the details of the mechanism, and in the fact that under the Beach patent the stay strip is fed at right angles to the line of the opposing dies and the corner joint of the box, while in the Horton machine the stay strip is fed on a line parallel to the line of the box corner, in other words, a back feed instead of a side feed; but they are both alike in that they grasp the paper and project it forward over the corner of the box when the dies are open. There is also a dissimilarity in the fact that the lower clamping die of the Horton machine is not movable into and out of its usual working position, is not moved when the machine is in operation, and is made movable only for the purpose of adjustment; but as the device is only used for the purpose of applying stay strips to the exterior of the box corner, such movability becomes unnecessary, or, as explained in the Beach patent, "the said anvil I is herein shown as constructed to move horizontally and as extending through a horizontal bearing aperture *a* in the frame, by which it is supported, a horizontal movement being given to the said anvil to aid in turning in or pasting stay strips to the inside of the box corner."

In the case of a pioneer patent like this, (and while the patent is not a great one, we are not speaking too highly of it in calling it a pioneer in its limited field,) there would be no difficulty in holding that these differences were immaterial, were it not for the fact that each one of the claims is limited by the words "substantially as described." In other words, that unless the infringing device contains mechanism substantially such as is described in the patentee's specification, and shown in his drawings, there can be no infringement. It was upon this point, and upon this alone, that there appears to have been any difference of opinion between the Circuit Court and the Court of Appeals. While the words "substantially as described or set forth" are not absolutely meaningless, they do not limit the patentee to the exact mechanism described in his specification, or prevent recovery against infringers who have adapted mechanical equivalents for such mechanism. In determining the range of such

equivalents much depends upon the question whether the machine is a primary one, or whether the patent covers some novel feature introduced into an old machine. It is difficult to say exactly what effect should be given to these words. In one sense it may be said that no device can be adjudged an infringement that does not substantially correspond with the patent. But another construction, which would limit these words to the exact mechanism described in the patent, would be so obviously unjust that no court could be expected to adopt it. The authorities really throw but little light upon their proper interpretation. In *Seymour* v. *Osborne*, 11 Wall. 516, it was intimated that a claim which might otherwise be held bad as covering a function or effect, when containing the words "substantially as described," might be construed in connection with the specification and be limited thereby; and when so construed, might be held to be valid. So in the *Corn Planter Patent*, 23 Wall. 181, 218, it was said that "this clause throws us back to the specification for a qualification of the claim, and the several elements of which the combination is composed." This rule, however, is equally applicable whether these words be used or not. While as stated in *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537, 558: "These words have been uniformly held by us to import into the claim the particulars of the specification," it was also said in *Mitchell* v. *Tilghman*, 19 Wall. 287, 391, that "words of such import, if not expressed in the claim, must be implied, else the patent in many cases would be invalid as covering a mere function, principle or result, which is obviously forbidden by the patent law, as it would close the door to all subsequent improvements." If these words are used, the patentee may still prove infringement in the use of a mechanical equivalent; if they are omitted, he is bound to prove no less. Perhaps it would be sufficient to say that, if a doubt arose upon the question whether the infringing machine was the mechanical equivalent of the patent device, that doubt should be resolved against the patentee where the claims contain the words "substantially as described or set forth."

Without determining what particular meaning, if any, should be given to these words, we are of opinion that they are not to be construed as limiting the patentee to the exact mechanism

described; but that he is still entitled to the benefit of the doctrine of equivalents, and that it is still true, as observed in *Morley Sewing Machine Co.* v. *Lancaster*, 129 U. S. 263, 273: "Where an invention is one of a primary character, and the mechanical functions performed by the machines are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same results are infringements," although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.

The Horton machine not only accomplishes the same result as the Beach device, but accomplishes it by the employment of the same combination of the same elements. The mere fact that the continuous strip is introduced between the dies from a different direction is immaterial. The fact that the Horton device contains no mechanism for turning the strip into the inside of the corner, merely indicates that it does not perform all the functions of the Beach patent. But it is no less an infringement if it performs its primary function in practically the same way. We are not concerned with the subordinate differences in the mechanism, least of all with the different names given by Horton to parts of his machine similar to the corresponding parts in the Beach patent. As the two machines are alike in their functions, combination and elements, it is unnecessary to go further and inquire whether they are alike or unlike in their details.

There seems to be no denial of defendants' infringement of the sixth claim. Plaintiff's expert testifies that he finds "in the defendants' machine two opposing clamping dies having diverging working faces, the upper one of which is constructed to act with an elastic or yielding pressure to enable the die to operate upon box corners of different thicknesses. This is the combination referred to in the sixth claim, and it is found in the defendants' machine." We do not find this to be denied. Both the Circuit Court and the Court of Appeals found this claim to have been infringed, and we accept their conclusion.

The decree of the Court of Appeals is therefore

Affirmed.

MITCHELL, GOVERNOR, AND BLOXHAM, COMPTROLLER, OF FLORIDA, *v.* FURMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 23. Argued October 17, 18, 1900. — Decided March 11, 1901.

The record considered, it is held that the jurisdiction of this court on a direct appeal from the Circuit Court may be maintained on the ground that the construction of a treaty made under authority of the United States was drawn in question.

This was a bill to remove clouds on title, and rested on appellees' alleged legal title under a Spanish grant, and cannot be sustained because the title set up was not absolutely complete and perfect prior to the treaty between the United States and Spain. As the grant needed confirmation, and had never received it, it could not be treated as constituting absolute legal title.

Even grants of land in Florida which were in fact complete and perfect prior to the ratification of the treaty might be required by Congress to have their genuineness and their extent established by proceedings in a particular manner, before they could be held valid.

Under the various acts of Congress cited, the cause of action proceeded on in this suit was barred by failure to comply with their provisions.

THIS was an amended bill of complaint filed November 30, 1895, in the Circuit Court of the United States for the Southern District of Florida by Charles M. Furman in his own right, and as administrator of the estate of Charles M. Furman; Bolivar B. Furman, and Alester G. Furman, all citizens of the State of South Carolina, against Henry L. Mitchell, Governor, William D. Bloxham, Comptroller, Charles B. Collins, Treasurer, William B. Lamar, Attorney General, and Lucius B. Wombwell, Commissioner of Agriculture, of the State of Florida, and citizens thereof, as the Board of Trustees of the Internal Improvement Fund of the State of Florida; the Florida Coast Line Canal and Transportation Company, a corporation of Florida, having its principal place of business at St. Augustine; the St. Johns Railway Company, a corporation of Florida, having

its principal place of business at Jacksonville; Horace S. Cummings, residing in the District of Columbia; and John A. Henderson, a citizen of the State of Florida, alleging: "That they own and hold title in fee simple, as tenants in common, to all that tract, parcel, or piece of land lying, situate, and being in the county of St. Johns in the State of Florida, and within townships seven, eight, and nine south of range thirty east, known as 'Anastasia,' or 'Saint Anastasia,' Island, said to contain ten thousand acres, but which in fact contains about seven thousand five hundred acres, excepting therefrom what was known at the time of the Spanish grant hereinafter mentioned as the King's Quarries, the boundaries of which were marked by stakes, the same being about two hundred acres, lying on and east of the old King's Road, between the same and the old lighthouse, which exception does not embrace the lands or any part thereof hereinafter alleged to be claimed by the defendants or any of them."

"That the said tract of land was granted by the government of Spain to José, or Joseph, Fish — otherwise known as Jesse Fish — (hereinafter designated as Joseph Fish), on or about the 19th day of June, A. D. 1795, which said grant was ratified and confirmed by the United States by the treaty with Spain ratified by the United States on the 19th day of February, A. D. 1821."

The bill then set up title to Anastasia Island as derived from Joseph Fish, through his mother Sarah Fish, her granddaughter, Jessie B. Perpall, who married Charles M. Furman, who became sole heir at law of his wife and their son, Gabriel, and left a will under which complainants claimed. It was averred that Joseph Fish died intestate in 1798; that his mother died intestate in 1825; that her granddaughter died intestate in 1827; that Mrs. Furman's son Gabriel died in infancy in 1836; and that Charles M. Furman died in 1872.

It was further alleged that Joseph Fish was placed in possession of the said land so granted and resided thereon in his dwelling house and cultivated an orange grove and fields, enclosed by a fence; that he used the woodlands on the island, and exercised such acts of possession of the whole of the island

as it was capable of; and that from his death to the present time those claiming under Fish have done the same.

The bill averred that the State of Florida claimed title under the act of Congress of September 28, 1850, relating to swamp lands, of certain lands on Anastasia Island, which complainants asserted were part of the grant to Joseph Fish, and owned by them; these were described according to the public surveys and alleged to contain 1465.15 acres, more or less, all in township seven, south of range 30 east; and that the United States on September 18, 1856, issued its patent to the State of Florida therefor.

That the State of Florida by an act of January 6, 1855, vested in the governor, the comptroller, the state treasurer, the attorney general, and the register of public lands, now known as the commissioner of agriculture, of that State, and their successors in office, as the board of trustees of the internal improvement fund of the State, the title to all lands granted to the State under the act of Congress, with power to sell and transfer the same; that defendants, Mitchell, governor, and others, now constitute the board of trustees; that the board on May 13, 1885, executed a deed of conveyance to the Florida Coast Line and Transportation Company of certain lots and parts of sections, in township seven, containing in all 549 acres, being part of the lands patented to the State, which land, except that conveyed to Horace S. Cummings, was claimed by the Transportation Company adversely to complainants; that of these lands, the Transportation Company executed a deed of conveyance to Cummings of one hundred and sixty acres, which was claimed by Cummings adversely to complainants.

That the board of trustees, September 21, 1886, executed a conveyance to the St. Johns Railway Company of certain lots and parts of sections in township seven, containing in all 328.10 acres, being part of the land patented to the State, which land was claimed by the railway company adversely to complainants; that the board of trustees on July 30, 1892, executed a deed of conveyance to defendant Henderson of certain lots in township seven, containing 286.28 acres, which land was claimed by Henderson adversely to complainants. It was further averred that

the United States issued to the State of Florida on June 27, 1895, a patent for certain other lands, being part of Anastasia Island, described by the public surveys, in township seven, containing 393.30 acres; that the United States issued to the State of Florida on April 8, 1895, a patent for certain other lands described by the public surveys, in township seven, containing 120 acres; that these lands were selections made by the State under an act of Congress of June 9, 1880, entitled "An act to confirm certain entries and to warrant locations in the former Palatka Military Reservation in Florida;" that in addition to the lands so patented the State had selected under said act certain lands on Anastasia Island in township seven containing 367.32 acres; that entries of these selections had been allowed by the commissioner of the general land office of the United States, and the same were held to be patented to the State under the act of Congress of June 9, 1880; that the lands so patented to the State and those selected by the State for patent under the act aforesaid were in lieu of selections under the act of Congress of September 28, 1850, and were vested by the legislature of Florida, by the act of January 6, 1855, in said board of trustees, if the United States held the title thereto at the time of the issue of the patents, and that the board of trustees claimed title to the same adversely to complainants.

The bill charged "that the said patents from the United States and the said deeds of those claiming thereunder, and said entries and selections of the State of Florida, whereby the said defendants claim title, respectively, to the said lands as aforesaid are invalid, and do not vest a title in the said defendants to the lands so claimed by them, respectively, as aforesaid, for the reason that the United States, under whom the defendants claim, did not, at the time of issuance of such patents or at any other time, have or hold title to the said lands, or any part thereof, but that the title to the same is in your orators, holding and claiming under the said grant of the government of Spain to the said Joseph Fish as aforesaid."

The bill also alleged that none of the defendants were in actual possession of the lands or any part thereof; that the lands exceeded in value the sum of $2000; and "that this

cause arises under the said treaty between the United States and Spain, which ratified and confirmed the said grant to the said Joseph Fish, under whom your orators claim title. And the controversy involved in this case necessarily involves the construction of said treaty."

It was then charged "that the said patents, entries, and deeds by and under which the defendants respectively claim title to said lands as aforesaid, are clouds upon the title of your orators in the said lands and tend to depreciate the value and sale thereof, to the great damage and injury of your orators in the premises."

The prayer was "that the said patents, entries, and deeds by and under which the said defendants respectively claimed title to the lands so respectively claimed by them as aforesaid may be set aside and declared void as clouds upon the title of your orators, and that the defendants and each of them may be enjoined from entering upon or taking possession of said lands, or in any manner disturbing the possession of your orators thereof, and that your orators may have such other and further relief in the premises as equity may require and as to your honors shall seem meet."

The defendants Mitchell and others, members of the board of trustees, moved to dismiss the bill for want of jurisdiction, which motion was overruled. Defendant Cummings made a similar motion. The trustees also filed a demurrer for want of jurisdiction, and a demurrer for want of equity. The defendants, the Canal and Transportation Company and the St. Johns Railway Company, also demurred. All the demurrers were overruled.

The trustees and Cummings then filed their answer, denying that Anastasia Island was granted by the government of Spain to José or Joseph Fish, June 19, 1795, or at any other time, or that the title to the lands in controversy was ever granted by the King of Spain or by his lawful authorities, and averring that the only part of Anastasia Island, the title to which was ever granted by the King of Spain or by his lawful authorities, was a tract of about three hundred acres granted to Lorenzo Rodriguez in 1793, and a tract of about twenty acres granted to

Statement of the Case.

F. X. Sanchez in 1802, both of which tracts had been confirmed by the United States and surveyed and platted as private grants upon the maps and plats of the land department of the United States. They denied that the treaty with Spain ratified or confirmed any grant of the lands in controversy in this suit to the ancestor of complainants or gave title thereto to any other person save only to the United States; and denied that Joseph Fish was placed in possession of Anastasia Island except the King's Quarries, as a grant thereof to him by the King of Spain or his lawful authorities, or that he or his successors exercised such acts of possession of the whole of Anastasia Island except the King's Quarries, as it was capable of, under claim of title, or that he claimed title as the owner of said island. But they said that the occupancy and acts of possession alleged, if true, applied to no other lands than those embraced in the Fish homestead, which was a point of land on the extreme west shore of Anastasia Island, nearly surrounded by water, and cut off from the main island of Anastasia, embracing about one hundred acres of land, well known by general reputation as "Fish's Island." They admitted the patenting by the United States to the State of Florida of the several tracts of land described in said bill, and averred that before any patent could be issued for these lands, the State of Florida was required to establish before the land department of the United States that the lands were vacant and unappropriated public lands of the United States; that Furman in behalf of complainants appeared before that tribunal and contested the matter, and presented and urged their claim to the same under the same title set up in the bill, and that there was a final determination by said tribunal which was adverse to complainants' claim, and decided that the lands were not private lands.

Also that in addition to the lands so patented to the State of Florida, the State had selected the lands set out in the bill, and that the entries had been allowed by the land office, and were held to be patented; and said that such allowance and holding for patent was an adjudication of a competent tribunal that the lands were public lands of the United States, which adjudication for the issue of the patent was subject to review in the land

department, and might be corrected if erroneous. They denied that the patents, deeds, entries and selections whereby defendants claim title to the lands in controversy were invalid, and asserted that the United States had title to said lands, and that it was not in complainants.

"They admit that this controversy involves the construction of the treaty between Spain and the United States, and they aver that complainants in their said bill have set out as their title an incipient and inchoate title under the 'government of Spain,' not cognizable in the courts of the Government until recognized or confirmed by the Congress of the United States; that by the rules established in the Territory of Florida by the authority of the King of Spain for the granting of lands, a grant from the government of Spain signified only the first concession or right of occupancy of the royal domain; that perfect or complete grants were recognized by the treaty with Spain, but incomplete grants were ratified by the treaty, to the same extent they would have been valid had the territory remained under the King of Spain; that if there had been a complete grant of the Anastasia Island at the date of the treaty the owners thereof were authorized under the laws of the United States to have the same surveyed without expense as a private claim by the United States, but by the averments of their said bill complainants show that said lands have been surveyed as public lands."

The answer stated "that Anastasia Island is a barrier of the sea, consisting chiefly of high sand hills blown in from the sea beach, covered with 'scrub,' a low growth of hard wood; that through the center of the northern part, in township 7, there runs north and south a ledge of coquina rock from one half to three quarters of a mile wide; that all the lands are barren and wholly unfit for any purpose whatever save seashore residence, and of no value apart from their proximity to a city patronized as a winter resort; that on the western shore of said island, nearly separated from the main island by a strip of low ground or 'swale,' is a neck of land called Fish's Island, containing about 60 to 100 acres, which is arable land, and on this point

was an orange grove and cultivated fields of about thirty acres under enclosure, and houses and outbuildings."

It was further averred that complainants or their ancestor never had any title whatever to the lands described in the bill unless it were to a part of lots two, three and six of section 29, township 7, range 30 east, which embraced the orange grove of "Vergel" plantation, alleged to have been sold by the Spanish government in probate proceedings upon the estate of Joseph Fish about March 21, 1792; that to this plantation the heirs of Fish might have had an equitable title, but this had been forfeited by failure to present or record such claim and have it surveyed.

Defendants further said that Anastasia Island was officially turned over in behalf of the King of Spain to the United States, in 1821, as one of the adjacent islands named in the treaty, and as a part of the royal domain, and the lands delivered as such by the lawful authorities of the King of Spain to the United States, whose authorities then went into actual occupancy of part, and the possession of the whole, of Anastasia Island, save two Spanish grants, one to Rodriguez and the other to F. X. Sanchez.

That June 19, 1795, the Spanish law in force in the Floridas vesting in the Spanish governors the power to make grants of lands was the royal order of 1790, under which Governor Quesada, Spanish governor of East Florida in 1795, required ten years of continued and uninterrupted possession before full title was granted to claimants, who upon petition had received a grant or concession and had been put in possession of lands, etc.

The answer further set forth that no person except the governor of the province was entitled to make grants of land under the Spanish law, and if any other person had authority to make grants the titles so granted were incipient until confirmed by the governor, etc.; and alleged on information and belief that any proceedings purporting to be a concession for 10,000 acres, dated June 19, 1795, to Joseph Fish, found among the archives at the date of the cession, were either forgeries, or so irregular as to render their genuineness too doubtful to be accepted as evidence.

Defendants averred that any claim which Fish ever had would be found to be an alleged grant purporting to be signed by one Morales, the commandant of the third battalion of Cuba, and not by the governor, an unauthorized proceeding under Spanish law; that no authority existed in Morales to make the grant, and no other claim in East Florida is based on action by him; that the law required an official survey to be filed in the records and a certified copy delivered to claimants, but there was none in this instance; that the archives relating to property in Florida, both public and private, contain a complete list of all real titles or patents for lands granted by the lawful authorities of the King of Spain in East Florida, but that list contains none to Joseph Fish for the lands on Anastasia Island.

The answer restated that the lands claimed by complainants to have been granted to Joseph Fish were never segregated from the royal domain, and were not measured, bounded or platted or otherwise located by official survey, and could not be identified by natural boundaries.

Defendants further averred that by the act of Congress of May 23, 1828, Congress confirmed all claims recommended for confirmation to the extent of a league square, and enacted that no more than a league square should be confirmed in any grant, and that no confirmation should be effectual until a full release by the claimant of all the lands claimed in any one grant in excess of a league square, but authorizing all claimants who were not willing to accept a league square to present their titles to the District Court of the United States within one year from the date of the act or be barred; that claimants never released the excess of a league square, nor presented their claim to the District Court of the United States, as did all others having claims in Florida in excess of that amount; that the legislative council of the Territory of Florida published the acts of May 23, 1828, May 26, 1830, and February 8, 1827, with the treaty with Spain, for circulation in Florida, and though often notified of the limitations in said acts, the claimants under Joseph Fish did not avail themselves of the acts, and abandoned and forfeited their claims to said land, so that the United States would have acquired title by prescription even if the lands were private

property; that in 1833, having given public notice that unless the private claims within the district were presented to the surveyor general, he would survey the same as public land of the United States, the claim of Fish not having been presented and having been abandoned, the United States extended the surveys over all of Anastasia Island except the grants to Rodriguez and Sanchez, and in 1839 advertised the lands for sale as public lands; that on May 6, 1851, the maps and plans of said lands surveyed as public lands were formally approved by the surveyor general for Florida; that the United States patented to the State of Florida certain lands in 1866 as vacant lands, and in 1867, 1868 and 1869 a large area of lands on Anastasia Island were entered under the homestead laws of the United States, and settled upon and improved, and wood was cut therefrom and sold; that some of the homestead settlers failed to make final proof of their entries, but final proof of homestead and settlement under the homestead laws for lands on the island was made and final certificates issued to several persons named in 1875, in 1876 and in 1882; that in 1867 the trustees executed a conveyance for lands on that island to Rogero for lots 2 and 3, section 29, to Hopkins and Rogero for lot 6, section 29, and to Magruder and Logan for lots 2 and 3, section 32, all in township 7, range 30 east, being part of the lands patented to Florida; that September 16, 1868, Sanchez applied to the land department of the United States for the issue of a patent upon the Fish claim, and in 1870 Furman advised the land department that he claimed to be the owner of Anastasia Island under an alleged grant prior to 1763, and made application for the issue of a patent from the United States to him.

That from 1831 to June 22, 1860, the claim was wholly barred; that June 22, 1860, Congress again authorized claimants to present their claims, if an imperfect grant, to commissioners for confirmation, but if a complete grant, to the District Court for the Northern District of Florida, but those claiming under Fish neglected to avail themselves of this right to have the validity of their claim determined, but did apply to the land department for further adjudication; that after application to the land department for an adjudication by Furman

in 1870, Congress extended the act of June 22, 1860, until June 10, 1875, by an act approved June 10, 1872, by the second section of which act no proof of title was required of claimants, provided they and those from whom they claimed had held continuous possession of the lands claimed; that having submitted their claim to a tribunal of their own choice they are now estopped to deny its jurisdiction.

That in June and July, 1888, the State of Florida applied to the land office at Gainesville to enter certain portions of land at the north end of Anastasia Island under the act of June 8, 1880, as vacant and public land, but because there was on file at the land office a letter from the commissioner dated March 7, 1887, advising that the island was claimed by Furman, and that the claim had not been adjudicated by the land department, the register and receiver rejected the selections of Florida, and the State appealed to the commissioner; that the claim of Furman was taken under advisement by the commissioner on briefs submitted by the State, and by Furman and others claiming under Fish, and on August 2, 1890, the commissioner rendered his decision that the lands were public lands of the United States, whereupon complainants took an appeal from the decision of the commissioner to the Secretary of the Interior, and submitted arguments in support of their contention that the said lands were owned by them under a valid Spanish grant, and on June 22, 1893, the Secretary rendered his decision affirming the decision of the commissioner, that said claim had no validity; that complainants failed to file any motion for review and the decision became final, and is a complete and final adjudication of complainants' want of title, and that the lands were public lands subject to disposal by the United States; that complainants caused a bill to be introduced in the Fifty-third Congress for confirmation and release to them by the United States of the lands on Anastasia Island as claimed under Fish, but Congress refused to consider the same.

The answer denied that complainants were in possession of any part of the land on Anastasia Island, and set forth the possession of many persons claiming title under the United States. It averred that the St. Augustine and South Beach Railroad

Company was in possession of a roadbed and right of way across the island through sections 17, 21, 27 and 28 in township 7, range 30 east, under authority of an act of Congress approved March 3, 1875, granting a right of way over the public lands of the United States; that lot one of section 21 was reserved for lighthouse purposes by order of the President dated June 22, 1869; that part of lot two of section 21 of township 7 was declared a reservation for lighthouse purposes by order of the President dated February 1, 1883; that afterwards by a like order the remainder of said lot two was declared a United States reservation for lighthouse purposes; and that by executive order dated May 4, 1893, the President reserved 700 acres of land in sections 21, 22 and 28 of township 7 for military purposes.

That the requirement by Congress that all claimants under grants from the King of Spain in the Floridas should relinquish all in excess of a league square of the lands claimed in any one grant, was a declaration of the policy of the political department of the United States as to the territory acquired from a foreign power and a determination by Congress of the extent of the obligations imposed on the United States by the treaty with Spain.

The answer further averred that the failure to release the excess forfeited the entire claim, and that, without any release, the excess over a league square was subject to sale as public land; that the issue of the patents depended upon the existence of facts which the land department of the United States had determined existed; that by the survey of the lands of Anastasia Island as public lands and their offer for sale by the proclamation of the President, and confirmation of portions thereof to the State of Florida by patent, the reservation of portions thereof by executive order, and the opening of all to homestead entry, the United States had become seized of the whole of said Anastasia Island by the equivalent of office found.

The St. Johns Railway Company and the Florida Canal and Transportation Company also filed an answer of similar purport. Numerous exceptions to these answers were filed and some of them were sustained to certain paragraphs. Replication having been filed, the cause was referred to a master, who

subsequently made a report containing findings of facts, findings of mixed law and fact, and conclusions of law, to which numerous exceptions were filed by defendants, all of which were overruled by the court, and a decree was entered in accordance with the prayer of the bill and the recommendations of the report. A decree *pro confesso* was entered against John A. Henderson.

From this decree all the defendants except Henderson, in respect of whom an order of severance was entered, prosecuted this appeal.

The master also filed with his report an elaborate and careful opinion on the whole case.

Complainants introduced in evidence from the American State Papers, Public Lands, vol. IV, Duff Green edition, 256, "Minutes of the proceedings of the commissioners appointed to ascertain claims and titles to land in East Florida for the year 1824."

Meeting of the board, March 29, 1824, pursuant to an act of Congress of February 28, 1824.

Meeting, September 13, 1824, when "Sarah Fish, 10,000 acres; same 500 acres," and three other "cases being called and not being prepared for trial," were "placed at the foot of the docket."

Minutes of meeting, March 28, 1825, pursuant to the act of Congress of March 3, 1825. April 21, 1825: "Permission was given by the board to the executors of the estate of Sarah Fish, deceased, to amend the memorials in the claims of said Sarah Fish."

December 16, 1825: "The following claims were this day reported to Congress for confirmation, viz: . . . Sarah Fish's heirs, for ten thousand acres; . . ."

Report of commissioners to the Secretary of the Treasury, January 31, 1826, transmitting claims and titles examined and disposed of, class three comprehending "claims exceeding 3500 acres, the titles to which were found among the public archives of the country, and are ascertained by the commissioners to be valid Spanish grants, and reported accordingly to Congress for confirmation." 4 Am. State Papers, Public

Lands, D. G. ed., p. 276. The Fish claim was included in class No. three, as follows:

"*Register of claims to land exceeding 3500 acres in East Florida, which are founded on patents or royal titles derived from the Spanish Government, and which in the opinion of the commissioners are valid.*

Number.	Names of—		Date of the patent or royal title.	Date of the concession or order of survey.	Quantity of land. Acs., hdths.	By whom conceded.	Authority or royal order under which the concession was granted.	Conditions.	Date of survey.	By whom surveyed.	Where situated.	Occupation and cultivation	
	Present claimants.	Original claimants.										From.	To.
*	* *	* *	*	*	*	*	*	*	*	*	* *	*	*
					Cases reported this session.								
21	Heirs of Jessie Fish.	Jessie Fish	.....	19 June, 1795.	10,000	Morales.	1790	Complied with.	...	...	Anastasia Island.		
*	* *	* *	*	*	*	*	*	*	*	*	* *	*	*

The petition of Mrs. Fish, dated August 31, 1823, asserted that she "claims title to the island lying in front [*i. e.*, to the east] of the city of St. Augustine, and running south about eighteen miles, more or less, along the east bank of the river Matanzas, known by the name of the island of St. Anastasia, supposed to contain ten thousand acres, as belonging to the deceased husband, Jesse Fish, Senior, in the year 1763. That in the year 1792 this island was sold at public sale by order of the Spanish governor, Quesada, when her son, the late Jesse Fish, Jr., deceased, became the purchaser."

Accompanying this memorial were certain papers and proceedings as follows: A petition of José Fish, (erroneously dated December 2, 1796,) stating that at the auction of his father's property for the payment of his creditors, he purchased the place called The Vergel for $1605, which sum he gave only with a view to the fruit trees of said place, and the timber which is on the land belonging to it, as the land is entirely useless for planting; that several of the neighbors had been cutting the wood, and therefore he begs to be declared owner of the lands which his said father possessed, annexed

to the place of the Orange Grove, which, according to the deeds granted in the time of the British possession, amounted to 10,000 acres, whether as a new settler or by the right which his deceased father had to them. That if he does not obtain this favor he will consider himself the loser of the greatest part of his purchase, because the lands will not produce crops of any kind and a great number of the fruit trees have dried up, which is likely to occur to the balance of them.

Governor Quesada, who described himself as "brigadier of the infantry of the royal armies, governor, commander in chief, vice royal patron, and sub-delegate of the royal domain of this city of St. Augustine, Florida, and its province, for His Majesty," referred the petition December 15, 1794, to the assessor general, who, on the same day, reported that if Fish had asked to prevent trespassing or to recover possession, he would render an opinion, but as Fish asked to be declared owner, it was for the governor to determine judicially the extent of Fish's purchase or his right as a new settler.

Thereupon Governor Quesada directed Fish to make proof of the facts on which he based his right or claim to favor.

Sundry depositions were then taken, and the governor on the 12th of February, 1795, referred the petition and proof to the collector of the exchequer, that as fiscal of it he may represent him in the discharge of his functions. February 27 the fiscal reported that at the sale of the orange grove to Joseph Fish, the boundaries of the land were not taken into consideration, and only the valuation of the trees within the orchard was made, without including the 10,000 acres of land annexed to it. And he was of opinion that Fish was not entitled to anything more than he could prove by the inventory, valuation and sale, and that after this land had been laid off, the remainder ought to be sold as belonging to his deceased father and for the benefit of the creditors of his estate; that the inventory, valuation and sale of the orchard should be annexed; and that in case Fish had occasion for the use of more public land, and without injury to a third person, the fiscal minister did not find any objection to granting them to him as a new settler, "according to what His Majesty has commanded of this particular."

The governor then directed, March 6, 1795, that the testimony indicated "be placed in continuation and with it those proceedings returned to the assessor general, that he may consult with me as to what is proper as respects the other points to which the foregoing fiscal representation refers."

The inventory, valuation, and sale of the orange grove in 1792, was accompanied by the commission of the governor dated January 18, 1792, appointing the appraisers, and specifying the "9th item" thus: "The place called 'El Vergel,' which belongs to the deceased, although the title under which he enjoyed it does not appear in the proceedings."

March 26, 1795, this entry was made by the governor: "Seen: Passed over to Don José Fish: Thus decrees and orders Senor Don Juan Nepomuceno de Quesada, brigadier of the infantry of the royal armies, governor, Commander General, Vice Royal Patron, and Subdelegate of the Royal Domain of this City of St. Augustine, Florida, and its province, for His Majesty, who signs it, with the opinion of Senor the assessor general, the twenty-sixth of March, one thousand seven hundred and ninety-five."

There then appears a new petition by Fish, without date, setting out that he is a new settler in the province; that the above mentioned documents have been given him, and he, being advised of their contents as also of the sale at auction of The Vergel, considers that the fiscal was in error when he reported adversely on the first petition; that he has produced proof that his father had ancient possession of "El Vergel," for which he paid an excessive price, and prays that a grant of "said island" be made to him, and that a copy of the writing which he presented to the notary after the sale, asking for the island at a valuation, be placed in continuation.

On April 17, 1795, the assessor general, Ortega, who recites that he is "advocate of the royal council, lieutenant governor, auditor of war, and assessor general of the city of Saint Augustine, Florida, and its province, for His Majesty, who signs it in consequence of the illness of the governor and commander-in-chief," directed that the copy be put in continuation, and the whole passed over to the representation fiscal. The writing

referred to is dated March 22, 1792, and Fish states therein that at the public sale, the day before, of the property of his father, there was no person who would bid "for the island del Vergel;" that he obligated himself to pay $1605; and "he prays your excellency to have the kindness to order that he be placed in possession of it." On May 4, 1795, the first officer of the chief comptroller's department, "and who is charged with the administration and court of justice of the royal treasury on account of the illness of his excellency, the governor, and as attorney fiscal of the royal treasury," reviewed the papers, and concluded that under the circumstances the governor might "order the boundaries of the Vergel to be marked off to the number of 10,000 acres." This was followed by this entry: "Having examined the proceedings, it was thus decreed and ordered by Senor Don Bartolome Morales, colonel of the infantry of the royal armies, commandant of the third battalion of Cuba which garrisons this city of Saint Augustine, Florida, and political and military governor of it and its province, from the indisposition of the governor, who signed it on the sixteenth of May, 1795; which I attest." This was signed by Morales, and attested by Ortega, assessor general, before the notary.

June 12, 1795, Morales and Ortega directed notice to be given to the defender of the estate of Fish, and that the proceedings be returned.

June 17, 1795, the defender of the estate reported that the 10,000 acres might be granted.

Then follow the alleged grant and delivery of possession, namely:

"Having examined those proceedings and seen the proof adduced in them by Don José Fish, it appears not only that his father of the same name possessed since the time of the old Spaniards and in that of the British dominion the 10,000 acres of land, possession of which he claims at the place called the Orange Grove, which he purchased at public auction, but also that he made a bid for the said land, under which his purchase ought to be understood, which defect in not explaining it thus at that time should not be prejudicial to him, and has given cause to

this litigation. His excellency said that declaring it, as he declared now, he ordered in consequence that whether by the right which the burdensome acquisition of the said land gives Fish, which cost him 1605 dollars, which it appears he paid for the purchase of the Orange Grove, or by the right which the ancient possession of his father gives him to the said 10,000 acres of land, or finally in consequence of the petition of Fish, that they should be granted to him as a new settler, he be placed in possession of the said land, which it appears his said father possessed, and which is already laid off, with the reserve of the quarries, and the remainder, which was not granted to his said father, and which the King has reserved, renewing, in case of necessity, at the cost of the interested, the boundaries by said appraisers, Don Manuel Solana, who at the time of the old Spaniards and at the new possession by them of the province laid off by order of the government, the aforesaid quarries, to give possession, as is proven, to the father of the memoralist of the land which he claims, and let them be granted to him on the terms above set forth, the present notary, who is commissioned for the purpose, when with the said appraisers, and any other workman that may be necessary, he shall assist at marking the boundary, at which also shall assist, to represent the royal treasury, the person whom the minister of the royal domain may depute for the purpose. All of which shall be made appear on the proceedings with which, and the taxation of the costs, which the interested shall satisfy, this proceeding shall be held as concluded. It was thus decreed and ordered by Senor Don Bartolome Morales, colonel of infantry of the royal armies, commandant of the third battalion of Cuba, which garrisons this city of St. Augustine, Florida, and political and military governor, who signed this, with the opinion of his honor the assessor general, on the 19th June, 1795, which I attest.

"BARTOLOME MORALES.
"LICENTIATE JOSEF DE ORTEGA."

"*Proof of boundary and possession.*

"Being at the plantation called the Orange Grove, in the island of St. Anastasia, on the tenth of July, 1795, in conformity

with what is provided in the foregoing decree, we proceeded to the marking the boundaries of the land comprised in these proceedings. Don Manuel Solano, the appraiser appointed for the purpose, passing from said place to where the quarries of the King and of individuals are situated, who, passing along the ancient boundaries with Don José Lorente, chief master of the royal works, who accompanied him to inform himself, Don Tadeo Arribas, officer of the royal comptroller's office, from the employment of the collector, for his fiscal cognizance, and I, the present notary, went fixing up stakes to point out said boundaries across the island, and separated the said quarries, saying that all besides them was what corresponded to Don José Fish; to whom, being also present, I, the said notary, in discharge of the commission which was conferred upon me, put him in possession of the land pointed out, leading him into it by hand, and riding together on horseback by various places, until arriving at the dwelling house; all of which I did as a token of said possession, which he took quietly, peaceably, and without contradiction. In testimony of which and for the due proof I have extended the present proceedings, which all signed with the exception of Solano, who said he did not know how."

Signed by Arribas, Lorente and Fish.

The Secretary of the Treasury transmitted the report of the commissioners, with the evidence and decisions, to Congress, February 21, 1826. Vol. 4, p. 400.

The act of Congress of May 8, 1822, 3 Stat. 709, c. 129, provided that "for the purpose of ascertaining the claims and titles to lands within the territory of Florida, as required by the treaty," commissioners should be appointed with power "to inquire into the justice and validity of the claims filed with them," but not to have "power to confirm any claim or part thereof where the amount claimed is undefined in quantity, or shall exceed one thousand acres; but in all such cases shall report the testimony with their opinions to the Secretary of the Treasury, to be laid before Congress for their determination." A surveyor was also to be appointed.

Section 4 provided that "every person, or the heirs or representatives of such persons, claiming title to lands under any

patent, grant, concession, or order of survey, dated previous to the twenty-fourth day of January, one thousand eight hundred and eighteen, which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, before the commissioners, his, her, or their, claims, setting forth, particularly, its situation and boundaries, if to be ascertained, with the deraignment of title, where they are not the grantees, or original claimants; which shall be recorded by the secretary, . . . and said commissioners shall proceed to examine and determine on the validity of said patents, grants, concessions, and orders of survey, agreeably to the laws and ordinances heretofore existing of the government making the grants, respectively, having due regard, in all Spanish claims, to the conditions and stipulations contained in the eighth article of a treaty concluded at Washington, between His Catholic Majesty and the United States, on the twenty-second of February, one thousand eight hundred and nineteen; but any claim not filed previous to the thirty-first day of May, one thousand eight hundred and twenty-three, shall be deemed and held to be void and of none effect."

This act was amended by an act approved March 3, 1823, 3 Stat. 754, c. 29, confining the existing board of commissioners to West Florida, and authorizing the appointment of three commissioners for East Florida. The second section of this act provided that in the examination of titles, the claimant or claimants "shall not be required to produce in evidence the deraignment of title from the original grantee or patentee, but the commissioners shall confirm every claim in favor of actual settlers at the time of cession of the said territory to the United States, where the quantity claimed does not exceed thirty-five hundred acres, where such deraignment cannot be obtained, the validity of which has been recognized by the Spanish government, and where the claimant or claimants shall produce satisfactory evidence of his, her, or their right to the land claimed. And said commissioners shall have the power, any law to the contrary notwithstanding, of deciding on the validity of all claims derived from the Spanish government in favor of actual settlers,

where the quantity claimed does not exceed three thousand five hundred acres."

It was enacted by the fifth section "that all claims not filed with the commissioners of the district, where the land claimed is situated, in the manner prescribed by the act to which this is an amendment, on or before the first day of December next, shall be held to be void and of none effect."

The act further provided for the appointment of a surveyor for the territory, for the opening of land offices in each district, and for the appointment of a register and a receiver for each of said offices.

February 28, 1824, an act was passed, 4 Stat. 6, c. 25, which extended the time limited for the settlement of private land claims in Florida by the act of March 3, 1823, until January 1, 1825; declared that no person should be taken and deemed to be an actual settler unless he, or those under whom he claimed title, should have been in the cultivation or occupation of the land at and before the period of the cession; and that it should be lawful for claims to be filed any time previous to September 1, 1824, "but all and every claim not filed by that time, shall be held and deemed void and of none effect."

On the third of March, 1825, another act was passed, 4 Stat. 125, c. 83, which provided that it should "be lawful for claims to be filed before the board of commissioners in East Florida any time prior to the first day of November, one thousand eight hundred and twenty-five;" and the commissioners were authorized to continue their session until the first Monday of January, 1826. The act provided for the appointment of keepers of the public archives.

February 8, 1827, an act was passed, 4 Stat. 202, c. 9, to confirm title to lands and lots favorably passed on or reported not exceeding thirty-five hundred acres. This act provided "that the several claimants to land in said district, whose claims have not been heretofore decided on or filed, before the late board of commissioners, be permitted to file their claims, and the evidence in support of them, with the register and receiver of said district, and evidence in support of those filed before said board, at any time before the first of November next, whose duty it

shall be to report the same, with their decision thereon, and those already filed, to the Secretary of the Treasury, on or before the first day of January, one thousand eight hundred and twenty-eight, to be laid before Congress at the next session." Surveys were to be made and certificates granted, and claims for which the surveyor refused to issue certificates designated on the township plats. Holders of claims exceeding 3500 acres were required to furnish the surveyor with such information as would enable him to exhibit the claims on said plats.

This was followed by the act of May 23, 1828, 4 Stat. 284, c. 70, which confirmed claims which had been recommended for confirmation "to the extent of the quantity contained in one league square, to be located by the claimants, or their agents, within the limits of such claims or surveys filed, as aforesaid;" "that no more than the quantity of acres contained in a league square, shall be confirmed within the bounds of any one grant; and no confirmation shall be effectual until all the parties in interest, under the original grant, shall file with the register and receiver of the district where the grant may be situated, a full and final release of all claim to the residue contained in the grant; and where there shall be any minors incapable of acting within said territory of Florida, a relinquishment by the legal guardian shall be sufficient; and thereafter the excess in said grants, respectively, shall be liable to be sold as other public lands of the United States."

The fourth section provided that the register and receiver should continue to decide the remaining claims in East Florida, subject to the same limitations and in conformity with the provisions of the several acts of Congress for the adjustment of private land claims in Florida, until the first Monday in the next December, when they should make a final report of all the claims aforesaid in said district to the Secretary of the Treasury; and provided that it should never be lawful after that time for any of the claimants to exhibit any further evidence in support of said claims.

It was further enacted by section six "that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States of the twenty-second of February,

one thousand eight hundred and nineteen, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater amount of land than the commissioners were authorized to decide, and above the amount confirmed by this act; and which have not been reported, as antedated or forged, by said commissioners, the register and receiver, acting as such, shall be received and adjudicated, by the judge of the superior court of the district in which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in the State of Missouri, by act of Congress, approved May twenty-six, eighteen hundred and twenty-four, entitled 'An act enabling the claimants to land within the limits of the State of Missouri, and territory of Arkansas, to institute proceedings to try the validity of their claims;' *Provided*, That nothing in this section shall be construed to authorize said judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners or register and receiver, in conformity with the several acts of Congress, providing for the settlement of private land claims in Florida." An appeal was provided for from the decision of the Judge of the District Court to this court within four months after the decision should be pronounced.

The twelfth section read: "That any claims to lands, tenements, or hereditaments, within the purview of this act, which shall not be brought by petition before said court within one year from the passage of this act, or which, after being brought before said court, shall on account of the neglect or delay of the claimant, not be prosecuted to a final decision within two years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever."

The act of May 26, 1824, 4 Stat. 52, c. 173, in respect of land claims in Missouri and Arkansas, which "might have been perfected into a complete title" under the prior government, provided that it might be lawful for claimants to lands in Missouri and Arkansas to institute proceedings to try the validity of their

claims in the manner set forth; that the court should have full power and authority "to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States."

The decision of this court, if an appeal were taken, or, if not, of the court below, was to be final and conclusive. By the fifth section of the act, any claim not brought before the court within two years, or not prosecuted to final decision within three years, was barred.

May 26, 1830, 4 Stat. 405, c. 106, an act was passed confirming the claims and titles to lands filed before the register and receiver of the land office acting as commissioners in the district of East Florida under the quantity contained in one league square, which had been recommended for confirmation, and referred to Congress January 14, 1830; "and all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the act of Congress approved twenty-third May, one thousand eight hundred and twenty-eight."

By the eighth section, claimants who were entitled to avail themselves of the act of May 23, 1828, or might avail themselves of the provisions of this act, by taking a quantity of land equal to a league square in lieu of the whole grant, were allowed a further time of one year from the passage of the act in which to make their relinquishments, etc.

By an act of June 22, 1860, 12 Stat. 85, c. 187, "for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri, and for other purposes," claimants of lands lying within those States by virtue of any grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States, were authorized

to make application for confirmation of their title to lands so claimed, and the registers and receivers of the land offices in Florida were appointed commissioners to hear and decide under such instructions as might be prescribed by the commissioner of the general land office, and according to justice and equity, in a summary manner, such claims within the district aforesaid as came within the provisions of the act. The claims were to be divided into three classes, first, all claims which in their opinion ought to be confirmed where the lands claimed had been in possession and cultivation by the private claimants or those under whom they derived title for a period of at least twenty years preceding the date of the filing of the claim, by virtue of some grant, concession, order of survey or permission to survey, or other written evidence of title; second, all claims which in their opinion ought to be confirmed, where the lands were claimed under written evidence of title, but where there had been no actual cultivation or possession for a period of twenty years; third, all claims which in their opinion ought to be rejected; that whenever the commissioner of the general land office should approve the report of the commissioners in cases embraced in classes first and second, he should report the same to Congress for its action; and that whenever it should appear that the lands claimed and the title to which might be confirmed had been sold in whole or in part by the United States prior to confirmation, or where the same could not be surveyed or located, the party in whose favor the title was confirmed should have the right to enter upon any of the public lands of the United States a quantity of land equal in extent to that sold by the government.

Section 11 provided for proceedings where lands had not been possessed or cultivated for twenty years, but were claimed "by complete grant, or concession, or order of survey, duly executed, or by other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain," by petition in any District Court of the United States, within whose jurisdiction the lands or any part thereof might lie; and for an appeal from the decree to this court.

Section 12 enacted that the act should remain in force for five years, unless sooner repealed, "and all claims presented or sued upon according to the provisions of this act within the said term of five years, may be prosecuted to final determination and decision, notwithstanding the said term of five years may have expired before such final determination and decision."

The provisions of this act were extended by an act of June 10, 1872, 17 Stat. 378, c. 421, putting it in force for a period of three years; and it was provided that all persons claiming land as specified in the first section of the act might have their claims confirmed, in all cases where it should be satisfactorily proved that the claimants, and those from whom they derived title, had "held continuous possession of the land claimed, from the date of the cession to the United States of the territory out of which" the State of Florida was formed.

Mr. William Whitwell Dewhurst for appellants.

Mr. Francis P. Fleming for appellees. *Mr. Horatio Bisbee*, *Mr. Francis P. Fleming, Jr.*, and *Mr. C. D. Rinehart* were on his brief.

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

Appellees submitted motions to dismiss or affirm, the consideration of which was postponed to the hearing on the merits.

The contention is that the appeal should have been taken to the Circuit Court of Appeals and not to this court.

We do not concur in that view. The bill alleged "that this cause arises under the said treaty between the United States and Spain, which ratified and confirmed said grant to the said Joseph Fish, under whom your orators claim title. And the controversy involved in this cause necessarily involves the construction of said treaty."

By motions to dismiss and demurrers appellants set up various objections to the jurisdiction of the Circuit Court, the disposition of which involved the construction of the treaty. These

being overruled, appellants by their answer admitted "that the controversy involves the construction of the treaty between Spain and the United States; . . . that perfect or complete grants were recognized by the treaty with Spain, but incomplete grants were ratified by the treaty, to the same extent they would have been valid had the territory remained under the King of Spain."

It was contended on the one hand that the title was absolutely confirmed by the treaty, and on the other that as this was not a suit brought under any of the acts of Congress in that behalf, the treaty could not be held to be self-executing.

The pleadings, the evidence, and the master's report and opinion considered, we think that rights under the treaty were so far set up and relied on as to give jurisdiction to the Circuit Court, and to justify an appeal from its decree directly to this court. The record differs from that in *Muse* v. *Arlington Hotel Company*, 168 U. S. 430, which fell short of affording adequate grounds for the maintenance of our jurisdiction.

This is a bill to remove clouds on title, and rests on complainants' alleged legal title, connected with possession.

The general rule is that complainants in such suits must be in actual possession. *Frost* v. *Spitley*, 121 U. S. 552. And such is the rule in Florida, where, however, it is enough if the land be wild and unoccupied, or if some independent head of equity jurisdiction exists. *Richards* v. *Morris*, 39 Florida, 205; *Hughes* v. *Hannah*, 39 Florida, 365, 376; *Sloan* v. *Sloan*, 25 Florida, 53.

In this case actual possession was claimed of a plantation styled the Orange Grove, of about one hundred acres, situated on what was called "Fish's" Island, which the master found was not an island in itself, but part of Anastasia Island; and constructive possession of the whole of Anastasia Island, a certain part excepted as reserved. Relief was not sought as to the Orange Grove, and some homesteads, and proof was introduced tending to show that the tracts in controversy were wild and unoccupied. It was insisted as to them that the legal title drew possession to it.

The master found as matter of mixed law and fact that the lands granted to Jesse Fish in 1795 were "an island, well known

and designated by name, and entirely surrounded by water," and that they were completely and sufficiently segregated from the royal domain by proceedings taken under the decree of 1795, and Fish placed thereby in possession thereof; that the grant and the segregation of the lands from the royal domain constituted "a complete and perfect title to the said land, to wit, to the whole of the island of St. Anastasia," certain lands, "marked off by the officials as reserved," excepted.

He also found that "on August 31, 1823, Sarah Fish presented her memorial to the board of commissioners appointed by Congress to investigate as to land claims in East Florida, claiming title to the Island of St. Anastasia under the grant to Jesse Fish in 1795, aggregating ten thousand acres of land; that on December 16, 1825, the board of commissioners for East Florida reported to Congress the claim of Sarah Fish, heir to Anastasia Island, for ten thousand acres, as a valid claim for confirmation, and that said claim was reported to Congress by the Secretary of the Treasury of the United States for confirmation, with his report under date of February 23, 1826."

The master ruled as matter of law "that the grant of Fish, being a valid and complete title, properly segregated from the public domain prior to January 24, 1818, stood ratified and confirmed both by the King of Spain and the United States by virtue of the eighth article of the treaty of cession. That this grant, having been passed upon by the commissioners of East Florida under the acts of Congress and reported by them to Congress for approval as a valid grant in 1826, was further confirmed as to its validity by the United States by the act of Congress of May 23, 1828. That the limitation in the twelfth section of the act of 1828 and the acts supplemental thereto and amendatory thereof, enacted by Congress in regard to private land claims in Florida, did not apply to complete valid grants of land properly segregated from the royal domain and in possession by the grantees prior to January 24, 1818, and therefore did and do not apply to the grant to Fish so as to bar the present action."

If then the limitations of the acts of Congress properly applied to complete and perfect titles and this was such, or if they

applied to the claim of Fish because it was not such a title, or under the particular circumstances, the conclusions reached were erroneous, and the decree must be reversed.

And, apart from these limitations, if the grant did not amount to an absolute title, requiring no confirmation, the bill, of course, could not be maintained.

It must be remembered that this is not a suit under any of the acts passed by Congress in reference to the settlement of claims in East Florida, but entirely independent of them. According to the theory of appellees, those acts have no application whatever. Appellees assert their title to have been absolutely perfect and complete prior to the treaty, and, in any aspect, they must stand or fall by their contention that the Fish grant was a complete and perfect royal title.

And while we can perceive that equitable grounds may have justified the recommendation to Congress for confirmation in 1826, we cannot hold as matter of law that a grant couched in the terms of this one, and not made by the governor of East Florida or ratified by him, was an absolute conveyance of the fee.

By the Spanish law the King was the source and fountain of title to all lands, which could only be disposed of by him, or his duly authorized representative. In the Province of East Florida the governor acted in the granting of lands in the name and by the authority of the King as his direct representative. It was in that point of view that Quesada described himself as "vice royal patron and subdelegate of the royal domain." Quesada was governor from July 13, 1790, to July 20, 1796. His last participation in the matter of Fish's application was on March 26, 1795, when the papers were returned to Fish. What appears afterwards purports to have been done by one Morales during an alleged illness of the governor. There is nothing to indicate that Governor Quesada was not in the exercise of the duties of his office during his entire term, except the mere recitation in these papers. There is no evidence that Morales performed the duties of the office of governor unless the single act under consideration is to be so treated, and that would not make out a *de facto* incumbency, if there could be such, which,

as to the exercise of this power, we cannot concede. There is no pretence that Morales was appointed governor *pro tempore*, and indeed he could not have been save by the King, or the captain general of Cuba and the Floridas, which appointment would have been formally made and duly recorded. 2 White's New Recopilacion, 270, 271. No evidence to that effect was introduced. Morales clearly cannot be held to have had the power to make a royal grant, nor was any ratification of what he did do shown.

In *United States* v. *Arredondo*, 6 Pet. 691, and in *United States* v. *Peralta*, 19 How. 343, it was held in view of the rules of decision prescribed by the statutes under which the courts exercised jurisdiction, that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the official executing the grant, but that the court would assume as a settled principle that a public grant was to be taken as evidence that it was issued by lawful authority. But under the act of March 3, 1891, creating the Court of Private Land Claims, inasmuch as it was made essential before a grant could be held legally valid that it must appear that the title was "lawfully and regularly derived," it was held that such presumption could not be indulged in; that the language of the act imported "that the court must be satisfied, from all the evidence, that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified." *Hayes* v. *United States*, 170 U. S. 637. The question involved in that case was whether the territorial deputation of New Mexico had authority to make the grant in controversy. Mr. Justice White, delivering the opinion, said, among other things: "Further, while it is reasonable to presume that any order or decree of the supreme executive of Mexico conferring authority to alienate the territorial lands or ratifying an unauthorized grant to the extent authorized by law was made matter of official record, the petition does not aver and the grant does not recite, nor was there any evidence introduced showing a prior authorization or subsequent ratification. In fact, it was not even shown that at or about the time of the grant the territorial deputation habitually

assumed to grant lands, particularly under circumstances which would justify an inference that the supreme executive was informed of such procedure."

In *Crespin* v. *United States*, 168 U. S. 208, which was a case under the act of 1891, it was held that the presumption indulged in *United States* v. *Arredondo* could not supply the want of power in the alleged granting officer.

In the case at bar, as we have said, complainants were not proceeding under any act of Congress permitting the United States to be sued, but as at common law, and on the basis of absolute legal title. That title they were obliged to make out, and could only avail themselves of such presumptions as would ordinarily obtain. Without going into the question of the presumptions which might on occasion be indulged in, it is enough to say that it is clear that where the officer who assumed to convey the public domain had no authority *ex officio* to do so, such authority cannot be presumed from the mere fact of the conveyance in the absence of other evidence.

We do not think that Governor Quesada could have delegated his power as subdelegate, and it cannot be assumed that he attempted to do so.

But, furthermore, we are not persuaded that Morales undertook to make an absolute grant in fee. He did not profess to be acting as "Vice Royal Patron and Subdelegate of the Royal Domain." The grant did not run in the name of the King; did not purport to make the grant as "in absolute property;" did not assert the legal right to make such a grant; and the terms of the paper were consistent with a grant of possession merely, or, at the most, of a concession, which required a title in form to be subsequently issued.

The report of the land commissioners of January 31, 1826, transmitting the Fish claim among others, (4 American State Papers, "Public Lands," D. G. ed., 276,) states: "A royal title is the highest order of title known by any law, usage, or principle, in the province of East Florida. Titles of this description were designed to convey the fee simple to the grantee; they were usually made by the acting governors of the province in the name of the King; they recited the grant to be 'in perpe-

tuity,' and also the specific metes and bounds of the land. . . . This title may be said to correspond in character with that of a patent issued by our Government. Concessions without condition are understood to differ from a royal title only in this, that most of the latter recite the metes and bounds, whereas the unconditional concession, although definite in quantity and location of the land, is still subject to a survey; which, when made, was followed up by maturing the concession by a royal title. . . . There is also a peculiarity in the phraseology of a royal title; in all the grants of this nature, the legal right to grant the lands is asserted."

The commissioners regarded the grant in question as a concession without condition, or with conditions fulfilled, and reported it as such for confirmation. They attributed it to the royal order of 1790 in respect of settlers. 1 Clarke's Land Laws, 994, 996; 2 White, 276; *United States* v. *Clarke*, 8 Pet. 436.

Referring to class one, being claims to lands not exceeding 3500 acres in quantity, they made the observations already quoted, and further said: "In deciding on the cases comprehended in this class, the board have in all cases of royal titles and concessions without condition, where the documents were found amongst the archives of the country, and no allegations on the part of the United States appearing against them, considered themselves bound to grant certificates of confirmation to the claimants. . . . Number three comprehends claims exceeding 3500 acres, the titles to which were found amongst the public archives of the country, and are ascertained by the commissioners to be valid Spanish grants, and reported accordingly to Congress for confirmation."

The question on this branch of the case is not whether the grant should have been confirmed, but whether it amounted to a complete title without confirmation. At the time of the cession was further action of the government required to perfect it? As it was not in itself a royal title and was neither made nor confirmed by the lawful authorities of the King, we think such action was necessary.

But were this otherwise it seems to us clear that the limitations of the acts of Congress applied.

Articles II and VIII of the treaty between the United States and Spain, concluded February 22, 1819, ratified by Spain, October 24, 1820, and by the United States February 19, 1821, read as follows:

"Article II. His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article. The said archives and documents shall be left in possession of the commissaries or officers of the United States, duly authorized to receive them."

"Article VIII. All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas, was made, are hereby declared, and agreed to be, null and void."

In the light of the Spanish text, to the effect that grants should "remain ratified and confirmed," the treaty has been frequently construed as meaning that grants needing no confirmation should stand confirmed, while those requiring confirmation should receive it in due course as might be provided.

Undoubtedly private rights of property to land lying within the territory ceded were entitled to protection, whether they

were complete and absolute titles, or merely equitable interests needing some further act of the Government to perfect the legal title. The duty of securing such rights belonged to the political department, and might be discharged by Congress itself, or through the instrumentality of boards, or of strictly judicial tribunals. And even grants which were complete at the time of the cession might be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they could be held valid. *Ainsa* v. *New Mexico & Arizona Railroad*, 175 U. S. 76; *Botiller* v. *Dominguez*, 130 U. S. 238; *United States* v. *Clarke*, 8 Pet. 436; *Glenn* v. *United States*, 13 How. 250.

In *United States* v. *Clarke*, the acts of Congress prior to 1834 were considered by Chief Justice Marshall, in the instance of a complete and perfect grant. Referring to the act of May 26, 1830, the Chief Justice said: "It was obviously the intention of Congress to extend the jurisdiction of the court to all existing claims and to have them finally settled. The purposes for which the act was made could not be otherwise accomplished. . . . The words which confer jurisdiction, and describe the cases on which it may be exercised, are 'all the remaining cases which have been presented according to law, and not finally acted upon.' The subsequent words 'shall be adjudicated,' etc., prescribe the rule by which the jurisdiction previously given shall be exercised." Quoting from the sixth section of the act of May 8, 1822, he said: "The object of this law cannot be doubted. It was to separate private property from the public domain for the double purpose of doing justice to individuals, and enabling Congress safely to sell the vacant lands in their newly acquired territories. To accomplish this object, it was necessary that all claims of every description, should be brought before the commissioners, and that their powers of inquiry should extend to all. Not only has this been done, but, further to stimulate the claimants, the act declares 'that any claim not filed previous to the 31st of May, 1823, shall be deemed and held to be void and of none effect.' This primary intention of Congress is best promoted by determining causes finally, where their substantial merits can be discerned." He further

quoted the sixth section of the act of May 23, 1828, and from the act of May 26, 1824, (referred to in the act of May 26, 1830,) and as to the latter act said that it "does not define the jurisdiction conferred on the court of East Florida by the act of 1830, but directs the mode of proceeding and the rules of decision."

In *Glenn* v. *United States*, Mr. Justice Catron, referring to the case of Arredondo, said: "That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the sixth section of the act of May 23, 1828, which embraced perfect titles, and was only applicable to suits in Florida."

The cases of *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Percheman*, 7 Pet. 51; *United States* v. *Clarke*, 8 Pet. 436, were all instances of complete and perfect titles brought into court under these statutes.

Botiller v. *Dominguez* was a writ of error to the Supreme Court of California to review a judgment in favor of plaintiff in an action in the nature of ejectment. Plaintiff's title was a grant alleged to have been made by Mexico, but no claim under the grant had ever been presented for confirmation to the board of land commissioners appointed under the act of Congress of March 3, 1851, c. 41, 9 Stat. 631; and no patent had ever issued from the United States to any one for the land or any part of it. The state court held that the title to the land by the Mexican grant was perfect at the time California was acquired, and that the grantee was not compelled to submit the same for confirmation to the board of commissioners. This court ruled that no title to lands in California dependent upon Spanish or Mexican grants could be of any validity which had not been submitted to and confirmed by the board provided for that purpose by the act of Congress, or, if rejected by that board, confirmed by the District Court or by the Supreme Court of the United States. Two propositions were urged in support of the decision of the state court. First, that the statute itself was invalid because in conflict with the treaty with Mexico, and also with rights of property under the Constitution and laws of the United States. Second, that the statute was not intended

to apply to claims which were supported by complete and perfect title from the Mexican government, but only to such as were imperfect, inchoate and equitable in their character. As to the first of these propositions, this court held that so far as the act of Congress was alleged to be in conflict with the treaty with Mexico, that was a matter in which the court was bound to follow the statutory enactments of its own Government. As to the second point, it was held that the statute applied to perfect as well as imperfect claims, and Mr. Justice Miller, delivering the opinion, said:

"It was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican government should be established as that imperfect claims should be established or rejected. The superior force which is attached, in the argument of counsel, to a perfect grant from the Mexican government had its just influence in the board of commissioners, or in the courts to which their decisions could be carried by appeal. If the title was perfect, it would there be decided by a court of competent jurisdiction, holding that the claim thus presented was valid; if it was not, then it was the right and the duty of that court to determine whether it was such a claim as the United States was bound to respect, even though it was not perfect as to all the forms and proceedings under which it was derived. So that the superior value of a perfected Mexican claim had the same influence in a court of justice which is now set up for it in an action where the title is contested. Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid. We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or

other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whosoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them."

We are of opinion that these acts applied and were intended to apply to all claims, whether perfect or imperfect, in that particular resembling the California act; that the courts were bound to accept their provisions; and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued.

Mrs. Fish naturally took that view and memoralized the commissioners, who reported in favor of the claim, and the report was transmitted to Congress in February, 1826.

The act of May 23, 1828, followed, which confirmed all claims, which had been recommended for confirmation, of which this was one, to the extent of a league square, but provided that the confirmation should not be effectual until all the parties in interest in the original grant had filed a full and final release of all claims to the residue contained in it, with the register and receiver of the district where the grant was situated. We do not agree with the master that the effect of this was to confirm the entire grant, but, on the contrary, we think that by the action of Congress all of the claim except a league square was rejected, and that as there was no release of the excess, the condition of the confirmation failed.

And inasmuch as this was the situation, and claimants had neither accepted the league square nor availed themselves of the legislation providing for resort to the courts, it was held when the matter was litigated in the land department that the claim was barred. The views there entertained were expressed by the Commissioner in his report of August 2, 1890, and by the Secretary of the Interior in his decision of June 22, 1893. 16 Land Dec. 550. The land department was of opinion that even conceding that the claim was a valid grant from the Spanish government for the full quantity of 10,000 acres,

and that the act of May 23, 1828, which governed that, among other claims, was in violation of the obligations of the treaty, the department and the courts were bound to follow the statutory enactments of their own government, and must be controlled thereby, and that regarding the claim as coming within the provisions of the acts of 1827 and 1828, its validity could not be recognized because the claimants had failed to comply with the conditions prescribed by these acts. All claims of every description whatever, whether arising under patents, grants, concessions or orders of survey, were required to be submitted to the board of commissioners for confirmation, or to be submitted to Congress for final action, before their validity could be recognized, and all claims reported upon by the commissioners, whether founded upon a complete or an incomplete title, were subject to the provisions of the act of Congress of May 23, 1828, and barred in accordance with its provisions. If the claim came within the provisions of the second section of that act, its validity was recognized only to the extent of one league square, and upon the condition that the claimant should relinquish all in excess of that quantity on or before May 26, 1831. If it did not come within the provisions of said section, then it was a claim not acted upon by Congress, and was barred by failure to commence the proper proceedings in the courts within the time limited in the sixth section of the act of May 23, 1828.

We accept these conclusions, and with the less reluctance, as if this were a perfect title as contended, resort to the courts might again have been had under the acts of 1860 and 1872.

It seems to us that the Government was unquestionably entitled to demand the seasonable assertion of such claims as this, and that years after the public surveys had been extended over the land, and the maps and plats thereof approved; many reservations made for public purposes; patents issued; homestead entries made and final certificates issued; the exhibition of a bill to set aside the patents of the Government by those who had failed to comply with the statutes came undeniably too late.

In our judgment the bill cannot be maintained because complainants failed to show complete legal title from the King;

and because the claim was barred by the statutes to which we have referred.

Decree reversed and cause remanded with a direction to dismiss the bill.

MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM dissented.

JOHNS *v.* WILSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 67. Submitted November 11, 1900.—Decided March 1, 1901.

Under the practice in Arizona the grantee of a mortgagor, who has agreed to pay the notes secured by the mortgage, may be held liable for a deficiency upon the sale of the mortgaged premises, in a direct action by the mortgagee.

In such action the grantee of the original mortgagor is the party primarily liable to the mortgagee for the debt, the relation of the grantee and mortgagor toward the mortgagee, as well as between themselves, being that of principal and surety.

Where a decree of foreclosure and sale against the original mortgagor and his immediate grantee is ineffectual, by reason of the fact that, a few days before the filing of the bill, the grantee conveyed the premises to a second grantee by a deed which was withheld from the record until after the foreclosure proceedings had been begun, a bill will lie to set aside the sale, to annul the deed upon the ground of fraud, and to decree a new foreclosure and sale of the same premises.

While it is possible that the mortgagee might have been able to obtain relief by an amended bill in the original suit, a new action is the proper remedy, where he has been mistaken in his facts, especially if such mistake has been brought about by the contrivance of the legal owners.

THIS was a complaint, in the nature of a bill in equity, under the Arizona code, filed in the district court of Maricopa County, by the appellee, Wilson, (who had already, in a prior suit, foreclosed a mortgage upon certain real estate against John M. Armstrong, mortgagor, and Robert E. Daggs, purchaser of the premises,) against Alvin L. Johns, subsequent purchaser *pen-*

dente lite of the same premises, and also against William A. Daggs, tenant in possession, Robert E. Daggs, his landlord, and A. Jackson Daggs, agent of Robert E., to charge Johns, and Robert E. Daggs with the payment of the mortgage debt, for a foreclosure of the mortgage against all the defendants, for a receiver and for a judgment against all for damages.

The complaint, which was filed June 22, 1895, alleged that when the former bill foreclosing the mortgage was filed, April 26, 1894, John M. Armstrong, the mortgagor, and Robert E. Daggs, who purchased the premises December 18, 1893, were the only parties known to the plaintiff to be liable upon the notes, or to have any interest whatever in the mortgaged property; but that the defendants Robert E. Daggs and A. Jackson Daggs, conspiring together to hinder and obstruct the plaintiff in the collection of his mortgage debt, procured a deed of conveyance of the property from Robert E. Daggs to Johns for the sole purpose of hindering, delaying and obstructing him in the collection of his mortgage debt; that the deed, though dated March 17, 1894, before the proceedings for a foreclosure were begun, was withheld from record until April 28, 1894, after the summons in the foreclosure action had been served, and after the *lis pendens* had been filed; that in this deed Johns expressly agreed and bound himself to pay the plaintiff's mortgage debt; that William A. Daggs, who was at the time of the foreclosure in possession as tenant of Robert E. Daggs, did not advise plaintiff of his surrender of the premises as tenant of Robert E. Daggs, or of his having taken possession as the tenant of Johns; and that such abandonment and release of the property, and the taking possession thereof as tenant of Johns, were done secretly, without any notice to the plaintiff, with intent to deceive him into the belief that he (William A.) was still holding possession as tenant of Robert E. Daggs, and that the plaintiff, on account of such secret transfer of possession, if any was made, was deceived, as the defendant intended him to be, and that the foreclosure action therefore proceeded to judgment without his joining or making the said Johns and William A. Daggs defendants therein; that plaintiff had no knowledge or informa-

tion, when he began his action and filed his *lis pendens*, that any other persons than Robert E. Daggs had any claim to the premises. Wherefore plaintiff prayed for a judgment against Robert E. Daggs and Alvin L. Johns, who had assumed and agreed to pay the mortgage debt, for the amount of such debt, and for the sum of one thousand dollars as damages; that his mortgage be adjudged unpaid and unsatisfied, and that the same be foreclosed against all the defendants and all persons holding under them, and for such further relief as the circumstances of the case required.

On a hearing upon pleadings and proof a judgment was rendered setting aside the sale had in the foreclosure suit of *Wilson* v. *Armstrong and Daggs*, and the satisfaction of the judgment made upon such sale; that the plaintiff Wilson recover of Robert E. Daggs and Alvin L. Johns, who had assumed and agreed to pay the mortgage debt, the amount of such debt, declaring such amount, $8541.13, to be a lien upon the property, which was also foreclosed; ordering a sale of the premises as against Robert E. Daggs and Johns, and also finding that appellants had fraudulently conspired together to cheat, wrong and defraud the appellee, and declaring the deed of Daggs to Johns to be fraudulent and void. It was further ordered that the former judgment stand and be carried into effect by a resale of the property, and in case the proceeds be insufficient to pay the judgment, that the sheriff make the deficiency out of the other property of Robert E. Daggs and Johns. The property was subsequently sold and bid in by the appellee for $2000, leaving a deficiency of $6861.26. There was no decree for damages.

An appeal was taken to the Supreme Court of Arizona, which modified the action of the lower court by omitting therefrom the personal judgment against Johns for the deficiency, but otherwise affirming it, 53 Pac. Rep. 583, and, upon an appeal being taken to this court, made the finding of facts set forth in the margin.[1]

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[1] *Finding of Facts.*

1. That on the 24th day of April, 1893, one John S. Armstrong executed a mortgage on certain real estate, described in the complaint herein, to one

Mr. A. J. Daggs for appellants.

Mr. D. H. Pinney and *Mr. Louis T. Orr* for appellee.

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

This case involves the right of a mortgagee to relief against

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James Wilson, to secure the payment of two certain promissory notes in said complaint set forth, each being for the sum of $3250.00 and interest, and dated on said 24th day of April, 1893.

2. That afterwards and on the 18th day of December, 1893, said Armstrong sold said premises thus mortgaged to defendant (appellant here) R. E. Daggs, and conveyed the same by certain deed of conveyance, in which said defendant R. E. Daggs agreed and bound himself, his heirs, executors and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the said premises by one W. A. Daggs as his tenant.

3. That on the 26th day of April, 1894, default having been made in the payment of the said notes secured by said mortgage, the said Wilson commenced an action in the district court of Maricopa County against the said Armstrong and said R. E. Daggs for the recovery of the amount due upon said notes and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a *lis pendens* in the office of the recorder of said county.

4. That at the time of the beginning of said suit the defendant W. A. Daggs was in the possession of the said premises, and the title to said premises, so far as disclosed by the record, then appeared to be in said R. E. Daggs.

5. That after personal service upon the defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said district court on the 8th day of May, 1894, against the said defendants J. S. Armstrong and R. E. Daggs, for the full amount due, with costs, and for the foreclosure of the mortgage.

6. That thereafter and on the 6th day of June, 1894, the said premises were sold by the sheriff of Maricopa County under execution and order of sale issued upon the said judgment, and were bid in by the plaintiff for the full amount of his judgment.

That thereafter and on the 12th day of December, 1894, the said sheriff, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the said purchaser under said sheriff's deed, the aforesaid W. A. Daggs,

one who secretly purchased the premises just prior to a bill being filed for the foreclosure of the mortgage, and who withheld his deed from record until after the summons in the foreclosure suit had been served, and a *lis pendens* had been filed.

At the time the original foreclosure suit was begun, the de-

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then being found in possession, refused to surrender the same and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that time to the present continued to hold and occupy said premises and property as such tenant of A. L. Johns, to the total exclusion of plaintiff James Wilson.

7. That on the 28th day of April, 1894, after the service of summons upon said R. E. Daggs in said action and the filing of the *lis pendens* aforesaid, a deed was placed on record in the office of the county recorder of said county, which said deed purported to convey the property in question from said R. E. Daggs to said A. L. Johns, of Chicago, Illinois.

That at the time the demand for possession, as aforesaid, was made by said Wilson upon the defendant W. A. Daggs, said W. A. Daggs claimed and asserted that on the first day of April, 1894, he ceased to be the tenant of R. E. Daggs and thereupon became the tenant of said A. L. Johns, and took possession of said property for said Johns at said time, and from that time forward held possession of said premises as the tenant of said A. L. Johns and not as the tenant of said R. E. Daggs.

8. That at the time of the commencement of said action to foreclose said mortgage the said plaintiff in said action, James Wilson, had no knowledge or information whatsoever that any other person than the said R. E. Daggs and J. S. Armstrong had any claim to said premises.

9. That said defendants R. E. Daggs and A. J. Daggs did conspire together to hinder and obstruct the said James Wilson in the collection of his said mortgage debt, and to that end did procure the said deed of conveyance from the said R. E. Daggs to said A. L. Johns, and to said end and for the said purpose did withhold the said deed of conveyance from the record until after the said foreclosure suit had been begun by the service of summons upon the defendants therein.

That the said deed from the said R. E. Daggs to said A. L. Johns was fraudulent and void as against said James Wilson and as against aforesaid mortgage, and was made and executed by the said Daggs and was recorded by him, the said Daggs, for the purpose of hindering and delaying the plaintiff in the securing the title and possession to the aforesaid mortgaged premises and for the purpose of hindering and obstructing and delaying plaintiff in said foreclosure suit, James Wilson, in the prosecution of said suit against said John S. Armstrong and R. E. Daggs and for the purpose of hindering, delaying and obstructing said Wilson in the sale of said premises and in obtaining satisfaction of his said judgment by process of law.

fendant William A. Daggs was in possession of the premises, and the title, so far as disclosed by the record, then appeared to be in Robert E. Daggs. But after it had culminated in a sale of the premises, June 6, 1894, and the sheriff had executed his deed December 12, 1894, William A. refused to surrender possession, and claimed to hold as the tenant of Johns, and from that time continued to hold as such tenant, to the exclusion of plaintiff.

The Supreme Court found as a fact that the defendants Robert E. and A. Jackson Daggs had conspired together to hinder and obstruct Wilson in the collection of his mortgage debt, and to that end procured the deed from Robert E. Daggs to Johns, and withheld it from record until after the foreclosure suit had been begun; that such deed was fraudulent and void as against Wilson, and was executed and recorded by Robert E. Daggs for the purpose of hindering and delaying the plaintiff in securing possession of the mortgaged premises, and of obtaining satisfaction of his judgment by process of law.

A large number of errors are separately assigned by the different defendants, but we shall notice only such as were passed upon by the Supreme Court or pressed upon our attention in the briefs.

1. The most important is that Robert E. Daggs, the grantee of the original mortgagor, was not liable in a direct action by the mortgagee, because no privity of contract was shown between such grantee and the plaintiff mortgagee; and the action was not brought in the name of, or for the benefit of, the mortgagor Armstrong.

This assignment should be read in connection with the second finding, which is in substance that, in December, 1893, Armstrong sold to the defendant Robert E. Daggs the premises previously mortgaged to Wilson, the appellee, and conveyed the same to him by deed, in which Daggs agreed and bound himself to pay the two notes executed by Armstrong and secured by the mortgage. Under this sale and transfer Daggs entered into possession of the premises by William A. Daggs, his tenant. There was also in the deed of March 17, 1894, from Robert E. Daggs to Alvin L. Johns, as appears from a copy of

the deed sent up with the record, a similar agreement by Johns to assume and pay the Wilson mortgage; but as the Supreme Court held this deed to be fraudulent and void, and that there could be no recovery upon the agreement against Johns, this deed becomes immaterial. The question is, whether there can be a personal judgment against Daggs upon the agreement in *his* deed from Armstrong to pay this mortgage. In the first decree rendered in the suit of *Wilson* v. *Armstrong and Robert E. Daggs*, there was a personal judgment against Armstrong upon the notes, which the mortgage was given to secure, and an order for a foreclosure and sale of the premises; and in case the proceeds of the sale were insufficient to satisfy the judgment, the sheriff should make the balance out of any other property of the defendant Armstrong; but there was no personal judgment against Robert E. Daggs. Such judgment was prayed for and granted in this case.

The question whether a mortgagee can recover against the grantee of the mortgagor upon a stipulation in his deed from the mortgagor to assume and pay off the mortgage, as well as the more general question how far a third party may avail himself of a promise made by the defendant to another party, has been the subject of much discussion and difference of opinion in the courts of the several States, but we think the decisions of this court have practically removed it from the domain of controversy.

In *National Bank* v. *Grand Lodge*, 98 U. S. 123, 124, the Masonic Hall Association, a Missouri corporation, had issued a large number of bonds which the Grand Lodge had assumed by resolution to pay. The bank brought an action at law against the Grand Lodge to compel the payment of certain coupons attached to these bonds, of which it was the holder, and this court held that it was not entitled to recover, upon the ground that the holders of the bonds were no parties to the resolution, and there was no privity of contract between them and the Lodge. In delivering the opinion of the court, Mr. Justice Strong observed: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of as-

sumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise."

Keller v. *Ashford*, 133 U. S. 610, was a bill in equity by Keller, the mortgagee, against Ashford, the grantee of the land subject to this mortgage, which he had agreed to pay. It was held after full examination of the authorities, first, that the mortgagee could not sue at law, citing *National Bank* v. *Grand Lodge*, 98 U. S. 123, and *Cragin* v. *Lovell*, 109 U. S. 194; second, that in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee; but, third, that under the equitable doctrine that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt, the mortgagee was entitled to avail himself of an agreement in a deed of conveyance from the mortgagor, by which the grantee promised to pay the mortgage. This is upon the theory that the purchaser of land subject to the mortgage becomes the principal debtor, and the liability of the vendor, as between the parties, is that of surety.

In *Willard* v. *Wood*, 135 U. S. 309, in error to the Supreme Court of the District of Columbia, it was held that the question whether the remedy of the mortgagee against the grantee of the mortgagor to enforce an agreement contained in the deed to him to pay the mortgage debt, be at law or in equity, was governed by the *lex fori*, and that in the District of Columbia such remedy was by bill in equity only.

In *Union Mutual Life Ins. Co.* v. *Hanford*, 143 U. S. 187, it was said to be "the settled law of this court, that the grantee is not directly liable to the mortgagee, at law or in equity; and

the only remedy of the mortgagee against the grantee is by a bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt." The court restated the rule laid down in *Willard* v. *Wood*, 135 U. S. 309, that the question of the remedy of the mortgagee, whether at law or in equity, was to be decided by the law of the place where the suit was brought. The material question in that case was whether the giving of time to the grantee, without the assent of the grantor, discharged the latter from personal liability. It was held that it did, citing *Shepherd* v. *May*, 115 U. S. 505.

As, however, under the Arizona code, there is no distinction between suits at law and in equity, we see no reason to doubt that this action will lie. Indeed, in *Williams* v. *Naftzger*, 103 California, 438, the Supreme Court of California, whose code was practically adopted by the legislature of Arizona, thought an agreement on the part of the grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor was liable, renders the grantee liable therefor to the mortgagee; and in an action for a foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency, citing *Keller* v. *Ashford*, 133 U. S. 610, 622.

2. Further objection is made to this proceeding upon the ground that it is not shown that the mortgagor "had been exhausted," or that he is insolvent. If by this is meant that, after the sale of the property, the mortgagee is bound primarily to proceed against the mortgagor personally for any deficiency, the position is inconsistent with the doctrine of the cases above cited, in which it is assumed that the purchaser, who has agreed to pay the mortgage, is the principal debtor, and the mortgagor is surety. This view is thus concisely stated by Mr. Justice Gray in *Union Mutual Life Ins. Co.* v. *Hanford*, 143 U. S. 187, 190: "The grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable

to the latter, and the relation of the grantee and grantor toward the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt." Undoubtedly the mortgaged property must first be applied to the payment of the debt. This was done. The judgment, though nominally against Daggs for the amount of the mortgage debt, contemplated in subsequent paragraphs that the sheriff should only make the balance out of the property of the defendant Daggs, in case the proceeds of the sale were insufficient to pay the judgment. This, too, was the language of the order of sale.

In the case of *Biddel* v. *Brizzolara*, 64 California, 354, relied upon by the appellants, the general principle was recognized that, where a purchaser of real estate from the mortgagor assumes payment of the mortgage debt, a cause of action arises, upon the principle of subrogation, in favor of the mortgagee, which he may enforce at any time within the life of his mortgage by a suit against the purchaser. In that case, however, it was held there could be no recovery, because the statute of limitations had run against the mortgage debt, and because the purchaser had reconveyed the mortgaged property to the mortgagor prior to the commencement of the action. As Armstrong could have recovered against Robert E. Daggs any deficiency he had been obliged to pay, the plaintiff could proceed against Daggs directly for such deficiency.

It is true that William A. Daggs was not made a party to the prior foreclosure bill, but his only claim to the property was that of tenant, either of Robert E. Daggs or of Johns. Robert E. Daggs was made a party to that bill, and Johns is made a party to this. We fail to see how either of them is prejudiced by William A. Daggs not being made a party to the former bill.

3. The seventh assignment, that no reason is shown for not applying for relief in the former foreclosure suit, appears to be based upon the theory that the former judgment is conclusive against the parties to the action, and that the plaintiff has no legal right to a second foreclosure. While it is true that, if the plaintiff had sought to foreclose the right of William A. Daggs

to this property, he should have been made a party to the former foreclosure, it is difficult to see how Johns would have been affected by a decree against Daggs, unless he also had been made a party. That he was not made such party is explained by the fact that his deed had not been put upon record, and that it was impossible for the plaintiff to have known, from aught that appeared to him, that Johns was the owner of the property. Where the mortgagee has no knowledge and no means of knowing that the mortgaged property has been sold by the person in whose name it stands of record, especially where such sale is brought about by a fraudulent conspiracy between the vendor and vendee, and the conveyance is withheld from record for the purpose of misleading the mortgagee, we know of no objection to a second foreclosure for the purpose of terminating the rights of the vendee. As stated in Jones on Mortgages, section 1679: "If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the cost of the previous sale." *Bank* v. *Abbott*, 20 Wisconsin, 570; *Stackpole* v. *Robbins*, 47 Barb. 212; *Shirk* v. *Andrews*, 92 Indiana, 509; *Brackett* v. *Banegas*, 116 California, 278; *Morey* v. *City of Duluth*, 69 Minnesota, 5; *Benedict* v. *Gilman*, 4 Paige, 58; *Georgia Pacific Railroad* v. *Walker*, 61 Mississippi, 481.

While it is possible that the mortgagee might have been able to obtain relief by an amended bill in the original suit, a new action is a proper remedy where he has been mistaken in his facts, especially if such mistake has been brought about by the contrivance of the legal owners. Appellants apparently proceed upon the assumption that the possession of William A. Daggs was not only notice of his own rights to the property, and of his tenancy under Robert E. Daggs, the record owner, but also of the ownership of Johns, whose title did not appear of record, and of which the mortgagee had no actual notice. We cannot acquiesce in this assumption. It is true that plaintiff asserts in his complaint that, two days after his original bill of foreclosure was filed, William A. Daggs "claimed and

asserted" (to whom is not stated) that he had abandoned the premises as tenant of Robert E. Daggs to become the tenant of Johns. Under such circumstances, the plaintiff, if he knew of it, should have at once filed an amended bill; but his failure to do so does not seem to have resulted to the prejudice of any of the defendants, nor can it be said that plaintiff has lost his rights, except to the costs of the first suit, by failing to do so. An amended or supplemental bill is rather an alternative than an only remedy, and a failure to pursue this course ought not to debar him from resorting to another bill. *White* v. *Secor*, 58 Iowa, 533; *Bottneau* v. *Ætna Life Ins. Co.*, 31 Minnesota, 125; *Rogers* v. *Benton*, 39 Minnesota, 39; *Foster* v. *Johnson*, 44 Minnesota, 290; *Stackpole* v. *Robbins*, 48 N. Y. 665; *Moulton* v. *Cornish*, 138 N. Y. 133; *Dodge* v. *Omaha & Southwestern Railroad Co.*, 20 Nebraska, 276.

Defendants also claim a misjoinder of causes of action, in that the plaintiff sues Daggs not only for a breach of his contract of assumption of the notes set out in the complaint, and to foreclose the mortgage lien, but upon an alleged conspiracy, wherein he charges him with colluding with A. Jackson Daggs to withhold the deed to Johns from record, and prays damages in the sum of one thousand dollars for a refusal to surrender possession. As there was no recovery, however, upon this claim, we think it has become immaterial to consider whether there was a misjoinder. The same comment may be made upon the alleged misjoinder of parties.

We have examined the remaining assignments of error, of which there are a large number, contained in appellants' brief, and find them to turn upon questions of facts or as to the admission or rejection of testimony, which are foreclosed by the findings of the Supreme Court, or upon the alleged defects in procedure, which were not deemed to be of sufficient importance to be noticed in the opinion of that court. We find in none of them any sound reason for disturbing this judgment, and it is therefore

Affirmed.

Syllabus.

W. W. CARGILL CO. *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 116. Argued and submitted December 3, 4, 1900. — Decided March 5, 1901.

Chapter 148 of the General Laws of Minnesota for the year 1895, entitled "an act to regulate the receipt, storage and shipment of grain at elevators and warehouses on the right of way of railroads, depot grounds and other lands used in connection with such line of railway in the State of Minnesota, at stations and sidings, other than at terminal points," contained in sections 1 and 2 the following provisions: "Section 1. All elevators and warehouses in which grain is received, stored, shipped or handled and which are situated on the right of way of any railroad, depot grounds or any lands acquired or reserved by any railroad company in this State to be used in connection with its line of railway at any station or siding in this State, other than at terminal points, are hereby declared to be public elevators and shall be under the supervision and subject to the inspection of the Railroad and Warehouse Commission of the State of Minnesota, and shall, for the purposes of this act, be known and designated as public country elevators or country warehouses. It shall be unlawful to receive, ship, store or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state Railroad and Warehouse Commission, which license shall be issued for the fee of one (1) dollar per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm or corporation owning and operating such elevator or warehouse and the names of all the members of the firm or the names of all the officers of the corporation owning and operating such elevator or warehouse and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this State and the rules and regulations prescribed by said commission, and every person, company or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same. If any elevator or warehouse is operated in violation or in disregard of the laws of this State, its license shall, upon due proof of this fact, after proper hearing and notice to the licensee, be revoked by the said Railroad and Warehouse Commission. Every such license shall expire on the thirty-first (31st) day of August of each year. Sec. 2. No person, firm or corporation shall in any manner operate such public country elevator or country warehouse without having a license as specified in the

preceding section, and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor to be punished as hereinafter provided, and any attempt to operate such elevator or warehouse in violation of law and without having the license herein prescribed, may upon complaint of the party aggrieved, and upon complaint of the Railroad and Warehouse Commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court." *Held:*

(1) That the highest court of the State having decided that the provision requiring a license was separable from other provisions, it was the duty of the Federal Court to accept that interpretation of the statute:

(2) That the mere requirement of a licensee to engage in the business specified in the statute was to be referred to the general power of the State to adopt such regulations as were appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition, and is not forbidden by the Fourteenth Amendment:

(3) That an acceptance of a license, in whatever form, will not require the licensee to respect or to comply with any provisions of the statute, or with any regulations prescribed by the state Railroad and Warehouse Commission, that are repugnant to the Constitution of the United States:

(4) That as the statute applied to all of the class defined by its first section it was not invalid by reason of its non-application to those who own or operate warehouses not situated on the right of way of a railroad. Such a classification was not so unreasonable as to amount to a denial of the equal protection of the laws, nor was the requirement of a license a regulation of commerce among the States.

THE case is stated in the opinion of the court.

Mr. Ralph Whelan for plaintiff in error.

Mr. W. B. Douglas and *Mr. W. J. Donahower* submitted on their brief for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The present action was brought in one of the courts of Minnesota, in the name of the State, against the W. W. Cargill Company, a Wisconsin corporation. The relief sought was a decree

perpetually enjoining the defendant from operating a certain elevator and warehouse owned by it, situated on the right of way of the Chicago, Milwaukee and St. Paul Railway Company, in the village of Lanesboro, Minnesota, until it should have obtained a license from the Railroad and Warehouse Commission of that State.

The suit is based on a statute of Minnesota, approved April 16, 1895, and entitled "An act to regulate the receipt, storage and shipment of grain at elevators and warehouses on the right of way of railroads, depot grounds and other lands used in connection with such line of railway in the State of Minnesota, at stations and sidings, other than at terminal points." Gen. Stats. Minn. 1895, c. 148, p. 313.

It seems to be necessary to a clear understanding of the case and to the disposition of some of the questions presented for consideration that the entire act be examined. It is therefore given in full in the margin.[1]

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[1] "§ 1. All elevators and warehouses in which grain is received, stored, shipped or handled and which are situated on the right of way of any railroad, depot grounds or any lands acquired or reserved by any railroad company in this State to be used in connection with its line of railway at any station or siding in this State, other than at terminal points, are hereby declared to be public elevators, and shall be under the supervision and subject to the inspection of the Railroad and Warehouse Commission of the State of Minnesota, and shall, for the purposes of this act, be known and designated as public country elevators or country warehouses.

"It shall be unlawful to receive, ship, store or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state Railroad and Warehouse Commission, which license shall be issued for the fee of one dollar per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm or corporation owning and operating such elevator or warehouse and the names of all the members of the firm or the names of all the officers of the corporation owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this State and the rules and regulations prescribed by said Commission, and every person, company or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same.

We here give only the first and second sections of the act: "§ 1. All elevators and warehouses in which grain is received,

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"If any elevator or warehouse is operated in violation or in disregard of the laws of this State its license shall, upon due proof of this fact, after proper hearing and notice to the licensee, be revoked by the said Railroad and Warehouse Commission. Every such license shall expire on the thirty-first day of August of each year.

"§ 2. No person, firm or corporation shall in any manner operate such public country elevator or country warehouse without having a license as specified in the preceding section, and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor to be punished as hereinafter provided, and any attempt to operate such elevator or warehouse in violation of law and without having the license herein prescribed, may upon complaint of the party aggrieved, and upon complaint of the Railroad and Warehouse Commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court.

"§ 3. The Railroad and Warehouse Commission shall before the first of September of each year, and as much oftener as they shall deem proper, make and promulgate all suitable and necessary rules and regulations for the government and control of public country elevators and public country warehouses, and the receipt, storage, handling and shipment of grain therein and therefrom, and the rates of charges therefor, and the rates so fixed shall be deemed *prima facie* responsible and proper, and such rules and regulations shall be binding and have the force and effect of law; and a printed copy of such rules and regulations shall at all times be posted in a conspicuous place in each of said elevators and warehouses, for the free inspection of the public.

"§ 4. The party operating such country elevator or country warehouse shall keep a true and correct account in writing, in proper books, of all grain received, stored and shipped at such elevator or warehouse, stating the weight, grade and dockage for dirt or other cause on each lot of grain received in store for sale, storage or shipment, and shall, upon the request of any person delivering grain for storage or shipment, receive the same without discrimination during reasonable and proper business hours, and shall, upon request, deliver to such person or his principal, a warehouse receipt or receipts therefor in favor of such person or his order, dated the day the grain was received, and specifying upon its face the gross and net weight of such grain, the dockage for dirt or other cause, and the grade of such grain, conformable to the grade fixed by the state Railroad and Warehouse Commission and in force at terminal points; and shall also state upon its face that the grain mentioned in such receipt or receipts has been received into store to be stored with grain of the same grade under such inspection, and that, upon the return of said receipt or receipts, and upon

stored, shipped or handled, and which are situated on the right of way of any railroad, depot grounds or any lands acquired

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the payment or tender of payment of all lawful charges for receiving, storing, delivering or otherwise handling said grain, which charges may have accrued up to the time of the return of said receipt or receipts, such grain is deliverable to the person named therein, or his order, either from the elevator or warehouse where it was received for storage; or if the owner so desires, in quantities not less than a carload on track on the same line of railway at any terminal point in this State which the owner may designate, where state inspection and weighing is in force, such grain to be subject to such official inspection and weight as may be determined upon its arrival or delivery at such terminal point and the party delivering shall be liable for the delivery of the kind, grade and net quantity called for by such certificate, less an allowance not to exceed sixty pounds per carload for shrinkage or loss in transit, if such shrinkage or loss occurs. On the return or presentation of such receipts by the lawful holder thereof, properly endorsed, at the elevator or warehouse where the grain represented therein is made deliverable and upon the payment or tender of payment of all lawful charges, as hereinbefore provided, the grain shall be immediately delivered to the holder of such receipt, and it shall not be subject to any further charges for storage after demand for such delivery shall have been made, and cars are furnished by the railway company which the party operating the elevator or warehouse shall have called for promptly upon the request for shipment made by the holder of such receipt in the order of the date upon which such receipts are surrendered for shipment. The grain represented by such receipt shall be delivered within twenty-four hours after such demand shall have been made and cars or vessels or other means of receiving the same from the elevator or warehouse shall have been furnished.

"If not delivered upon such demand within twenty-four hours after such car, vessel or other means for receiving the same shall have been furnished, the warehouse in default shall be liable to the owner of such receipt for damages for such default, in the sum of one cent per bushel, and in addition thereto one cent per bushel for each and every day of such neglect or refusal to deliver; *provided*, no warehouseman shall be held to be in default in delivering if the property is delivered in the order demanded by holders of different receipts or terminal orders and as rapidly as due diligence, care and prudence will justify.

"On the return of said receipts, if shipment or delivery of the grain at terminal point is requested by the owner thereof, the party receiving such grain shall deliver to said owner a certificate in evidence of his right to such shipment or delivery, stating upon its face the date and place of its issue, the name of the consignor and consignee and place of destination and shall also specify upon the face of such certificate the kind of grain and the grade and net quantity exclusive of dockage, to which said owner is entitled by

or reserved by any railroad company in this State to be used in connection with its line of railway at any station or siding

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his original warehouse receipts and by official inspection and weighing at such designated terminal point.

"The grain represented by such certificate shall be subject only to such freight or transportation or other lawful charges which would accrue upon said grain from the date of the issue of said certificate to the date of actual delivery, within the meaning of this act, at such terminal point.

"All warehouse receipts issued for grain received and all certificates shall be consecutively numbered, and no two receipts or certificates bearing the same number shall be issued during the same year from the same warehouse, except when the same is lost or destroyed, in which case the new receipt or certificate shall bear the same date and number as the original and shall be plainly marked on its face 'Duplicate.' Warehouse receipts or certificates shall not be issued except upon grain which has actually been delivered in said country warehouse. Warehouse receipts shall not be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received. No receipt or certificate shall contain language in anywise limiting or modifying the liability of the party issuing the same as imposed by the laws of this State, and any such language, if inserted, shall be null and void.

"A failure to specify in such warehouse receipts or certificates the true and correct grade and net weight, exclusive of dockage, of any lot of grain to which the owner of such grain may be entitled shall be deemed a misdemeanor on the part of the person issuing the same for which, on conviction, he may be punished as hereinafter provided.

"§ 5. In case there is a disagreement between the person in the immediate charge of and receiving the grain at such country elevator or warehouse, and the person delivering the grain to such elevator or warehouse for storage or shipment, at the time of such delivery, as to the proper grade or proper dockage for dirt or otherwise, on any lot of grain delivered, an average sample of at least three quarts of the grain in dispute may be taken by one or both parties and forwarded in a suitable sack, properly tied and sealed, express charges prepaid, to the chief inspector of grain at St. Paul, which shall be accompanied by the request in writing, of either or both of the parties aforesaid, that the said chief inspector shall examine the same and report what grade or dockage or both the said grain is, in his opinion, entitled to and would receive, if shipped to the terminal points and subjected to official inspection.

"It shall be the duty of said chief inspector, as soon as practicable, to examine and inspect such sample of grain and adjudge the proper grade or dockage or both, to which said sample is, in his judgment, entitled, and which grain of like quality and character would receive if shipped to the terminal points and subjected to official inspection.

"As soon as said chief inspector has examined, inspected and adjudged

in this State, other than at terminal points, are hereby declared to be public elevators, and shall be under the supervision and

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the grade and dockage as aforesaid, he shall at once make out in writing and in triplicate a statement of his judgment and finding in respect to the case under consideration, and shall transmit by mail to each of the parties to said disagreement a copy of the said statement of his judgment and finding, preserving the original together with the sample on file in his office.

"The judgment and finding of the said chief inspector shall be deemed conclusive as to the grade or dockage, or both, of said sample, submitted for his consideration, as herein provided, as well as conclusive evidence of the grade or dockage, or both, that grain of the same quality and character would receive if shipped to the terminal points and subjected to official inspection.

"§ 6. Whenever complaint is made, in writing, to the Railroad and Warehouse Commission by any person aggrieved, that the party operating any country elevator or country warehouse under this act fails to give just and fair weights and grades, or is guilty of making unreasonable dockage for dirt or other cause, or fails in any manner to operate such elevator or warehouse fairly, justly and properly, or is guilty of any discrimination, then it shall be the duty of the Railroad and Warehouse Commission to inquire into and investigate said complaint and the charge therein contained, and to this end and for this purpose the Commission shall have full authority to inspect and examine all the books, records and papers pertaining to the business of such elevator or warehouse, and all the scales, machinery and fixtures and appliances used therein.

"In case the said Commission find the complaint and charge therein contained, or any part thereof, true, they shall adjudge the same in writing, and shall at once serve a copy of such decision, with a notice to desist and abstain from the error and malpractice found, upon the party offending and against whom the complaint was made, and to afford prompt redress to the party injured, and if such party does not desist and abstain and does not give the proper redress and relief to the party injured, it shall be the duty of the said Commission to make a special report of the facts found and ascertained upon the investigation of said complaint and the charge therein contained, which report shall also include a copy of the decision by said Commission made therein to the attorney of the county where such elevator or warehouse is located, who shall institute and carry on in the name of the complainant such actions, civil or otherwise, as may be necessary and appropriate to redress the wrongs complained of and to prevent their recurrence in the future.

"§ 7. Any person, firm or corporation operating any country warehouse or country elevator under this act shall, at any and all times when requested by the Railroad and Warehouse Commission, render and furnish in writing under oath to the said Commission a report and itemized statement of all grain received and stored in or delivered or shipped from such elevator or

subject to the inspection of the Railroad and Warehouse Commission of the State of Minnesota, and shall, for the purposes of this act, be known and designated as public country elevators or country warehouses. It shall be unlawful to receive, ship, store or handle any grain in any such elevator or warehouse,

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warehouse during the year then last past. Such statement shall specify the kind, grade, gross and net weight of all grain received or stored, and all grain delivered or shipped, and shall particularly specify and account for all so-called overages that may have occurred during the year. Such statement and report shall be made upon blanks and forms furnished and prescribed by the Railroad and Warehouse Commission.

"The Commission shall cause every warehouse and the business thereof, and the mode of conducting the same, to be inspected at such times as the Commission may order, by one or more members of the Commission, or by some member of the grain inspection department, especially assigned for that purpose, who shall report in writing to the Commission the result of such examination; and the property, books, records, accounts, papers and proceedings, so far as they relate to their condition, operation or management, shall, at all times during business hours, be subject to the examination and inspection of such Commission.

"§ 8. It shall be unlawful for any person, firm or corporation who shall operate any country grain elevator or country warehouse, under this act, to enter into any contract, agreement, understanding or combination with any other person, firm or corporation, who shall operate any other country grain elevator or country grain warehouse under this act, for pooling of the earnings or business of other different and competing grain elevators or warehouses so as to divide between them the aggregate or net proceeds of the earnings or business of such grain elevators or warehouses, or any portion thereof; and in case of any agreement for the pooling of the earnings or business aforesaid, each day of its continuance shall be deemed a separate offense.

"§ 9. Any person, firm or corporation who is guilty of any of the misdemeanors specified in this act, or who is guilty of violating any of the provisions of this act, shall, on conviction, be punished by a fine of not less than fifty dollars and not more than five hundred dollars, and in case a natural person is so convicted, he may be imprisoned until the fine is paid or until discharged by due course of law; and in case a corporation is so convicted, the fine may be collected by execution, as judgments are collected in civil actions, or the property of the corporation may be sequestered and charged with the same in appropriate legal proceedings.

"§ 10. All laws and parts of laws inconsistent with this act are hereby repealed.

"§ 11. This act shall take effect and be in force from and after the date of its passage."

unless the owner or owners thereof shall have procured a license therefor from the state Railroad and Warehouse Commission, which license shall be issued for the fee of one dollar per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm or corporation owning and operating such elevator or warehouse and the names of all the members of the firm or the names of all the officers of the corporation owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this State and the rules and regulations prescribed by said Commission, and every person, company or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same. If any elevator or warehouse is operated in violation or in disregard of the laws of this State its license shall, upon due proof of this fact, after proper hearing and notice to the licensee, be revoked by the said Railroad and Warehouse Commission. Every such license shall expire on the thirty-first day of August of each year.

"§ 2. No person, firm or corporation shall in any manner operate such public country elevator or country warehouse without having a license as specified in the preceding section, and any attempt to operate such elevator or warehouse without such license shall be deemed a misdemeanor to be punished as hereinafter provided, and any attempt to operate such elevator or warehouse in violation of law and without having the license herein prescribed, may upon complaint of the party aggrieved, and upon complaint of the Railroad and Warehouse Commission, be enjoined and restrained by the district court for the county in which the elevator or warehouse in question is situate, by temporary and permanent injunction, conformably to the procedure in civil actions in the district court."

The complaint alleged that the elevator was used by the defendant company in connection with the railway for the receiving and shipping of wheat and other grains transported over

the lines of the railway company; was essential and necessary to the railway company in order promptly, safely and properly to handle grains received by it for shipment; and constituted, in that respect, a necessary adjunct of the railroad.

The facts upon which the case was determined are set forth in a finding based upon the stipulation of the parties and may be summarized as follows:

On April 16, 1895, and for more than a year prior thereto, the defendant company was engaged in the business of buying, selling and dealing in grain—its principal office and place of business being in the city of La Crosse, Wisconsin. It owned and operated large terminal and other grain elevators in that city, in Green Bay, and in other places in Wisconsin.

The village of Lanesboro contained about eleven hundred inhabitants, and was situated in the county of Fillmore, Minnesota, upon the railway line of the Southern Minnesota division of the Chicago, Milwaukee and St. Paul Railway Company, distant about fifty-four miles west from La Crosse, and having by the railway line referred to direct connection with that city.

Considerable quantities of grain had been annually raised in Fillmore County, and marketed, sold and delivered into local grain elevators and warehouses in Lanesboro and thence shipped in cars over the above-mentioned line of railway, which was the only means for such shipment.

The defendant company owned, occupied and operated a grain warehouse situated on the right of way of the railway company and along its tracks in Lanesboro.

No machinery or mechanical appliances whatever had been used or were contained in its warehouse at Lanesboro; and all grain of every kind received into it during the period in question had been hauled to the warehouse in bags or farm wagons and there unloaded. The bags of grain were placed upon small hand trucks at the entrance of the building and conveyed first to the weighing scale and thence to the grain bins of the warehouse into which the grain was poured from the bags.

The grain shipped from the warehouse was "spouted" by force of gravity into box cars standing on the railway tracks

and thence carried by the railroad company over its line for the defendant company to such points as the latter might direct.

Each parcel or lot of grain received into or deposited or handled in or shipped from the warehouse had been purchased by the defendant and was its sole and absolute property.

The defendant company during the period mentioned never received into or shipped from or handled or deposited or in any way stored in the warehouse any grain in which any other person or persons had any property, title, right or interest; nor issued or offered to issue any warehouse receipt or storage ticket for grain received there; nor carried on or offered or attempted to carry on in the warehouse the business of receiving, handling, storing or shipping grain of or for any other person or persons. But the warehouse was used, occupied and operated by the defendant solely for the purpose of receiving, handling and shipping its own grain in its private capacity as grain owner and merchant.

During all the time the warehouse was owned, occupied and operated by the defendant, all grain of every kind and description, received into or deposited or handled in or shipped from the warehouse, was purchased by it for the express purpose of acquiring, shipping and transporting it as its property solely to its terminal elevators in the cities of La Crosse and Green Bay, or to Milwaukee, Wisconsin, or to Chicago, Illinois, and thence to other points in States east of Lake Michigan and upon the Atlantic seaboard.

All the grain so received into or deposited or handled in the warehouse had been actually shipped as its property from the warehouse in carload lots over the railway line, and directly and continuously transported by the railway company beyond Minnesota to its terminal elevators, cities or points in Wisconsin, Illinois, and States other than Minnesota, and to no other points or places.

As fast as received into the warehouse from wagons all the grain was "spouted" into the box cars of the railway company for shipment, or was loaded into such cars severally containing different kinds of grades of grain separated from each other within the car by partitions, as sufficient grain for such a car-

load was accumulated in the warehouse, or was loaded out and so shipped as a full carload of grain of any one kind and grade was received into the warehouse; and no grain received or deposited in or shipped from the warehouse was handled or shipped in any manner other or different from one of the modes indicated, or kept in the warehouse longer or for any other purpose than as stated.

No grain received into or deposited or handled in or shipped from the warehouse had been bargained or sold or delivered to any person or firm or corporation doing business or resident in or a citizen of Minnesota, or shipped or transported to or delivered at any city, village, town, point or place within the boundaries of that State.

During the time mentioned all grain of every kind and description received into or deposited or handled in or shipped from the warehouse was grown in Minnesota, and was sold and delivered to the defendant by and received into the warehouse from citizens and residents of or other persons doing business in Minnesota, the weights, grades, dockage and inspection of all such grain having been fixed by mutual agreement between such persons and the company without controversy in respect thereto, and in no other manner and by no other persons; and no weighing, grading, docking or inspection of or supervision or regulation of any grain was performed or attempted or offered to be done or performed in or about the warehouse on the receipt or shipment of grain or at any other place or time by any person delegated or furnished by or acting under the authority of the State of Minnesota or of any law thereof or of the Railroad and Warehouse Commission of Minnesota, or any rule, regulation, officer, agent or representative thereof, or by any person in any capacity whatsoever.

The defendant company never applied to the Railroad and Warehouse Commission for license to receive, ship, store or handle any grain in its elevator, and never procured a license therefor from the Commission.

The parties stipulated and agreed that the plaintiff would make no claim of right to maintain the action except under and by virtue of the law in question.

Such being the case made by the finding of facts, the relief asked was denied, the court of original jurisdiction holding that the statute was not a lawful exercise of the police power and was repugnant as well to the constitution of Minnesota as to section one of the Fourteenth Amendment in so far as it declared warehouses and elevators in which only the grain of the owner was received, stored, shipped or handled to be public elevators, subject to the supervision of the Railroad and Warehouse Commission.

The case was carried to the Supreme Court of Minnesota, and the judgment was reversed. That court, speaking, by Judge Canty, said: "If the business carried on at this warehouse consisted of nothing more than storing defendant's own grain, we would concede that such business would warrant but little interference or regulation of it by the State. But that business does consist of something more. It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector and grader of the grain. Surely such a business is of a public character and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State. The business carried on by defendant at its warehouse is similar to that carried on at a large number of other warehouses and elevators in this State. The grain crops of this State constitute by far the most important part of its commerce and its greatest resource. It is important to see that correct weights are had; that uniform grades are given; that the proper amount of dockage and no more is taken; that no dishonest practices are allowed and no undue advantage is permitted to be taken. Said chapter 148 requires the person operating such an elevator or warehouse to procure a license to be issued by the state Railroad and Warehouse Commission, for which a fee of one

dollar per year must be paid. The act also provides that such license may be revoked by the Commission if the warehouse or elevator is operated in violation or in disregard of the laws of this State. Section 2 provides that any person attempting to run such an elevator or warehouse without a license may be enjoined in a suit for that purpose. Section 3 provides that the Commission may make suitable and necessary rules and regulations for the government of public country warehouses and elevators. Then follow other provisions. There are undoubtedly many provisions in the act which apply only to warehouses and elevators in which grain is stored for others or for the public, and which provisions do not and cannot apply to such warehouses as the one here in question. There are, perhaps, provisions in the act which it would be unconstitutional to apply to such a warehouse as this. But such matters need not be considered at this time. The provision recognizing a license is not one of these. This disposes of the only question argued which it is necessary to consider." *State ex rel. &c.* v. *W. W. Cargill Co.*, 77 Minnesota, 223.

Judge Mitchell delivered a separate opinion, in which he said that in view of the fact, among others, that grain was the principal agricultural product of the State, that in its purchase and sale there was great liability to abuse in the matter of weights and grades, and that these were usually determined by the purchaser with his own instrumentalities, he agreed with the court that although the owner of a warehouse use it exclusively for the storage of his own grain, yet if he used it for the purpose of buying grain from the public, thus rendering it, in effect, a public market, his business was a proper subject of police regulation by the State to the extent of providing such rules and regulations as were reasonably necessary to secure to the public just and correct weights and grades. He was also of opinion that the requirement of a license might be a reasonable regulation in such cases as a means of enabling state officials to ascertain who were engaged in the business. But he was of opinion that the provisions of the statute constituted a system of rules and regulations the different parts of which were so connected with and dependent upon each other that it was in many in-

stances impossible to separate them; that many of them were wholly inapplicable to warehouses not used for the storage of grain for others. Some of them were, in his judgment, clearly not within the police power of the State as applied to warehouses not used for the storage of grain for others. Considering the case only upon the lines followed by the majority, Judge Mitchell was of opinion that in view of the connection and interdependence of its various provisions the whole act should be held invalid as to warehouses not used for the storage of grain for others.

We have seen that the only relief asked by the State was that the defendant company be restrained and enjoined from the further operation of its elevator in receiving, storing or handling of wheat or other grains until it was duly licensed therefor by the Railroad and Warehouse Commission. It was, in effect, adjudged that a license from that Commission was a condition precedent to the right of the defendant company to use or operate its elevator or warehouse in the manner and for the purposes indicated; also, that although the statute might contain many provisions not applicable to warehouses like the one owned by the defendant, and other provisions that, perhaps, were unconstitutional when applied to business like that in which the company was engaged, the provision requiring a license could stand and be enforced.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution we must, in the particulars named, accept the interpretation put upon it by the state court. In *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348, 353, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The Supreme Court of that State held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt "the interpretation of a statute of a State affixed to it by the court of last

resort thereof." See also *Missouri Pacific Railway Co.* v. *Nebraska*, 164 U. S. 403, 414; *Chicago, Milwaukee &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 456; *St. Louis, Iron Mountain &c. Railway* v. *Paul*, 173 U. S. 404, 408.

Pursuant to this rule, and without expressing any opinion on the question, we assume that the provision requiring a license from any person, firm or corporation proposing to engage in the business described in the first section embraces the defendant company; that such provision may stand alone; and that its validity may be determined without reference to other provisions of the statute.

Thus considering the statute, we are of opinion that the mere requirement of a license from a person, firm or corporation engaged in such business as that conducted by the defendant is not forbidden by the Fourteenth Amendment of the Constitution of the United States. "The liberty mentioned in that Amendment," we have said, "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. But to require the defendant company to obtain a license is not forbidden by the Amendment. The authority to make such a requirement is to be referred to the general power of the State to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition. *Dent* v. *West Virginia*, 129 U. S. 114, 122; *Plumley* v. *Massachusetts*, 155 U. S. 461. The state court well said that the defendant's warehouse could be fairly regarded "as a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector and grader of the grain."

We cannot question the power of the State, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation.

The defendant however insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) "thereby to have agreed to comply with the same." § 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State and the valid rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.

But the further contention of the defendant company is that the requirement of a license from the owners of elevators and warehouses situated on the right of way of a railroad at one of its stations or sidings other than at terminal points, without requiring a license in respect of elevators and warehouses differently situated, is a denial of the equal protection of the laws, and makes the statute obnoxious to the principle that "no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." *Bar-*

bier v. *Connolly*, 113 U. S. 27, 31; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181.

Assuming that the defendant is entitled, upon this record, to invoke the benefit of the clause of the Fourteenth Amendment forbidding a State from denying to any person within its jurisdiction the equal protection of the laws, we adjudge that as the statute applies to all of the class defined in its first section, it is not invalid by reason of its non-application to those who own or operate elevators *not* situated on the right of way of a railroad. The railroad, as this court has often said, is a public highway established primarily for the convenience of the public, and—subject always to any right acquired by the railroad company under an inviolable contract with the State—the use of such a highway may be so regulated as to promote the public convenience, provided such a regulation be not arbitrary in its character and does not materially interfere with the enjoyment by the railroad company of its property. The right of way is so closely connected with the operations of the railroad company that its use may be so regulated by the State as to promote the ends for which the corporation was created, and thus subserve the interests of the general public without interfering unreasonably with the company's management of its property. If in the judgment of the State it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute. *Gulf, Col. & Santa Fé Ry.* v. *Ellis*, 165 U. S. 150, 165. It is worthy of observation in this connection that it was neither alleged nor proved that there were in the

State any elevators or warehouses that were not situated on the right of way of a railroad company.

It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the States. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the State between the defendant and the sellers of grain. We do not perceive that in so doing the State has entrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license.

Without expressing any opinion as to the extent to which the Railroad and Warehouse Commission may supervise the business of a person, firm or corporation receiving a license under the statute, and restricting our decision to the only question necessary to be decided, we adjudge that the statute of Minnesota, so far as it requires a license for conducting such business as that in which the defendant is engaged, is not repugnant to the Constitution of the United States.

The judgment is

Affirmed.

MITCHELL *v.* FIRST NATIONAL BANK OF CHICAGO.

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

Argued October 11, 12, 1900. — Decided March 5, 1901.

Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed.

THE case is stated in the opinion of the court.

Mr. Theodore M. Maltbie and *Mr. Charles E. Mitchell* for petitioner.

Mr. Percy S. Bryant and *Mr. William C. Case* for respondent.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a suit upon a written guaranty held by the First National Bank of Chicago. It was signed in Connecticut by H. Drusilla Mitchell, she being a married woman, and by others, and was delivered in Chicago to the bank under circumstances presently to be stated.

The Circuit Court held that the liability of Mrs. Mitchell should be determined by the laws of Connecticut. The Circuit Court of Appeals adjudged that as the writing was delivered to the bank in Illinois, Mrs. Mitchell's liability was determinable by the laws of that State.

The case, however, presents the further question whether the precise matter in issue—the liability of Mrs. Mitchell notwithstanding her coverture at the time the guaranty was signed—was not adjudicated against the bank in the courts of Connecticut prior to the final judgment in the present case; and if so,

whether the bank was concluded by that adjudication, which remains unmodified.

The case as presented by the pleadings and by the agreed facts set forth in a written stipulation of the parties is this:

In 1891 and prior thereto the firm of Morse, Mitchell & Williams, composed of Francis E. Morse, Frederick C. Williams and George H. Mitchell, (the latter being the husband of H. Drusilla Mitchell,) was engaged in mercantile and real estate business at Chicago, Illinois, and kept an account with the First National Bank of that city.

The firm became indebted to the bank in the sum of $20,000 or more, as evidenced by its notes. The bank agreed to continue giving it credit upon the condition that the firm and its individual members, together with Mrs. Mitchell, would execute a certain paper which it had directed to be prepared.

Mitchell and his wife at the time resided in Connecticut, and did not have a residence elsewhere after their marriage, which occurred in 1857. He took the paper prepared by the bank and brought it to his residence in Connecticut and there procured his wife to sign the same, and it was thereafter by him enclosed, addressed and sent by mail to Morse in Chicago, who delivered the paper to the bank.

The paper referred to was signed by Morse, Mitchell & Williams, Francis E. Morse, Frederick C. Williams, G. H. Mitchell, and H. Drusilla Mitchell, and was as follows: "We hereby request the First National Bank of Chicago to give and continue to Morse, Mitchell & Williams credit as they may desire from time to time, and in consideration of all and any such credit given we hereby guarantee any and all indebtedness now due or which may hereafter become due from them to said bank, to the extent of thirty thousand dollars, and waive notice of the acceptance of this guaranty and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from us of the discontinuance thereof shall be received by said The First National Bank of Chicago. Chicago, Ill., Feb. 20th, 1891."

The bank continued to extend credit to Morse, Mitchell & Williams until the firm became insolvent and made an assign-

ment for the benefit of its creditors on the 30th day of July, 1893. At the time of such insolvency and assignment it held and owned the notes of Morse, Mitchell & Williams; renewals of unpaid portions of the above-mentioned notes, for $16,500; a note of Elizabeth Ewing endorsed by that firm; also notes of F. E. Morse & Son, with whom George H. Mitchell had no connection.

It appears that on the 28th day of December, 1893, Mrs. Mitchell notified the executor of her father that she had assigned and transferred to the bank all of her right, title and interest in so much of the testator's estate as was then undistributed, and authorized such executor to pay to the bank all money and property coming to her or to which she was entitled from that estate.

The present action was brought by the bank in the Circuit Court of the United States for the District of Connecticut on the 30th day of December, 1895, against Mrs. Mitchell and her husband. The complaint alleged that in reliance upon and in consideration of the above guaranty and promise, the bank had extended credit and advanced money to Morse, Mitchell & Williams from time to time and within the period specified in the instrument to the amount of thirty thousand dollars; and for that amount it claimed judgment.

Mr. Mitchell, by plea in abatement filed April 28, 1896, (her husband having died the month previous,) averred that at the time the above guaranty was executed, as well as at the commencement of the action, "she was a married woman, the wife of George H. Mitchell, since deceased, and was so married prior to April 27, 1877, viz., on the — day of ——— 1857, and has not entered into the contract authorized by section 2798, General Statutes of Connecticut."

The section here referred to as well as the two preceding sections are as follows:

"§ 2796. In case of marriages on or after April 20, 1877, neither husband nor wife shall acquire, by force of the marriage, any right to or interest in any property held by the other before, or acquired after, such marriage, except as to the share of the survivor in the property, as provided by law. The separate earnings of the wife shall be her sole property. She shall

have power to make contracts with third persons, and to convey to them her real and personal estate, as if unmarried. Her property shall be liable to be taken for her debts, except when exempt from execution, but in no case shall be liable to be taken for the debts of the husband. And the husband shall not be liable for her debts contracted before marriage, nor upon her contracts made after marriage, except as provided in the succeeding section.

"§ 2797. All purchases made by either husband or wife in his or her own name shall be presumed, in the absence of notice to the contrary, to be on his or her private account and liability; but both shall be liable when any article purchased by either shall have in fact gone to the support of the family, or for the joint benefit of both, or for the reasonable apparel of the wife, or for her reasonable support, while abandoned by her husband. It shall, however, be the duty of the husband to support his family, and his property when found shall be first applied to satisfy any such joint liability; and the wife shall in equity be entitled to an indemnity from the property of the husband, for any property of her own that shall have been taken, or for any money that she shall have been compelled to pay, for the satisfaction of any such claim.

"§ 2798. In case of marriage existing prior to April 20, 1877, the provisions of the two preceding sections shall apply, whenever any husband and wife have entered, or shall hereafter enter, during marriage, into a written contract with each other for the mutual abandonment of all rights of either in the property of the other, under prior statutes, or at common law, and for the acceptance instead thereof of the rights in said sections provided, which contract shall be recorded in the Court of Probate of the district, and in the town clerk's office of the town in which they reside. And thereupon, said provisions shall apply to such marriage." Gen. Stats. Conn. 1888, pp. 610, 611.

It appears that at a Court of Probate, held at Bristol, Connecticut, on the 30th day of September, 1896—after the institution of the present suit in the Federal Court and after commissioners in insolvency in the probate court had made a report

on the estate of Mrs. Mitchell—Edward A. Freeman, trustee of that estate, took an appeal to the Superior Court at Hartford from "the doings of said commissioners in allowing a claim in favor of the First National Bank of Chicago"—*the same claim on which the bank brought this suit.*

In the Superior Court the bank filed a statement in which it was alleged that its claim was secured by an assignment to it of Mrs. Mitchell's interest in the estate of her father. Mrs. Mitchell filed an answer denying certain allegations in that statement and pleading among other things her coverture at the time of the signing of the writing relied on by the bank and her residence in Connecticut during all her married life and since. To this answer the bank filed a reply. The parties—the bank and the trustee Freeman—consented in writing that the case be reserved "for the advice of the Supreme Court of Errors of the State as to the judgment to be therein rendered," and *they united in requesting the Superior Court* "to so reserve the case upon the issues joined and the agreed facts." In conformity with this request the case was reserved. At the same time the parties filed in that court their agreed statement of facts.

It may be here stated that in Connecticut "questions of law may be reserved by the Superior Court, Court of Common Pleas, or District Court, in cases tried before either of them, for the advice of the Supreme Court of Errors: *Provided*, That no such questions shall be reserved without the consent of all parties to the record in such cases; and the court making such reservation *shall*, in the judgment, decree or decision made or rendered in such cases, *conform to the advice of the Supreme Court of Errors.*" Gen. Stat. Conn. 1888, p. 260, § 1114.

The Supreme Court of Errors of Connecticut advised the Superior Court to disallow every part of the claim of the bank. Speaking by Judge Baldwin it said, among other things: "Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this State until his death. Her marriage gave her, under the laws of the State then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a judicial point of view, was merged in that of her husband.

Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority. 1 Swift's Dig. 30. If she assumed to make such a contract, it was absolutely void. These personal disabilities the common law imposed partly for the protection of the husband and partly for that of the wife. To preserve what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognized as the established policy of the State. *Jackson* v *Hubbard*, 36 Connecticut, 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband. *Kilbourn* v. *Brown*, 56 Connecticut, 149. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married. Gen. Stats. Conn. § 2796. Whenever a peculiar status is assigned by law to the members of any particular class of persons affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status. Anson's Principles of Contract, 328. If he could, his private agreements would outweigh the law of the land. *Jus publicum privatorum pactis mutari non potest.* Coverture constitutes such a status, and one of its incidents in this State at the time of Mrs. Mitchell's marriage was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute unless both husband and wife have executed for public record a written contract by which both accede to the provisions of the statute of that year and accept the rights which it offers to them. Gen. Stats. § 2798. No such contract was ever executed by Mrs. Mitchell.

"The claim in favor of the First National Bank of Chicago, which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing

dated in Illinois, but signed in this State. . . . He [the husband] sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented any one but himself, it was his copartners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority as her agent to make or procure such a delivery at some subsequent time. . . . Engagements which coverture prevents a woman from making herself she cannot make through the interposition of an agent whom she assumes to constitute as such in the State of her domicil. If this were not so the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a State to lend the aid of its courts to enforce a security which rests on a transgression of its own law by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do, what she had no legal capacity to do, by making her husband the agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois than he would have had to make it operative here had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery. The Superior Court is advised to disallow all and every part of the claim of the First National Bank." *Freeman's Appeal*, 68 Connecticut, 533, 542.

The opinion of the Supreme Court of Errors of Connecticut was rendered February 23, 1897; and on March 2, 1897, the Superior Court in conformity with the advice of the former court entered judgment disallowing the claims of the bank against the estate of Mrs. Mitchell.

After this judgment the bank proceeded with the case commenced by it in the Circuit Court of the United States on the 30th day of December, 1895, just as if nothing had occurred in the state courts affecting its claim. Mrs. Mitchell on May 22, 1897, filed in that court a substitute plea in abatement, asking judgment in her favor, "because she signed said writing, Ex-

hibit 'A,' [the writing of February 20, 1891], at her domicil in Bristol, in the State of Connecticut, and was, at the time of signing the same, a married woman, the wife of said George H. Mitchell, to whom she was married in 1857, at said Bristol, where she has ever since resided." She also filed on May 26, 1897, an answer, alleging that she signed said guaranty at her domicil in Connecticut and not elsewhere, she being then a married woman, and stating that said copartnership at the time the alleged guaranty was signed, and prior thereto, "was indebted to the plaintiff in a large sum, viz., $25,000 and more, and the plaintiff did not thereafter give said copartnership additional credit, but such indebtedness was largely reduced." Subsequently, June 8, 1897, the parties having previously stipulated in writing to waive a jury, filed in the Circuit Court an agreed statement of facts, which did not materially differ from the one filed in the Superior Court at Hartford.

The Circuit Court of the United States gave judgment for the defendant. It referred to the above decision of the Supreme Court of Errors of Connecticut, and said among other things: "The capacity of citizens of a State, so long as they actually remain within the borders of the State, would seem to be a matter of local law, to be controlled by the laws of the State, and not to be evaded by the simple device of sending or mailing a letter to some other State. Suppose that the laws of some State should provide that infants might attain their majority and become capable of contracting at the age of eighteen years, could it be held that a minor eighteen years old in Connecticut could, by mailing a contract to that State, subject his property in Connecticut to execution against the will of his guardian and against the determination of the legislature and courts of Connecticut? . . . In the present case, the law by which the invalidity of a contract is established is the common law, and the decisions that a married woman has capacity to make such contracts are founded upon local statutes. In these circumstances I think it is the duty of this court to follow the decision of the Connecticut court of last resort." 84 Fed. Rep. 90.

The case was carried by the bank to the Circuit Court of Appeals, in which court the judgment was reversed with in-

structions to the Circuit Court to render a judgment in favor of the bank for the amount due by the terms of the guaranty of February 20, 1891. That court, one of its members dissenting, held that the guaranty in question became effective and was to be deemed to have been made when delivered in Illinois, and that its validity as a contract was determinable by the law of that State and not by the laws of Connecticut. The court said: "We are extremely reluctant to differ with the Supreme Court of Connecticut in a case involving the same facts, between substantially the same parties, not only because the opinion of that learned tribunal is always entitled to great consideration, but also because it is, in a sense, unseemly that there should be diverse judgments under such circumstances between a Federal court sitting in that State and the highest court of the State. But the case is one which concerns the rights of a citizen of Illinois, acquired before the decision of the state court; and its decision depends, not upon the construction of local laws, but upon the application of the principles of general jurisprudence. In such cases the Federal courts are in duty bound to exercise their own independent judgment. In view of the decision of the Supreme Court of Connecticut, we should be glad to certify the question which we have thus considered to the Supreme Court for its instructions, but we do not feel authorized to do so, especially as that tribunal, under the power to issue a certiorari, can review our judgment if it sees fit." 92 Fed. Rep. 565.

In the view we take of this case it is not necessary to inquire whether the liability of Mrs. Mitchell under the writing of February 20, 1891, was determinable by the laws of Connecticut or by the laws of Illinois. If, as the bank contends, that writing became a contract when delivered to the bank in Illinois, and not before, and if, as is also contended, Mrs. Mitchell was liable thereon by the laws of that State, although she was a married woman at the time of signing the writing in Connecticut where she resided, the question remains whether the parties were not concluded by the final judgment of the Hartford County Superior Court based upon the judgment rendered in the Supreme Court of Errors of Connecticut. There can be no doubt that the identical question now presented—namely, as to the lia-

bility of Mrs. Mitchell on the writing in suit notwithstanding her coverture—arose in the Superior Court upon appeal from the allowance of the bank's claim by the Probate Court; and, as we have seen, the parties united in the request that the case be reserved for the advice of the Supreme Court of Errors of Connecticut, and the latter court upon full consideration advised the disallowance of all and every part of the bank's claim. To that advice the Superior Court, as it was compelled to do by the laws of Connecticut, conformed in its final adjudication of the bank's claim. The bank then turned to the Federal court, as if nothing had been adjudicated in the courts of Connecticut, and sought a judgment in support of the same claim that had been rejected by the state court in the case between it and the trustee of the estate of Mrs. Mitchell.

We are of opinion that the bank was concluded by the judgment in the state court. In the recent case of *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, 48, we said, after an extended examination of the adjudged cases, that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." The authorities cited in the margin illustrate the rule.[1]

[1] *Hopkins* v. *Lee*, 6 Wheat. 109, 113; *Smith* v. *Kernochen*, 7 How. 198, 216;

It is said that the question here presented was one of general jurisprudence involving the rights of citizens of different States, and that the Circuit Court was not bound to accept the views of the state court but was at liberty, indeed under a duty, to follow its own independent judgment as to the legal rights of the parties. *Burgess* v. *Seligman*, 107 U. S. 20. If it were true that the question was in whole or in part one of general law, the thing adjudged by the state court when properly brought to the attention of the Circuit Court would still be conclusive between the same parties or their privies. Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed.

It is also said that after this suit was brought in the Federal court the defendant made a voluntary assignment in insolvency under the statutes of Connecticut; that a master was appointed who took possession of all of the property assigned for the benefit of creditors; that commissioners were appointed to receive and adjust claims on her estate; and that it was necessary for the bank to present its claims to the commissioners or be forever barred from sharing in the assets of such estate. Therefore it is contended that the bank's appearance in the State court was compulsory, and that such appearance, although followed by an adverse final judgment in the state court, did not operate as a surrender of its right to thereafter proceed to final judgment in the Federal court in respect of the same matter.

These suggestions are without force. We do not suppose that the bank acquired any lien upon the property of Mrs. Mitchell

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Thompson v. *Roberts*, 24 How. 233, 240; *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles*, 24 How. 333, 340, 341, 343; *Russell* v. *Place*, 94 U. S. 606, 608; *Cromwell* v. *Sac County*, 94 U. S. 351; *Campbell* v. *Rankin*, 99 U. S. 261; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Bissell* v. *Spring Valley Township*, 124 U. S. 225, 230; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 691; *Forsyth* v. *Hammond*, 166 U. S. 506, 518; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396.

merely by bringing its suit in the Federal court, or that the bringing of that suit prevented her from making such an assignment of her property for the benefit of creditors as the laws of the State of which she was a citizen permitted. It may be that the bank could not have shared in the particular estate assigned and in the custody of the trustee Freeman without presenting its claim to the commissioners. Still, if the bank had not appeared in the state court nothing that could have been done by the tribunal administering the assigned estate would have relieved Mrs. Mitchell altogether from any obligation to the bank which she had legally incurred by having signed the guaranty of February 20, 1891. The bank could have kept out of the state court and proceeded to a final judgment in the Federal court taking its chances to enforce the collection of such judgment. Instead of doing that it presented its claim to the commissioners and invoked the judgment of the highest court of Connecticut upon the question of the liability of Mrs. Mitchell notwithstanding her coverture at the time she signed the writing in question. Its appearance in the state court was not, in any legal sense, a compulsory one, but was made in its own interest for the purpose of obtaining a share of the proceeds of certain property assigned for the benefit of creditors. It united with the trustee in having the case reserved for the advice of the Supreme Court of Errors upon the question whether the coverture of Mrs. Mitchell constituted a defence against its claim; knowing, as it must be conclusively presumed it did know, that such advice when given would under the laws of Connecticut absolutely control the final action of the Superior Court. Having failed in its effort to have the state court adjudge that Mrs. Mitchell was liable on the writing in suit notwithstanding her coverture at the time of signing it, the bank cannot be permitted to relitigate that question in disregard of the final judgment against it and seek a judgment in another court which, if rendered in its favor, could rest only upon grounds which the state court had held, as between it and the trustee of Mrs. Mitchell's estate, could not, in law, be sustained. Although it does not appear that Mrs. Mitchell was, in form, a party to the proceedings in the state court, she

was in privity with the trustee who held her estate for the benefit of creditors. It was admitted at the bar that a judgment in that court in favor of the bank would have concluded the question of her liability. If the writing in suit was binding upon her, notwithstanding her coverture when signing it, then the bank was a creditor entitled to its proportionate part of the proceeds of the estate to be administered for creditors. When, therefore, the state court adjudged that the coverture of Mrs. Mitchell protected her against liability for any claim based upon that writing, and that the bank was not entitled, in virtue of its provisions, to be regarded as a creditor of Mrs. Mitchell, there was a judicial determination by a tribunal of competent jurisdiction of the material question involved in this case, and consequently the bank could not, in a suit in another court against Mrs. Mitchell, reopen that question. The Circuit Court had before it, by agreement of the parties, a copy of the record of the proceedings in the state courts; and upon the evidence furnished by that record the question was distinctly presented whether those proceedings in connection with the defendant's plea of coverture constituted a defence against the plaintiff's cause of action based upon the writing of February 20, 1891.

In our opinion, for the reasons we have given, the Circuit Court properly adjudged that the decision of the state court should control the rights of the parties in this case, and therefore that the law was for the defendant.

The judgment of the Circuit Court of Appeals must be reversed, and the judgment of the Circuit Court is affirmed.

THOMPSON *v.* FERRY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 144. Submitted February 25, 1901.—Decided March 18, 1901.

This appeal being from the judgment of a territorial court and no exceptions to the rulings of the court on the admission or rejection of testimony being presented for consideration, the court is limited to a determination of the question whether the facts found are sufficient to sustain the judgment rendered.

And this must be assumed to be the case as the so-called statement of facts is not in compliance with the statute.

THE case is stated in the opinion of the court.

Mr. J. F. Wilson for appellant.

Mr. G. W. Kretzinger for appellees.

THE CHIEF JUSTICE: This appeal being from the judgment of a territorial court, and no errors having been assigned on exceptions to rulings on the admission or rejection of testimony, we are limited in our review to the determination of the question whether the facts found are sufficient to sustain the judgment rendered. *Gildersleeve* v. *New Mexico Mining Company*, 161 U. S. 573; *Harrison* v. *Perea*, 168 U. S. 311; *Marshall* v. *Burtis*, 172 U. S. 630.

The opinion of the trial court sets forth facts on which it proceeds, but there are no specific findings as such.

In the Supreme Court the statement of facts is as follows:

"Statement of facts by the Supreme Court of the Territory of Arizona, sitting as a court of appeal; on the foregoing transcript on appeal from the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, wherein judgment was rendered on a full hearing of the case in said district court in favor of said appellees and against the said appellant, as appears from the complete record

of said cause now on file in this court, and which said judgment has been brought to this court on appeal by appellant herein.

"The Supreme Court of the Territory of Arizona takes the facts as certified to by the clerk of the said district court of Yavapai County, Arizona Territory, as found in the original papers in said cause, to wit, the judgment roll, and forwarded by the said clerk and now on file in the office of the clerk of this court; also the minute entries in said cause, certified to by said clerk of said district court, together with the findings of facts of the court below, the motion for a new trial, and the reporter's transcript of the evidence taken on the trial of said cause below, all certified to by said clerk of said district court as being the whole of the record of said cause, and also the assignment of errors filed by appellant herein and contained in his brief on file herein, and the facts shown by the whole record herein as the facts shown in this cause and makes the same the statement of facts as found in the transcript in this cause the facts as found in this case.

"That from such transcript and from the same as the statement of facts herein this court finds that the said district court did not commit error in rendering judgment against the said appellant and in favor of said appellees; that the said appellees were the owners of all the right, title and interest in the Poland and Hamilton mining claims, free from any claim of appellant.

"And the Supreme Court further finds that the judgment of the said district court should be affirmed, and therefore affirms the same."

This is not in compliance with the statute in that behalf, and as we must assume that the evidence sustained the judgment, that judgment is

Affirmed.

LI SING *v.* UNITED STATES.

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

No. 27. Argued April 18, 19, 1900.—Decided March 18, 1901.

Li Sing was a Chinaman who, after residing for years in the United States, returned temporarily to China, taking with him a certificate purporting to have been issued by the imperial government of China, at its consulate in New York, and signed by its consul, stating that he was permitted to return to the United States, that he was entitled to do so, and that he was a wholesale grocer. On his return to the United States by way of Canada, he presented this certificate to the United States collector of customs at Malone, New York, who cancelled it and permitted him to enter the country. Subsequently he was brought before the Commissioner of the United States for the Southern District of New York, charged with having unlawfully entered the United States, being a laborer. At the examination he set up that he had a right to remain here, and that he was a merchant. The Commissioner found that on his departure from the United States he was and had long been a laborer, and ordered his deportation. *Held*, that the decision of the Collector at Malone was not final, and that by the act of October 1, 1888, c. 1064, the certificate issued to him by the Chinese consul on his departure from the United States was annulled.

Fong Yue Ting v. *United States*, 149 U. S. 698, affirmed and followed, especially to the points: (1) That the provision of the statute which puts the burden of proof upon the alien of rebutting the presumption arising from his having no certificate, as well as the requirement of proof "by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government; (2) that the requirement not allowing the fact of residence here at the time of the passage of the act to be proved solely by the testimony of aliens in a like situation was a constitutional provision; and (3) that the question whether, and upon what conditions these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the Government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

In June, 1893, Li Sing, a native of China, but then a resident

of Newark, New Jersey, returned to China and took with him a certificate purporting to have been issued by the imperial government of China, at its consulate at New York, and signed by its consul, that he was permitted to return to the United States and was entitled to do so, and which, furthermore, styled him a wholesale grocer. This certificate was *viséd* in Hong Kong by the United States consul on June 27, 1896, when Li Sing was about to return to this country. He thereafter returned by the way of Canada, presented the certificate to the United States collector of customs at Malone, New York, who cancelled it on August 28, 1896, and permitted him to enter the country.

On January 6, 1897, the United States officer, who is called the United States inspector for the port of New York, represented in writing and under oath to John A. Shields, United States commissioner for the Southern District of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was and had been for many years a Chinese laborer. Whereupon he was brought before the commissioner for examination. It was claimed by the counsel for Li Sing before the commissioner that by the action of the collector of customs at Malone the question of the Chinaman's right to be and remain in this country was *res adjudicata*, and also that he was a merchant. Testimony as to his status as a merchant was given by Chinese witnesses exclusively, which was received by the commissioner, notwithstanding the objection of the attorney of the United States. The commissioner found, upon all the evidence, that Li Sing was, at the time of the examination, a Chinese laborer, that he was such at the time he departed for China, and for several years prior thereto, and was such after his return from China in August, 1896.

The commissioner ordered his deportation, but did not order imprisonment as a punishment or penalty. A writ of *habeas corpus* and a writ of certiorari were thereupon allowed by the Circuit Court for the Southern District of New York upon Li Sing's petition. After a hearing the writ of *habeas corpus* was dismissed, and the relator was remanded to the custody of the

United States marshal for deportation. An appeal was then taken by the relator from the order of the Circuit Court to the Circuit Court of Appeals for the Second Circuit, and, on April 7, 1898, that court affirmed the order of the Circuit Court.

A writ of certiorari was thereafter, on February 1, 1899, allowed by this court.

Mr. W. C. Beecher for Li Sing.

Mr. Assistant Attorney General Hoyt for the United States.

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

The first contention on behalf of the petitioner is that the collector of customs at Malone had exclusive jurisdiction to hear and determine the right of petitioner to enter the country; that any error committed by the collector could only be reviewed by the Secretary of the Treasury, and that, consequently, the commissioner had no jurisdiction to act in the present case.

This contention is based upon the provisions of section 12 of the act of September 13, 1888, 25 Stat. 476, c. 1015, as follows: "And the collector shall in person decide all questions in dispute, with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise."

Doubtless, if this section had gone into effect and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final as to the questions passed on by him. But the act of September 13, 1888, was passed to take effect upon the ratification of a treaty then pending between the United States and the Emperor of China, and it is conceded that such treaty never was ratified.

Thereupon, the treaty not having been ratified, the act of October 1, 1888, 25 Stat. 504, c. 1064, was passed, which declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then,

or might thereafter be, a resident within the United States, and who had departed or might depart therefrom, and should not have returned before its passage, to return to or to remain in the United States, and that no certificates of identity, under which by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued, and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue of any such certificate.

The effect of this act was considered by this court in the case of *Wan Shing* v. *United States*, 140 U. S. 424, decided May 11, 1891. In the opinion in that case the act of July 5, 1884, c. 220, 23 Stat. 115, was cited as still in force, which provided that any certificate given by the Chinese government, and *viséd* by the indorsement of the diplomatic or consular representative of the United States in China, shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States, at which the person named therein shall arrive, and after produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate might be controverted and the facts therein stated disproved by the United States authorities.

In summing up a review of the existing acts of Congress, the court, in that case, through Mr. Justice Field, said:

"The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning."

The counsel for the petitioner cite cases in some of the Circuit Courts of the United States in which it has been held that some of the provisions of the act of September 13, 1888, notwithstanding the treaty was not ratified, could be regarded as in force.

Without finding it necessary to say that there are no provisions in the act of September 13, 1888, which, from their nature, are binding on the courts, as existing statements of the legislative will, we are ready to hold that section 12 of that act cannot be so regarded. In the act of August 18, 1894, 28 Stat. 390, it was provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

And in the case of *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547, it was held, expounding the act of August 18, 1894, that the decision of the appropriate immigration or custom officers, excluding an alien from admission into the United States under any law or treaty, is made final in every case, unless, on appeal to the Secretary of the Treasury, it be reversed. But it is obvious that it is only when the decision of the customs officer excludes an alien from admission that his decision is final. When his decision admits the alien, then the provisions of the act of July 5, 1884, are still applicable, which provide that, notwithstanding the contents of the certificate exhibited to the collector of customs, and their *prima facie* effect, "said certificate may be controverted and the facts therein stated disproved by the United States authorities."

Accordingly, we agree with the courts below in holding that the judgment of the collector of customs at Malone did not conclude the Commissioner, and that the latter had authority, under the statutes, to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States.

The decision of the collector of customs not being conclusive as to the right of the petitioner to enter the United States, much less as to his right to remain therein, we are brought to consider the errors assigned to the acts of the Commissioner in the proceedings before him.

Those proceedings were instituted under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884,

c. 220, 23 Stat. 115, which provides that "no Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came." Such required certificate in regard to persons not laborers, as specified in the sixth section of the said amended act, was to be obtained from the Chinese government by every Chinese person, other than a laborer, who was about to come to the United States, and was for the purpose of identifying the person and evidencing the permission of the government for his departure. The section provides that this certificate "shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States, whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

The certificate produced by the petitioner, of which we are furnished with a copy, bears date the 13th day of June, 1893, purports to permit Li Sing to return to and remain within the United States, and states that he was a wholesale grocer. But it appears, on the face of the certificate, that it was not issued to Li Sing by the Chinese government when he was about to return from China to the United States, as prescribed in the sixth section of the act of July 5, 1884, but was a paper he had procured from the Chinese consul at New York before he left the United States. Such a paper can scarcely be regarded as the certificate provided for in the act of Congress, which, in terms, declares that "in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to

the United States, shall obtain the permission of and be identified as so entitled by the Chinese government."

Without, however, insisting that the certificate produced was not, in form and substance, within the act of July 5, 1884, and even if it were conceded that it was so, yet such a question was rendered irrelevant by the act of November 3, 1893, c. 14, 28 Stat. 7, which, in its second section, provided that "where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

It is not pretended that any such evidence was produced by the petitioner before the collector of customs, and it is conceded that the latter acted, in admitting Li Sing to enter the United States, solely on the strength of the certificate. Accordingly, under the provisions of the several statutes hereinbefore cited, it was not only competent for the Commissioner to permit the allegations of the certificate to be controverted, but also to insist on the production of the evidence prescribed as necessary by the second section of the act of November 3, 1893.

As the Commissioner found, upon all the evidence, that Li Sing was a Chinese laborer, was such at the time he departed from China and for a term of years prior thereto, and has remained such since his return from China, his order of deportation was a legitimate conclusion and should be carried into effect, unless it can be made to appear either that the Commissioner failed to obey the statutes under which he was acting, or that the provisions of those statutes, applicable to the facts of the present case, are unconstitutional and void.

We do not understand it to be asserted, on behalf of the petitioner, that the Commissioner disregarded, in any particular, the provisions of the several statutes; but it is claimed that

some of those provisions are invalid, and that, therefore, the sentence of deportation should be set aside.

The petitioner's counsel assails the validity of the third section of the act of 1892, in the following terms:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

It is said that it was not competent for Congress to cast the burden of proof upon the petitioner. This precise question was determined by this court in the case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729. It was there said:

"If no evidence is offered by the Chinaman, the judge makes the order of deportation, as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves 'an unavoidable cause,' within the meaning of the act, for not procuring one. If he proves that he had procured a certificate which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof. The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof 'by at least one credible white witness that he was a resident of the United States at the time of the passage of the act,' is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.' *Ogden* v. *Sanders*, 12 Wheat. 349; *Pillow* v. *Roberts*, 13 How. 472, 476; *Cliquot's Champagne*, 3 Wall. 114, 143; *Ex parte Fisk*, 113 U. S. 713, 721; *Holmes* v. *Hunt*, 122 Mass. 505, 519."

Again, it is contended that section 2 of the act of November 3, 1893, c. 14, 28 Stat. 7, prescribing that "where an application is made by a Chinaman for entrance into the United States on

the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses, other than Chinese, the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States," etc., is violative of the Constitution which guarantees equal rights and equal laws to all.

This argument was also considered in the case of *Fong Yue Ting* v. *United States*, and it was said:

"The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may, at its discretion, modify or repeal. Rev. Stat. 558, 1977. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field in *Chae Chan Ping's* case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.' 130 U. S. 598. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.' . . .

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment,

in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

It may be proper here to mention that this court has held that, while the United States can forbid aliens from coming within their borders, and expel them from the country, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials, yet, when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. *Wong Wing* v. *United States*, 163 U. S. 228.

We cannot, however, yield to the earnest contention made in behalf of inoffensive Chinese persons who seek to come within the limits of the United States and subject themselves to their jurisdiction, by modifying or relaxing, by judicial construction, the severity of the statutes under consideration. We can but repeat what was said to similar appeals in the case of *Fong Yue Ting* v. *United States*, above cited: "The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

The judgment of the Circuit Court of Appeals, affirming the order of the Circuit Court, is

Affirmed.

MAGRUDER *v.* ARMES.

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

No. 171. Argued and submitted March 7, 1901. — Decided March 18, 1901.

Jurisdiction cannot be vested in this court, in a case brought here by writ of error to the court of the District of Columbia, by a mere claim of the statutory amount of damages, unsupported by facts.

On February 13, 1896, in the Supreme Court of the District of Columbia, at the Circuit Court Term No. 1 thereof, a judgment was entered in favor of George A. Armes, of which the following is a copy:

"Comes here now the plaintiff, by his attorney, and prays judgment on the verdict rendered in this case on the 7th instant, which is granted. Therefore it is considered that the plaintiff recover against said defendant and George C. W. Magruder, her surety, six dollars and twenty-five cents ($6.25), being the money payable by them to the plaintiff by reason of the premises, together with the costs of suit, to be taxed by the clerk, and have execution thereof."

Thereafter an execution was issued thereon in the following form:

"George A. Armes, Plaintiff
vs.
Eleanor A. H. Magruder and Geo. C. W. Magruder, Surety, Defendant. } No. 39,058.

"The President of the United States to the marshal for said District, Greeting:

"You are hereby commanded that of the goods and chattels, lands and tenements, of the defendant and Geo. C. W. Magruder, surety, you cause to be made $6.25, with interest from February 13, 1896, which the plaintiff on the 13th day of February, 1896, by the judgment of said court in the above-entitled cause, recovered against said defendant and surety for money

found payable to said plaintiff, and $22.70 for costs and charges about said suit expended, as appears of record, and return this writ into the clerk's office of said court within 60 days so endorsed as to show when and how you have executed the same.

"Witness the Honorable Edward F. Bingham, chief justice of said court, the 19th day of February, A. D. 1896.

{ Seal of the Supreme Court of the District of Columbia here imprinted. }

"JOHN R. YOUNG, *Clerk.*

By —— ——, *Assistant Clerk.*"

This execution was levied upon lot K in James Crutchett's subdivision of lots in square No. 755, in this city. Advertisement of sale was made in the ordinary form, and on May 9 (the day named for the sale) the principal defendant, plaintiff herein, paid the amount of $89.94 to satisfy the execution and prevent a sale. The value of the lot thus levied upon was $1800.

Thereafter, and on May 8, 1899, this action was commenced in the Supreme Court of the District, the declaration setting forth a copy of the judgment and execution, alleging the levy and the advertisement, averring that the lot was the separate property of the plaintiff, that she was a married woman and that George C. W. Magruder, the surety against whom judgment was also rendered, was her husband. The declaration also alleged that the judgment was rendered for witness fees, but was without law or merit; that both judgment and execution were void because not in terms limited by the rights which belonged to her as a married woman; that efforts were made by her to quash the execution and to appeal from the proceedings had upon such efforts, but that they failed, and that, therefore, she paid the sum of $89.94 to prevent the sale and save her property. As damages the sum of $6000 was claimed. A demurrer to this declaration was sustained, judgment entered for the defendants, which judgment was affirmed by the Court of Appeals, and thereupon this writ of error was sued out.

Mr. Jackson H. Ralston for defendants in error.

Mr. Joseph J. Waters for plaintiff in error submitted on his brief.

MR. JUSTICE BREWER, after making the above statement, delivered the opinion of the court.

The jurisdiction of this court in ordinary actions in the District of Columbia is limited to cases in which the amount in controversy is over $5000. Act of February 9, 1893, c. 74, § 8, 27 Stat. 434, 436. The fact, as disclosed by the declaration, is that plaintiff paid less than $90 to preserve from sale property worth only $1800. Everything which the defendants did was done by virtue of an order or judgment of a court of this District, having full jurisdiction. Whether such judgment was simply irregular or absolutely void, plaintiff cancelled all her liabilities by the payment of a sum less than $90, and the only property of hers endangered by their action she avers was worth $1800. It is true that in the declaration she charges illegality and spite, but such language is mere matter of epithet. We are guided by the facts as they are stated. There was no personal violence, no insult; nothing which sometimes rightfully opens the door to punitive damages. Finding that property of the value of $1800 was, as she thought, endangered, she paid $90 to escape the danger. Obviously her assertion that she was damaged to the amount of $6000 was without legal foundation and only made with the purpose of securing a review in this court. Nothing in the facts justified any such assertion. Jurisdiction cannot be vested in this court by a mere claim of damages, unsupported by facts. We do not care to enter into any discussion of this question, but refer simply to *Bowman* v. *Chicago & Northwestern Railway Company*, 115 U. S. 611, and cases cited in the opinion. The writ of error will be

Dismissed.

MINNESOTA *v.* BRUNDAGE.

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

No. 159. Argued February 28, 1901. — Decided March 18, 1901.

The principle reaffirmed that 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 an 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; so, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses.

But the power of the Federal court upon *habeas corpus* to discharge one held in custody by state officers or tribunals in violation of the Constitution of the United States ought not to be exercised in every case immediately upon application being made for the writ. Except in cases of emergency, such as are above defined, the applicant should be required to exhaust such remedies as the State gives to test the question of the legality, under the Constitution of the United States, of his detention in custody.

THE case is stated in the opinion of the court.

Mr. W. B. Douglas for appellant.

Mr. William D. Guthrie for appellee. *Mr. Albert H. Veeder* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellee Brundage was arrested under a warrant issued

by the Municipal Court of Minneapolis, Minnesota, upon the complaint under oath of the Inspector of the State Dairy and Food Department of that State charging him with having violated a statute of Minnesota approved April 19, 1899, entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health." Gen. Laws, Minnesota, 1899, c. 295.

The specific offence charged was that the accused, in the county of Hennepin, Minnesota, "did wilfully, unlawfully and wrongfully offer and expose for sale, and have in his possession with intent to sell, a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter whereby the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Minnesota."

He was adjudged to be guilty and to pay a fine of twenty-five dollars and costs, or in default thereof to be committed to the workhouse to undergo hard labor for thirty days, unless he sooner paid the fine and costs or was thence discharged by due course of law.

Having been taken into custody in execution of the judgment, Brundage presented his application to the Circuit Court of the United States for a writ of *habeas corpus*, alleging that he was restrained of his liberty in violation of the Constitution of the United States. That court held the statute to be unconstitutional and discharged the accused from the custody of the state authorities.

The State insists, upon this appeal, that the statute, at least in the particulars applicable to this case, was consistent with the Constitution of the United States.

This question is one of great importance, but we do not deem it necessary now to consider it; for in our opinion the Circuit Court should have denied the application for the writ of *habeas corpus*, without prejudice to a renewal of the same after the

accused had availed himself of such remedies as the laws of the State afforded for a review of the judgment in the state court of which he complains.

We have held, upon full consideration, that although under existing statutes a Circuit Court of the United States has jurisdiction upon *habeas corpus* to discharge from the custody of state officers or tribunals one restrained of his liberty in violation of the Constitution of the United States, it is not required in every case to exercise its power to that end immediately upon application being made for the writ. "We cannot suppose," this court has said, *Ex parte Royall*, "that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' (R. S. § 761,) does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the State, 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. 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 an 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 na-

tions, 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. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses." *Ex parte Royall*, 117 U. S. 241, 251; *Ex parte Fonda*, 117 U. S. 516, 518; *In re Duncan*, 139 U. S. 449, 454; *In re Wood*, 140 U. S. 278, 289; *McElvaine* v. *Brush*, 142 U. S. 155, 160; *Cook* v. *Hart*, 146 U. S. 183, 194; *In re Frederich*, 149 U. S. 70, 75; *New York* v. *Eno*, 155 U. S. 89, 96; *Pepke* v. *Cronan*, 155 U. S. 100; *In re Chapman*, 156 U. S. 211, 216; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *Iasigi* v. *Van De Carr*, 166 U. S. 391, 395; *Baker* v. *Grice*, 169 U. S. 284, 290; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Fitts* v. *McGhee*, 172 U. S. 516, 533; *Markuson* v. *Boucher*, 175 U. S. 184.

There are cases that come within the exceptions to the general rule. In *Loney's* case, 134 U. S. 372, 375, it appeared that Loney was held in custody by the state authorities under a charge of perjury committed in giving his deposition as a witness before a notary public in Richmond, Virginia, in the case of a contested election of a member of the House of Representatives of the United States. He was discharged upon a writ of *habeas corpus* sued out from the Circuit Court of the United States, this court saying: "The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice." So, in *Ohio* v. *Thomas*, 173 U. S. 276, 284–5, which was the case of the arrest of the acting governor

of the Central Branch of the National Home for Disabled Volunteer Soldiers, at Dayton, Ohio, upon a charge of violating a law of that State, the action of the Circuit Court of the United States discharging him upon *habeas corpus*, while in custody of the state authorities, was upheld upon the ground that the state court had no jurisdiction in the premises, and because the accused, being a Federal officer, "may, upon conviction be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal Government might in the meantime be obstructed." The exception to the general rule was further illustrated in *Boske* v. *Comingore*, 177 U. S. 459, 466–7, in which the applicant for the writ of *habeas corpus* was discharged by the Circuit Court of the United States, while held by state officers, this court saying: "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 present case does not come within any of the exceptions to the general rule announced in the cases above cited. It is not, in any legal view, one of urgency. The accused does not, in his application, state any reason why he should not be required to bring the question involved in the prosecution against him before a higher court of the State and invoke its power to discharge him if in its judgment he is restrained of his liberty in violation of the Constitution of the United States. It cannot be assumed that the state court will hesitate to enforce any rights secured to him by that instrument; for upon them equally with the courts of the Union rests the duty to maintain the supreme law of the land. *Robb* v. *Connolly*, 111 U. S. 624, 637. If the state court declined to recognize the Federal right specially claimed by the accused, the case could be brought here for review.

After observing that the questions of constitutional law arising in this case had been determined in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, and *Collins* v. *New Hampshire*, 171 U. S.

30, adversely to the present contention of the State, and that there was jurisdiction to discharge the petitioner on *habeas corpus*, the Circuit Court said: "Even then, for reasons of comity, such power will seldom be exercised by the Circuit Court to discharge a petitioner held under process from a state court, even after conviction by the trial court, unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay which will be caused by the prosecution of a writ of error to a final decision, or unless the question has already been decided by the Supreme Court of the United States, whose decision the state court has disregarded in the proceeding. State statutes prohibiting the importation from other States and sale of articles of commerce, especially articles of food, or adapted for general use, are regarded as affecting general interests and the rights of the public; and *habeas corpus* has frequently been resorted to in cases of imprisonment for violation of such statutes." *In re Brundage*, 96 Fed. Rep. 963, 969.

Among the cases cited in support of the action of the Circuit Court are *Minnesota* v. *Barber*, 136 U. S. 313, and *Plumley* v. *Massachusetts*, 155 U. S. 461. It must be admitted that in the first named case the general rule announced in prior and subsequent cases was not applied. The reasons for not then applying it do not appear from the opinion of the court. It may be that the precise point now under examination was not called to its attention. *Plumley* v. *Massachusetts* is not in point, for it came to this court upon writ of error to the highest court of Massachusetts.

It is undoubtedly true that the state enactment in question may in its operation affect the business of many, and in some degree, but indirectly, the rights of the public; but that consideration is not sufficient to justify such interference by the Federal court as will interrupt the orderly course of proceedings in the state court. We do not think that the exercise by a Federal court of its power upon *habeas corpus* to discharge one held in custody by the state authorities and charged with a violation of a state enactment should be materially controlled by any consideration of the extent of particular business

interests that may be affected by a prosecution instituted in a state tribunal against him, or of the indirect effect of his detention in custody upon the rights of the general public. Nor do we think that the Circuit Court should have interfered with the custody of the appellee because in its opinion the action of the Municipal Court of Minneapolis was inconsistent with the judgments of this court in the *Schollenberger* and *Collins* cases. Upon that question the state court was entitled to form its own opinion, and give judgment accordingly. Whether, in view of the judgments in the *Schollenberger* and *Collins* cases, the state court should have held the Minnesota statute to be repugnant to the Constitution of the United States, it is not necessary now to say. Besides the record does not show that the attention of the Municipal Court of Minneapolis was called to those cases; much less is there any reason to suppose that it deliberately refused to accept the decisions of this court as controlling upon questions arising under the Constitution of the United States. As disclosed by the record, the case, we repeat, is not one of urgency within the meaning of our decisions, and does not suggest any adequate reason why the appellee should not be required, before applying to the Circuit Court of the United States to be discharged upon *habeas corpus*, to seek at the hands of the higher courts of the State a reversal of the judgment rendered against him in the Municipal Court of Minneapolis.

Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus*, without prejudice to a renewal of it when the appellee shall have exhausted the remedies provided by the State for a review of the judgment of the Municipal Court of Minneapolis.

Reversed.

WILKES COUNTY *v.* COLER.

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

No. 167. Argued October 19, 22, 1900.—Decided March 18, 1901.

The decisions of the highest court of a State upon the question whether a particular act was passed in such manner as to become, under the state constitution, a law, should be accepted and followed by the Federal courts.

The principle reaffirmed that the recital in municipal bonds of a wrong act as authority for their being issued does not preclude a holder of such bond from showing that independently of such act there was power to issue the bonds.

The rule reaffirmed that the question arising in a suit in a Federal court of the power of a municipal corporation under existing laws to make negotiable securities is to be determined by the law as judicially declared by the highest court of the State at the time the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation.

THE ultimate question in this case is whether the county of Wilkes, North Carolina, is liable upon certain bonds issued in 1889 in payment of a subscription in its name to the capital stock of the North Western North Carolina Railroad Company.

Each bond was in the usual form of such instruments, was made payable October 1, 1913, and recited that it was "one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the North Western North Carolina Railroad for the construction of a *second division* from the towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes County, by an election regularly held for that purpose on the 6th day of

November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars made to the capital stock of the North Western North Carolina Railroad Company by said county of Wilkes."

The question of a subscription by Wilkes County to the extent of $100,000 to the stock of that company, to be paid in bonds, was submitted to a popular vote and a majority of the qualified voters approved of the proposition. Taxes were imposed and collected for eight years to pay the interest on the bonds and the amounts collected were so applied; but the county officers refused to pay the interest due and payable April 1, 1896, April 1, 1898, and October 1, 1898, although they had in their hands moneys collected from taxpayers for that purpose. The object of the present suit was to compel those officers to apply the moneys so collected in payment of such interest.

Was the act of 1879—which was recited in the bonds as authority for their being issued—passed by the legislature in such manner as to become a law of North Carolina? Was there power to issue the bonds without the aid of that enactment? These are the principal matters involved in or depending upon our answer to the certified questions.

The material facts upon which the decision of the case depends are as follows:

The Convention that assembled at Raleigh, North Carolina, on January 14, 1868, for the purpose of framing a constitution for that State concluded its labors on March 16, of the same year. The constitution adopted by that body was ratified April 24, 1868, and was approved by Congress, June 25, 1868. 15 Stat. 73, c. 70.

A few days prior to its final adjournment, namely, on the 9th day of March, 1868, the Convention passed an ordinance (which, by its terms, was to take effect from its passage) that constituted the charter of the North Western North Carolina Railroad Company. The company was incorporated by the ordinance for the purpose of constructing a railroad of one or more tracks

from some point on the North Carolina Railroad between the town of Greensboro in Guilford County and the town of Lexington in Davidson County, running by way of Salem and Winston in Forsyth County "to *some* point *in the northwestern boundary line* of the State *to be hereafter determined.*"

By the 5th section of the ordinance it was provided that after the organization of the company its officers should proceed "to locate the *eastern* terminus of the North Western North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth County, which portion of said railroad, when completed, shall constitute its *first division.*"

By the 12th section it was declared that "all *counties* or towns subscribing stock to said company shall do so in *the same manner* and *under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company;" and by section 13, that "the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia."

The North Carolina and Atlantic Railroad Company referred to in the 12th section was the Atlantic and North Carolina Railroad Company incorporated by an act of assembly approved December 27, 1852. By the 33d section of the charter of that company it was declared to "be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided." Provision was made (§ 34) in the same act to take the sense of the qualified voters of any town or county upon the question of a subscription by it to the stock of the company, and it was declared (§ 35) that if a majority of the qualified voters of any county or town voting upon

the question were in favor of the subscription, the corporate authorities of the town and the justices of the county should appoint an agent to make the subscription in behalf of such town and county, to "be paid for *in the bonds of such town and county*, and on such time as shall be agreed on by said town officers and the justices of such county." Laws North Carolina, 1852, pp. 484, 499.

By an act of assembly of August 11, 1868, the ordinance of March 9, 1868, was reënacted, ratified and confirmed. By the same act also the commissioners of Forsyth County were invested with authority to levy from time to time such tax as was sufficient to pay the subscriptions made to the capital stock of the North Western North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created in borrowing money to pay the subscription of stock. At the end of that act as published are the words, "Ratified the 11th day of August, A. D. 1868."

By the first section of the above act of February 20, 1879, it was declared that "section 13 of chapter 17 of the ordinance of the Convention of 1868, ratified the 9th day of March, 1868, be amended by adding the words—'and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin by the way of Jonesville *and Wilkesboro, in the county of Wilkes*, to Patterson's Factory, in the county of Caldwell, which branch shall be known as the *second division*.'" By the first and second sections the ordinance of 1868 was further amended in particulars that need not be mentioned. By the fourth section it was provided: "That any township or city, town, county or other municipal corporation of this State shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein." After prescribing the mode in which the will of the people as to a subscription of stock should be ascertained, that section proceeded: "If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county or other municipal corporation, favor the taking of the amount of stock

so voted for in such election, then the authorities who, by this act, are empowered to determine what amount of stock shall be taken, shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township or city, town, county or other municipal corporation shall have power to issue bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon such bonds, and also for the payment of said bonds when they become due: . . . " At the close of that act, as published, are these words: "Read three times in the General Assembly and ratified the 20th day of February, A. D. 1879."

Another act was passed March 2, 1881. By that act the North Western North Carolina Railroad Company was authorized to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina Railroad, and to build and operate additional branches thereto, or from its present main line, to any important mines or manufactories in any of said counties, or counties adjacent to them; and any corporation, county, city, town or township interested therein was empowered to subscribe to stock for those purposes, or otherwise contribute to the work in such manner and amount as should be determined by the proper authorities of such corporation, county, city, town or township, and agreed on with the said North Western North Carolina Railroad Company. At the close of that act, as published, are the words: "In the General Assembly, read three times and ratified this the 2d day of March, A. D. 1881."

The validity under the constitution of the State of each of the above acts of March 11, 1868, February 20, 1879, and March 2, 1881, was questioned upon grounds presently to be stated.

Counsel for Parties.

In the Circuit Court judgment was rendered in favor of the plaintiffs, Coler & Co., who were found to be *bona fide* holders for value of some of the bonds. The case was carried to the Circuit Court of Appeals, and is now here upon questions certified under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826.

The certified questions are as follows:

"1. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the Circuit Court of the United States was bound in passing upon this case by the decisions of the Supreme Court of North Carolina in the following cases: *Commissioners of Wilkes County* v. *Clarence Call et al.*, 123 N. C. 308; *Bank* v. *Commissioners*, 119 N. C. 214; *Commissioners* v. *Snuggs*, 121 N. C. 394; *Rodman* v. *Washington*, 122 N. C. 39; *Commissioners* v. *Payne*, 123 N. C. 432, considered in connection with prior decisions of said court and the following provisions of the constitution of said State: Article 2, sections 14 and 16, and Article 5, sections 1, 4, 6, and 7, and Article 7, section 7.

"2. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the Supreme Court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"3. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity."

Mr. A. C. Avery for the Board of Commissioners of Wilkes County.

Mr. John F. Dillon and *Mr. Charles Price* for Coler & Co. *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on *Mr. Dillon's* brief.

Mr. R. O. Burton on behalf of the Commissioners of Oxford, and *Mr. James E. Shepherd* on behalf of the Commissioners of Stanly County, each filed a brief by leave of court.

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

This being the case disclosed by the record, we proceed in our examination of such matters involved in the certified questions as are presented with sufficient distinctness to require notice at our hands.

The county insists that the bonds in question were issued in violation of the 14th section of Article 2 of the constitution of the State, which is in these words: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless* the yeas and nays on the *second* and *third reading of the bill* shall have been *entered on the journal.*"

In support of the above proposition reliance is placed upon the cases named in the first of the certified questions.

We are asked whether the Circuit Court was bound to follow those decisions when considered in connection with prior decisions of the Supreme Court of North Carolina and with the above and other provisions of the state Constitution, by one of which it is declared that "each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly." Art. 2, § 16.

Premising that the journals of the two houses were put in evidence and that it did not appear therefrom that the yeas and nays, on the second and third readings of the acts of 1868, 1879 and 1881, respectively, were entered on the legislative journals, let us inquire as to the scope of the decisions in the above cases.

In *Bank* v. *Commissioners*, 119 N. C. 214, 220 (1896), which involved the validity under the 14th section of the state constitution of an act passed in 1891 authorizing a municipal subscription to the stock of a railroad company and the issuing of bonds in payment thereof, it was said: "This section of the constitution is imperative and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in the organic law would be converted into a nullity by judicial construction. . . . The point is one of transcendent importance, and is simply whether the people, in their organic law, can safeguard the taxpayers against the creation of state, county and town indebtedness by formalities not required for ordinary legislation, and must the courts and the legislature respect those provisions? This safeguard is section 14 of Article 2 of the constitution. . . . The journals offered in evidence show affirmatively that 'the yeas and nays on the second and third reading of the bill' were not 'entered on the journal.' And the constitution, the supreme law, says that, unless so entered, no law authorizing State, counties, cities or towns to pledge the faith of the State or to impose any tax upon the people, etc., shall be valid. . . . The people had the power to protect themselves by requiring in the organic law something further as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the journals on the second and third reading in each house. It is provided that such laws are 'no laws,' *i. e.*, *are void unless* the bill for the purpose shall have been read three several times in each house

of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal.* This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a state or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 Dill. Mun. Corp. 545, and cases cited. It is certainly in the power of the sovereign people in framing their constitution to require as a prerequisite for the validity of this class of legislation these precautions and the additional evidence in the journals that they have been complied with, over and above the mere certificate of the speakers which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the journals is plain beyond power of controversy. . . . The certificate of the speakers is not good for more than it certified, *i. e.*, that the bill has been read three times in each house and ratified. And ordinarily that makes the bill a law. But *for this class of legislation* the constitution provides that the facts thus certified by the speakers will make no law unless it further appears that the yeas and nays have been recorded on the journals on the second and third reading in each house. The constitution makes the entry on the journals essential to the validity of the act."

These principles were again announced in *Commissioners* v. *Snuggs*, 121 N. C. 394, 398 (1897), which also involved the validity of county bonds issued in payment of a subscription to the capital stock of a railroad corporation. It appeared that the act relied on as authority for issuing them passed its third reading in the House of Representatives without any entry on the journal of the yeas and nays. The court said: "We are of opinion that it was competent to introduce the House journal as proof that the acts referred to were not passed according to the requirements of the constitution, and they estab-

lished that fact. That provision of the constitution (section 14 of Article 2) is mandatory, as we have decided in *Bank* v. *Commissioners*, 119 N. C. 214. It is the protection which the people, in convention, have thrown around themselves for the benefit of the minority as well as the majority. . . . The bill may, in point of fact, have been read three several times on three different days, and the yeas and nays have been actually called on the second and third readings and the presiding officers may have certified thereto, and yet, if the entry of the yeas and nays is not actually made on the journal, the constitution speaking with absolute clearness says that the failure of such entry is *absolutely* fatal to the validity of the act. The entry, showing who voted on the bill and how they voted, must be made before the bill can ever become a law. The constitution does not allow the certificate of the presiding officers or any other power to cure such an omission. The certificate of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the journals were silent in reference thereto, because, in ordinary legislation, the directions of the constitution are not a condition precedent to the validity of the act. But, in that class of legislation, the purpose of which is to legislate under section 14 of Article 2 of the constitution, a literal compliance with the language of that section is a condition precedent and one which must be performed in its entirety before the bill can ever become a law."

These two decisions were followed in *Rodman* v. *Washington*, 122 N. C. 39, 41 (1898), and *Commissioners* v. *Payne*, 123 N. C. 432, 487 (1898).

The same question arose in *Commissioners of Wilkes County* v. *Call*, 123 N. C. 308, 310 (1898). That case involved the validity of the identical issue of bonds that are here in suit. Referring to its former decisions, above cited, the court said: "Under the authority of those decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An act of the legislature passed in violation of the constitution of the State, or in disregard to its mandatory provisions, is to the extent of such repugnance

absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law. The act under which these bonds profess to have been issued [the above act of February 20, 1879] was never legally passed and never became a law."

To the above cases we may add that of *State* v. *Patterson*, 98 N. C. 660, 662, 664, determined in 1887 before the bonds in question were issued. That was an indictment for selling spirituous liquors in a certain county wherein sales were prohibited by a supposed statute. Priv. Acts, N. C. 1887, c. 113, § 8. The defendant, under the plea of not guilty, claimed that the statute cited was void, because it had no enacting clause, that is the words, "The General Assembly of North Carolina do enact." The court, referring in its opinion to the constitutional provision that "the style of the acts shall be, 'The General Assembly of North Carolina do enact,'" Art. 2, § 21, and to the provision "that all bills and resolutions of a legislative nature shall be read three times in each house, before they pass into laws, and shall be signed by the presiding officers of both houses," Art. 2, § 23, held that the statute under which the prosecution was inaugurated was not a law. The court, among other things, said: "It thus appears that its framers, and the people who ratified it, deemed such provisions wise and important, the purpose being to require every legislative act of the legislature to purport and import upon its face to have been enacted by the General Assembly, and to be further authenticated by the signatures of the presiding officers of the two houses comprising that body. The purpose of thus prescribing an enacting clause—'the style of the acts'—is to establish the act—to give it permanence, uniformity and certainty—to identify the act of legislation as of the General Assembly—to afford evidence of its legislative, statutory nature, and to secure uniformity of identification, and thus prevent inadvertence, possible mistake and fraud. Such purpose is important of itself, and as it is of the constitution, a due observance of it is essential. The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the constitution makes it so."

Opinion of the Court.

After the decision in *State* v. *Patterson*, rendered as above stated before the bonds in suit were issued, it might have been anticipated that the same court would hold as they did in the subsequent cases above cited that the entering of the yea and nay vote on the second and third readings of an act of the class mentioned in section 14 of Article 2 of the state constitution was a condition precedent that could not be dispensed with under any circumstances.

The defendants however contend that by the decisions of the Supreme Court of North Carolina, as those decisions stood at the time the bonds were issued, a person consulting the laws of the State was not bound to examine the journals of the legislature and ascertain at his peril whether such acts had been passed in the particular manner prescribed by the constitution; that every one could properly assume that the act of February 20, 1879, signed by the proper officers, and enrolled and published as one of the statutes of the State, was passed in conformity with the constitutional provision as to the entry on the journal of the yea and nay vote on the second and third readings of a bill.

The North Carolina cases cited by the defendants in support of this proposition are *Brodnax* v. *Groom*, 64 N. C. 244 (1870), *Gatlin* v. *Town of Tarboro*, 78 N. C. 119 (1878), and *Scarborough* v. *Robinson*, 81 N. C. 409 (1879). Let us see what was involved in those cases.

In *Brodnax* v. *Groom* it was held that the courts could not go behind an enrolled act, duly certified by the presiding officers of the two houses of assembly, to ascertain whether there had been a compliance with the 12th section of Article 2 of the state constitution providing that the "General Assembly shall not pass any private law unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law."

In *Gatlin* v. *Town of Tarboro*, the question was as to the validity of a tax levied by a town, which was resisted on the ground that the act was private and had been passed without any notice of the application as required by the constitution

(Art. 2, § 12), and was therefore void—the parties admitting that no such notice was given. The court said: "As to the second point: If it appeared from the act itself, or affirmatively appeared by the journals of the legislature, which would have been competent evidence, that the notice of the intended application for the act, which the constitution requires, had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the court below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the legislature had obeyed the constitution, and that it appeared that notice had been given. '*Omnia præsumuntur rite esse acta.*' We cannot accept the agreement of the parties that no notice was in fact given, as proof that it did not appear to the legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois. *Happel* v. *Brethaner*, 70 Ill. 166. If any weight were allowed to admissions of this sort, the law might change as each case was presented. Our opinion on this point renders it unnecessary to determine whether the act was technically a public or private one."

In *Scarborough* v. *Robinson*, the issue presented was as to the power of the court to compel the presiding officers of the two houses *to sign* an act to the end that it might be authenticated —it being alleged that the bill had been duly ratified by the two houses as shown by their respective journals. That case arose under section 23 of Article 2 of the state constitution providing that all bills and resolutions of a legislative nature should be read three times in each house, before they pass into laws, "and shall be signed by the presiding officers of both houses." Preliminary to the decision of the question really involved in that case the court made some general observations upon the question whether the existence and validity of a statute should depend "upon the uncertain results of an inquiry made in each particular case, whether the provisions of the constitution directing the mode of legislative proceedings have been followed in the action of the two houses in passing a bill through

its different stages of progress." But it was added that the determination of that question was not necessary to a decision of the application before the court. It was then decided, and nothing more was decided than, that "the signatures of the presiding officers of the two houses, under and by force of the words used in our constitution, are an essential prerequisite to the existence of the statute—the finishing and perfecting act of legislation—and must be affixed during the session of the General Assembly." Upon that ground only the application for a mandamus was denied.

It thus appears that no one of the cases cited by defendants involved a construction of section 14 of Article 2 of the state constitution. Those cases arose under other provisions of the constitution. It is true that in *Scarborough* v. *Robinson*, there are general expressions touching questions adverted to but not decided, that lend apparent support to the contention that the North Carolina decisions rendered after the issuing of the bonds in suit were not, in all particulars, in harmony with what was said by the state court in prior cases. But such general expressions as to matters expressly excluded from decision are not authority and reference must be had to the points in judgment.

In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the Circuit Court of the United States justified in holding the acts of 1868, 1879 and 1881 to be laws of the State? Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose. May a Federal court disregard the decisions of the highest court of the State holding that such enactment, in the form of a statute, was never passed so as to become, under the state constitution, a law?

These questions have been so distinctly answered by this court in cases heretofore decided that a discussion of them upon principle is unnecessary.

In *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 267, 268, which was an action upon municipal bonds, the question was

whether any such statute ever existed as that under the authority of which the bonds there in suit purported to have been issued. It was contended that as the bonds were held by a *bona fide* purchaser for value, and as the town sued had paid the first instalment of interest, it was estopped from offering any evidence that the act under the authority of which the bonds purported to have been issued was not legally passed, the same having been duly published among the printed statutes as a law, and being therefore *prima facie* a valid law; in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage. This court said: "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise." "As a matter of propriety and right, the decisions of the state courts on the question as to what are the laws of the State is binding upon those of the United States. But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to govern the action of the court below. In our judgment, it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without asking the advice of a jury on the subject. When once it became the settled construction of the con-

stitution of Illinois that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States."

These principles were reaffirmed in *Post* v. *Supervisors* (*Amoskeag Bank* v. *Ottawa*), 105 U. S. 667.

It is said, however, that the Circuit Court of the United States could not have followed the cases referred to in the certified questions without departing from the principles announced by this court in *Field* v. *Clark*, 143 U. S. 649, 671, 672. This point deserves examination.

In the present case, the express mandate of the constitution of North Carolina is that "no law shall be passed . . . to impose any tax upon the people of the State or to allow the counties, cities or towns to do so . . . unless the bill for that purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless* the yeas and nays on the second and third reading of the bill shall have been entered on the journal." Whether the absence from the journal of entries showing the required number of *readings* of a bill, on three different days, will be notice to all that the legislature has not conformed to the requirements of the constitution in respect of such readings, is a question that need not be decided in this case. As the state constitution does not expressly require those facts to be entered on the journal of legislative proceedings, it may be that when an enrolled bill, certified and duly authenticated by the presiding officers of the two houses, is approved by the Governor, it is to be conclusively presumed that the constitution was complied with as to the mere readings of the bill. Without however expressing any opinion on that question, we remark that no such conclusive presumption can arise to defeat the express constitutional in-

hibition upon the passage of an act authorizing a county, city or town to impose taxes upon its people unless "the yeas and nays on the second and third reading of the bill shall have been entered on the journal." The object of that provision was to make such an entry on the journal a condition precedent to any legislation imposing taxes on the people. Every one who took municipal bonds to be paid by means of taxation authorized by the legislature was bound to know, from the face of the constitution, that there was a want of power to issue such bonds and to impose such taxation, if the yeas and nays on the second and third readings of the bill were not entered on the journal. The constitutional requirement in that matter could not be dispensed with by the act of the presiding officers of the two houses of the General Assembly in certifying a bill as passed when the journal did not contain entries showing that to have been done which was necessary to be done before there was power to enact the bill into a law. These are the grounds upon which the Supreme Court of North Carolina have rested their decisions in the cases referred to in the first of the certified questions.

The case of *Field* v. *Clark* was altogether different. In that case it was contended that a certain enrolled act of Congress in the custody of the Secretary of State and appearing upon its face to have become a law in the mode prescribed by the Constitution of the United States, was to be deemed a nullity in all its parts because it was shown by the congressional record of proceedings, reports of committees of each house and other papers printed by authority of Congress that a section of the bill as it finally passed was not in the bill authenticated by the signatures of the presiding officers of the respective houses of Congress and approved by the President. The clause of the Constitution upon which that contention was based declares that "each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal." Art. 1, § 5. It was not claimed in that case that a yea and nay vote was demanded by one fifth of the members of either house on the passage of the

section alleged to have been omitted, or on the passage of the bill as approved by the two houses of Congress. This court said: "In regard to certain matters, the constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fullness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the constitution does not expressly require bills that have passed Congress to be attested by the signature of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the Government, require that mode of authentication." It was then said: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the Government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority

to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the Government, charged, respectively with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

So that in *Field* v. *Clark* the question substantially as now presented — namely, as to the effect upon legislation of the failure to enter upon the journals that which is expressly required by the state constitution to be entered on them before an act can become a law — was not decided, but was in terms reserved from decision. Nothing said in that case conflicts with the judgments of the Supreme Court of North Carolina in the cases cited.

To avoid misapprehension it may be well to add that even if the decisions in North Carolina rested upon grounds inconsistent with the principles announced in *Field* v. *Clark* as applicable to the constitutional provisions relating to acts passed by Congress, it would be the duty of a Federal court to follow the rulings of the highest court of a State on the question whether a particular enactment found in the printed statutes had been passed in such a manner as to become, under its constitution, a law of the State. Whether a different principle would apply in cases where rights had accrued under a statute previously adjudged by the state court to have been so passed as to become a law, we need not now inquire.

It is, however, earnestly contended that the county cannot escape liability even if the acts of 1868, 1879 and 1881 are disregarded as not having been passed so as to become laws; that the recital in each bond that it was issued under the au-

thority of the act of 1879 does not estop the holders of bonds from showing that there was in fact ample authority to issue them, although such authority was not recited in the bonds. This contention rests mainly upon *Anderson County* v. *Beal*, 113 U. S. 227, 236, 237, 238 (1885). In that case it was said: "It is not disputed that the recital in the bond that it was issued under the act of February 26, 1866, Sess. Laws of Kansas, 1866, c. 24, p. 72, was an error. . . . It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds. . . . The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County of September 13, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county." To the same effect is *Knox County* v. *Ninth National Bank*, 147 U. S. 91.

The point here made is not specifically embraced in either of the certified questions, but it is so closely connected with the question whether the Circuit Court should have followed the decisions of the Supreme Court of North Carolina in *Bank* v. *Commissioners*, *Commissioners* v. *Snuggs*, *Rodman* v. *Washington*, *Commissioners of Wilkes County* v. *Call*, and *Commissioners* v. *Payne*, above cited, that it ought to be examined.

Of course, if there was an absolute want of power to issue the bonds in question, every purchaser of them would be charged with notice of that fact, and could not look to the county in whose name they were issued. So that the inquiry must be whether the county had power to issue the bonds without the aid of any act passed after the constitution of 1868 went into operation.

The plaintiffs insist that requisite authority was given by the Convention ordinance of March 9, 1868, and that it had been in effect so decided by the Supreme Court of the State before the bonds were issued in *Hill* v. *Commissioners*, 67 N. C. 367 (1870) and *Belo* v. *Commissioners*, 76 N. C. 489 (1877).

In *Hill* v. *Commissioners* the relief sought was an injunction to restrain the Commissioners of Forsyth County—into which the first division of the railroad was to be constructed—from imposing and collecting taxes to be applied in paying instalments due upon a subscription made by that county to the stock of the North Western North Carolina Railroad Company. The general question presented in that case, and the only one decided, was whether the legislature could constitutionally authorize a county to take stock in a railroad company under the sanction of a popular vote, and impose a tax to pay for such subscription. The Supreme Court of the State adjudged that such legislation would be legal. No reference was made to the ordinance of 1868 or to the ratifying act of August 11, 1868. Nor does it appear from the report of that case that any question was raised as to the validity of that act under the 14th section of Article 2 of the constitution of the State, nor that evidence was offered to show whether the journals of the legislature contained any entry of the yea and nay vote on the second and third readings of the bill. Still, it must be taken that the ordinance of 1868 was assumed by the court in that case to be in force so far as Forsyth County, named in it, was concerned. The decision cannot however be regarded as authoritative upon the question whether Wilkes County had power, under that ordinance alone, to issue the bonds here involved.

In *Belo* v. *Commissioners* the relief sought was a judgment compelling the Commissioners of Forsyth County to provide for the payment of the bonds issued by them in payment of its subscription of stock to the North Western North Carolina Railroad Company. The Supreme Court of the State said: "The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regu-

lations and restrictions is given to counties and towns as was conferred by an act incorporating the Atlantic and North Carolina Railroad Company, passed by the legislature of 1852. By section 34 of the latter act the justices of the county through or near which the road was located, 'a majority concurring,' are authorized to fix upon a subscription sum and submit it to the voters of the county. If the majority favored subscription, the justices were to choose an agent to subscribe the stock voted and to prepare and issue county bonds, as the justices should direct. The minutes of the special term of the county court of Forsyth County, which ordered the proposition to be submitted to the popular vote, recite that a majority of the justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding court, held in June, 1868. The minutes of that term recite that thirty-five justices were present, which number is admitted to be a majority of the whole number. At this latter term of the court the justices ordered the subscription to be made to the capital stock of the company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his banking house in Salem, on the 5th of March, 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County at June term, 1868, and reënacted and ratified and confirmed by an act of the General Assembly, ratified the 11th of August, 1868.' At the same term at which the subscription was made the justices assessed a special tax upon the county to meet the semi-annual interest on the bonds. This special railroad tax was annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the railroad company to the county, which it yet holds; an agent was annually chosen to represent and did represent the county stock in all the meetings of the company. Under the new state constitution of 1868 a Board of County Commissioners succeeded to all the powers and

duties of the justices, and up to 1872 this board unanimously caused the levy and collection of the railroad tax and its application to the discharge of the coupons due upon the bonds. But the board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the county was illegal and void."

Again: "For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the county of Forsyth *by the ordinance of the Convention.* It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the justices of the county, a majority concurring, was the court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality."

After considering the rights of the parties under the Convention ordinance of 1868, the court proceeded: "So far, as to the rights of the parties under the original act of the railroad corporation, granted by the Convention of 1868. But the plaintiff further relies upon a subsequent act of the legislature, ratified the 11th of August, 1868, which confirms the original charter [ordinance] of March, 1868. This act in express terms 'ratifies all acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'Board of Commissioners of the county full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the county in borrowing money to pay such stock subscription.' The competency of the legislature to enact retrospective statutes to

validate an irregular or defective execution of power by a county corporation is well settled." The court then declared that the ratifying act of August 11, 1868, was a curative act and validated both the county subscription and the issue of the bonds, if any defects existed therein.

What was said in the *Belo* case about the validity of the act of August 11, 1868, as a curative statute, within the power of the legislature to pass, cannot be deemed as an adjudication upon the question whether that act was void upon the ground that the yeas and nays on the second and third readings of the bill were not entered on the journal. It does not appear that any such question was presented or considered, or that the journals of the legislature were in evidence or proved so that the question could have been decided.

But the *Belo* case involved other considerations. Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court however held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force* and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds just as Forsyth County had done.

Whether Wilkes County was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth County is a question not now decided.

In this connection we must allude to what was said in *Commissioners of Wilkes County* v. *Call*, 123 N. C. 308, 317 (1898).

That was a suit brought by the Commissioners of Wilkes County against the County Treasurer to test the validity of the bonds issued in the name of that county to pay its subscription to the stock of the North Western North Carolina Railroad Company. No holder of bonds was made party to the original suit. In the progress of the case however two persons who became owners of *one* bond after the institution of the action were permitted to intervene. The Supreme Court of the State said: "We have not overlooked the fact that in *Belo* v. *Commissioners*, 76 N. C. 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852 [incorporating the Atlantic and North Carolina Railroad Company]; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that 'as the case is presented to us, that question does not arise and we do *not* decide it.'" There is some ground for holding that the question which the court said was neither presented nor decided was whether the "justices could have been compelled by process of law to make the subscription, unless in defence they could have shown that the election was not fairly conducted, but was influenced by the fraud of the railroad company." Whether this be a correct interpretation of the opinion in the *Belo* case or not is immaterial; for that the ordinance of 1868 gave power to Forsyth County to make the subscription and issue bonds in payment of it was expressly affirmed in that case—indeed, it was not there disputed. So far from the *Belo* case turning, in part, upon the ratifying act of 1868, the court distinctly adjudged that the bonds were valid in the hands of *bona fide* holders under the ordinance of 1868 *without the aid of the act of August* 11, 1868.

A further reference must be made to the *Call* case. It was there said (p. 320) that "the ratification of the constitution on

the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements." This view was again expressed in *Commissioners* v. *Payne*, 123 N. C. 432, 486–7. By Article 7, section 7, of the state constitution, it was provided that "no county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, *unless by a vote of a majority of the qualified voters therein.*" If the state court intended to adjudge in the *Call* and *Payne* cases that no municipal subscription to the stock of a railroad company could be made after the constitution of 1868 took effect, except in conformity to section 7, of Article 7, we perceive no reason to doubt the correctness of such interpretation of that instrument; for it could not be that any unexecuted provision of the ordinance of 1868 inconsistent with the state constitution could be executed. *Aspinwall* v. *Commissioners*, 22 How. 364; *Wadsworth* v. *Supervisors*, 102 U. S. 534, 537; *Norton* v. *Brownsville*, 129 U. S. 479, 490. But if it was intended to say that the state constitution abrogated all authority previously given to make such municipal subscriptions, and that no such subscriptions could be made except pursuant to a new statute passed in conformity with the requirements of section 14 of Article 2, we are constrained to say that such a rule could not be applied in this case so as to violate any rights which the plaintiff had under the law of North Carolina as declared by the highest court of the State before the bonds here involved were issued. It is the settled doctrine of this court "that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the State when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation." *Loeb* v. *Trustees of Columbia Township*, 179 U. S. 472, 492, and authorities there cited.

We have referred fully to the *Hill* and *Belo* cases because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the ordinance of 1868, without the aid of subsequent legislation, gave full power to Wilkes County to issue such bonds. This view suggests various questions as to the scope and effect of that ordinance. Assuming, as we must, that the *Belo* and *Hill* cases held that the ordinance of 1868 remained in force after the adoption of the constitution, did the general power given by that ordinance to the North Western Railroad Company to construct a railroad from its eastern terminus, "running by way of Salem and Winston, in Forsyth County, to *some* point in the northwestern boundary line of the State, *to be hereafter determined*," invest Wilkes County with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes County in the same category with Forsyth County? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the State to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the State? Did Wilkes County have authority, under the ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell?

These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the Circuit Court of Appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this

Counsel for Parties.

court should, under the questions certified, consider and determine the entire merits of the case.

We answer the certified questions to this extent:

1. That the Circuit Court of the United States should have regarded the decisions of the Supreme Court of North Carolina in *Bank* v. *Commissioners*, *Commissioners* v. *Snuggs*, *Rodman* v. *Washington*, *Commissioners of Wilkes County* v. *Call*, and *Commissioners* v. *Payne*, above cited, as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed *in such manner* as to become, under the constitution, *laws* of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the state court to be at the time the bonds here involved were made in the name of the county and put upon the market.

These answers will be certified to the Circuit Court of Appeals.

MOUNTAIN VIEW MINING AND MILLING COMPANY *v.* McFADDEN.

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

No. 162. Submitted March 5, 1901. — Decided March 25, 1901.

Blackburn v. *Portland Gold Mining Company*, 175 U. S. 571, and *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, affirmed and applied.

Resort cannot be had to judicial knowledge to raise controversies not presented by the pleadings.

THE case is stated in the opinion of the court.

Mr. W. B. Heyburn and *Mr. L. A. Doherty* for appellant.

Mr. A. B. Browne, *Mr. Alexander Britton* and *Mr. W. T. Stoll* for appellees.

Opinion of the Court.

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

The Mountain View Mining and Milling Company had made application for a patent on a certain lode mining claim in the land office at Spokane, Washington, against which McFadden and others duly filed their protest and adverse claim, and thereupon brought this action "in aid of their said adverse claim, and to determine the right of possession," in the Superior Court of Stevens County, Washington, which was removed on the mining company's petition into the Circuit Court of the United States for the District of Washington, but not on the ground of diverse citizenship. Plaintiffs moved to remand the cause, and the motion was denied.

The petition for removal set up "that the controversy herein is a suit of a civil nature arising under the Constitution and laws of the United States, brought in pursuance of the provisions of section 2326 of the Revised Statutes of the United States, providing for the filing of adverse claims against the application for patent for mining claims, and the bringing of suits in support of said adverse claims."

The petition also set forth that the construction of two acts of Congress was involved, namely, an act approved July 1, 1892, 27 Stat. 62, entitled "An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes," and an act of February 20, 1896, 29 Stat. 9, entitled "An act to extend the mineral land laws of the United States to the lands embraced in the north half of the Colville Indian Reservation." But the jurisdiction of the Circuit Court on removal depended on plaintiffs' statement of their own claim, and that only disclosed an action brought in support of an adverse mining claim.

In *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, and *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, we held that a suit brought in support of an adverse claim under the Revised Statutes, sections 2325, 2326, was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal court regardless of the citizenship of the parties.

It is conceded by counsel on both sides that those decisions are controlling, unless the Circuit Court was entitled to maintain jurisdiction by taking judicial notice of the fact "that the Mountain View lode claim was located upon what had been or was an Indian reservation," and "of the act of Congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain;" notwithstanding no claim based on these facts was stated in the complaint. But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge. Thayer, Treatise on Evidence, ch. VII; *Oregon &c. Railway* v. *Skottowe*, 162 U. S. 490.

In *Spokane Falls &c. Railway Company* v. *Ziegler*, 167 U. S. 65, plaintiff alleged in his complaint that he was in possession, as a preëmptor, of a tract of land, and entitled to a patent for the same from the United States; that the defendant company, being a corporation of the Territory of Washington, had seized a strip of his land and appropriated it for railroad purposes without his consent and without having compensated him therefor; but that the entry on and seizure of the land was under and pursuant to the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks. As we had judicial knowledge that the authority of the territory to legislate in respect of the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of Congress of March 3, 1875, we held that the plaintiff's complaint disclosed the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress. The case before us affords no such basis for sustaining the jurisdiction.

In *Powell* v. *Brunswick County*, 150 U. S. 433, 440, we said: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment

without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered." And see *Yazoo & Mississippi Railroad* v. *Adams*, 180 U. S. 41.

The result is that

The judgment of the Circuit Court of Appeals must be reversed; the judgment of the Circuit Court must be also reversed, and the cause be remanded to that court with a direction to remand it to the state court, the costs of this court and of the other courts to be paid by the Mountain View Mining and Milling Company. So ordered.

In re ALEXANDER McKENZIE, PETITIONER.

ORIGINAL.

No. . Original. Submitted February 26, 1901.—Decided March 25, 1901.

The writ of *habeas corpus* cannot be made use of as a writ of error, and when applied for to relieve from restraint in punishment for contempt in the violation of orders of court, will not be issued unless the orders violated are absolutely void.

Orders of the District Court of Alaska, second division, appointing a receiver and granting an injunction, are appealable to the Circuit Court of Appeals for the Ninth Circuit, and on refusal of the District Court to do so, the Court of Appeals may allow such appeals with supersedeas, and grant writs of supersedeas, if considered necessary.

If a judge of the Court of Appeals allows such appeals and supersedeas, and directs the issue of writs of supersedeas, ordering among other things the restoration of the property taken possession of by the receiver, orders of the Court of Appeals approving of his action in doing so, and of the writs so issued, are not void.

Where appeals are granted and the original citation and writ of supersedeas together with certified copies of the assignments of error and of the super-

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sedeas bond and of the orders allowing the appeal are filed in the District Court, the judgment of the Circuit Court of Appeals that this is sufficient to give effect to the appeals, is not open to review on this application.

The Circuit Court of Appeals having jurisdiction in the matter of the appeal herein involved, its decrees and orders in the premises are not void and cannot be revised on *habeas corpus*.

THIS was an application by Alexander McKenzie for leave to file a petition for *habeas corpus* to relieve him from an alleged unlawful restraint under certain orders of the Circuit Court of Appeals for the Ninth Circuit committing him for contempt.

The petition stated that on July 23, 1900, McKenzie was, by the judge of the second division of the District Court of Alaska, appointed receiver of the property involved in an action then pending in said court, entitled *L. F. Melsing et al.* v. *John I. Tornanses*, and was directed by the order appointing him as receiver to take possession of and operate a certain placer mining claim situated on Anvil Creek near Nome, in the District of Alaska; a copy of the order was attached. That he duly qualified as such receiver and took possession of and operated said mine and was engaged in operating the same continuously from the time of his appointment down to and including the 14th day of September, 1900. That on the 29th of August, 1900, an appeal from said order, so appointing him receiver, was allowed by the Hon. W. W. Morrow, judge of the Circuit Court of the United States for the Northern District of California; that a citation on said appeal was on that day signed by the said circuit judge, and a supersedeas bond approved. That none of these papers were filed with the clerk of the District Court of Alaska, 2nd division, until the 14th day of September, 1900. That on the same 29th day of August, 1900, the clerk of the United States Circuit Court of Appeals for the Ninth Circuit issued a writ of supersedeas, a copy of which was attached and made a part of the petition.

"That thereafter and on the 14th day of September, 1900, a copy of such writ of supersedeas was served on your petitioner at Nome, Alaska; that your petitioner immediately ceased operations on said properties so taken possession of by him as such receiver under and in obedience to the order of the Dis-

trict Court of Alaska, 2nd division, but that your petitioner then and there refused to deliver to the defendants in said action the gold and gold dust then in his possession as receiver, and which had come to his possession from operating said properties.

"That thereafter, on the 1st day of October, 1900, the United States Circuit Court of Appeals for the Ninth Circuit made and entered an order directing the United States marshal of the Northern District of California to attach the person of the said Alexander McKenzie, and produce him before the United States Circuit Court of Appeals for the Ninth Circuit, at the city and county of San Francisco, State of California, to answer to his refusal to obey the said writ of supersedeas hereinbefore referred to; that this matter came on regularly to be heard, and on the 11th day of February, 1901, the said United States Circuit Court of Appeals, Ninth Circuit, ordered and adjudged your petitioner guilty of contempt of said court, and adjudged that he be imprisoned in the county jail of Alameda County, California, for the period of six months, and that by virtue of said judgment and in obedience to it he is now confined in the county jail of Alameda County, California, by Oscar L. Rogers, sheriff of Alameda County, California.

"Your petitioner further states and alleges, as he is advised, that the said United States Circuit Court of Appeals for the Ninth Circuit had no jurisdiction or lawful authority to cause the arrest of your petitioner, or to proceed against him in the manner and form aforesaid, and that the said pretended process, arrest, order, trial, and judgment and warrant whereby your petitioner was committed to the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and whereby he is held in the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and imprisoned and restrained of his liberty, were and are, each and all of them, wholly without authority of law, in violation of law and of the just rights of your petitioner.

"That on the 29th day of August, 1900, the said Circuit Court of Appeals for the Ninth Circuit was without authority of law to issue said writ of supersedeas, so called, or order the said writ to issue, for that it did not then have jurisdiction of

the action entitled *L. F. Melsing et al.* v. *John I. Tornanses*, as at that time no appeal had been taken to the said court in the said case of *L. F. Melsing* v. *John I. Tornanses*, or from any order made or entered in said cause by the District Court of Alaska, 2nd division, because:

"(*a*) On said 29th day of August, 1900, no appeal had been taken in said cause from the District Court of Alaska, 2nd division, to the Circuit Court of Appeals for the Ninth Circuit, for on said date neither the order allowing the appeal nor the assignment of errors, nor the undertaking on appeal, nor citation, had been filed with the clerk of the District Court for the District of Alaska, 2nd division, and no appeal had been allowed by said court or the judge thereof.

"(*b*) That on the 1st day of October, 1900, when the warrant for the arrest of your petitioner was issued, the Circuit Court of Appeals for the Ninth Circuit was entirely without jurisdiction in the above-entitled cause, for on said date neither the order allowing the appeal nor any assignment of errors or undertaking on appeal had been filed with the clerk of the District Court of Alaska, 2nd division; and, further, that on said date the above-entitled cause had not been docketed in the Circuit Court of Appeals for the Ninth Circuit, nor the record in said cause filed therein, and the return day of the appeal, as designated in the order allowing the appeal herein, and citation signed by the Honorable W. W. Morrow, the judge allowing said appeal, had passed, and there had been no extension of the time to file such record.

"That the said Circuit Court of Appeals for the Ninth Circuit has been at all times without jurisdiction in the action of *L. F. Melsing et al.* v. *John I. Tornanses*, or of any order made therein, for that no appeal to said honorable court from the District Court of Alaska has ever been taken in the above-entitled action or from any order made therein by said District Court of Alaska, and that neither the order allowing an appeal signed by the Honorable W. W. Morrow on the 29th day of August, 1900, or any assignment of errors in said matter, nor any undertaking upon appeal has at any time been lodged or filed with the clerk of the said District Court of the District of Alaska.

"That the paper entitled a writ of supersedeas annexed hereto was issued by the clerk of the Circuit Court of Appeals, Ninth Circuit, on the order of the Honorable W. W. Morrow, Circuit Judge for the Ninth Circuit, and as such judge and not otherwise; that the said Honorable W. W. Morrow, Circuit Judge as aforesaid, was without authority of law to order the issuance of said writ, for that the same should only be issued, if at all, by the United States Circuit Court of Appeals for the Ninth Circuit, acting as a court, and power to issue the same was not vested in the individual judges thereof; therefore said order of said Honorable W. W. Morrow, Circuit Judge as aforesaid and the said writ issued in obedience to his order, was and is void.

"Defendant alleges that on the dates when it is alleged in the affidavits on which the warrant for the arrest of this defendant was issued this defendant failed to obey said writ of supersedeas said writ of supersedeas was inoperative and void, for that no appeal had been taken to said court in the action entitled *L. F. Melsing et al.* v. *John I. Tornanses.*

"That the United States Circuit Court of Appeals for the Ninth Circuit and the judges thereof were without authority to issue or direct the issuance of the writ of supersedeas individually in this case, inasmuch as said writ went beyond the proper scope of such writ and nullified the order of the lower court instead of directing a mere stay of proceedings.

"A judge of the Circuit Court of Appeals for the Ninth Circuit had no power to grant the supersedeas staying the proceedings in the court below herein, for the reason that such power was vested exclusively in the District Court of Alaska; that the said Court of Appeals for the Ninth District was and is without jurisdiction in the premises, because:

"(*a*) There is no provision of law authorizing an appeal from an interlocutory order from the District Court of Alaska appointing a receiver, or from an order refusing to discharge a receiver, and said appeal was not taken or attempted to be taken within the time limited by law.

"(*b*) Because the order in question made by the District Court of Alaska is an interlocutory order appointing a receiver, and

not an interlocutory order granting an injunction or refusing to dissolve an injunction.

"That the United States Circuit Court of Appeals for the Ninth Circuit did not authorize or direct the issuance of the paper entitled a writ of supersedeas, which it is claimed this defendant disobeyed, and which was issued by the clerk of the Circuit Court of Appeals, Ninth Circuit, on the 29th day of August, 1900, and that the same was issued by said clerk without authority of law and was and is void.

"Your petitioner hereto attaches a copy of the record on appeal in said cause, and a copy of the record in the matter of his alleged contempt and a copy of the testimony submitted in the trial of said alleged contempt, marked Exhibits A, B, C, and D."

Petitioner prayed for the writs of *habeas corpus* and certiorari and for his discharge.

"*Copy of Order Appointing Receiver.*

"Now, on this 23d day of July, A. D. 1900, come the complainants, L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, above set forth, and upon the complaint filed in said action on behalf of the complainants comes on for hearing the application of said complainants for the appointment of a receiver, and the same having been considered by the court and the court having been fully advised in the premises, it is now hereby—

"Ordered, adjudged and decreed that Alexander McKenzie of Nome, Alaska, be, and he is hereby, appointed receiver to take charge of and manage and control the placer mining claim mentioned and described in said complaint, and the said receiver is hereby authorized and directed to take immediate possession of said placer mining claim and to manage, mine, and work the same, and perform such other acts and things in and about said premises as are authorized by law, and to preserve the gold and gold dust and proceeds resulting from the working and mining of said claim, and to dispose of the same, subject to the further orders of this court.

"It is further ordered that the said receiver file with the

clerk of this court a proper bond with sureties to be approved by the judge of this court, in the penal sum of five thousand dollars, conditional for the faithful discharge of his duties as such receiver, and accounting for all the funds coming into his hands as such, according to the order of this court.

"It is further ordered that the said defendants, and each and all of them, turn over and deliver to said receiver the immediate possession, control, and management of said placer mining claim, and that the said defendants, and each of them, are hereby restrained and enjoined until the further order of this court from interfering with the control or management of said receiver in the mining and working of said placer mining claim, or any part thereof, or from interfering in any manner whatever with the possession or management of any part of the said property over which said receiver is hereby appointed; or in interfering in any manner to prevent the discharge of his duties or of the operation of said property under the order of this court, until the further order of this court."

"*Copy of Writ of Supersedeas, entitled in the Circuit Court of Appeals for the Ninth Circuit.*

"United States of America, *ss:*

"The President of the United States of America to the Honorable Arthur H. Noyes, Judge of the District Court for the District of Alaska, second division, and to L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, and Alexander McKenzie, Greeting:

"Whereas, in the above-entitled cause appellant has petitioned this court for an order allowing an appeal to this court from an interlocutory order, judgment and decree given and rendered herein on the 23d day of July, 1900, by the District Court for the District of Alaska, second division, granting unto complainants herein an injunction ordering and directing the defendant and appellant to cease from working a certain mining claim in said bill of complaint mentioned called No. 10 Above Discovery, on Anvil Creek, situated within said District of Alaska, and also ordering and directing said defendant to turn the possession of said mine unto the said Alexander

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McKenzie, as receiver thereof, and also ordering and directing said receiver to take possession of said mine and mining property and to conduct and work the same as receiver thereof, together with such other and various things as are in said order provided, and also allowing an appeal from the order made and entered by said court in said action on the 10th day of August, 1900, by which said court denied appellant's motion to vacate and set aside said first-named order, judgment and decree, and has also in said petition prayed for a writ of supersedeas, and said appeal having been by said Circuit Court of Appeals allowed and said petition for a writ of supersedeas granted upon the appellant's filing a bond in the sum of $20,000 to be approved by this court, and said bond in the sum of $20,000 with approved sureties having been filed and approved by this court:

"Now, therefore, you the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, Alexander McKenzie, and Arthur H. Noyes, judge of said District Court for the District of Alaska, second division, and each of you are hereby commanded that from every and all proceedings on any execution of the aforesaid order, or in anywise molesting said defendant and appellant on the account aforesaid, or in any manner interfering with his possession of said property, you entirely surcease and refrain as being superseded, and that you, the said Alexander McKenzie, do forthwith return unto said defendant the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas together with your acts and doings thereon to said District Court for the District of Alaska, second division, as you will answer the contrary at your peril, and you, the judge of said District Court for the District of Alaska, second division, are hereby commanded to stay any and all proceedings which may have issued as aforesaid upon said order, and to stay any and all further proceedings in relation to said order and the appointment of a receiver thereunder in this case pending the appeal last aforesaid to this court.

"Witness the Honorable Melville W. Fuller, Chief Justice of

the United States this 29th day of August, in the year of our Lord one thousand nine hundred.

[SEAL] F. D. MONCKTON,
"*Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.*"

From the records and exhibits attached to the petition it appeared that on July 24, in the case of *Melsing* v. *Tornanses*, the parties claiming under Tornanses moved the District Court to vacate the order of July 23, supporting the motion by Tornanses' notice of location of his claim, by his deed of conveyance, and by numerous affidavits in respect of action thereunder. The District Judge on August 10 entered an order denying the motion made to vacate the order granting the injunction and appointing the receiver; and on August 14 defendants applied to the District Judge for an order allowing an appeal from the order granting the injunction and appointing the receiver, the proper bond on appeal being at the same time presented to the judge, together with an assignment of errors and a proposed bill of exceptions for settlement and allowance, in response to which the District Judge, on August 15, made an order "that said proposed bill of exceptions is in each and every part thereof disallowed as a bill of exceptions herein, and the settlement thereof, or of any proposed bill of exceptions herein, is hereby refused; that said petition for an order allowing said appeal is hereby denied, and said judge declines to accept or fix the amount of any bond for costs thereof or allow a supersedeas bond to be given, or fix the amount thereof."

On the same day, to wit, August 15, 1900, the judge made and entered the following order:

"It is further ordered that in addition to the powers and authorities already granted the receiver appointed, the said receiver is hereby ordered to take possession of the placer claim mentioned in the complaint herein, and all sluice boxes, dams, excavations, machinery, pipe, boarding houses, tents, buildings, safes, scales, and all other personal property fixed or movable on the said placer claim; also all gold, gold dust, precious metals, money, books of account, and each and all personal property

upon the said claim connected therewith, and in any way appertaining thereto, in possession of and under the control of the defendant, his lessees, grantees, assigns, employés; and all and every person in possession of the said claim or claiming any right, title or interest in and to the said placer claim, or any gold dust therein or any personal property thereon of any nature whatsoever, are hereby ordered to deliver the same to the said receiver, and are hereby restrained from interfering with the said receiver in quiet and peaceable possession of the same, or any agent that the said receiver may designate to take possession thereof.

"It is further ordered that this order shall revoke all and any order in conflict herewith, and does hereby revoke the same; and

"It is further ordered that this order shall remain in full force and effect until further order of this court.

"It is further ordered that a copy of this order shall be served upon any person in possession of or claiming possession of the property described."

The allowance of an appeal, the taking of a supersedeas bond, the issue and approval of a writ of supersedeas, in this and another case, followed. Certified copies of the order allowing the appeal in each case, together with certified copies of the assignments of error and of the bond, were with the original writ of supersedeas and the original citation in each case filed in the lower court on the 14th of September, 1900, and copies thereof served at once upon the receiver McKenzie and a demand made upon him for restitution of the property in accordance with the writs.

The Circuit Court of Appeals from the evidence taken on the hearing of the proceedings in contempt found the fact to be "that the respondent McKenzie thereupon refused and continued to refuse to restore in accordance with the requirements of the writs of supersedeas, the gold, gold dust, and other personal property received by him under the orders of the trial court, and that fact being made to appear to this court by affidavits on the 1st day of October, 1900, and it further being made to appear to this court that the last steamer for the season

would leave the city of Seattle for Nome within a few days, and that no further communication could be had with that section of the country until the spring or early summer of 1901, this court thereupon made an order directing its marshal to proceed to Nome, enforce its writs of supersedeas, arrest the offending receiver and produce him at the bar of this court. The evidence taken upon the hearing of these proceedings is also to the effect, and we so find the fact to be, that the receiver McKenzie at all times had it within his power to comply with the requirements of the writs of supersedeas issued out of this court; that he contumaciously refused to restore the gold, gold dust, and other personal property to the defendants, as required by those writs, and has continued such refusal ever since."

Mr. J. M. Wilson, *Mr. T. J. Geary*, *Mr. C. A. Severance*, and *Mr. F. B. Kellogg* for petitioner.

No opposing appearance.

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

The writ of *habeas corpus* cannot be availed of as a writ of error and unless the writ or orders, for a violation of which petitioner is being punished, in the case referred to in the petition, were absolutely void, this application must be denied. Accordingly it is contended that there was no legal authority for the issue of the writ of supersedeas, and that the Circuit Court of Appeals had not, at the time the writ was issued, nor at any other time, jurisdiction of the appeal in question.

It is said the appeal was not "taken" until the allowance thereof was filed in the office of the District Court for the District of Alaska.

In *Credit Company* v. *Arkansas Central Railway Company*, 128 U. S. 258, a final decree had been entered in the Circuit Court for the Eastern District of Arkansas dismissing a bill for want of equity on the 22d of January, 1883, and on the 22d of January, 1885, a petition for an appeal was presented to Mr.

Justice Miller in Washington and allowed, citation signed, and bond approved. These papers were filed with the clerk of the Circuit Court, January 27, 1885, being five days after the expiration of two years from the date of the final decree. It was ruled that an appeal could not be said to be "taken" until it was in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court.

In *Brandies* v. *Cochrane*, 105 U. S. 262, it was decided that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office.

In *Brown* v. *McConnell*, 124 U. S. 489, it was held that the signing of a citation returnable to the proper term of this court, though without the acceptance of security, nevertheless constituted an allowance of appeal which would enable this court to take jurisdiction and to afford the appellants an opportunity to furnish the requisite security here.

In these cases the original citation and the original writ of supersedeas together with certified copies of the assignment of errors and of the supersedeas bond and of the orders allowing the appeals, were filed in the District Court, September 14, 1900. This was held by the Circuit Court of Appeals sufficient to give effect to the appeals, and we concur in that conclusion if treated as open to reëxamination here.

It is also contended that an appeal did not lie from the orders of July 23 and August 10, inasmuch as they were interlocutory orders in respect of the appointment of a receiver. June 6, 1900, an act was passed "making further provision for the civil government in Alaska and for other purposes," 31 Stat. 321, c. 786, section 504 of which provided: "Appeals and writs of error may be taken and prosecuted from the final judgments of the District Court for the District of Alaska, or any division thereof direct to the Supreme Court of the United States in the following cases, namely: . . . and that in all other cases

where the amount involved or the value of the subject-matter exceeds five hundred dollars, the United States Circuit Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of error or appeal the final judgments, or orders, of the District Court.

Section 507 read as follows: "An appeal may be taken to the Circuit Court of Appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the District Court within sixty days after the entry of such interlocutory order. The proceedings in other respects in the District Court in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the District Court."

Section 508 provided that "all provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the Ninth Circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts, respectively, from the District Court for the District of Alaska."

Section seven of the judiciary act of March 3, 1891, as amended by the act of February 18, 1895, 28 Stat. 666, c. 96, provided that where upon a hearing in equity in a District Court or a Circuit Court, an injunction should be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction should be refused, an appeal might be taken from such interlocutory order or decree to the Circuit Court of Appeals within thirty days from the entry of such order or decree; "and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." On June 6, 1900, the section was further amended so as to allow such appeals from orders appointing a receiver. 31 Stat. 660, c. 803. Reading these acts in *pari materia*, as we should, it may well be concluded that appeals were thereby authorized from the District Court of Alaska from interlocutory orders appointing

receivers, and that such appeals might be prosecuted from that court within sixty days from the entry of such orders. Moreover, the order of July 23, granted an injunction in connection with the appointment of the receiver. In the case of the *Tampa Railroad Co.*, 168 U. S. 583, decided before the statute was amended, it was held that an appeal would lie from such an order and would bring up the entire order, including the appointment.

In *Highland Avenue Railroad* v. *Columbian Equipment Co.*, 168 U. S. 627, the order was confined to the appointment of the receiver, and contained no injunction.

The Circuit Court of Appeals, however, held that these orders were final decrees, and appealable as such. As we are of opinion that an appeal was allowable on other grounds we need not discuss the correctness of this view.

Granting all this, it is further insisted that the writ of supersedeas was void because not directed to be issued by the Court of Appeals as a court. By section four of the act of March 3, 1891, it is provided that "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same;" and by section eleven that "any judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the condition of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." That this court as a court has power to issue a writ of supersedeas under section 716 of the Revised Statutes is clear for that section concedes its power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeably to the usages and principles of law. This is equally true of the Circuit Courts of Appeals under § 12 of the act of March 3, 1891.

Although the issue of the writ is not ordinarily required there are instances in which it has been done, under special circum-

stances, and in furtherance of justice. *Stockton* v. *Bishop*, 2 How. 74; *Hardeman* v. *Anderson*, 4 How. 640; *Ex parte Milwaukee Railroad*, 5 Wall. 188.

In *In re Claasen*, 140 U. S. 200, we held, referring to sections 1000 and 1007 of the Revised Statutes, that a justice of this court had authority not only to allow the writ of error but also to grant the supersedeas. After the decision in that case Rule 36 was adopted providing that any justice of this court or any Circuit Judge within his circuit or any District Judge within his district might allow an appeal or writ of error, take proper security, and sign the citation, and that he might "also grant a supersedeas and stay of execution, or of proceedings, pending such writ of error or appeal."

The court below had refused to grant an appeal and as an appeal lay, the judge of the Circuit Court of Appeals had the power to award it and to grant a supersedeas, and if in his judgment a writ of supersedeas was required, under the particular circumstances, the order for it to issue was not in itself void, nor was the process void, issued under such order. Obedience to an order granting a supersedeas is as much required as to an order for a writ of supersedeas and to the writ thereupon issued. The essential point is that the order or decree below is superseded, and the parties affected must govern themselves accordingly.

Nor do we think that the language used in section 507 of the Alaska Code operated as a limitation on the power of the Court of Appeals to grant a supersedeas. It is true that the section provided that "the proceedings in other respects in the District Court in the cause in which such interlocutory order was entered, shall not be stayed during the pendency of such appeal, unless otherwise ordered by the District Court." And similar language was used in section seven of the judiciary act of March 3, 1891.

In *In re Haberman Manufacturing Co.*, 147 U. S. 525, 530, it was held that in view of the terms of the act the lower court had a discretion to grant or refuse a supersedeas, and that thereupon this court would not issue a mandamus to command the judge of that court to approve a supersedeas bond, to supersede

an injunction, and to enter an order vacating the injunction. Even if the language used be given this scope beyond proceeding with the main cause, it nevertheless does not interfere with the inherent power of the appellate court to stay or supersede proceedings on appeal from such orders as those here. Tested by the principles and rules which relate to chancery proceedings, the power of the appellate court to render its jurisdiction efficacious, the court below refusing to do so, is unquestionable.

The frame of the writs in these two cases, one of which is attacked on this application, was approved by a specific order of the Circuit Judge; but it is objected that so much thereof as directed the receiver to restore the property taken by him was void. The authorities are many that where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and that this may be directed to be done. It is at all events evident that an order that he should do so is not void in itself. We cannot on this application review the judgment of the Circuit Court of Appeals sustaining such an order and approving of the writs as issued.

The opinion of the Circuit Court of Appeals presents a comprehensive review of the facts and circumstances surrounding the granting of the orders appealed from, but it has not been necessary to recapitulate these matters at length on this inquiry. The question before us is whether petitioner is unlawfully restrained of his liberty by way of punishment for violation of orders absolutely void.

The distinction between a total want of power and a defective exercise of it is obvious, and want of power cannot be predicated of mere errors, if such were committed here, which we do not intimate.

We hold that the Circuit Court of Appeals had jurisdiction in the premises, and was clothed with the power to pass on all questions in respect of the means taken to enforce and maintain it. We are not called on to revise its conclusions on this application. It is enough that, in our judgment, it has not exceeded its powers.

Leave denied.

Syllabus.

THROCKMORTON *v.* HOLT.

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

No. 21. Argued December 7, 10, 1900.—Decided March 25, 1901.

At the trial of this case before the jury, the main issue was upon the validity of the will of Adjutant General Holt. Tecumseh Sherman, a son of General Sherman, was called to prove that the signature of his mother as a witness was genuine. He was not inquired of as to the genuineness of the signature of his father, because his uncle, Senator Sherman, had testified that that signature was genuine. Subsequently Mr. Randolph testified that he was familiar with the signature of General Sherman, giving his sources of knowledge, and that he was of opinion, (giving his reasons for it,) that it was not his signature. Tecumseh Sherman was recalled to prove that the objection found to the signature of his father was not an unusual feature in his signature, but the court, on objection, excluded the evidence. *Held*, that the evidence was competent as rebuttal, and should have been received.

It is the general rule that if evidence which may have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of the presiding judge, such direction cures any error which may have been committed by its introduction; but there may be instances, (and the present case is one,) where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error. There may also be a defect in the language of the attempted withdrawal. In such a case, and under the particular facts in this case, the names of the witnesses should have been given, and the specific evidence which was given by them, and which was to be withdrawn should have been pointed out.

The opinion of a witness as to the genuineness of the handwriting found in a paper, based in part upon his knowledge of the character and style of the composition and the legal and literary attainments of the individual whose handwriting it purports to be, are not competent to go to the jury upon the question raised in this case.

Declarations, either oral or written, made by a testator, either before or after the date of an alleged will, unless made near enough to the time of its execution to become part of the *res gestæ*, are not admissible as evidence in favor of or against the validity of the will.

If not admissible generally, they are inadmissible even as merely corroborative of evidence denying the genuine character of the handwriting.

No presumption of revocation of the will by the testator, or under his di-

Statement of the Case.

rection, arises from the appearance of this will when first received by the register of wills. There must be some evidence of an act by the deceased, or under his direction, sufficient to show the fact, or the instrument must have been found among the papers of the deceased, mutilated, torn or defaced, under such circumstances that the revocation might be presumed.

As the production of the will in this case created no presumption of revocation, it was necessary to prove that the act of mutilation was performed by him or by his direction, with an intention to revoke, and his declarations, not being part of the *res gestæ*, cannot be used for that purpose.

THIS was a proceeding in the Supreme Court of the District of Columbia for the purpose of proving an alleged will of the late Joseph Holt, a distinguished lawyer and for many years Judge Advocate General of the United States Army, who died at the age of eighty-seven, in Washington on August 1, 1894, after a residence of many years in that city. The proceeding resulted in the rejection of the paper on the ground that it was not the will of Judge Holt but was a forged document, and judgment refusing probate was entered upon the verdict of the jury. The proponents of the will appealed to the Court of Appeals of the District, but before the appeal was brought on for argument Miss Hynes, one of the legatees named in the will, withdrew her appeal. The judgment of the Supreme Court upon the appeal of the other proponents was subsequently affirmed by the Court of Appeals, and the proponents of the paper, excepting Miss Hynes, have brought the case here by writ of error.

The record shows that Judge Holt died leaving no relatives nearer than nieces and nephews, residents of the States of Indiana, Mississippi and Kentucky, and of the city of Washington, D. C., all being respondents in this appeal. He had been twice married and both wives had died long prior to his own demise. He had no children by either wife. Immediately upon his death his nephews, Washington D. Holt and William G. Sterrett, came to his late residence in Washington, and the keys being delivered to them by one of the servants, a strict search was made for a will but none was found. While the nephews were in possession of the house and the search was going on for the

will, papers were burned and destroyed, all of which the nephews testified were wholly unimportant, and consisted of letters from relatives of Judge Holt to him, and that no papers destroyed were of a testamentary character. No will having been found, the nephews above named, and another, named John W. Holt, filed a petition in the Supreme Court of the District of Columbia, holding a special term for orphans' court business, in which the fact of intestacy was stated and the appointment of an administrator was asked. Pursuant to the petition and on September 28, 1894, the National Safe Deposit, Savings and Trust Company of the District was appointed administrator of the estate, and has continued so to act since that time.

Up to August 26, 1895, nothing out of the ordinary occurred in the administration of the estate, but on the last mentioned date a sealed envelope, addressed to the register of wills in Washington was received by that officer, which envelope was postmarked "Washington, D. C., August 24, 6 P. M. 1895, L." The envelope was opened by the register who found therein a paper purporting to be a will signed by "J. Holt," dated February 7, 1873, and on the paper appeared what purported to be the signatures of Ellen B. E. Sherman, U. S. Grant and W. T. Sherman as witnesses. By this paper Judge Holt gave one half of his estate to Lizzie Hynes, her real name being Elizabeth Hynes, and the other half to Josephine Holt Throckmorton.

Lizzie Hynes had been left an orphan in infancy and had been committed to the care of her uncle, Dr. Harrison, and his daughter, the first Mrs. Holt, and she had taken special charge of the child up to the time of her own marriage to Judge Holt, who had promised his wife at the time of their marriage to care for the child, and Mrs. Holt upon her deathbed asked and received a promise from Judge Holt that he would always take care of Lizzie, and treat her as if she were his own daughter. From that time until his death, Judge Holt fully and in all things kept his promise and always supported her, she living most of the time in Kentucky, though frequently visiting and traveling with him.

The other beneficiary, Miss Throckmorton, was Judge Holt's goddaughter, her mother being the cousin of his second wife, and

while her father was a young man Judge Holt treated him with great kindness, and always so treated Miss Throckmorton.

The following is the text in full of the alleged will, with punctuation as in the original:

"In the name of God Amen

"J, Holt, of the City of Washington D. C. being of sound mind declare this to be my last will & Testament

"I do hereby give devise & bequeathe all of my property—both personal & real to Lizzie Hynes—cousin of my first wife & to Josephine, Holt, Throckmorton—who is my God-child & to their heirs & assigns forever—I do hereby direct that at my death all of my property be divided equally between them.—

"Lizzie Hynes is to inherit hers at my death Josephine at the age of 21, her father Maj. Charles B. Throckmorton will hold her share in trust—

"I appoint Mr Luke Devlin of the city of Washington D. C. whose character I believe to be of the highest standard & who will I am certain carry out my wishes my executor

"Signed & sealed by me in the presence of these witnesses in the City of Washington, D. C.

"Feby 7th 1873—

J. Holt

"Ellen B. E. Sherman

"U. S. Grant

"W. T. Sherman"

There was nothing in the envelope addressed to the register of wills other than this paper. The postmarks on the package indicated that it had been deposited in one of the many local mail boxes to be found in the northwest quarter of the city of Washington, which is quite a large district, running from North Capitol street on the east to Georgetown on the west, and bounded on the south by the Mall and north by the boundaries of the city. When the paper was taken from the envelope it bore evident signs of mutilation by burning and tearing, and although the paper recited that it was signed and sealed, there was no seal on it, and if it ever had been affixed it had been torn away. At the time the paper bears date, February 7, 1873, Ellen B. E. Sherman was the wife of W. T. Sherman, who

was then the general commanding the army of the United States, and U. S. Grant was then President. The paper was torn nearly in two across the page between the signatures of the testator and that of the first witness. Some of the evidence tended to show that the tearing was complete, but, as stated by the court below, the weight of the evidence was that it was not entirely separated at one end. The burning appeared on the edges of the paper and at the top, but the body of the instrument was so far intact as to be plainly legible.

Upon the receipt of this paper by the register of wills he communicated with Mr. Luke Devlin, the person named therein as executor, and after the latter had seen it he communicated with the parties interested, and on September 20, 1895, filed his petition in the Supreme Court of the District of Columbia, held for orphans' court business, for the probate of the paper as the last will and testament of Joseph Holt, deceased.

The contestants, as next of kin, filed their caveat October 18, 1895, opposing the probate of the paper, to which answer was made and filed December 2, 1895, by Luke Devlin, the executor, and by the Misses Hynes and Throckmorton, the two legatees named in the paper.

Issues were duly made up in the orphans' court and transferred to the Circuit Court for trial by jury. They are as follows:

"1. Was the paper writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?

"2. Was the execution of said paper writing procured by fraud exercised and practised upon said Joseph Holt by any person or persons?

"3. Was the execution of said paper writing procured by the undue influence of any person or persons?

"4. If the said paper writing was executed by the said Joseph Holt as his last will and testament, has the same been revoked by said testator?"

Upon the trial of these issues the proponents of the paper proved the death of the subscribing witnesses, and gave evi-

dence in regard to the genuineness of their signatures as well as of Judge Holt's. Senator John Sherman testified to the genuineness of the signature of his brother, General Sherman; Colonel Frederick D. Grant to that of his father, President Grant, and P. Tecumseh Sherman to that of his mother, Mrs. Ellen B. E. Sherman. Mr. Henry B. Burnett testified that in his opinion the body of the will and the signature of the testator were written by Judge Holt; that he became acquainted with him in 1863; had frequently seen him write and had had considerable correspondence with him which continued up to 1889, and that he was familiar with his handwriting. After this evidence was given counsel for proponents offered the paper in evidence, which was objected to by counsel for the contestants on the ground that the paper was evidently separated into two parts; that it purported to be under seal, and the seal, if it ever bore one, had been torn away; that it appeared to have been burned and mutilated, and had been sent to the register of wills anonymously, and that it was incumbent upon proponents to explain these circumstances before the will could be read to the jury. The objection was overruled and the paper read in evidence.

Elizabeth Hynes, one of the legatees and proponents, was called and testified that the paper writing was never in her possession, and she never saw it until it was shown her on the witness stand at the trial.

Miss Throckmorton also testified that she had never had the paper in her custody and had never seen it until it was shown her by the register of wills in the latter part of October, 1895, and that the first she knew of its existence was through a telegram from Mr. Devlin, which she received in New York city, August 26, 1895; that she had known Luke Devlin when she was a child but had not seen him since until after the paper was filed.

Mr. Devlin, the person named as executor in the paper writing, also testified that it was never in his possession, and that he first saw it in the office of the register of wills on the day it had been received there. On cross-examination Devlin testified that he knew Joseph Holt well since 1862, having been a copyist

and messenger at that time in the office of the Judge Advocate General when Judge Holt succeeded to that office; that he continued to be employed in that office until 1876, when Judge Holt retired therefrom; that he had little communication with him in relation to office matters; that he visited Judge Holt once or twice at his house; that he was in the habit of meeting him socially at the residence of Mrs. Throckmorton, Sr., the grandmother of Miss Josephine H. Throckmorton, from 1865 to 1878; that he had not seen Mrs. Throckmorton, Sr., more than four or five times during a period of ten years preceding the receipt of the will at the register's office, and on learning of the existence of the will he had to consult the city directory to ascertain where she then lived; that on the day the will reached the register of wills he received a telephone message from the register, went to his office, and saw the will for the first time. He called on Mrs. Throckmorton, Sr., and on the same day telegraphed Miss Josephine H. Throckmorton of the finding of the will, having first learned her address from her father upon inquiry at the War Department; that he called on several occasions in later years at Judge Holt's house, and was informed by the colored servant that he was out or that he was engaged, and asked witness to call again, the last of these visits being about April 9, 1894, shortly before his death; that he had met Judge Holt outside on several occasions, the last of which was about two years before his death, and conversed with him.

At this point the proponents announced their *prima facie* case closed, but opposing counsel objected that it was incumbent upon the proponents to put in all their testimony essential to the establishment of the alleged will before contestants were called upon to offer any; whereupon the court ruled that because of the fact that there was no attesting clause to the will, it was proper and necessary for the proponents to offer all the evidence they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt to the will, and counsel for the proponents accepted the ruling as being a matter within the discretion of the court.

Testimony was then given by Elizabeth Hynes, who stated that she had corresponded with Judge Holt for forty years,

and that in her opinion both the body of the will and the signature were in his handwriting. Mr. Devlin testified that he had had daily opportunity for thirteen years of becoming familiar with Judge Holt's handwriting, and that the signature to the instrument was undoubtedly in testator's handwriting.

Miss Throckmorton testified that she had corresponded with him, and was familiar with his handwriting and knew his signature, and that both the will and the signature were in the handwriting of Joseph Holt.

Other witnesses were called, who testified that they were acquainted with the handwriting of Judge Holt, and that in their opinion the body of the paper and the signature were in his handwriting; after which the proponents rested.

Counsel for the contestants then offered in evidence the deposition of John Judson Barclay, in which the deponent testified that he knew the testator intimately from 1857 to 1866, and at intervals thereafter until the time of his death, and that he had last seen him in November, 1893, when he was in impaired health and in a darkened room, at which last stated time he had a conversation with Judge Holt in regard to the disposition by him of his property and estate. Evidence in regard to this conversation was duly and fully objected to, and the objection overruled and an exception taken by the proponents. The witness then stated the conversation as follows:

"In our conversation he referred most touchingly to my deceased sister, Mrs. Sarah Barclay Johnson, and made many kind inquiries in regard to my aged mother, who had also been his warm personal friend for many years. In this connection he remarked, 'I have made my will and have made provision for her to receive some pictures,' etc., which my sister had painted for him, as well as an ambrotype or photograph of herself, which he highly prized and wished my mother to possess."

Another witness, Mrs. Briggs, testified under proper objection and exception that she had had a conversation with Judge Holt relating to wills some time between 1888 and 1891, in which he told the witness that if she were going to make a disposition of any piece of her property to do it before she

passed away; then she would be sure that it would be done and be permanent; but, he continued, "in my own case my nephew, my brother's son, will attend to my affairs, and I know it will be done all right." Before the conversation ended Judge Holt had stated that it was his nephew, Washington Holt, and that he would attend to his affairs, and he knew it would be all right.

The objection to this testimony was on the ground that, if it tended to prove anything, it could only mean that there was a will existing in which Washington Holt was named as executor, and that if offered for the purpose of proving the contents of such will its execution could not be proved by mere declarations of the testator, and also that the legal presumption was that as the will was not produced or found it had been revoked. If not revoked it must be produced, and that parol declarations of this character are inadmissible as a basis for proving revocation. Counsel for the contestants admitted that their claim was that there was a will existing in which Washington Holt was executor, but at the same time counsel stated that they wished it understood that the evidence was also offered both on the question of forgery and on the question of revocation of the alleged will of 1873. The objections were overruled and the testimony admitted and exceptions duly taken.

Subject to the same objections and exceptions, counsel for the contestants further gave evidence to the jury tending to prove that between the years 1884 and 1893 Judge Holt, on several occasions, told Washington D. Holt that he had made him (Washington Holt) his executor, and on several occasions Judge Holt informed Mary Holt and her mother Vanda Holt that they would be much better off after his death; that they would then go to Europe, and Mary must become proficient in French so that while in Europe she could act as their interpreter. Evidence was also given that during the same period Judge Holt told the servants of his house on two occasions that Washington D. Holt would have charge of his affairs after his death.

It was also proved that Judge Holt was born in or about the year 1807, in the State of Kentucky, and that until 1856 he lived there, excepting a few years when he practiced law in

Mississippi; that he died in the city of Washington in August, 1894, leaving an estate of about $180,000, about $40,000 of which consisted of real estate in the city of Washington; his mother died in 1871, previous to the date of the alleged will, February 7, 1873.

During the war it would appear that there was some bitterness of feeling engendered in Judge Holt's mind by the part taken by his relatives, most of whom favored the South, and some of whom entered its military service. Evidence was also given on the part of contestants tending to prove that Judge Holt, prior to February 7, 1873, had on several occasions received visits at his house in Washington from some of his nieces and nephews, and had kindly received them and spoken kindly of them to others after they had gone.

Letters of his were received in evidence, without objection, dated prior to February 7, 1873, directed to different relatives in Kentucky, and tending to show pleasant relations between them, while letters of a similar nature from him to those relatives, dated subsequently to February 7, 1873, and up to within a few years prior to his death in 1894, were admitted, but under an objection and exception as to their competency. Evidence was also given, subject to similar objections and exceptions, of declarations of an unfriendly character on the part of Judge Holt towards the father of Miss Throckmorton, and also towards her grandmother, the evidence tending to show that he had said some time after the date of February, 1873, that the Throckmortons were his enemies, and that at a reception given by President Arthur, Judge Holt had refused to shake hands with Major Throckmorton, the father of Miss Josephine; also declarations of his to his servants that he would not see the Throckmortons, these declarations having been made many years subsequently to February, 1873.

All of this class of evidence was offered by the contestants in support of their allegation that the paper was a forgery as well as upon the issue of revocation.

There was also evidence given on the part of the proponents tending to show that Miss Throckmorton was a great favorite of Judge Holt's, and that his feelings of affection for her had

never changed, notwithstanding he may have felt differently towards her father and grandmother. She was his goddaughter, and she testified (after the evidence above referred to on the part of contestants) that she frequently visited and stayed at Judge Holt's house, and in 1892 he told her that he was an old man, on the brink of his grave, but that he had provided for her, and that she would be perfectly independent, and that was the last time she ever saw him; that he never spoke to her at any time otherwise than kindly and with affection.

Letters indicative of interest and affection for the mother of Miss Throckmorton were put in evidence by proponents, after evidence of that character had been given by contestants, in relation to the relatives of Judge Holt.

Other evidence was given upon the trial not necessary now to be referred to.

To the question whether the paper filed in court on August 26, 1895, was executed by Joseph Holt as his last will and testament, the jury answered "No."

To the fourth question, whether, if the paper had been executed by Joseph Holt as his last will and testement, the same had been revoked by him, the jury answered "No; because it was not executed."

No evidence having been given in relation to matters referred to in the second and third questions, the jury by direction of the court returned a negative answer.

Mr. William G. Johnson and *Mr. Calderon Carlisle* for plaintiffs in error. *Mr. J. J. Darlington* and *Mr. George C. Fraser* were on their brief.

Mr. A. S. Worthington and *Mr. J. M. Wilson* for defendants in error.

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

Before proceeding to a discussion of the more important questions involved in this case we will refer to two decisions of the

trial court upon questions of evidence, in which we think there was error.

The witness, P. Tecumseh Sherman, had been called by the proponents of the will for the purpose of proving the signature of his mother, Mrs. Ellen B. E. Sherman, and had stated that in his opinion the signature on the paper was genuine. He did not testify as to the genuineness of the signature of his father, as Senator John Sherman, the brother of the General, had testified that in his opinion the signature was genuine. Subsequently, when the case was with them, the contestants called as a witness John B. Randolph, who, after testifying that he had been employed for more than thirty years in the office of the Secretary of War, and that he was so employed while General Sherman had acted as Secretary and also when he had been General of the Army, testified that he was familiar with the signature of General Sherman, and had recently reëxamined the signature on the paper in question, and that in his opinion the signature was not that of General Sherman. Upon cross-examination he was asked his reason for that opinion, and among others stated that in the genuine signature of General Sherman in the long quirl on the capital T the upper and lower lines meet; that he never saw one in which they did not meet, and he had seen thousands of them. In response to a further question on cross-examination he said that the upper and lower lines met at least in four out of five signatures. He also stated that another reason for his belief that the signature was not that of the General's was that the S in Sherman differed from the genuine S in the little stroke at the lower part of that letter where the upward stroke crosses the staff; that it should not make so much of a loop or so pronounced a loop as in the paper.

The proponents in rebuttal called as a witness P. Tecumseh Sherman, who had already been sworn in relation to the handwriting of his mother, and by him they offered to prove that this failure of the lines to meet in the letter T was by no means an unusual feature in the signature of his father, General Sherman, and that it was frequently, if not habitually, found therein, and also that the loops at the bottom of the S, as large as that

in the signature to the paper, were also usually found. The court excluded this evidence on the objection of contestants that it was not competent as rebuttal.

We think this evidence was competent in that character, and should have been received. The case in regard to the genuineness of the paper was very closely contested, and was one of the vital points in the trial. Evidence had been given on both sides and witnesses of the highest character and respectability had differed in regard to the genuineness of the signatures. Although the court, when the case was first with the proponents, had notified counsel that they must offer all the evidence they proposed to offer upon the subject before they first rested their case, and in accordance with such decision they had proceeded to give further evidence, we are not able to see how that fact is material at this point. Counsel for the proponents could not anticipate what evidence would be given by their opponents, nor what reasons might be offered by a witness as the ground for an opinion against the genuineness of any signature on the paper. When Mr. Randolph therefore was examined, and stated his opinion that the signature on the paper was not that of General Sherman, he was naturally asked on cross-examination if there were any particular reason why he had come to that conclusion, and in giving that reason he stated the failure of the lines to meet in the letter T, and the peculiarity of the loop in the letter S. The proponents could surely not be expected to anticipate that the letter T or the letter S would be the particular subject of criticism by any witness on the other side, nor what the character of the criticism might be. There was nothing to call their attention to the question, and in the nature of things it is plain the alleged peculiarities suggested by Mr. Randolph could not have been anticipated before they were spoken of by the witness. Under these circumstances it seems to us it was proper evidence in rebuttal, and that it was most important and material to show by a perfectly competent and absolutely disinterested witness, the son of General Sherman himself, that the peculiarities testified to by Mr. Randolph were in fact no peculiarities, and were frequently if not habitually present in the genuine signature. The fact that after the

witness Randolph had testified that he never saw one signature of General Sherman's in which the lines in the capital T did not meet, he subsequently stated that they met certainly as often as four out of five times, did not render the proposed evidence of Mr. Sherman immaterial when it was offered to be shown by him that these lines not only frequently but habitually met. It is possible to imagine that the signatures of General Sherman which Mr. Randolph had examined in the War Department would bear out his statement that the meeting of these lines occurred at least as often as in four out of five of the signatures, while in those examined by the son of the General, and with which he was familiar, a failure to meet might be frequent, if not habitual, and thus there might be no contradiction between the two witnesses; but such a case would be highly improbable to say the least, and we think that if Mr. Sherman had been permitted to testify upon the subject, and had in fact testified in accordance with the offer, such testimony would have been most material as affecting the reasons given by Mr. Randolph for his belief that the signature was not that of General Sherman. This might be true without impeaching in any degree the integrity of Mr. Randolph or his intention to testify what he believed to be the truth. As neither witness saw the signature made, it was a matter of opinion with each, and while either might have been mistaken, such mistake would not necessarily affect the character of the witness. It was not a case where the discretion of the judge was appealed to. It was a case of strict right, and we are of opinion that the court below erred in refusing to admit the evidence. In such a case as this, where there was no evidence by an eyewitness as to the signatures of the parties, it became of the greatest importance that no admissible evidence should be excluded when offered upon the question of their genuineness. For this error we think a new trial will have to be granted.

Again, in the course of the trial the contestants called a Mrs. Briggs as a witness, and proved by her that she was a journalist by profession and had made literature her business in life, and that she had received instruction from Judge Holt in the line of composition in the English language; that she had gone to him

and asked his advice about a series of articles written by her, because she had been informed that he was a master of the English language; that he was her master and teacher in such matters. She was also somewhat familiar with his handwriting, and stated that in her opinion the signature "J. Holt" to the paper in question was not the signature of Judge Holt. She was then asked: "Have you formed that opinion in any respect upon any matter except the mere handwriting?" This was objected to and admitted under an exception. The witness answered that she had, that it was from the composition: "More the composition, as well as the writing."

Other witnesses were called who were permitted to prove that they formed their opinions in regard to the paper from its composition and style, and their knowledge of Judge Holt's legal and literary attainments, as well as from their familiarity with his handwriting. One witness was asked this question: "Let me call your attention to the use of the word 'inherit' in that paper, in the middle paragraph. From your knowledge of General Holt's characteristics and his way of expressing himself, what do you think as to that being his expression?" This question was duly objected to and the grounds fully stated, but the court overruled the objection and permitted the witness to answer, which he did by saying that he did not think the testator would use that expression.

The counsel for the contestants say that these rulings were right, but that if there were any error, it was cured by the subsequent charge of the court to the jury, given upon the request of counsel for the contestants, in which the jury were instructed "to disregard any opinion as to whether Joseph Holt wrote the paper in controversy that may have been expressed by any of the witnesses for the caveators in this case so far as such opinion was based upon anything but the handwriting of the paper. In so far as any such opinion may have been based in whole or in part upon the composition of the paper or the expressions contained in it, or the legal or literary attainments of said Joseph Holt, they are withdrawn from the consideration of the jury. But all other evidence which has been admitted in this case bearing upon the legal attainments and literary style of said

Joseph Holt remains as competent evidence for the consideration of the jury, along with the other evidence in the case bearing upon the question of the genuineness of said paper."

The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. *Pennsylvania Coal Company* v. *Roy*, 102 U. S. 452; *Hopt* v. *Utah*, 120 U. S. 430, 438. But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt* v. *Utah*, *supra*. And see *Waldron* v. *Waldron*, 156 U. S. 361, 383.

There may also be a defect in the language of the attempted withdrawal, whether it was sufficiently definite to clearly identify the portion to be withdrawn. This evidence was regarded upon the trial as of considerable importance. The question of its admissibility was raised in the early stages of the trial, and the evidence was excluded. It was again raised while the case was with the contestants and the evidence admitted at their instance, and several witnesses sworn in regard to it. After that an effort was made on the part of the proponents to give testimony in their favor on this question, and it was refused as not rebutting in its character. It is not a case therefore of the introduction of merely irrelevant evidence, such as was stated in *Pennsylvania Coal Company* v. *Roy*, *supra*; nor like the case of *Hopt* v. *Utah*, *supra*, where the testimony of a single witness, a physician, as to the direction from which the blow was delivered, had been admitted, and where it was held that if it had been erroneously admitted, its subsequent withdrawal from the case with the accompanying instructions cured the error. That was a plain question of evidence on a single point, and on the part of one witness only.

Here was a case where several witnesses gave opinions in regard to the handwriting in the disputed paper, based upon

their knowledge of the handwriting of Judge Holt, and also based upon their familiarity with his legal attainments and with his characteristics of style and composition, while others based their opinions upon handwriting only. Which were the witnesses that based their opinions partly upon both foundations, the jury could not be expected to accurately recall after a long trial lasting several weeks. Nevertheless it was called upon to separate and cast aside that portion of the evidence which had been based upon such facts, and after excluding that evidence, determine as to the value of the remaining opinions based upon knowledge of handwriting only. It is at least questionable whether the case does not come within the exception to the rule by reason of the possible impression produced upon the jury during the long trial, in which the evidence of several witnesses upon this point was given after much opposition and long argument as to its admissibility.

The witnesses who testified upon both knowledge of handwriting and familiarity with the style and legal attainments of Judge Holt may have made the deeper impression upon the jury, and they may have failed to realize that it was those particular witnesses whose evidence on the subject was to be withdrawn. And while the opinions of these witnesses as to the handwriting of the deceased were withdrawn, yet their evidence as to the legal attainments and composition and style of Judge Holt was to remain as competent evidence in the case. All this was called for by the directions, and without naming a single witness or recalling to the jury the fact that it was his particular opinion regarding the handwriting which was withdrawn. This was a somewhat difficult task for any mind, and there was no certainty under such general directions that it was properly understood, or that with the best intentions it was fully performed. In such a case as this and under the particular facts herein we think the names of the witnesses should have been given and the specific evidence which was given by them and which was to be withdrawn should have been pointed out.

The court, be it remembered, was not responsible for the character of the directions. It simply gave them as asked for by

the contestants and in the language prepared by their counsel, and whatever they lacked in the way of precision and certainty is not the fault of the court.

It would appear that the counsel felt the doubt as to the admissibility of the evidence, and after striving so hard to get it in, when they desired it to be withdrawn they were under an obligation to have it done plainly and certainly. Upon the particular facts of this case, while not impairing the force of the general rule, we are of opinion that the withdrawal was far too uncertain to be of any avail.

We are thus brought to a consideration of the merits of the question decided by the court below. Is the opinion of a witness as to the genuineness of the handwriting found in the paper, based in part upon the knowledge of the witness, of the character and style of composition and the legal and literary attainments of the individual whose handwriting it purports to be, competent to go to the jury upon that question? If he is able to give an opinion without such evidence, and from his familiarity alone with the handwriting, can the attempt be permitted to corroborate or strengthen such an opinion by this kind of evidence? We think not. An expert in regard to handwriting is one who has become familiar with the handwriting of the individual in regard to whom the question is raised. Handwriting is a physical matter and does not in itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal attainments. It is to be seen and the characters recognized by the eye. But the process of his mind and the language or style in which in the opinion of a witness the person habitually clothes his thoughts, are not matter of expert evidence, proper to be presented to a jury, for the purpose of determining whether the paper presented is or is not in the handwriting of the particular individual, in regard to whom the inquiry is made. The fact may of course be proved that the person was a man of intelligence, education, high legal attainments, refinement, and not addicted to coarseness in speech or writing, and the inference may be sought to be drawn from the facts that the paper in question is or is not his composition and is or is not his handwriting; but where it is material the

inference is for the jury, and taking the opinion of the witness in that regard is to take his opinion upon the very subject to be decided by the jury, and is not at all a proper case for opinion evidence.

We think the court, therefore, erred in permitting witnesses to give an opinion as to the genuineness of handwriting founded partly upon knowledge and familiarity with the legal attainments, the style and composition of the individual whose handwriting was in controversy, and as corroborative of their opinion from knowledge of handwriting alone.

The two points above indicated in which we think the trial court fell into error require the reversal of this judgment, and the granting of a new trial, but there are other questions in the case which are fully presented by the record, and which have been most ably and exhaustively argued by counsel on both sides. These questions will necessarily arise at the very threshold of the case when it comes on for trial again, and we think it is our duty to express our views in relation to them. They relate to certain evidence upon the issues of forgery and revocation.

And first, as to forgery. The paper in question was propounded as the will of Joseph Holt.

The facts set forth in the statement prefixed to this opinion show the case to be one of an extraordinary nature. There being no proof in regard to the history or whereabouts of the paper before it was received by the register of wills, and the evidence *pro* and *con* as to its genuineness having been received upon the trial, the question arises as to the admissibility of the various declarations of the deceased, and also of his letters to different relatives living in Kentucky and other States, which it is claimed tend to show the improbability of the deceased making such a disposition of his property as is made in the paper in controversy. (They are referred to in the statement of facts above given.) The question is, in other words, can the contestants prove by unsworn oral declarations and by letters of the deceased facts from which an inference is sought to be drawn that the disposition of the property as made in the paper is improbable, and that the paper was therefore a forgery?

Opinion of the Court.

The decisions of the state courts as to the admissibility of this kind of evidence are not in accord. Many of them are cited in the margin.[1] Those included in class A favor the exclusion of such evidence, while those in class B favor its admission. The principle of exclusion was favored by Chancellor Kent, and also by Justices Washington, Story, Livingston and Thompson, all of whom once occupied seats upon the bench of this court.

The cases cited in the two classes do not all, or even a majority of them, deal with the question of forgery, but many of them treat the subject of declarations of a deceased person upon a principle which would admit or exclude them in a case where forgery was the issue. It is not possible to comment upon each of the cases cited in these lists, without unduly extending this opinion. We can only refer to the two classes generally, and state what we think are the questions decided by them.

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[1] Class A. *Boylan* ads. *Meeker*, 28 N. J. Law, 274; *Rusling* v. *Rusling*, 36 N. J. Eq. 603; *Gordon's Case*, 50 N. J. Eq. 397, 424; *Hayes* v. *West*, 37 Ind. 21; *Kennedy* v. *Upshaw*, 64 Texas, 411; *Mooney* v. *Olsen*, 22 Kan. 69; *Thompson* v. *Updegraff*, 3 W. Va. 629; *Couch* v. *Eastham*, 27 W. Va. 796; *Dinges* v. *Branson*, 14 W. Va. 100; *Gibson* v. *Gibson*, 24 Mo. 227; *Cawthorn* v. *Haynes*, Id. 236; *Walton* v. *Kendrick*, 122 Mo. 504; *Comstock* v. *Hadlyme*, 8 Conn. 254, 263; *Shailer* v. *Bumstead*, 99 Mass. 112; *Lane* v. *Moore*, 151 Mass. 87; *Robinson* v. *Hutchinson*, 27 Vt. 38, where the evidence was received, but the inquiry was as to mental capacity, the testatrix being greatly broken and enfeebled in mind and capacity and of advanced age; *Jackson* v. *Kniffen*, 2 Johns. 31; *Jackson* v. *Betts*, 6 Cow. 377; *Waterman* v. *Whitney*, 11 N. Y. (1 Kernan) 157, citing many cases; *Johnson* v. *Hicks*, 1 Lansing (N. Y.), 150; *Marx* v. *McGlynn*, 88 N. Y. 357; *Leslie* v. *McMurtry*, 60 Ark. 301; *Stevens* v. *Vancleve*, 4 Wash. C. C. 262; *Provis* v. *Reed*, 5 Bing. 435; 1 Redfield on Wills (4th ed.), pp. 556, 557; Gillett on Ev. sec. 281; Schouler on Wills (3d ed.), sec. 317*a*.

Class B. *Turner* v. *Hand*, 3 Wall. Jr. 88, 92, 107; *Warren* v. *Brown*, 51 Tex. 65; *Swope* v. *Donnelly*, 190 Pa. St. 417; *Taylor Will Case*, decided by Surrogate of New York County, 10 Abb. Pr. N. S. 300, 306. This case was reversed *sub nom. Howland* v. *Taylor*, in the Court of Appeals on a question of fact, but no opinion is reported: 53 N. Y. 627; *Davis* v. *Elliott*, 55 N. J. Eq. 473; claimed by respondents to be adverse to *Boylan* ads. *Meeker*, which is not referred to neither is the question itself discussed, although evidence of this nature seems to have been received, without objection; *Hoppe* v. *Byers*, 60 Md. 381; *Burge* v. *Hamilton*, 72 Ga. 568, 624; *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 154; *Collagan* v. *Harrison*, 57 Me. 449, by an equally divided court; 1 Phillim. Rep. 447–460.

In the cases contained in class A, it is held that declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become a part of the *res gestæ*, are not admissible as evidence in favor of or against the validity of the will. The exception to the rule as admitted by these cases is that where the issue involves the testamentary capacity of the testator and also when questions of undue influence over a weakened mind are the subject of inquiry, declarations of the testator made before or after, and yet so near to the time of the execution of the will as to permit of the inference that the same state of mind existed when the will was made, are admissible for the purpose of supporting or disproving the mental capacity of the testator to make a will at the time of the execution of the instrument propounded as such. These declarations are to be admitted, not in any manner as proof of the truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or, in other words, the mental capacity, of the testator at the time when the instrument in question was executed.

The cases contained in class B favor generally the admission of declarations of the deceased, made under similar conditions in which declarations are excluded by the cases in class A.

If declarations of the character now under consideration are admissible when made prior to the execution of the alleged will, although not after it, then a large part of the evidence in this case as to the oral and written declarations of the deceased was properly admitted upon the issue of forgery, because such declarations may have all been made before the forgery was executed, the date of the paper not furnishing any evidence of the time when it was in fact prepared. The forger could not be permitted, by giving a date to the instrument, to fix the time subsequent to which the declarations should be excluded.

But we see no good ground for the distinction. The reasons for excluding them after the date of the will are just as potent when they were made prior thereto. When made prior to the will, it is said they indicate an intention as to a testamentary disposition of property thereafter to be made, and that such

declarations may be corroborative of the other testimony as to what is contained in the will, as is said by Mellish, L. J., in *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 154, 251, (a case of a lost will,) or else they indicate the feeling of the deceased towards his relatives, from which an inference is sought that a testamentary provision not in accordance with such declarations would be forged. The declarations are, however, unsworn in either case, and if they are inadmissible on that ground when made subsequent to the execution of the will, they would be also inadmissible when made prior to its execution. In *Stevens* v. *Vancleve*, 4 Washington C. C. 262, 265, *supra*, Mr. Justice Washington said that declarations of the deceased, prior or subsequent to the execution of the will, were nothing more than hearsay, and there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity. Judge Pennington concurred in those views.

After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not a part of the *res gestæ*, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground

that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue, (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity,) but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations.

Thus it is said in *Shailer* v. *Bumstead*, 99 Mass. 112, which is one of the cases cited in the margin in class A: "Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by the power of language.

Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. *The truth or falsity of the statement is of no consequence.*" The testatrix in the above case died in 1865, at the age of ninety-one, having executed a will in 1851, another in 1853, and a codicil thereto in 1857, and among other issues raised was one of testamentary capacity. The declarations that were held admissible were only for the purpose of showing "what manner of person she was," who uttered them. They were used to throw light upon an alleged state of mind which was involuntary and the result of disease and old age. If used for any other purpose they were not admissible, said the court, because they were mere hearsay and could never be explained or contradicted by the person who uttered them.

And so in *Gibson* v. *Gibson*, 24 Missouri, 227, the court said such declarations were admitted when it was proposed to show the condition of the testator's mind or to show the state of his affections, but never as a mere narrative of facts. The latter remark is explained in the next case in the same volume, (p. 236,) the opinion in which was delivered by the same judge, by which it is seen that such evidence was admissible only on the issue of insanity. See pages 238 and 239, where the point is plainly made that there must be a foundation of that kind in order to let in the proof of declarations as to his affections, which could only be admitted on such an issue.

And it was also said in *Waterman* v. *Whitney*, 11 N. Y. *supra*, that to receive declarations when no such issue was involved would be attended "with all the dangers which could grow out of a change of purpose, or of external motives operating upon an intelligent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator." To the same effect is *Boylan* ads. *Meeker*, 28 N. J. L. cited in class A. It is therefore clear that as their truth in such an issue is not of importance, and their materiality lies only in the fact that they were made, the principle of rejecting unsworn declarations has no application. But when it is sought to prove them as coming from one about whose perfect mental capacity there is no dispute, although

they relate to the alleged state of his affections when made, the only possible importance of such declarations rests in the claim that they are true, and an inference is sought to be drawn which is founded wholly upon the assumption of their truth. Now if their only value rest upon that assumption, then the fact that they are unsworn declarations brings them at once within the bar of the general rule of evidence that unsworn declarations are not admissible. As indicative of mental capacity they are original evidence, sworn to by the witness, but as evidence of the truth of the statement declared they are simply unsworn declarations, and should be excluded accordingly.

The cases mentioned in class B proceed upon a totally different theory, viz., that the declarations may be true and are made by a person who knows all about the subject, and they are therefore proper to be submitted to the jury for what that body may regard their worth, although it is admitted that it is a very dangerous kind of evidence. We are familiar with the case of *Sugden* v. *Lord St. Leonards*, *supra*, L. R. 1 P. D. 154. Cockburn, Chief Justice, in that case favored the admission of declarations of the testator as secondary evidence of the contents of the lost will, on the ground that such declarations were usually honestly made, and that the evidence might be put on the same footing with declarations of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case. pp. 224, 225. It seems to us that the admission of the evidence substantially enlarged the exception to the rule as to hearsay. Jessel, M. R., (at p. 240), undertook to give the exceptions to the general rule as to hearsay, (which exceptions do not include this case,) but he thought upon the principles upon which some of the exceptions were founded, the declarations had been properly admitted, the case being one of a lost will, known to have existed but which at the death of the testator was not forthcoming. Mellish, L. J., thought the declarations of testator made after the will were inadmissible, while James, L. J., and Baggallay, J. A., concurred with the Chief Justice.

The remarks of the Master of the Rolls were adverted to in

the subsequent case of *Woodward* v. *Goulstone*, in the House of Lords, L. R. 11 App. C. 469, by Herschell, L. C., and by Lords Blackburn and Fitzgerald, all of whom stated (pp. 478, 484, 486) that they did not wish in deciding the case to be regarded as approving the views in the *Sugden* case upon the admissibility of the declarations of the deceased testator made subsequently to the execution of the will, even in the case of a lost will; that the question was not necessary to the decision of the case then before them, and that they wished to reserve their opinion until it was necessary to decide it. Considerable doubt is thus thrown by the highest legal tribunal in England upon the correctness of the decision of the lower court. In New York and probably in most of the other States the character and sufficiency of the evidence to establish a lost will are provided for by statute. *Schultz* v. *Schultz*, 35 N. Y. 653.

The decision in the *Sugden* case also overrules that of *Quick* v. *Quick*, 3 Sw. & Tr. 442, where Lord Penzance refused probate of the alleged will, there being no other evidence of its contents than the declarations of the testator made after its execution, and it also runs counter to the opinion of Lord Campbell in *Doe* v. *Palmer*, 16 Q. B. 747.

The law cannot therefore be regarded as settled in England that, even in the case of a lost will, declarations of the testator made after its execution are to be admitted as evidence of its contents. It is also proper to call attention to the fact that all the judges participating in the decision of *Sugden's* case were entirely satisfied with the proof of the contents of the lost will, wholly aside from evidence of these declarations.

While the case is not like the one before us, inasmuch as the inquiry here is not in regard to the contents of a lost will, yet it might perhaps be urged with some force that if declarations of that kind were admissible, the evidence now before us is competent, and was properly admitted.

We are, however, convinced that the true rule excludes evidence of the kind we are considering. We remain of the opinion that the declarations come within no exception to the law excluding hearsay evidence upon the trial of an action, and we think the exceptions should not be enlarged to admit the evi-

dence. Where the issue is not one in regard to the mental capacity of the alleged testator to make a will, his declarations upon the subject cannot be said to be declarations made against interest, such as declarations made by an individual while in possession of property, in disparagement of his absolute ownership. Such evidence has been admitted as declarations against interest or as characterizing possession, but the same declarations made after a conveyance of the land would be inadmissible, as mere hearsay and in no degree as declarations against interest. Declarations made by an alleged testator before or after the date of the paper are not declarations against interest, because they can have no effect upon his interest. The will would not take effect until after his death, and before that time he could revoke it or make another, and it would still be immaterial evidence even if he did neither.

There is another reason why no exception should be made in favor of such evidence upon which to build a presumption or inference of forgery, and that is the inherent weakness and danger of the evidence itself. No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator's mind towards relatives or others, as evidenced by his declarations. It is every day experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed, and that too in cases where there is not the remotest suspicion of forgery, that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will. Although admitting the evidence, yet Sir John Nicholl, in *Johnston* v. *Johnston*, 1 Phillim. Rep. 447, 460, said: "Parol declarations ought to be received with great caution; in general, they are the lowest species of evidence. . . . They may on the part of the testator be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misappre-

hended and misrepresented. But confidential communications with his wife upon her serious representations to him respecting so important a subject are deserving of rather more weight as evidence of the deceased's mind and intentions."

The common-law rules of evidence do not obtain in the ecclesiastical courts of England in regard to the proof of wills relating to personalty. "On the contrary, the evidence bearing on these points is generally mixed up with declarations of the party, and frequently consists of such declarations alone." Per Tindal, Ch. J., in Exchequer Chamber, 1838, in *Marston* v. *Fox*, 8 Ad. & El. 14, 56. The unreliable character of the evidence is acknowledged, but it is taken in connection with almost any other evidence, for what it is worth. In our judgment its value is entirely too problematical at its best to cause us to make an exception to the well considered rule of evidence prohibiting hearsay.

The motives underlying and causing the particular provisions of a will may be so various and so hidden from observation that it is in the highest degree unsafe to draw an inference of forgery based upon declarations as to testamentary intentions which are so subject to change and which declarations may or may not represent the true feelings of the testator or even his actual testamentary intention at the time when spoken. The result is very apt to be a breaking down of the safeguards provided by statute for the proof of the due execution of a will, and to provide in place of that proof evidence which is in itself of the most unsatisfactory nature, and from such evidence permit a jury to draw a still more uncertain inference of forgery.

We are not aware of any well founded rule permitting such evidence on the mere ground that it is probable the declarations were true, and therefore, though unsworn, should be received. On this ground it might equally be maintained that evidence of the declarations of a person, since deceased, in a matter regarding which he had been familiar, who had been a man of undoubted character and probity, and who had had no interest in the subject, ought to be received though not sworn to. But in such case the probability of their truth has not been regarded as sufficient to admit the declarations.

In matters of pedigree, declarations by members of the family are admitted, because the question in such cases is generally one concerning the parentage or descent of the individual, and in order to ascertain that fact it is material to know how he was acknowledged and treated by those who were interested in him or sustained towards him any relations of blood or affinity. 1 Greenleaf's Ev. secs. 103, 104. Evidence showing how he was acknowledged and treated is frequently only to be shown by declarations made at the time, and though unsworn are received as the best that the nature of the case permits. The analogy between such evidence and evidence of the nature under discussion is somewhat formal and far-fetched.

Undoubtedly cases may arise from the enforcement of this rule where injustice may be the result. It is possible that a forged instrument may in a particular case be declared a true one, where if evidence of this nature had been admitted the decision might have been the other way. An extreme case may be assumed, such as was put by Mr. Justice Grier in *Turner* v. *Hand*, 3 Wall. Jr. 88, 107, *supra*, by way of illustration in charging the jury, and although he held in the case he was trying that the evidence was admissible, he at the same time said it must be regarded with very great caution as a dangerous kind of evidence. *Turner* v. *Hand* was one of the many phases in which the controversy over the alleged will of Meeker was conducted in the courts of New Jersey and in the Federal court, while *Boylan* ads. *Meeker*, 28 N. J. Law, above cited, was another.

The difficulty in regard to a rule of evidence is that it cannot be the subject of enforcement or non-enforcement according to the exigencies of the particular case. The rule must be general in its application. It cannot depend upon the opinion of the judge in each case whether the declarations are or are not to be relied upon. The rule must either permit or refuse to permit the evidence. We think that more injustice is possible as a result of admitting the evidence than from its exclusion. The statutes of all the States have very careful and stringent provisions in relation to the making of wills, and the due proof of their execution. The wills must be in writing, (with the

exception of certain nuncupative wills,) signed by the testator and witnessed by others; and to permit evidence of the nature given in this case tends, as we think, most strongly to break down the efficiency of the statutory provisions, and to render proof of the execution of wills much less certain than was contemplated by the statutes. If declarations of the deceased were admissible to attack, they would then of course be admissible to sustain the will, and there would be apt to arise a contest in regard to the number and character of conflicting declarations of the deceased which he could neither deny nor explain, and in the course of which contest great opportunities for fraud and perjury would exist. The statutes as to wills were passed, as we believe, for the very purpose of shutting out all contests of such a character.

If not admissible generally, it is as we think inadmissible even as merely corroborative of the evidence denying the genuine character of the handwriting. It is open to the same objection in either case as merely unsworn declarations or hearsay.

We are therefore of opinion that the court below erred in admitting this evidence upon the issue of forgery, and that the error was of a most important and material nature.

The last question is whether this evidence, even though not admissible on the issue of forgery, was admissible upon that of revocation, as it was offered on both, and if admissible upon either, the general objection to its admission would be unavailing, and there was no request to charge the jury to confine it to the issue of revocation alone. This question remains therefore, although the jury found there was no revocation because the will was never executed.

It is manifest that upon the issue of revocation the fact of the execution of the will is to be assumed, for in the nature of things one cannot revoke a will which he never made. It is conceded on the part of proponents that the will appeared, when it came to the hands of the register of wills, to have been mutilated, torn and burned around its edges, and counsel concede that its appearance is such that if it had been found among the papers or repositories of the deceased, a presumption would have

arisen in favor of its revocation. The question is whether any presumption of cancellation or revocation by the deceased, or under his direction, is created in this case by the condition in which the paper was when received by the register of wills through the mail on August 26, 1895. If not, then these declarations subsequent to 1873 are not admissible on the theory that they are in aid or corroborative of a presumption that does not exist.

After proof that a will had been duly executed and was in the possession of the testator, the failure to find it after his death would be presumptive evidence that the testator had destroyed with an intention to revoke it. The presumption could, of course, be overcome by proper evidence leading to a contrary conclusion. This is conceded.

But here the will is found, not among the papers of the deceased at his former residence, but it comes through the mail to the register of wills more than a year after the decease of Judge Holt. The presumption of revocation cannot therefore attach from the failure to find a will once shown to have existed, for here the will is found and produced. We are left absolutely without evidence as to its whereabouts from the time of its execution in 1873 down to the time when the register of wills received the envelope enclosing it in August, 1895.

It is in evidence that immediately after the death of Judge Holt two of his nephews came to the house, and during the next few days papers were burned under their direction by one of the servants in the house. The evidence of these nephews given on the trial was absolute and distinct to the point that no paper of any consequence or in the nature of a testamentary disposition of property was found or destroyed, and there is no one to contradict or dispute such evidence; but the fact exists that there was a burning of papers.

Some evidence was given upon the subject of a similarity of form between the half printed and half written characters on the envelope directed to the register of wills and those found upon a sign put upon the stable of the deceased by the servant who had destroyed papers under the direction of the nephews, but we think such evidence was of no importance, and it must

therefore be admitted that there is no evidence that the address on the envelope was in the handwriting of any particular person.

We think no presumption of revocation by the testator, or under his direction, arises from the appearance of this will when first received by the register of wills.

In *Hitchings* v. *Wood and others*, decided by the Judicial Committee of the Privy Council in 1841, (2 Moore's P. C. C. 355, 447,) Lord Lyndhurst, Langdale, M. R., Shadwell, V. C. Baron Parke and Mr. Justice Littledale being in the court, the holograph instrument purporting to be a codicil to the will of James Wood, sent anonymously by the post to one of the legatees named therein, though partly burned and torn, was (reversing the court below) admitted to probate, the handwriting being satisfactorily proved; and it was held that under the circumstances of the case the *onus* of proving that the cancellation was the act of the testator, and with what intention it was done, lay on the parties opposing the proof. In the course of his opinion, Lord Lyndhurst said:

"Then, as to the alleged cancellation, we think, if this be a genuine instrument, that the *onus* to make out the fact of the cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom, and under what circumstances, does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. If it be a genuine instrument it proves that there was also another codicil, and which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practised, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his death, we incline to think some further evidence beyond its present appearance would be necessary to show that he intended to cancel it. Our opinion, therefore, is that the codicil ought to be approved."

This case establishes the point that no presumption of revocation arose upon the facts herein by reason of the appearance of the paper, and after execution is proved by evidence of the handwriting the *onus* rests upon the individual claiming that the paper was revoked by the testator, to prove the fact. There must be some evidence of an act by the deceased, or under his direction, which would be sufficient to show the fact, or the instrument must have been found among the papers of the deceased, mutilated and torn or otherwise defaced, and under such circumstances that the fact of revocation might be presumed. It was observed in *Johnston* v. *Johnston*, 1 Phillimore Rep. 447, 497, that a will once regularly made, the presumption of law is strong in its favor; the intention to revoke must be plain and without doubt.

There being no presumption of revocation from the appearance of the paper, and the *onus* being on those who assert its revocation, can the written or oral declarations of the testator, made subsequently to the execution of the will, and tending to show the existence of another will, not otherwise proved, or tending to show the state of his affections for his relatives and an alleged change in his feelings towards the relatives of one of the legatees, though not toward the legatee herself, be admitted for the purpose of asking the jury to infer either that the testator himself mutilated and burned with the intention to revoke the will, or directed the acts of mutilation and burning, in order to accomplish such revocation? Can such evidence take the place of proof of an act on the part of the deceased (or directed by him) sufficient to revoke a will, and from which an intention to revoke might be presumed? Here is simply a case of an inference sought to be drawn that the testator did the act and with the intent to revoke the will, because of his making certain declarations as to a will and also because he had expressed friendly feelings towards some of his relatives, and feelings the reverse of friendly towards the father of one of the legatees.

The will having been executed by the testator, it is said that it must be assumed to have been in his possession or under his control up to the time of his decease, and it is urged that proof

of the state of mind of the testator during more than twenty years subsequent to the execution of the will is proper to be considered by the jury, in order that it may from that proof infer that the acts of mutilation were performed by the testator or under his direction, and also that they were performed or directed with the purpose of revocation. A double inference is thus based upon a most insecure and dangerous foundation. The evidence is of the same nature that we have just said was inadmissible upon the issue of forgery; only here the inference sought is a revocation instead of the forgery of the will. We think the declarations are no more admissible for the purpose of inferring a revocation than for the purpose of inferring the forgery of the will.

There is in the first place no evidence that the testator either himself performed or that he authorized the acts of mutilation, and we think no presumption that he did can arise from the fact that the will was not found among his papers. And the appearance of the will when received by the register furnished no such presumption.

Counsel for the contestants have cited a number of cases which they claim show the admissibility of this class of evidence, in addition to those cited in the foregoing discussion, upon the issue of forgery. They are placed in the margin.[1]

The evidence is claimed to be admissible for the purpose of authorizing an inference therefrom that the testator himself mutilated or directed the mutilation of the will for the purpose of thereby revoking it. Declarations made by a testator at the time of mutilation or cancellation, going to show the intent with which the act is done, are of course admissible, being part of the *res gestæ*. But as the production of the will under the circumstances proved in this case created no presumption of revocation, it was necessary to prove that the act of mutilation

[1] *Lawyer* v. *Smith*, 8 Mich. 411, 423; *Patterson* v. *Hickey*, 32 Ga. 156, 164; *Harring* v. *Allen*, 25 Mich. 505; *Burge* v. *Hamilton*, 72 Ga. 568, 625; *Collagan* v. *Burns*, 57 Me. 449; *Collyer* v. *Collyer*, 110 N. Y. 481, 484; *McDonald* v. *McDonald*, 142 Ind. 55, 81; *Miller* v. *Phillips*, 9 R. I. 141, 144; *In re Valentine's Will*, 93 Wis. 45, 55; *Pickens* v. *Davis*, 134 Mass. 252; *Gould* v. *Lakes*, L. R. 6 P. D. 1, 5.

was performed by the testator or by his direction, and with an intention to revoke, and we think that his declarations, not being part of the *res gestæ*, cannot be permitted for the purpose of asking the jury to infer therefrom that the testator not only performed or directed the act of mutilation but did so with the intent to revoke the instrument. This kind of evidence is of a most dangerous character. It is hearsay, and nothing more.

Some of the cases cited above admitted proof of declarations in aid of the presumption of revocation arising from the finding of the mutilated will among the effects of the deceased. *Lawyer* v. *Smith*, 8 Mich. 411; *Patterson* v. *Hickey*, 32 Georgia, 156. Another case, *Burge* v. *Hamilton*, 72 Georgia, 568, admitted declarations of a testator made to his attorney at the time of the execution of a codicil to his will, in relation to the number of pages to his will, then present and exhibited to the attorney, the question arising from some mistake in the numbering of the pages, and the testator declaring to his attorney that the will which was then read over to him was all right and the numbering of the pages a mistake. The court held the paper presented an ambiguity, and a question of the identity of the paper produced with the will as executed. The declarations were in reality part of the *res gestæ*.

In another case the evidence went to prove that two sheets stitched together and found in an envelope were parts of the will. *Gould* v. *Lakes*, L. R. 6 P. D. 1. In some of the other cases declarations were admitted on the same theory as stated above in the discussion as to forgery.

There must be an act and an intention in order to revoke. Neither can be inferred from evidence of declarations of a testator apart from the act and with no proof that the testator ever performed an act of a revocatory nature. Unless a part of the *res gestæ* we see no reason for the admission of these declarations any more than upon the issue of forgery.

As is stated by James, Lord Justice, in *Cheese* v. *Lovejoy*, L. R. 2 P. D. 251, in speaking of the evidence of revocation:

"It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put

by Dr. Deane in the court below, 'all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two.'"

We cannot overcome the feeling that to admit evidence of this nature is in the highest degree dangerous, and that its admission would tend very strongly to impair the efficacy of the statutes relating to the proof and revocation of wills.

The judgment of the Court of Appeals of the District of Columbia is reversed and the cause remanded to that court with directions to reverse the judgment of the Supreme Court of the District and to remand the cause to that court with instructions to grant a new trial.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA agreed with the opinion only upon the first and second grounds discussed, and dissented from the others.

MR. JUSTICE BROWN concurred in the result.

FREEPORT WATER COMPANY *v.* FREEPORT CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 348. Submitted October 31, 1900.—Decided March 25, 1901.

The water company was a corporation organized under general statutes of Illinois, as was also the city. In June, 1882, the government of the city gave the water company an exclusive right to supply the city with water for thirty years, reserving the right of purchasing the works erected for that purpose, and if this right were not exercised, the rights of the company were to be extended for a further term. Provision was made for the erection of hydrants by the company for which fixed rentals were to be charged, and the city was given rights in a part of them. Further provisions were made for the payment of water rates by consumers. In 1896 an ordinance was passed by the city reducing the rentals of the hydrants and rates to consumers to take effect from the date of its passage. At the time when the grant of 1882 was made, a statute passed in 1872 was in force in Illinois, authorizing cities and villages to

Statement of the Case.

contract with incorporated companies for a supply of water for a public use, for a period not exceeding thirty years. *Held*, that the power so conferred by the statute of 1872 in force in 1882 could, without straining, be construed as distributive; that the city council was authorized to contract with any person or corporation to construct and maintain waterworks at such rates as might be fixed by ordinance and for a period not exceeding thirty years; that the words "fixed by ordinance" might be construed to mean by ordinance once for all to endure during the whole period of thirty years, or by ordinance from time to time as might be deemed necessary; and that of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

THIS was an action of assumpsit brought by the plaintiff in error against the defendant in error in the circuit court of Stephenson County, State of Illinois, for the price of water delivered by plaintiff in error to defendant in error between January 1, 1896, and July 1, 1896.

The cause of action was based upon a contract arising from an ordinance passed by defendant empowering the plaintiff to construct certain waterworks in the city of Freeport and the renting from the plaintiff by the city of certain fire hydrants.

To the defences of a subsequent ordinance reducing the rental of such hydrants, it was replied that the latter ordinance impaired the obligation of the first ordinance as a contract, and therefore violated the Constitution of the United States.

The case was presented upon a demurrer to the pleas of the defendant. The demurrer was overruled by the circuit court, and the plaintiff electing to stand by its demurrer, judgment was entered for the defendant for costs. On appeal to the Supreme Court the judgment was affirmed, 186 Illinois, 179, and to that action this writ of error was directed.

The facts presented by the pleadings are as follows:

The plaintiff is a corporation organized and existing under the general laws of the State, and the defendant is a municipal corporation organized under the general act of the State, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, and in force July 1, 1872, and the acts amendatory thereof.

That on the 6th of June, 1882, defendant enacted an ordinance

giving and granting to Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the 1st of July, 1882, to supply the city of Freeport and its citizens with water suitable for domestic and manufacturing purposes. The city reserved the right of purchasing the works at the end of thirty years. If such right should not be exercised the rights and privileges of the plaintiff were to be extended for a further period of twenty-five years. There were the usual provisions for the use of the streets, the character of the works and appliances, the quality of the water, and provision was made for the extension of the system as the growth of the city and its needs might require.

Section 7 of the ordinance was as follows:

"The said Nathan Shelton or his assigns shall erect double-nozzle fire hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains, and shall erect said fire hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his assigns as an annual rental for the first one hundred of said hydrants the sum of one hundred dollars each, for all said hydrants over one hundred and up to one hundred and fifty an annual rental of eighty dollars each, and for all of said hydrants over one hundred and fifty an annual rental of fifty dollars each, which said rentals shall be payable semi-annually on the fifteenth days of January and July in each year, and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof, and shall continue during the full term specified in this ordinance, unless said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease. The pay of any hydrant shall cease whenever any hydrant is out of repair or unfit for use or incapable of throwing a stream as provided for in this ordinance."

The city was given the right to use water free of charge from the hydrants on streets curbed and guttered for flushing and washing the gutters, and from any hydrant, upon giving notice, for flushing any and all sewers; also water free of charge for the use of the fire department and for the city hall, public

offices, public schools, churches and for four public drinking fountains if the city should erect the same.

Maximum rates to consumers were fixed for purposes which were especially enumerated, and it was provided that "rents for other purposes not herein named will be fixed by meter measurement, as may be agreed upon between the consumer and the water company, not exceeding the following rates." The rates were specified.

Section 13 was as follows:

"This ordinance shall become binding as a contract between the city of Freeport, Illinois, and Nathan Shelton or his assigns, upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns, provided the same shall be done within thirty days from the passage and publication of this ordinance, and this ordinance when so accepted shall not be altered, amended or changed in any way without the concurrence and consent of both parties thereto and interested therein, or their successors or assigns."

On June 27, 1882, Shelton filed a written acceptance of the terms and conditions of the ordinance. On August 8, 1882, he assigned all his rights to plaintiff, of which defendant had notice. Plaintiff has complied with all things required of Shelton or of it, has constructed 121 hydrants as required by section 7 and as ordered by defendant, which were in operation on January 1, 1896, and defendant paid all rentals which became due January 1, 1896, and there was due for rentals subsequent to that date, and up to the 15th of July, 1896, the sum of $5840.

The pleas of the defendant in substance alleged that it was a municipal corporation organized under the general laws of the State for the incorporation of cities and villages, and that in pursuance of the statutes of the State relating to waterworks passed the ordinance of June 6, 1882.

It was alleged in plea No. 1 that the water rates fixed by such ordinance "were then unjust, unreasonable and oppressive to the citizens and taxpayers of said city, and so remained and continued to be unjust, unreasonable and oppressive from said enactment thereof up and until the subsequent action of the council of said city had in relation thereto. . . ." This

charge was substantially repeated in the other pleas, and it was alleged that the new rates were just and reasonable. The ordinance of February 11, 1896, was set out in full. The following is all that is necessary to be quoted:

"SEC. 1. That the Freeport Water Company, a corporation, now furnishing to the city of Freeport and its inhabitants water for fire protection, domestic uses and manufacturing purposes, and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed and no more.

"*Fire Protection and Public Uses.*

"SEC. 2. Said corporation shall be entitled to charge and receive from the city of Freeport for all water furnished for fire protection and other public uses and purposes as hereinafter defined and enumerated an annual rental or rate of fifty dollars ($50.00) for each double-nozzle fire hydrant now in use in the said city of Freeport, or any that may be ordered hereafter by the city council of the city of Freeport, such rental to be payable in semi-annual instalments on the fifteenth (15th) day of January and July, provided that it shall be shown by a certificate signed by the committee on water, city engineer and chief of fire department that test of the works of said corporation has been made within six (6) months, and that such works have been in such condition as to furnish at all times and for any length of time a fire pressure sufficient to throw six (6) fire streams from six (6) hydrants chosen by the committee on water, each through fifty (50) feet of two and one-half inch hose and one inch nozzle from each hydrant so chosen to a height of one hundred (100) feet, or maintain its equivalent in pressure at the nozzles of the hydrants. Where the works of said corporation are not shown to be maintained in condition to furnish such fire pressure the rental shall be one-half the amount hereinbefore fixed. The above rate and rental shall be in full payment for all water, furnished as follows: For fire protection including the furnishing and setting of fire hydrants for all water used by the fire department in extinguishing fires and in practice, for all water used by the committee on water

Counsel for Parties.

for cleaning, washing, flushing gutters and sewers, in said city, and for all water used for the city hall, fire and police stations, and other city offices, for drinking fountain in park when desired, and for all public schools and churches in the city."

The ordinance further established in detail maximum rates for water to be furnished for domestic and manufacturing uses and other uses when furnished without meter; also rates when furnished or measured by meter. There was a penalty provided for charging greater rates than those established.

The ordinance was to take effect from the date of its passage, and the right of further regulation was reserved.

The rates established by the ordinance of February 11, 1896, were considerably less than those established by the ordinance of June, 1882.

The assignment of error presented the contentions in various ways that the ordinance of February 11, 1896, and the statutes in pursuance of which it was claimed to have been passed, violated the Constitution of the United States, in that the ordinance and statutes impaired the obligation of the contract made by the ordinances of June, 1882, with plaintiff, and deprived it of its property without due process of law.

The statutes of the State which are urged as applicable to the contentions of the parties are cited in the margin.[1]

Mr. George C. Fry and *Mr. James W. Hyde* for plaintiff in error.

Mr. A. J. Hopkins for defendant in error.

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

[1] An act to enable cities and villages to contract for a supply of water for public use, and to levy and collect the tax to pay for water so supplied. Approved April 9, 1872, in force July 1, 1872.

Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years. Public Laws of Illinois of 1871, p. 271.

Opinion of the Court.

The Supreme Court of the State based its decision on its opinions in the case of *Danville* v. *Danville Water Co.*, 178 Illinois, 299, and 180 Illinois, 235. In that case the same statutes were involved as in the case at bar, and the contract which was claimed was based upon a substantially similar ordinance to that involved in the pending controversy.

It is not clear from the opinion of the court whether it intended to decide that municipal corporations could not be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in *Los Angeles* v. *Los Angeles City Water Co.*, 1900, 177 U. S. 558. See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 7, where the subject is more extensively discussed and the cases reviewed. See also *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674.

We do not mean to say that if it was the declared policy of the State that the power of alienation of a governmental function did not exist, a subsequently asserted contract would not be controlled by such policy. In *Stevenson* v. *School Directors*, 87 Illinois, 225, 255, and in *Davis* v. *School Directors*, 92 Illinois, 298, it was held that a school board could not make a contract for the employment of teachers to extend beyond the current year and this was put upon the ground of the inability of one board to control the exercise of the functions of its successor. In *East St. Louis* v. *East St. Louis Gas Light & Coke Co.*, 98 Illinois, 415, decided in May, 1881, the doctrine of those

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An act to provide for the incorporation of cities and villages. Approved April 10, 1872, in force July 1, 1872.

Sec. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water works. Public Laws of Illinois of 1871, p. 259; 1 Starr & Curtis' Stat. p. 785, § 175.

cases was not adopted as applicable to a contract for gas rates, nor was it rejected. One Justice asserted it with great emphasis, quoting those cases. The court, however, left it disputable, placing the decision on other grounds. There was at least admonition in those cases to persons entering into contracts with municipalities. If there was anything more, we need not decide, as there are other grounds for judgment.

The Supreme Court did decide in the *Danville* case (1) that the water company having been incorporated under the general incorporation act of the State, approved April 18, 1872, the provisions of the act entered into and formed a part of its charter, and that by section 9 of the act (inserted in the margin,[1]) the right of the legislature to regulate and provide for the rates, at which the company should supply water to the city, was reserved; and (2) that the language of the act of April 9, 1872, and in force July 1, 1872, (inserted in the margin,[1]) did "not necessarily imply the power to make and fix rates." The court further said in 178 Illinois at page 309: "The authority 'to contract for a supply of water for public use for a period not exceeding thirty years' does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law. *Carlyle* v. *Carlyle Water, Light & Power Co.*, 52 Illinois App. 577."

AN ACT to enable cities, towns and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by an individual, company or corporation to any such city, town or village and the inhabitants thereof. Approved June 6, 1891, in force July 1, 1891.

SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That the corporate authorities of the city, town or village, now or hereafter incorporated under any general or special law of this State, in which any individual, company or corporation has been, or hereafter may be, authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates

It is true that we do not necessarily have to follow this decision. When section 10, article 1, is invoked we decide for ourselves the fact of contract—not only its formal execution but its legal basis in law, and therefore construe for ourselves the statutes of the State upon which it is claimed to rest. In such case, we have also said, we are disposed to incline to agreement with the state court. These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in *Burgess* v. *Seligman*, 107 U. S. 20, 33. After stating the peculiarity of the existence of two coördinate jurisdictions in the same territory and the necessity for the exercise of mutual respect and deference to avoid anomalous and inconvenient results, and yet asserting the necessity in the Federal courts of the right to exercise an independent judgment, the learned Justice said:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled,

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and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town or village may be. Public Laws of Illinois of 1891, p. 85; 1 Starr & Curtis' Stat. p. 868, § 458.

Section 9 of the General Incorporation Act cited in the opinion is as follows:

The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: *And provided further*, That this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation. Section 9, Corporation Act; 1 Starr & Curtis' Stat. p. 1006.

it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such case, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

Applying these principles to the case at bar, we solve its questions. The Supreme Court of the State in passing on the case not only considered the acts of the 9th and 10th of April, 1872, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated, and it was held that the act "must be regarded as entering into and forming part of the charter" of the plaintiff. The statute reserves to the general assembly the power to prescribe in the government of corporations "such regulations and provisions as it may deem advisable." The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The Supreme Court of the State has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations.

The plaintiff, however, contends that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business management of the corporation itself," but regulate "those classes of acts which control the relation existing between stockholders as individuals and the corporation as

an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the powers of a corporation." We think the construction is too narrow. The statute made no distinction between the internal and the external business of corporations—between their relations to stockholders and their relations to third persons. Such are but special exertions of the power which the legislature possesses.

In *Beer Co.* v. *Massachusetts*, 97 U. S. 25, a provision was passed on of an act defining the general powers and duties of manufacturing corporations as affecting the beer company. The general statute was enacted in 1809, and the provision construed was as follows: "*Provided always*, that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient." The beer company was incorporated in 1828 "for the purpose of manufacturing malt liquors in all their varieties." It was held that the provisions of 1809 were adopted in the charter of the beer company, and were a part of the contract between the State and the company, rendering the latter subject to the exercise of that power; and the seizure and forfeiture of certain malt liquors, which were intended to be sold in violation of the prohibitory liquor law passed in 1869, were sustained.

But assuming that section 9 of the general incorporation act is correctly interpreted by plaintiff, we are brought to the question of the power of the city to make an irrevocable contract for thirty years, fixing water rates. The power is claimed under the statutes of 1872, heretofore quoted. The Supreme Court of the State, as we have seen, decided against the claim, and the principle of *Burgess* v. *Seligman* applies if the ruling of the court and the contention of the plaintiff is "balanced with doubt." There were no previous interpretations of the statutes by the state courts upon which the plaintiff had a right to rely. It acted upon the faith of the statutes alone, and committed its rights to a judicial interpretation of the statutes.

The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Detroit Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.

In *Smith* v. *McDowell*, 148 Illinois, 51, 62, the Supreme Court of the State expressed the rule as follows: "Their power [the power of municipal corporations] is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

The Supreme Court of the State applied these principles. It held that an irrevocable contract for specific rates was not indispensable to the other powers with which the cities of the State were invested. And a distinction was made between a contract which related to a governmental function, which the regulation of rates was said to be, and a contract which related to franchises which, though public in their nature, yet were not governmental, which the supply of water was said to be. This distinction, it was held, the statutes of 1872 observed, and gave the power to make one kind of contract but not the other—the power to contract for a supply of water, but not the power to contract "to pay a fixed and unalterable rate for thirty years." This was deduced from the silence of the statute of the 9th of April and the necessity of resolving all ambiguities in favor of the public. But ambiguity disappears, it was said, when the statute of the 9th was considered with the statute of the 10th, as it necessarily had to be, as the statutes were "*in pari materia*, and should be construed together." Section one of the act of the 10th of April "authorizes," the court said, "the city council to empower a private corporation to construct and maintain waterworks at such rates *as may be fixed by ordinance.* The meaning of this language is not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, 'for a period not exceeding thirty years,' qualifies the words

'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.'"

The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the *Railroad Commission Cases*, 116 U. S. 307, 325, by Chief Justice Waite, of the power of the regulation of rates:

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, 561, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the State was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company or corporation to supply water, "be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation. . . ." There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation we might have to listen to them, but now undisturbed by them we yield without resistance to that meaning which the subject-matter demands in the absence of negativing words.

Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks "*at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.*" The words "*fixed by ordinance,*" may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted, which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

It is also urged by plaintiff that the ordinance of February 10, 1896, deprives the plaintiff of its property without due process of law. The grounds of this contention are that (1) by the statute of June 6, 1891, none of the circumstances which, it is claimed, constitute a rate just and reasonable, are required to be considered by the authorities of cities nor is previous notice required to be given to the parties furnishing water; (2) establishing rates is a legislative, not a judicial act, and that, therefore, the power to review and determine them given by the statute to the circuit court is void; (3) the cities, towns and villages of the State are made judges in their own cases.

The first ground is answered by *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 750, and we may say there is no question of the reasonableness of the rates. It was alleged in the pleas of the defendant that the rates of the ordinance of June, 1882, were unreasonable when established. This was conceded by the demurrer. It was alleged in the pleas that they continued unreasonable. This was conceded by the demurrer. It was also alleged that the rates established by the ordinance of February 10, 1896, were just and reasonable. This was also conceded. The allegations, therefore, must be accepted as true conclusions from investigation. And it was averred besides that "the plaintiff refused to treat" with a committee appointed by the city council, "and neglected to reduce or fix such rental and water rates so as to make them just, reasonable and fair."

JUSTICES WHITE, BREWER, BROWN and PECKHAM, dissenting.

Of the second ground it is only necessary to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition therefor of the privileges granted to plaintiff. The act of 1891 only repeated and emphasized the power.

The third ground urged why plaintiff is deprived of its property without due process of law is as abstract, as free from real grievance to plaintiff, as the other grounds. With what functions the circuit courts of the State may be invested may not be of Federal concern. It is also a matter of construction, in which we might be obliged to follow the state courts. The ground we are now reviewing seems not to have been presented to the Supreme Court of the State either in the case at bar or the cases referred to by it and upon which it based its opinion.

In *City of Danville* v. *Danville Water Co.*, *supra*, the provision of the statute was referred to, but not in such way that it can be confidently said that the power given to the circuit court was to only review the rates fixed by the city council and to determine them to be reasonable or unreasonable, or whether the court could go farther and fix rates. The former seems a natural construction. But whether it is or not, the plaintiff has yet no reviewable grievance. No power has been attempted to be exercised by the circuit court against the plaintiff and no judicial remedy has been denied it.

Judgment affirmed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE BREWER, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM, dissenting.

The far-reaching consequences which must result from the principles upon which this case is decided, and the conflict between those principles and what I conceive to be previous well-settled rules of law, impel me to state the reasons for my dissent.

The legislature of Illinois, in 1872, passed a law entitled "An act to enable cities and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for water supplied." The act in full is as follows:

"SEC. 1. *Be it enacted by the People of the State of Illinois,*

represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years.

"SEC. 2. Any such city or village, so contracting, may levy and collect a tax on all taxable property within such city or village, to pay for the water so supplied."

This act was approved on April 9, 1872. Public Laws of Illinois, 1871–1872, p. 271.

At the same session, an elaborate law was passed entitled "An act to provide for the incorporation of cities and villages." Article X, under the heading "(Miscellaneous Provisions.)—Water," in section 1, provided as follows:

"SEC. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring or sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, *and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years;* also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

This was followed, in subsections 2 and 3, by the granting of full power to municipal corporations, in the event they determined to construct their own waterworks, to acquire land, etc., to levy taxes, and to provide for the collection of water rates or assessments for the use of the water to be supplied to the inhabitants from the works to be constructed. This act was approved on April 10, 1872. Public Laws of Illinois, 1871–1872, p. 259.

At the same session an act was passed entitled "An act concerning corporations." It was in effect a general law regulating the organization of private corporations in the State of Illinois. Section 9 thereof, in part, reads as follows:

"SEC. 9. The general assembly shall, at all times, have power

to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act. . . . "

This act was approved April 18, 1872. Public Laws of Illinois, 1871–1872, p. 299.

None of the foregoing acts contained an emergency clause; and, hence, although approved on different dates, each act went into force on the same day, viz., July 1, 1872. Constitution of 1870, Illinois, Art. IV, sec. 13; 1 Starr & C. Ann. Stat. (2d ed.) p. 125.

The defendant in error, the city of Freeport, a municipal corporation, on June 6, 1882, enacted an ordinance giving Nathan Shelton or his assigns the right of constructing, maintaining and operating waterworks for the term of thirty years from the first day of July, 1882, for the purpose of furnishing fire protection to and for the supply of said city of Freeport and the inhabitants thereof with water suitable for domestic and manufacturing purposes. The ordinance consisted of fourteen sections. It provided for a stand pipe, that the pumping machinery should possess a capacity of at least three million gallons of water in twenty-four hours, to be increased as the growth of the city and its needs required, and that not less than eight miles of mains, of specified dimensions and quality, should be laid for the distribution of water. Ample provision was also made for the extension of these mains by the water company, at its cost, upon the direction of the city government. The obligation was further imposed upon Shelton or his assigns to erect double-nozzle fire hydrants at the rate of not less than ten to each mile of main pipe, whenever and wherever the city council should direct. Payment was to be made by the city for fire hydrants by an annual rental for the first one hundred of one hundred dollars each, for all said hydrants, over one hundred and up to one hundred and fifty, an annual rental of eighty dollars each, and for all said hydrants over one hundred and fifty, an annual rental of fifty dollars each. It was expressly provided, in section 8 of the ordinance that the hydrant rentals "shall continue during the full term specified in this ordinance,

unless said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease." By section 6 the city reserved to itself the right to acquire the waterworks by purchase at the expiration of thirty years from July 1, 1882, the valuation of the property to be determined as provided in the section.

The ordinance contained provisions for the use of water "free of charge from the hydrants on streets curbed and guttered, for the purpose of washing and flushing the gutters, and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary for sanitary purposes, upon giving notice to the person in charge of said waterworks." It was also provided that "the city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches, and for four public fountains for drinking only, and one fountain in the public square or park should the city erect the same." Full specifications were contained in the ordinance as to the maximum charge to be made for water to be furnished individual consumers. In other words, the ordinance formulated a complete system, not only for the construction of the works, but for their operation during the time specified therein.

It was provided that the ordinance should become a binding contract upon its acceptance in writing by Shelton within a stated time, and when so accepted its provisions should not be changed, altered or amended in any way without the consent of both parties thereto or their successors or assigns.

On June 27, 1872, within the time limited, Shelton filed his written acceptance of the contract. In the following August he assigned all his rights to the plaintiff in error, a corporation organized under the provisions of the general statute relating to private corporations, approved April 18, 1872, above referred to. The assignment was recognized by the municipality, and it is unquestioned that the works were constructed in accordance with the contract, and that all obligations which it imposed were discharged by the company to the satisfaction of the municipality.

JUSTICES WHITE, BREWER, BROWN and PECKHAM, dissenting.

Up to January 1, 1896, under the contract, one hundred and twenty-one hydrants were placed in position, and up to that date the annual rental as provided in the contract was regularly paid by the municipality.

In 1891 an act was passed by the legislature of the State of Illinois entitled "An act to enable cities, towns and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof." Briefly stated, this act, as its title indicated, empowered municipal corporations to prescribe by ordinance "maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable." The act moreover provided that the reasonableness of the rates prescribed by the municipality might be tested by proceedings before a designated court.

Availing itself of the power conferred by this statute, the city of Freeport on February 11, 1896, passed an ordinance reducing the rates stipulated to be paid under the contract of 1882. It is necessary, however, only to consider, for the purposes of this case, the reduction made on the contract price for the public hydrants. At the reduction they were to be paid for annually at the uniform rate of fifty dollars each. Whilst thus seeking to reduce the sum which the city was to pay for the hydrants, the ordinance in effect retained all the contract obligations for the benefit of the city resting upon the water company, among them being the duty to lay additional mains as directed and to furnish free water for schools, churches and other purposes. The city refusing to pay any longer for the hydrants at the original contract price, an action was instituted to recover an amount asserted to be then due under the contract. Without stating the form of pleadings, it suffices to say that on the one hand the right of the water company to recover according to the rates fixed by the original contract was asserted and on the other the obligation of the city to pay only at the reduced rates was alleged. It was expressly charged in the pleadings on be-

half of the water company that the enforcement of the ordinance reducing the rates would be an impairment of the obligations of the contract, and hence a violation of the contract clause of the Constitution of the United States.

The case was ultimately taken to the Supreme Court of Illinois, and, upon the authority of the analogous case of *City of Danville* v. *Danville Water Company*, 178 Ill. 299, judgment went in favor of the city and against the water company. 186 Ill. 179. The opinion of the court in the *Danville* case was not unanimous, three of the seven judges dissenting. Without attempting to reproduce in its details the reasoning by which the court reached its conclusion, it seems to me that all the views expressed are embodied in the following propositions:

That the fixing of water rates was a public attribute, which from its nature was incapable of being alienated or restrained by the obligations of a contract, even although express authority to do so was conferred by the legislature on the municipality. That even if this was not the case, to contract for rates to be paid for a definite term required authority of the legislature, and that no such grant to the municipality had been conferred in this case, because, albeit, the legislative acts gave power to contract for a definite time for a supply of water, this did not give the right to fix the rates to be paid for the water during the time for which the municipality was authorized to contract; the argument being that the power to contract for a definite time is one thing and the fixing of the rates for the same time for the water contracted for is another and different thing. That even under the hypothesis that the power to contract for a definite time included the authority to fix the rates for such time, the reservation found in the general private incorporation law operated to confer upon the legislature the right to change the rates, because the contract, although originally made by the city with an individual, had been assigned to the defendant, a private corporation organized under the general private incorporation law.

These propositions practically embrace all but one of the contentions urged in the argument at bar, and their consideration will therefore substantially dispose of the controversy, except in

the particular above referred to, which we shall separately notice before concluding. Inverting the order in which they have been stated, I come to consider their correctness. In logical sequence the questions which arise are these: Was there power in the legislature to confer upon the municipality authority to contract for water for public use and fix by contract the rates to be paid by the city for a stated period? If so, was such power conferred upon the municipality, and did it contract under it? If it did so, was the contract to that effect taken out of the protection of the contract clause of the Constitution of the United States by reason of the reservations contained in the general private incorporation law under which the water company was organized?

It is not even intimated in the opinion below that there was any express limitation in the constitution of the State of Illinois restricting the power of the legislature to authorize a municipality to contract for water for public use for a fixed period and to agree upon the rates to be paid therefor for such time. That in the absence of such restriction the legislature of a State may contract, by statute, or may empower a municipality to contract for water for public use for a stated period and fix the rates to be paid during such term for the same, and that such contract if made is protected from impairment by the Constitution of the United States, is no longer an open question. *New Orleans Water Works Company* v. *Rivers*, 1885, 115 U. S. 674.

In that case the exclusive right granted was to continue for fifty years, and the act which it was held constituted a contract stipulated for the furnishing of a supply of water for public use during the continuance of the contract, "in consideration whereof the franchises and property of the company, used in accordance with its charter, were exempted from taxation, state, municipal and parochial." p. 677. After observing that the case before the court was controlled by the decision in *New Orleans Gas Company* v. *Louisiana Gas Company*, 115 U. S. 650, the court, speaking through Mr. Justice Harlan, said (p. 680):

"The two are not to be distinguished upon principle; for, if it was competent for the State, before the adoption of her present constitution, as we have held it was, to provide for supply-

ing the city of New Orleans and its people with illuminating gas by means of pipes, mains and conduits placed at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city."

In the *Gas Company* case, beginning at page 660, the court considered and held untenable the contention "that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects." After reviewing various decisions bearing upon this feature of the case, the court said (p. 664):

"Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *Asylum* v. *New Orleans*, 105 U. S. 362, 368; *Home of the Friendless*, 8 Wall. 430; *New Jersey* v. *Wilson*, 7 Cranch, 164, 166; *State Bank of Ohio* v. *Knoop*, 16 How. 363, 376; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Wilmington Railroad* v. *Reid*, 13 Wall. 264, 266; *Humphrey* v. *Pegues*, 16 Wall. 244, 248–9; *Farrington* v. *Tennessee*, 95 U. S. 679, 689."

The doctrine of the cases just cited was applied in *St. Tammany Waterworks* v. *New Orleans Waterworks*, 120 U. S. 64. It was also recognized and applied in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 9. In that case the court held valid a stipulation contained in a contract with the water company by which the city of Walla Walla bound itself not to erect waterworks during the stipulated life of a contract, viz., twenty-five years. Speaking of the earlier decisions to which we have above referred, the court, speaking through Mr. Justice Brown, said (p. 9):

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

"Where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

That a city if authorized by the legislature, in the absence of limitations in the state constitution on the legislative power, could validly stipulate in a contract for a supply of water that the existing rates should not be *reduced* by the municipality during the contract period, was expressly adjudged in the recent case of *Los Angeles* v. *Los Angeles City Waterworks Co.*, (1900) 177 U. S. 558. Indeed, in that case, at the time the contract was made, the city was without authority to make it, but inasmuch as subsequently its action had been ratified by legislative enactment the effect of such ratification was held to be equivalent to a prior original grant. But I need not further pursue this aspect of the case, since, as I understand the opinion of the court, it does not sanction the theory adopted by the Supreme Court of Illinois on this subject, and hence does not therefore in terms overrule the principle so firmly settled by the previous decisions of this court that the subject-matter of a water supply

may be contracted for a definite time, and that when so contracted for the obligations of the contract are protected from impairment by the Constitution of the United States.

That in the present case some authority was delegated by the legislature to the municipality to contract for water is unquestioned, and it is also undisputed that under the right thus conferred the municipality acted in making the contract which is now in controversy. The issue which then arises is simply this, Did the authority conferred by the legislature upon the municipality authorize it to contract, and in doing so to fix the rates to be paid for such supply during the time stated? Of course, an answer to this question involves an analysis of the statutes of Illinois under which the authority to make the asserted contract arises.

Before approaching the text of the statutes it is well to state the scope of the duty which devolves upon this court in determining whether there was a contract and the principles which must control in doing so. It is elementary that where a contract is asserted to have been impaired by subsequent state legislation, this court is constrained to form an independent judgment as to the existence of the contract and its terms. It is equally true that where the contract originates from a state statute, if, in the exercise of an independent judgment, the existence or nature of the contract becomes balanced in doubt, such doubt will be resolved in favor of the construction given to the state statute by the court of last resort of the State. But this qualification is not a limitation upon the duty to form an independent judgment, and does not imply that because the statute has been construed against the contract by the state court, therefore the matter is "balanced in doubt." If the rule did so imply, it would follow that in every case where a right arose from a state statute, and the court below held there was no contract, the review of that question in this court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the state court would have to be followed. The rule then to be applied when the matter is balanced in doubt is this and nothing more, that if in using its independent judgment, as it is its duty to do, a

serious doubt arises in the mind of the court, then the interpretation by the state court, acting upon a serious doubt created by the exercise of independent judgment, will cause such judgment to preponderate in favor of the construction given by the state court to its own statute. *Board of Liquidation* v. *Louisiana*, 179 U. S. 622, 638.

It is unquestioned also that where a right asserted if enforced will put a contractual limitation upon the power of the lawmaking authority of a State, presumably to be exercised for the public benefit, doubt is to be resolved in favor of the continued existence of the lawmaking power. In other words, that no contract limitation on the powers of government can be upheld by mere implication or sustained if there be doubt on the subject. The existence of such a contract limitation must arise clearly and by express intendment.

Bearing these principles in mind, I come to consider the legislative acts by which it is asserted the contract in question arose. Whilst it is quite clear to my mind that the powers conferred by the respective statutes were to be exerted under different circumstances and that the contract which is here in question came more especially within the scope of the act approved April 10, 1872, I shall not stop to discuss this view, since, whether the statutes be treated separately or together, they fully authorize the contract. Under this view I first approach the consideration of the act of April 9, 1872. Its language is that in all cities and villages where waterworks may hereafter be constructed, the city or village authorities "may contract . . . for a supply of water for public use for a period not exceeding thirty years." And the second section conferred upon a municipality so contracting power to levy taxes "to pay for the water so supplied." Clearly, authority is expressly conferred to contract for a supply of water for the period stated. The argument is that this right to contract for the water for the period of thirty years did not include the power to agree upon the sum to be paid for it for that period. In other words, the contention is that the right to contract for the purchase existed for the stated period without the power to fix the price which was an inseparable and necessary concomitant of the right itself.

This inevitably follows, since the contract for the supply for a fixed time and the payment to be made for it are one and each the correlative of the other. That the statute contemplated that the contract should include the price to be paid is manifestly the result of the second section, which confers upon the municipality the right to raise by taxation the money to pay the sum stipulated. Upon the hypothesis that the power to contract for the supply for thirty years did not include the agreement to pay for the supply during the stated period, the second section of the act would become wholly superfluous. Indeed, the theory of construction which excludes the rates from the power to contract for the period specified would render the whole act meaningless. Undoubtedly, if waterworks existed and use was made of the streets of the city by the owner of the works, in the absence of contract the power to compel the furnishing of water at just and reasonable rates would exist by operation of law. It follows that the statute should not be construed as merely authorizing the doing of that thing which could have been done without its passage, but must in reason be held to have empowered the obtaining of a water supply and facilities by way of extension of the water system, free water for certain public purposes and fire protection and all the other incidents to such contract, for the period named and at the rates to be agreed upon for such period. The same view obtains from considering the provisions of the first section of Article X of the act of April 10, 1872. By this section municipal authorities were authorized to provide for a supply of water by constructing municipal waterworks, or to accomplish the same purpose by authorizing "any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not exceeding thirty years." There was here an express delegation of authority to municipalities if they did not wish to assume the burden of constructing their own waterworks, to contract with an individual or private corporation to construct and maintain them at "*such rates as may be fixed by ordinance and for a period not exceeding thirty years.*" My mind fails to perceive how language could more directly and positively confer the authority to contract for the supply

and agree as to the rates to be paid therefor for a period of thirty years. Adopting the most technical rules of construction, I do not understand how the words "at such rates as may be fixed by ordinance and for a period not exceeding thirty years" can be construed as relating to the construction and maintenance of the works for that period and not to the sum to be paid for the supply for the same length of time. The view adopted by the court below was the words "at such rates as may be fixed by ordinance" can be taken out of the text and be treated as following and not as preceding the words "and for a period not exceeding thirty years." But this, as I understand it, instead of construing the statute, would be the equivalent of writing a new one. Obviously, whilst the statute authorized a contract for a supply and the rates to be paid therefor, it contemplated that the rates must in the nature of things be fixed by the passage of an ordinance to be embodied in the contract, and therefore the words "may be fixed by ordinance" were inserted. In other words, in order to insure under the contract the rates to be agreed upon, it provided that by ordinance these rates should be fixed for the designated period. Both laws, as I have stated, went into effect on the same day, but whilst relating to cognate subjects, contemplated the exercise of the power conferred as a result of somewhat different conditions. The one, the law approved April 9, had in view a contract for a water supply to be made where waterworks were established, and conferred the authority to contract for such supply under such circumstances and to fix the price to be paid for the supply for the contract term specified in the statute. The other, the law approved April 10, 1872, authorized a contract *to procure the construction of waterworks*, and also in doing so to fix the rates for the definite period which that statute likewise enumerated. To construe the words "*may be fixed by ordinance and for a period not exceeding thirty years*," as found in the statute as a legislative prohibition on the municipality to fix rates for the period stated in the law, is but to say that the power to contract and fix the rates for the definite time was at one and the same identical moment both given and prohibited.

But the construction adopted below and now maintained by

the court, as I understand it, leads yet further. As the words "may be fixed by ordinance and for a period not exceeding thirty years" are not found in the law authorizing a contract for water supply where waterworks were established when the agreement was made, they cannot be applied to such a contract. The following, then, is the inevitable result of the construction given to the statutes. The power to contract and fix rates for a definite time was conferred in the case where such a contract was made with an established water company. This power, however, was not given but was expressly prohibited where the purpose of the contract was to procure the building of waterworks and the purchase of a supply of water to be furnished from the works when constructed. This is but to say that where municipalities were legally entitled to secure the water supply without the necessity for a contract and at reasonable rates, they were unauthorized to contract for a definite time and at rates to be fixed for that period. But in the case where municipalities had no such power (for they could not, of course, compel an individual or corporation to undertake the expense of erecting waterworks) the power to fix rates for a definite period was absolutely prohibited. In other words, the power was conferred to contract for the supply and fix the price for a definite time where it was not at all needed, and it was absolutely forbidden in the case where in the nature of things such a power was essential. Considering the statutes separately, no doubt whatever then arises in my mind as to their import. When they are construed *in pari materia* this conclusion becomes to me an absolute conviction. This must be the result, since it is impossible, in reason, to hold that if the meaning of each statute is plain when considered separately the significance of each disappears when they are considered together.

The contract as executed, beyond peradventure, expressly fixed the rates for the term for which it was agreed the supply should be furnished. It imposed, moreover, upon the water company duties to construct and extend the works, which could only arise from contract, and which cannot reasonably be assumed to have been entered into but upon the basis of an agreed compensation. The obligations on the water company were not

simply to furnish a supply of water in accordance with the capacity of the plant existing at the inception of the contract, or provided for therein, but that the company came under the duty of largely extending its plant at the discretion of the municipality during the statutory period covered by the contract. The company, moreover, agreed to furnish a large volume of water during the same period without charge. It is inconceivable that all these obligations would have been assumed upon the hypothesis that they were to be performed during the thirty years without any previous understanding or agreement as to the payment to be made during the same time.

Various authorities are cited in the opinion of the court below, and were referred to in argument, upon the theory that they support the contention that where authority is given to contract for a supply of water for a fixed period, this power to contract does not as a necessary incident import authority to also agree upon the rates for the same period. In other words, the authorities cited, it is contended, separate the inseparable.

All the authorities cited are excerpted in the margin.[1] I do not pause to analyze them, contenting myself with the statement that not a single one of them, except the decision of a lower appellate court in Illinois, rendered subsequent to the execution of the contract here considered, have any relation to the proposition which they are cited to maintain. They all proceed upon the theory that where authority is given to a municipality or official board to contract, *without any specification of the time*, the municipality or board can contract only for a reasonable period, to be determined usually by the tenure of office of the official board. That is, *in the absence of a specification of time in the statute*, a limit is to be implied resulting from the nature of the

[1] *Carlyle* v. *Carlyle Water, Light & Power Co.*, 52 Ill. App. 577; *East St. Louis* v. *East St. Louis Gaslight & Coke Co.*, 98 Ill. 415; *Millikin* v. *Edgar County*, 142 Ill. 528; *Gale* v. *Kalamazoo*, 23 Mich. 354; *Des Moines Waterworks Co.* v. *Des Moines*, 95 Iowa, 357; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347; *State* v. *Columbus Gaslight & Coke Co.*, 34 Ohio St. 572; *Zanesville* v. *Gaslight Co.*, 47 Ohio St. 1; Greenh. Pub. Pol. p. 317; Cooley, Const. Lim. p. 206; 1 Dill. Mun. Corp. sec. 443.

functions of the officials by whom the contract is made. I cannot conceive upon what principle these authorities are held to control a case where in the statute conferring authority *the time was expressly fixed.* Indeed, the decisions in Illinois, (among them not only the cases cited below, but others which were referred to in those cases,) which are now relied upon to sustain the proposition that a power to contract for a supply of a commodity or the services of an individual does not include the authority to agree upon the compensation to be paid, actually refute the contention which it is alleged they sustain. Thus, in *Millikin* v. *County of Edgar*, 142 Ill. 528; *Davis* v. *School Directors*, 92 Ill. 294, and *Stevenson* v. *School Directors*, 87 Ill. 255, though it was held, from a consideration of co-related statutes, that where authority was conferred upon statutory boards to employ individuals to render public services, but no period was mentioned in the statute for the duration of such hiring, a contract of hiring might only lawfully be made for the current year, it was conceded that the power existed as a necessary result of the right to contract, to fix the compensation for such period. These cases demonstrate the unsoundness of the contention, here asserted, that the contract under consideration should be dismembered by disassociating the right to fix rates from the authority to contract for the period authorized by statute, and they also, in my opinion, refute the assumption that because the statute gave express power to fix rates by ordinance, thereby there did or could arise a limitation on the authority to contract for the price for the term for which the contract was authorized.

The contract in its entirety being then valid, the question which arises is, Did the power to destroy the contract arise from the reservation contained in the general private incorporation law?

In considering this question it must be borne in mind that there was no reservation whatever of the power to repeal, alter or amend contained in the law regulating public corporations, nor was such a reservation found in the constitution of the State. The power conferred upon municipalities to contract for a supply of water or for the construction of waterworks

authorized them to contract with individuals as well as corporations, and in this particular instance the contract was made with an individual. It is clear, then, that any reservation in the private incorporation act would not have acted upon the contract for the supply of water if that contract had remained in the hands of an individual. To hold, then, that the provision of the ninth section of the law regulating private corporations, which reserved to the general assembly the power to prescribe such regulations and provisions as it might deem advisable as to such corporations, retained the power to abrogate a contract like the one here involved, would import that, although there was no reservation whatever to abrogate or change the contracts as to water supply, made by a municipal corporation, that the private incorporation law was intended to deprive private corporations of the power to contract with municipal corporations as to water supply. That is to say, that public corporations were fully authorized to make irrevocable contracts, but such agreements became revocable when a private corporation was the other contracting party. But, aside from these considerations, the views of the contract, which I have already expressed, to my mind clearly demonstrate the inapplicability of the reservation relied upon. The reservation, as I have shown, went into effect on the same day as did the laws which expressly and specifically authorized the making, by municipal corporations, of a contract for a supply of water for a designated period *with individuals* or corporations. The statutes having gone into effect upon the same day, it would be beyond reason to construe the mere reservation of the legislative right to regulate private corporations as abrogating and destroying the express legislative authority to contract for a supply of water for a specified and definite period. To do so would be, by a mere implication, in effect to repeal and set aside the express authority conferred by the statutes, and would amount to holding that the authority had been conferred in the one breath and had been retracted in the other.

Indeed, the statute of 1891 which conferred the power to regulate water rates—under the authority of which the ordinance here complained of reducing the rates, was passed—shows

on its face that it was not enacted under the authority to regulate private corporations but upon the supposed existence in the legislature of a common-law right to fix rates, any contract to the contrary notwithstanding. This will become manifest when it is observed that the statute in question authorized municipalities to fix the rates for the supply of water, whether furnished by *private individuals* or corporations.

Although no reference was made to it in the opinion below, it is suggested in argument that as there was a provision in the constitution of the State of Illinois forbidding a grant of exclusive privileges, therefore the contract here considered was void because, it is asserted, such contract expressly conferred an exclusive right and privilege. It is, however, settled that the mere making of a contract for a water supply for a definite time and the fixing of rates for such time, accompanied with an obligation that the municipality itself would not construct waterworks for such period, does not amount to a grant of an exclusive privilege. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 14, 17. This being beyond question, it clearly follows that even upon the hypothesis that the contract in this case contained an express or implied stipulation that the city would not grant to any one else the right to use the streets of the city for the purposes of a waterwork system during the life of the contract, the stipulation for such exclusive right and not the contract would come within the inhibition of the provision of the constitution. We say this *arguendo* only, as the controversy here presented involves the validity of the contract in so far as it affected the supply for public use and fixed the rates of such supply during the period stated.

In my opinion, the contract having been expressly authorized for a definite period, the rates agreed upon could not, during the term of the contract, be changed without violating the contract clause of the Constitution of the United States; and I therefore dissent from the judgment holding otherwise.

DANVILLE WATER COMPANY *v.* DANVILLE CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 373. Submitted November 12, 1900.—Decided March 25, 1901.

The judgment below is affirmed on the authority of *Freeport Water Co.* v. *Freeport City*, *ante*, 587.

THE case is stated in the opinion of the court.

Mr. Alexander Pope Humphrey and *Mr. W. W. Davies* for plaintiff in error.

Mr. John H. Lewman and *Mr. George F. Rearick* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The parties to this action were respectively plaintiff and defendant in the courts of the State, and we will so denominate them. The plaintiff is a private corporation, and the defendant is a municipal corporation organized and existing under the general laws of the State. The action was brought by the plaintiff to recover the sum of $5000 alleged to be due for the rental of certain fire hydrants.

The cause of action relied on is based on an ordinance passed on the 9th of November, 1882, by the defendant, granting the plaintiff the privilege of constructing and maintaining waterworks for supplying the city of Danville, Illinois, with water. The ordinance provided in detail for the character of the works and the supply, the rates to consumers, whether furnished by meter or otherwise, and the purchase by defendant of the works at the expiration of five, ten and twenty years, and at the expiration of thirty years of any renewed term.

Section 8 and section 14 are respectively as follows:

"In consideration of the benefits which will be derived by

the said city and its inhabitants from the construction and operation of the said waterworks, and in further consideration of the water supply hereby secured for public uses, and as the inducement to said water company to accept the provisions of this ordinance and contract, and to enter upon the construction of said waterworks, the rights and privileges hereby granted to and vested in said water company shall remain in force and effect for thirty years from the passage of this ordinance; and for the same consideration and as the same inducement, the city of Danville hereby rents of the Danville Water Company, for the uses hereinafter stated, one hundred fire hydrants of the character hereinafter described, and for and during the term of thirty years from passage of this ordinance, and agrees to locate them promptly along the line of the street mains, on demand of said water company, and on submission by it to said city of a plan of the location of said street mains, and agrees to use the said hydrants carefully and to pay said water company for any injury which may happen to any of them when used by any officer, servant or member of the fire department of said city, and agrees to pay rent for said one hundred hydrants at the rate of seventy-five dollars each per year, and agrees to pay during the unexpired term of said ordinance and privilege, for any additional fire hydrants which city may hereafter locate at the rate of sixty-two and fifty one hundredths dollars each, per year, for the next forty additional hydrants, and for all fire hydrants in excess of one hundred and forty at the rate of fifty dollars each, per year; all of which sum shall be paid by said city to said water company, beginning from the dates when each of such hydrants shall be put into successful operation, in quarter-yearly instalments on the first days of February, May, August and November of each year, and terminating upon the expiration of said term of thirty years, or upon the purchase of said works and their privileges and property by the said city.

"This ordinance shall become binding as a contract on the said city of Danville in the event that the said Danville Water Company shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its

written acceptance of the terms, obligations and conditions of this ordinance, and upon such acceptance this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the said city and the said water company."

The acceptance was duly filed by plaintiff. On the first of May, 1883, another ordinance was passed amending the first ordinance, for the construction of the works, the streets where the mains should be laid, and the place where the fire hydrants should be put, and how constructed.

Section 2 provided as follows:

"This ordinance shall become binding as a part of the contract existing between the city of Danville and the Danville Water Company in the event that said water company, shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its written acceptance of it."

Between the 8th of June, 1893, and the 18th of October, 1894, twelve other ordinances were passed, requiring the extension of the mains of the water system to other streets and the erection of fifty-seven additional fire hydrants; all of the ordinances were declared binding as contracts upon acceptance of the plaintiff, and all were accepted. The rental of the hydrants was fixed, as to some of them, at $62.50 per annum, and others at $50 and $40 per annum. In the ordinance fixing the latter sums it was provided that nothing therein should "operate to affect in any way any of the provisions of the ordinance heretofore passed by said city relative to the Danville Water Company except to the extent of the reduction of the rental of the additional hydrants therein provided and hydrants thereafter to be provided."

There was an allegation that plaintiff did all things required of it in the construction of the system, and put in all mains and hydrants and kept them supplied with water.

The pleas of the defendant admitted that the sum of $1930 was due, but denied liability for anything over that sum, because the rental for the hydrants had been reduced by an ordinance passed by the city January 17, 1895, which was entitled "An ordinance prescribing the maximum rates and charges for

the supply of water furnished by the Danville Water Company of the city of Danville." The ordinance recited that after a careful comparison of water rates and charges in other cities it was found that those of the Danville company were "unjust, excessive and unreasonable." And that whereas under the act of the State approved June 6, 1891, in force July 1, 1891, and under "other fully competent and complete legal authority," the city was empowered to prescribe by ordinance maximum rates for water furnished by the Danville company; and whereas, after full investigation the members of the council believed the rates prescribed were just and reasonable, a schedule or scale of rates was ordained to take effect on the first of May, 1895. The rental of fire hydrants was reduced for the first one hundred and forty to a uniform rate of $50 per annum; for all others then rented and others which should be rented, $40 per annum. For certain uses of water which had been theretofore furnished free by the plaintiff a rate was fixed, to be paid by the city. Provision was made for the appearance by the city attorney if the plaintiff should desire to apply to the circuit court of the county for a review of the rates.

There was an allegation of notice of the passage of the ordinance to the plaintiff, and the prior ordinances under which plaintiff claimed an irrevocable contract were at the time of the passage of said ordinances in excess of a reasonable compensation for the water supplied, and were at the time of suit "unjust, unreasonable and excessive."

The plaintiff demurred to each of the defendant's pleas, and the demurrer was sustained. The defendant asked that the demurrer be carried back to the declaration, and elected to stand by its pleas. Judgment was entered for the plaintiff in the sum of $2701, motion to arrest, which was denied, and the case was then taken to the Supreme Court of the State, by which court the judgment was reversed, and the cause was remanded for further proceedings in accordance with the views expressed in the opinion filed in the cause.

On the return of the case to the circuit court the defendant by leave of the court filed additional pleas, to which a demurrer was sustained. With this action of the court we have no concern.

Opinion of the Court.

In accordance with the opinion of the Supreme Court of the State the demurrer of the plaintiff was overruled as to the first and second pleas of the defendant, and sustained as to the third. The plaintiff elected to stand by its demurrer, and judgment was entered for the sum of $1930 and all costs of suit. On appeal to the Supreme Court it was sustained, the court expressing the following opinion, (186 Illinois, 326):

"This case has practically been before us on two former occasions, the parties then being reversed.

"Counsel for appellant concede the judgment from which this appeal is taken is in exact conformity with the judgments and opinions in the former cases, and that no new question or matter has intervened since the former hearings here. Manifestly the only purpose of this appeal is to obtain a final judgment in this court to enable appellant to take a further appeal, if it should desire to do so.

"Adhering as we do to the reasoning and conclusions announced in *Danville Water Co.* v. *Danville City*, 78 Illinois, 229, and *Same* v. *Same*, 180 Illinois, 235, on the authority of these cases this judgment will be affirmed."

The chief justice of the State allowed this writ of error.

The questions presented by this record are the same passed on in *Freeport Water Co.* v. *Freeport City*, *ante*, 587, and depends upon the same statutes. Upon the authority of that case the judgment of the Supreme Court of Illinois is

Affirmed.

Mr. Justice White, with whom concurred Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Peckham, dissenting.

It will be seen from the opinion of the court that this case differs in no material particular from that of the *Freeport Water Co.* v. *Freeport City*, just decided. Under the sanction of the same statutes considered in the *Freeport* case, the defendant in error, the city of Danville, contracted with the plaintiff in error, the water company, for the period authorized by the statute, and stipulated as to the rates to be paid for a public

water supply. These rates were adhered to until, under the authority of the statute of the State of Illinois passed in 1891, referred to in the opinion in the *Freeport* case, the defendant in error reduced the rates below the contract price. It now asserts in this record that it possessed the power to do so.

For the reasons stated by me for dissenting from the opinion and decree in the *Freeport* case, I dissent from the opinion and decree in the present case.

ROGERS PARK WATER COMPANY *v.* FERGUS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 56. Argued and submitted October 31, 1900.—Decided March 25, 1901.

So far as the contentions in this case are the same as those passed upon in *Freeport Water Company* v. *Freeport City*, *ante*, 587, and in *Danville Water Company* v. *Danville City*, *ante*, 619, they are governed by those cases.

A governmental function in a statute granting powers to a municipal corporation cannot be held to have been granted away by statutory provisions which are doubtful or ambiguous.

There is no complaint in this case that the rates fixed by the ordinance of 1897, passed by the city council of Chicago, were unreasonable; and as the plaintiff in error relies strictly on a contractual right, and as it has no such right, the judgment below is affirmed.

THIS is a petition for a writ of mandamus which was brought by the defendant in error on the 13th of December, 1897, in the circuit court of Cook County, State of Illinois, against the plaintiff in error, to compel it to furnish him water at rates fixed by an ordinance enacted by the city of Chicago.

The defence is that such ordinance impairs the obligation of the contract which plaintiff in error claims to have with the village of Rogers Park before its annexation to the city of Chicago, as hereinafter mentioned.

The village of Rogers Park was from November 12, 1888, and until April 4, 1893, a municipal corporation organized un-

der the laws of Illinois. At the latter date it was annexed to the city of Chicago.

The Rogers Park Water Company, plaintiff in error, was a corporation, incorporated about the 24th of January, 1889, under the laws of Illinois, to construct and operate a system of waterworks in the village of Rogers Park, and to acquire such property and exercise the powers necessary thereto.

The company constructed and operated a system of waterworks in said village, and the premises of the defendant in error were connected thereto and supplied with water therefrom. The rates for such water under the ordinance of the city of Chicago were $8.72, payable in advance, for the current half year, from November 1, 1897, to May 1, 1898. Those rates were tendered to the company, and a supply of water demanded of it. The company refused to comply, demanding $13.50 for such supply, claiming that sum under section 12 of an ordinance of the village of Rogers Park before its annexation to Chicago, and which ordinance empowered the construction of the waterworks system.

The contract, which plaintiff in error claims, is based on that ordinance. It was passed November 12, 1888, and was entitled "An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works."

It was provided that in consideration of the public benefit to be derived therefrom the village of Rogers Park, Illinois, granted the exclusive right and privilege for a period of thirty years from the time the ordinance should take effect "unto H. E. Keeler, his successor and assigns, of erecting, maintaining and operating a system of waterworks in accordance with the terms and provisions" of the ordinance. There was a grant of the use of the streets and alleys for mains and conduits, and power given to extend the system to new territory, if any should be acquired by the village. There were provisions prescribing the character of the system to be constructed, and that the village should pay "an annual rental for fire protection, for

less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the rental rate of five hundred and seventy-five ($575) dollars for each mile of main, to be payable semi-annually." There were also provisions for payment of taxes by the company, the flushing of sewers, and the maintenance of fountains, for the supply of water to the inhabitants, the quality of water and the manner of the supply before prescribed, and for the acceptance in writing by the company of the terms of the ordinance. Provision was also made for the purchase of the system by the village.

Section 12 was as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars."

Then follow the rates for the particular purpose for which the water might be used.

Section 13 provided for the levy of a tax to meet the payments stipulated by the ordinance, which should be irrepealable.

Section 14 was as follows:

"Within sixty days after the passage of this ordinance said H. E. Keeler, his successors and assigns, shall file with the village an acceptance of the same, which acceptance, duly acknowledged before some officer duly authorized to administer oaths, shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns."

The plaintiff in error is the assignee of Keeler.

The plaintiff in error claimed in its answer that said ordinance of the village of Rogers Park constituted a contract with plaintiff in error by which it had the right to charge the rates contained in section 12, and that the ordinance of the city of Chicago reducing their rates impaired such contract and violated not only the constitution of the State of Illinois, but also

violated section 10, article 1 of the Constitution of the United States, as well as the Fourteenth Amendment.

One of the defences of the plaintiff in error was that the premises of defendant in error were connected with the system by reason of his written application, which application was accepted and became a contract. That defence, however, is not made in this court, and further reference to it is omitted.

There was a demurrer filed to the answer of the plaintiff in error, which set up its defences under the Constitution of the United States. The demurrer was sustained. Certain issues of fact were made on other pleadings, upon which there was a trial by jury, resulting in a verdict for petitioner and judgment on the verdict. The judgment was affirmed by the Supreme Court of the State, 178 Illinois, 571, and this writ of error was sued out. The assignments of error present constitutional questions only.

Mr. Newton A. Partridge for plaintiff in error.

Mr. Jesse B. Barton, for defendant in error, submitted on his brief.

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

At the time of the passage of the ordinance in November, 1888, by the village of Rogers Park, counsel for plaintiff in error says "two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for waterworks to be built and operated by private enterprise." The first is as follows:

"An act entitled 'An act to enable cities, incorporated towns and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for the water so supplied.' Approved April 9, 1872." In force July 1, 1872. Laws, 1871–2, p. 271. This title is as amended by act approved June 26, 1885, in force July 1, 1885, p. 64.

"Sec. 1. Be it enacted by the People of the State of Illinois,

represented in the General Assembly, That in all cities, incorporated towns and villages where waterworks have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." As amended by act approved June 26, 1885. In force July 1, 1885, Laws, 1885, p. 64.

"SEC. 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village to pay for the water so supplied."

The second, passed one day later and taking effect on the same day as the first, was the cities, villages and towns act. The title to that act and the article and section bearing upon this case are as follows:

"An act entitled 'An act to provide for the incorporation of cities and villages.' Approved April 10, 1872. In force July 1, 1872. Laws of 1871–2, p. 218.

"Article X, Section 1. The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of Artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not to exceed thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. We have passed on a similar contention in *Freeport Water Co.* v. *Freeport*, and in *Danville Water Co.* v. *Danville*, and we need not repeat the reasoning. Besides, it is disputable if the ordinance of 1888 justifies the claim of plaintiff in error. The Supreme Court of the State held that it did not. A strict construction must be exercised. The contract claimed concerned governmental functions, and

such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.

Section 1 of the ordinance recites "that in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Illinois, hereby grants the exclusive right and privilege for a period of thirty years . . . unto H. E. Keeler, his successor or assigns," of erecting and maintaining a system of waterworks. The use of the streets was also granted for such purpose.

Section 3 recites "in consideration of the public benefits and the protection of property resulting from the construction of said system of waterworks," the village agrees to pay a certain annual rental proportional to the length of the mains.

The grantee, on his part to pay "all municipal and village taxes," (sec. 3,) "in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted" (sec. 4,) agreed to furnish the village and the residents thereof an adequate supply of water. Failing to supply water for a year in quantity or quality stipulated, the "franchise and all their rights and privileges granted under this ordinance, and the contract entered into, shall be null and void."

If the ordinance contained any other provisions it could not be claimed that the company's charges to consumers of the water furnished them were free from regulation by the municipality if it otherwise had power of regulation. There are other provisions, and especial stress is laid upon them. Section 12 provides as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars."

Then follows an enumeration of uses and the rates for such uses. There is a schedule for meter rates, and also the following provision:

"Rates for all other purposes that may be applied for, not

named in the foregoing schedule of maximum rates, will be fixed by estimation or meter, at the option of the grantee or assigns."

This, it will be observed, is the language of command, not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away, and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding. The predecessor of the plaintiff in error was given the monopoly of the supply of water. That might be necessary to induce the investment of capital, and for its security the obligation of a contract might be sought and given. There was no such inducement for an unalterable rate. A reasonable rate the law assured, and assured even against governmental regulation. And the statute of 1891, which is especially complained of, assures it. By section 1 of that statute municipalities are "empowered to prescribe by ordinance maximum rates and charges," and if unreasonable rates and charges be fixed they may be reviewed and determined by the circuit court of the county in which the municipality may be. There is no complaint in this case that the rates fixed by the ordinance of 1897, passed by the city council of Chicago, were unreasonable. Plaintiff in error relies strictly on a contractual right. We think it has no such right, and the judgment of the Supreme Court is

Affirmed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE BREWER, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM, dissenting.

This case, in my opinion, should be controlled by the same principles which it seemed to me should have been applied in

the case of the *Freeport Water Company* v. *Freeport City*, *ante*, 587, just decided. The only difference of fact between that and the present one is this: In the *Freeport* case the matter involved was the power of the city to contract and to fix the rates to be paid for a supply of water for public use during the designated period. Here the question is whether the village of Rogers Park had power to contract for the construction and maintenance of waterworks, and in such contract to fix the rates to be charged for the water to be supplied to private consumers during the contract period.

The authority under which the contract in question was made was the two acts of the legislature of the State of Illinois considered in the *Freeport* case, that is to say, the acts of April 9, 1872, and April 10, 1872. There is this difference, however: The act of April 9, 1872, was amended on June 26, 1885, (Public Laws of Illinois, 1885, p. 64,) so as to authorize contracts for a supply of water as therein stated to be made with private individuals as well as private corporations. Thus authority existed to contract with individuals under both acts. The ordinance passed by the village of Rogers Park and the contract made as fully recited in the opinion of the court was for the erection, maintenance and operation of waterworks, the extension of the system as might be required, the payment of an annual rental by the village for public hydrants, and the establishment of the rates to be paid by private consumers during the contract period.

The language of the legislative act conferring authority to fix the rates, it seems to me, clearly sanctions the establishment by contract of the rates for private use as it did those to be paid for the public supply. The fixing of rates is plainly generic and of necessity embraced those rates which were to be paid for the supply of water which the statute authorized the village to contract for. So far as the power of the legislature to authorize a contract for designated rates for a stipulated time is concerned, I can see no difference between fixing the rates for the public and those for the private supply during the authorized time. This in my judgment is conclusively settled by the authorities to which reference was made in my dissent in the

Freeport case. Especially is this shown by the ruling of the court in *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, 569, where it was, in effect, decided that a contract, made by a municipality with a water company that existing rates to private consumers should not be reduced during the life of the contract was a valid stipulation, provided that the action of the city was previously sanctioned or was subsequently ratified by legislative authority.

The only question then remaining to be examined seems to me to be whether the particular contract made by the village of Rogers Park, considered in this case, fixed the rates for private consumers for the period of the contract. And this only involves an examination of the contract for the purpose of determining its import. Of course, it is conceded, under the rule of construction stated by me in my dissent in the *Freeport* case, that if doubt arises from an analysis of the provisions of the contract, that doubt must be solved against the water company and in favor of the municipality. But it is submitted that there can be no doubt, from a consideration of the text of the contract, that it fixed the rates to be paid by private consumers during the life of the contract. The ordinance established in detail a tariff of specific water rates for private purposes, embracing an enumeration which would seem to include every variety of use. It conferred upon the contractor the right, if he did not choose to charge these rates, to insert in the connection a water meter, and to charge for the water supplied at meter rates instead of at the aggregate sum otherwise fixed. The opening clause of section 12 read as follows: "The said grantee or assignee shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and to collect from them at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars." As I understand this language, it without doubt embodies the rates, whether fixed by the purpose for which the water was taken or by the meter measurement, and explicitly stipulates that these rates may be charged during the life of the contract. Indeed, it seems to me

impossible to conceive that the contract for the construction, maintenance and supply would have been entered into without such agreement. Can it, in reason, be said, in view of the terms of the contract, that if the water company had wished to charge more than the contract price, on the ground that an unreasonably low sum had been fixed in the contract, it would have had a right at once to ignore the contract stipulation and exact higher rates? If it cannot be, how can it be held that the city had the right at its pleasure to disregard the rates fixed in the contract? Was not the obligation of one the correlative of the right of the other? To say that the provisions of the contract constitute the language of command and not the language of contract, does not weaken or obliterate the unambiguous provisions of the agreement into which the parties entered. They were indeed, in my judgment, commands, arising from the express authority conferred upon the municipality by the legislature of the State of Illinois, sanctioned by the agreement of the parties, and protected from impairment by the Constitution of the United States.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 125. SCOTT *v.* TEXAS AND PACIFIC RAILWAY COMPANY. Error to the United States Circuit Court of Appeals for the Fifth Circuit. Argued December 7, 1900. Decided January 14, 1901. Judgment affirmed, with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the Eastern District of Texas. *Mr. T. P. Young* for the plaintiff in error. *Mr. John F. Dillon*, *Mr. Winslow S. Pierce* and *Mr. D. D. Duncan* for the defendant in error.

No. 94. CAMPBELL *v.* WAITE. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Submitted December 20, 1900. Decided January 14, 1901.

Per Curiam. Dismissed for the want of jurisdiction on the authority of *Pratt* v. *Fitzhugh*, 1 Black, 271; *Kurtz* v. *Moffitt*, 115 U. S. 487, and cases cited; *Cross* v. *Burke*, 146 U. S. 88; *Perrine* v. *Slack*, 164 U. S. 452. *Mr. Milton Remley* for the appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Beck* for the appellee.

No. 169. HARKINS *v.* CITY OF ASHEVILLE. Error to the Supreme Court of the State of North Carolina. Argued March 7, 1901. Decided March 11, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Oxley Stave Company* v. *Butler County*, 166 U. S. 640; *Kipley* v. *Illinois*, 170 U. S. 182; *Scudder* v. *Comptroller*, 175 U. S. 32; *Baltimore, C. & A. Railway Company* v. *Mayor*, 179 U. S. 681, and cases cited. *Mr. Charles A. Moore* for the plaintiffs in error. *Mr. Louis M. Bourne* for the defendant in error.

No. 298. PACIFIC COAST STEAMSHIP COMPANY *v.* PANDE. Error

to the District Court of the United States for the District of Alaska. Motions to dismiss or affirm submitted March 5, 1901. Decided March 11, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Thorp* v. *Bonnifield*, 177 U. S. 15; *Shute* v. *Keyser*, 149 U. S. 649. *Mr. J. J. Darlington* for the motions to dismiss or affirm. No brief filed in opposition.

No. 181. FALK *v.* UNITED STATES. Error to the Court of Appeals of the District of Columbia. Submitted March 8, 1901. Decided March 25, 1901. *Per Curiam.* Writ of error dismissed for the want of jurisdiction on the authority of *Chapman* v. *United States*, 164 U. S. 436. *Mr. Edwin Forrest* for the plaintiff in error. *Mr. Attorney General*, *Mr. Solicitor General*, and *Mr. Thomas H. Anderson* for the defendant in error.

Decisions on Petitions for Writs of Certiorari.

No. 492. COLUMBUS CONSTRUCTION COMPANY *v.* CRANE COMPANY. Seventh Circuit. Denied January 14, 1901. *Mr. J. R. Custer*, *Mr. S. S. Gregory* and *Mr. Grover Cleveland* for petitioner. *Mr. Charles S. Holt* opposing.

Nos. 511 and 512. OLD COLONY STEAMBOAT COMPANY *v.* PEARCE *et al.* First Circuit. Denied January 14, 1901. *Mr. Harrington Putman* and *Mr. Edward S. Dodge* for petitioner. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* opposing.

No. 488. GUARANTEE TRUST AND SAFE DEPOSIT COMPANY *v.* DELTA AND PINE LAND COMPANY. Fifth Circuit. Denied January 14, 1901. *Mr. Michael F. M. Cullen* and *Mr. T. D. Young* for petitioner. *Mr. Frank Johnston*, *Mr. Edward Mayes* and *Mr. J. M. Dickinson* opposing.

Decisions announced without Opinions.

No. 527. WOLFSON *v.* UNITED STATES. Fifth Circuit. Denied January 14, 1901. *Mr. William A. Maury*, *Mr. W. O. Hart*, *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. A. G. Brice* for petitioner. *Mr. Attorney General* and *Mr. Assistant Attorney General Beck* opposing.

No. 528. OHIO RIVER RAILROAD COMPANY *v.* LOCKWOOD. Fourth Circuit. Denied January 14, 1901. *Mr. Wm. A. Hubbard* for petitioner. *Mr. John G. McCluer* opposing.

No. 525. TOWN OF MOUNT VERNON *v.* WESSON. Seventh Circuit. Denied January 28, 1901. *Mr. Thomas M. Jett* for petitioner. *Mr. Thomas C. Mather* opposing.

No. 443. PHILLIPS & BUTTORFF MANUFACTURING COMPANY *v.* WHITNEY, ASSIGNEE. Fifth Circuit. Denied February 11, 1901. *Mr. J. Quintus Cohen* for petitioner. *Mr. O. W. Underwood* and *Mr. James J. Garrett* opposing.

No. 503. WILLIAMS *v.* GAYLORD. Ninth Circuit. Granted February 11, 1901. *Mr. C. Walter Artz* for petitioner. *Mr. Curtis H. Lindley* and *Mr. Henry Eickhoff* opposing.

No. 521. SIGUA IRON COMPANY *v.* GREENE. Second Circuit. Denied February 11, 1901. *Mr. W. B. Hornblower* and *Mr. Howard A. Taylor* for petitioner. *Mr. L. Laflin Kellogg* and *Mr. Alfred C. Pette* opposing.

No. 539. SCHWARTZ *v.* DUSS. Third Circuit. Granted February 11, 1901. *Mr. George Shiras, 3d*, and *Mr. S. Schoyer* for

petitioners. *Mr. D. T. Watson* and *Mr. Johns McCleave* opposing. (Mr. Justice Shiras took no part in the consideration and disposition of this application.)

No. 557. UNITED STATES *v.* MORGAN, MASTER, *etc.* Fourth Circuit. Denied February 11, 1901. *Mr. Attorney General, Mr. Solicitor General* and *Mr. Edgar Allan* for petitioner. *Mr. Floyd Hughes* opposing.

No. 553. ADAMS *v.* SHIRK. Seventh Circuit. Denied February 25, 1901. *Mr. John S. Runnells, Mr. William Burry* and *Mr. Edward A. Isham* for petitioner. *Mr. Frederic Ullman* and *Mr. Nicholas W. Hacker* opposing.

No. 555. COUNTY OF OTOE *v.* CLAPP. Eighth Circuit. Denied February 25, 1901. *Mr. James M. Woolworth* and *Mr. William D. McHugh* for petitioner.

No. 564. GULF, WESTERN TEXAS AND PACIFIC RAILROAD COMPANY *v.* NEW YORK AND TEXAS LAND COMPANY. Denied February 25, 1901. *Mr. L. E. Payson* and *Mr. Maxwell Evarts* for petitioner.

No. 465. BOARD OF COUNTY COMMISSIONERS OF MEADE COUNTY, KANSAS, *v.* CORNING. Eighth Circuit. Denied March 5, 1901. *Mr. S. S. Ashbaugh* for petitioner. *Mr. C. F. Hutchings* opposing.

No. 540. SECURITY TRUST COMPANY *v.* BLACK RIVER NATIONAL BANK OF LOWVILLE. Eighth Circuit. Granted March 5, 1901. *Mr. A. B. Browne* and *Mr. Edmund S. Durment* for petitioner. *Mr. Edward C. Stringer* opposing.

Decisions announced without Opinions.

No. 542. BUELL *v.* FARMERS' LOAN AND TRUST COMPANY. Sixth Circuit. Denied March 5, 1901. *Mr. C. Walter Artz* for petitioner. *Mr. Herbert B. Turner* opposing.

No. 554. HANIFEN *v.* PRICE. Second Circuit. Granted March 5, 1901. *Mr. W. P. Preble, Jr.*, for petitioner. *Mr. Edmund Wetmore* opposing.

No. 558. WARD, TREASURER, *v.* JOSLIN. First Circuit. Granted March 5, 1901. *Mr. William Reed Bigelow* for petitioner. *Mr. John S. H. Frink* opposing.

No. 560. SOUTHERN PINE COMPANY *v.* HALL. Fifth Circuit. Denied March 5, 1901. *Mr. T. C. Catchings* and *Mr. T. M. Miller* for petitioner. *Mr. D. B. H. Chaffe* and *Mr. E. J. Bowers* opposing.

No. 561. COLTON *v.* RAYMOND. Second Circuit. Denied March 5, 1901. *Mr. A. Walker Otis, Mr. Wayne Mac Veagh* and *Mr. Frederic D. McKenney* for petitioner. *Mr. John L. Hill* and *Mr. E. C. James* opposing.

No. 572. HILLER *v.* UNITED STATES. Second Circuit. Denied March 5, 1901. *Mr. Everit Brown* and *Mr. Albert Comstock* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

No. 573. UNITED STATES *v.* HAHN. Second Circuit. Denied March 5, 1901. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. *Mr. Albert Comstock* and *Mr. Everit Brown* opposing.

Decisions announced without Opinions.

No. 576. MUELLER *v.* NUGENT. Sixth Circuit. Granted March 5, 1901. *Mr. William W. Watts* for petitioner. *Mr. H. M. Lane* opposing.

No. 570. KNIGHTS TEMPLARS' AND MASONS' LIFE INDEMNITY COMPANY *v.* JARMAN. Eighth Circuit. Granted March 11, 1901. *Mr. Hervey Bryan Hicks* and *Mr. S. S. Gregory* for petitioner. *Mr. Frederick H. Bacon* opposing.

No. 574. UNITED STATES *v.* LUCIUS BEEBE AND SONS. First Circuit. Denied March 11, 1901. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. *Mr. William R. Sears* opposing.

No. 583. CLARKE *v.* LARREMORE, TRUSTEE. Second Circuit. Granted March 18, 1901. *Mr. S. Livingston Samuels* and *Mr. George Bell* for petitioner. *Mr. Nelson S. Spencer* opposing.

No. 591. GRIMES *v.* ALLEN. Seventh Circuit. Denied March 18, 1901. *Mr. E. W. Bradford*, *Mr. Chester Bradford* and *Mr. W. H. H. Miller* for petitioner. *Mr. Frederick W. Winter* and *Mr. James I. Kay* opposing.

No. 593. ILLINOIS CENTRAL RAILROAD COMPANY *v.* TUTT. Sixth Circuit. Denied March 25, 1901. *Mr. William A. Maury*, *Mr. J. M. Dickinson* and *Mr. Edmund F. Trabue* for petitioner.

AMENDMENTS OF RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

I.

It is ordered by the Court, That Section 1 of Rule 5 of this court be, and the same is hereby, amended so as to read as follows:

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

(*Promulgated December* 17, 1900.)

II.

It is ordered by the Court, That the first sentence of Rule 12 of the Rules of Practice in Equity be, and the same is hereby, amended so as to read as follows:

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule day or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof.

(*Promulgated December* 17, 1900.)

CORRECTION OF ERROR IN VOLUME 179.

On page 649, lines two and three from the bottom should read:

"*Mr. William B. Putney* and *Mr. Henry B. Twombly* for the Haddens."

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APPENDIX.

CENTENNIAL OF CHIEF JUSTICE MARSHALL'S APPOINTMENT.

In his message to Congress, at the beginning of the second session of the Fifty-Sixth Congress, President McKinley said: "I transmit to the Congress a resolution adopted at a recent meeting of the American Bar Association concerning the proposed celebration of John Marshall Day, February 4, 1901. Fitting exercises have been arranged, and it is earnestly desired by the committee that the Congress may participate in this movement to honor the memory of the great jurist."

Congress followed this suggestion by passing the following Concurrent Resolution:

Whereas the 4th day of February, A. D. 1901, will be generally celebrated throughout the United States as the one hundredth anniversary of the assumption by John Marshall of the office of Chief Justice of the United States; and

Whereas it is proposed that Congress shall observe the day by exercises over which the Chief Justice of the United States shall preside, and at which the President shall be present; and

Whereas a memorial praying that Congress shall so take part in honoring the memory of this great Chief Justice has been transmitted to the Congress by the President in his last annual message: Therefore

Resolved by the Senate (the House of Representatives concurring), That Congress will observe the 4th day of February next, being the one hundredth anniversary of the day when John Marshall became the Chief Justice of the Supreme Court of the United States, by exercises to be held in honor of his memory; and for that purpose a Joint Committee be appointed by the President of the Senate and the Speaker of the House

respectively to arrange said exercises, and the time and place therefor, to be participated in by the President, the Supreme Court, the Congress, and such officers of this Government and foreign governments, such members of the judiciary and of the bar, and such distinguished citizens as may be invited thereto by such committee.

"SEC. 2. That the exercises herein provided for shall be held in the Hall of the House of Representatives on said 4th day of February next, beginning at 10 o'clock A. M. and ending at 1 o'clock P. M. That the joint committee herein provided for shall consist of five members, two to be appointed by the President pro tempore of the Senate and three by the Speaker of the House of Representatives."

Chief Justice Marshall, as stated in this Joint Resolution, took his seat upon the bench as Chief Justice on the 4th day of February, 1801. In accordance with the suggestion made in the Resolution, this important event was noticed or celebrated in various parts of the country on the 4th day of February, 1901. The Reporter feels that the members of the Bar may well expect him in this volume to notice such proceedings as were participated in by a member or members of the Supreme Court of the United States. They were three in number: one held in Washington, in the Hall of the House of Representatives; one held in Richmond, Virginia; and one held at Parkersburg, West Virginia.

THE MARSHALL CENTENNIAL.

I. PROCEEDINGS IN WASHINGTON.

These proceedings were had in the Hall of the House of Representatives. The Chief Justice of the United States presided, and the President, his Cabinet, and other members of the Court and of the Senate and the House of Representatives were present. In opening the proceedings the Chief Justice made remarks which will be found below. He was followed by an address by Wayne McVeagh, Esq., delivered upon the invitation of the American Bar Association and of a Joint Committee of Congress. This address also will be found below.

REMARKS OF CHIEF JUSTICE FULLER.

The August Term of the year of our Lord eighteen hundred of the Supreme Court of the United States had adjourned at Philadelphia on the fifteenth day of August, and the ensuing term was fixed by law to commence on the first Monday of February, eighteen hundred and one, the seat of the government in the mean time having been transferred to Washington. For want of a quorum, however, it was not until Wednesday, February fourth, when John Marshall, who had been nominated Chief Justice of the United States on January twentieth by President Adams, and commissioned January thirty-first, took his seat upon the Bench, that the first session of the court in this city began.

It was most fitting that the coming of the tribunal to take its place here as an independent, coördinate department of the government of a great people, should be accompanied by the rising of this majestic luminary in the firmament of jurisprudence, to shine henceforth fixed and resplendent forever.

The growth of the Nation during the passing of a hundred years has been celebrated quite as much perhaps in felicitation over results as in critical analysis of underlying causes, but this day is dedicated to the commemoration of the immortal contri-

butions to the possibilities of that progress, rendered by the consummate intellectual ability of a single individual exerted in the conscientious discharge of the duties of merely judicial station.

And while it is essential to the completeness of any picture of Marshall's career that every part of his life should be taken into view, it is to his labors in exposition of the Constitution that the mind irresistibly reverts in recognition of "the debt immense of endless gratitude" owed to him by his country.

The court in the eleven years after its organization, during which Jay and Rutledge and Ellsworth—giants in those days—presided over its deliberations, had dealt with such of the governmental problems as arose, in a manner worthy of its high mission; but it was not until the questions that emerged from the exciting struggle of 1800 brought it into play, that the scope of the judicial power was developed and declared, and its significant effect upon the future of the country recognized.

As the Constitution was a written instrument, complete in itself, and containing an enumeration of the powers granted by the people to their Government—a Government supreme to the full extent of those powers—it was inevitable that the issues in that contest (as indeed in so many others) should involve constitutional interpretation, and that finally the judicial department should be called on to exercise its jurisdiction in the enforcement of the requirements of the fundamental law.

The President who took the oath of office administered by the Chief Justice, March 4, 1801, in his Inaugural included among the essential principles of our Government "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-Republican tendencies;" and "the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad;" but it was reserved for the Chief Justice, as the organ of the Court, to define the powers and rights of each, in the exercise of a jurisdiction, which he regarded as "indispensable to the preservation of the Union, and consequently of the independence and liberty of these States."

The people, in establishing their future government, had assigned to the different departments their respective powers, and prescribed certain limits not to be transcended, and that those limits might not be mistaken or disregarded, the fundamental law was written. And, as the Chief Justice observed, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained?"

The Constitution declared: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;" and "the judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The judicial power was, then, in a general sense, co-extensive with the legislative power, the executive power, and the treaty-making power, and to the department created for its exercise was exclusively committed the ultimate construction of the Constitution, although that power could not be invoked save in litigated cases and could not act directly beyond the rights of the parties.

And as the rule of construction was merely a question of law, it was to be, and it was, determined and applied according to law.

The principles applicable to the construction of written documents were thoroughly settled, and in themselves exceedingly simple. Applying them to the Constitution, the Chief Justice declared that "the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;" that while it was not open to dispute that an "enlarged construction which would extend words beyond their natural and obvious import," should not be indulged

in, it was not proper, on the other hand, to adopt a narrow construction, "which would deny to the Government those powers which the words of the grant, as usually understood, import, and which were consistent with the general views and objects of the instrument; that narrow construction, which would cripple the Government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent."

These were apparently plain legal rules of construction, yet in their application is to be found the basis of the National fabric; the seed of the National growth; the vindication of a written form of Government; and, simple as they now appear to be, their successful application, then, required the highest judicial qualities.

For we are to remember that there had been intense opposition to the adoption of the Constitution; that each of the Departments necessarily acted on its own judgment as to the extent of its powers; and that the operation of the sovereignty of the Nation on the powers of the States was the subject of heated partisan controversy.

To hold the balance true between these jarring poles; to tread the straight and narrow path marked out by law, regardless of political expediency and party politics on the one hand, and of jealousies of the revising power on the other; to reason out the governing principles in such manner as to leave the mind free to pursue its own course without perplexity, and to commend the conclusions reached to the sober second thought; these demanded that breadth of view; that power of generalization; that clearness of expression; that unerring discretion; that simplicity and strength of character; that indomitable fortitude; which, combined in Marshall, enabled him to disclose the working lines of that great republic, whose foundations the men of the Revolution laid in the principles of liberty and self-government, lifting up their hearts in the aspiration that they might never be disturbed, and looking to that future when its lofty towers would rise "into the midst of sailing birds and silent air."

During these first years of constitutional development in the due administration of the law, it was inevitable that bitter an-

tagonisms should be engendered, but their shafts fell harmless before that calm courage of conviction, which, perceiving no choice between dereliction of duty and subjection to obloquy, could exclaim with the Roman orator: "*Tamen hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem.*"

And so the great Chief Justice, reconciling "the jealousy of freedom with the independence of the judiciary," for a third of a century, pursued his stately way, establishing, in the accomplishment of the work given him to do, those sure and solid principles of government on which our constitutional system rests.

The Nation has entered into his labors, and may well bear witness, as it does today, to the immortality of the fame of this "sweet and virtuous soul," whose powers were so admirable, and the results of their exercise of such transcendent consequence.

ADDRESS OF WAYNE McVEAGH, ESQ.

Mr. Chief Justice, members of the American Bar Association, ladies and gentlemen:

Today is dedicated to the law. I therefore speak to you as a lawyer; and I congratulate you that it is part of our happy fortune that the occasion which brings us together offers in itself its amplest and completest justification. It would indeed have been a grave dereliction of duty if the brotherhood of American lawyers, on the bench and at the bar, had not assembled to honor with fitting observances the centennial anniversary of the entrance by John Marshall into the office of Chief Justice of the United States.

And the place where we are assembled is of all places the most fitting for these ceremonies; for it was here, in the capital of the country he loved so devotedly and served so faithfully, that he was attended by those patient and achieving years during which his labors enrolled his name among the few immortal benefactors of mankind. It is also eminently fitting

that such an occasion should be honored by the presence of the Chief Magistrate and the members of the Cabinet, whose subjection to the law was determined by him; by the presence of members of that illustrious tribunal the vast extent of whose rightful jurisdiction was determined by him; by the presence of distinguished Senators and Representatives, representing in Congress the States whose proper and abiding place in our governmental system was determined by him; and by the presence of citizens of the country which under his forming hand, instead of becoming a dissoluble confederacy of discordant States, became a great and indissoluble nation, endowed with all the powers necessary to enable it not only to protect itself against enemies at home or abroad, but also to accept and discharge the splendid and ennobling mission which had been confided to it in the divine purpose for the education of the world, and which he recognized when first of all men he spoke of the Empire of America—that of securing to the whole American continent, "government of the people, by the people, and for the people."

The small Virginia hamlet in which John Marshall was born on the twenty-fourth day of September, 1755, is almost within sight from the noble terrace of the Capitol, and much as the world has changed, that section of Virginia has not very greatly changed since that day. His birth fell almost half way between the opening of the seventeenth century and the opening of the twentieth—midway of the three centuries which, in many important respects, of all the centuries, have been the most fruitful, the most interesting, and the most beneficent.

The first half of that stirring period of

"Change, alarm, surprise,"

witnessed what is probably the most far-reaching and certainly the most romantic drama of history—the colonization of America. The landing at Jamestown had followed the dawn of the seventeenth century by only seven years, and the Pilgrims having landed in Massachusetts in 1620 and William Penn having landed in Pennsylvania in 1683, it is reasonably accurate to consider that the essential and formative labors of the first

settlers extended over and were comprised within the hundred and fifty years preceding John Marshall's birth, and that a like period of a hundred and fifty years extends from his birth to the day on which we are assembled to do honor to his memory.

I know not how others may feel, but I have never been able to read a single page of the marvellous story of the settlement of America without an access of generous enthusiasm, and of seeming to be lifted into a purer and serener air. The men engaged in those transforming labors were fully conscious of the greatness of the work given them to do; and they addressed themselves to it as co-workers with God for the advantage, not only of themselves and their children, but of the future generations which were to rise up and call them blessed, as age after age entered upon its inheritance of the free institutions prepared for it, by the unceasing toil and the unwitnessed sacrifice, by the lonely vigil and the drear winter, by the fear of sudden massacre and the absence from all accustomed joys, by the unshed tears and by the shed blood of the first comers to these shores.

It is too often forgotten that we are in almost all essential things only their lawful heirs, and such will be our children's children to the last syllable of recorded time. We sometimes talk with dull misapprehension of our inheritance, as if the mingling here of the different nationalities of the earth was a mere accident of our own time, and as if because some of our misfortunes are traceable to it, we are privileged to deny to any less fortunate brother such opportunity to seek a home upon this free and bountiful continent as our ancestors enjoyed. The truth is that the citizenship to which John Marshall was born, with all its far-reaching opportunities and inspirations, was due to just such mingling of the blood of different races as we are now witnessing. A Jesuit father is authority for the statement that eighteen different languages were spoken in what is now the city of New York two centuries ago, and probably no greater number is spoken there today; while as early as 1761 it was declared by a very competent authority that "the diversity of peoples, religions, nations, and languages in Amer-

ica is prodigious." Certainly the Dutch, the English, the French, the Germans, the Scotch, and the Swedes, Protestants and Catholics, were all self-asserting and aggressive agencies in the era of our colonization; and each stock and each creed made contributions of the greatest possible value to the foundations of the enduring structure of our nationality. Let us, therefore, always have the faith to believe that America is the heritage, not of ourselves alone, but of mankind, destined as well as fitted to receive all who come to her, and able to ameliorate their distresses, to diminish their differences, to cultivate their self-respect, and to fuse them, in the processes of the uncounted years, into one great and free and happy people.

This vast continent of America is also charged and will, I believe, always remain charged with another mission, impressed upon it by the men who settled it—that of being the refuge and the home of a true equality and of the republican form of government. It was settled and civilized and defended by men to whom the idea of privilege was abhorrent, and to whom the sense of substantial equality of opportunity was as the very breath of their lives. If in the changing circumstances of times and seasons any of the inequalities or privileges of the old world, from which they fled to the solitude of unbroken forests and the perils of savage foes, should unhappily reappear in the new world they founded, I beg you to believe they will not long find shelter here; for this entire continent has been, in counsels wiser than ours and which we could not hope to withstand if we wished, irrevocably dedicated to the common brotherhood of man in its truest and broadest sense. M. de Tocqueville long ago rightly described the controlling spirit of the youthful nation when he declared that it was "a manly and legitimate passion for equality." That noble passion is one of the most ancient and most constant forces in civilization, and it is necessarily the inexorable foe of inequality and of privilege in all their forms. It has often been checked, often thwarted, often even defeated and overthrown; but it has had, in the end, resistless power; and it has always advanced to new and more extensive conquests. Its last and greatest conquest is the continent on which we live.

The Marshall Centennial.

To properly estimate the true grandeur of character of any great man it is always necessary to understand his environment and the spirit of the age in which he lived. The vibrant and electric atmosphere, into which John Marshall was born and in which his youth was passed, was the inevitable consequence of the memories which the colonists had brought with them from the old world to the new, and of the elevating experiences of the life of adventure, of courage, of intellectual and religious fervor which they had lived. "Not many noble, not many mighty," were enrolled in their ranks. They were people of the middle class, such as we all have continued to be and, however reluctant some of us may be to admit it, we all are likely to remain. They did not primarily seek wealth, but they avoided poverty and acquired property by hard and honest toil. They came indeed "out of great tribulation," but often also out of great joy and buoyancy of spirit; and the fruits of their experiences were visible in their daily lives, illuminated as those lives were by that sublime spirit of sacrifice for conscience's sake, which in so many of their old homes had "wrought righteousness" for them and "out of weakness had made them strong."

The men who came from Sweden, from Holland, from England, from France, and from Germany, differing in many respects—in language, in habits, in dress, in manners—were agreed, as if of one blood and one creed, in the underlying principles of the Reformation, for which they and their fathers had suffered unspeakable afflictions; and they were agreed also in their common hatred of all tyranny, whether of church or king. They were an advance guard of a political Renaissance sent to take possession of the new world and to plant here that tree of liberty whose leaves should be "for the healing of the nations."

And as these different nationalities were commingled and were rapidly being fused into one people, the professors of all the different religious creeds gathered here were united in their devotion to the land which gave to each of them the right to freedom of religious worship; and when John Marshall was born the American colonists, thinly scattered along the Atlantic coast from Massachusetts Bay to Georgia, were as one people slowly marching inland to take possession of the continent,

and to establish a great nation resting upon the sublime truth—true yesterday, true today, and true forever—that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, and that among these are life, liberty and the pursuit of happiness."

What followed was as inevitable as a decree of fate, although to the courtiers of the old world, its nobles and its kings, the revolt of the new world seemed like a dislocation of the order of nature. To them, in their blindness, "the world was all so suddenly changed, so much that was vigorous was sunk decrepit, so much that was not was beginning to be. Borne over the Atlantic to the closing ear of Louis, king by the grace of God, what sounds were these, new in our centuries? Boston harbor was black with unexpected tea. Behold a Pennsylvanian Congress gather; and ere long on Bunker Hill democracy, announcing in rifle volleys, death-winged, under her star banner, that she was born, and would envelope the whole world." In truth nothing in the evolution of the material world is more orderly than the evolution in history of the American Revolution and the American Union. They were the natural and inevitable results of the memories, the sufferings, the faith, and the aspirations of the early settlers. The British Crown lost its American Colonies not because of the stamp act, or the tax on tea, not because of the cynical statesmanship of Lord North or the immeasurable stupidity and stubbornness of the King. The future of the colonies was determined beyond recall when Luther defied the papal tyranny at Worms; when Egmont and Horn were beheaded at Brussels; when Hampden was mortally wounded on Chalgrove Field; when the Huguenots were massacred because they would not renounce their faith; when Lord Baltimore was persecuted for being a Catholic, and William Penn was persecuted for being a Quaker. The American colonists had been consecrated, in the eternal councils, to the old, undying struggle for civil and religious freedom and were now giving the breath of life and the spirit of liberty to the new nation which was growing, day by day, into shape and strength under the imposition of their hands. As early as the year 1765, when John Marshall was only ten years old, the citizens of the

county of Westmoreland, where his father had been born, wrote and signed a declaration setting forth the rights of the colonies. Before he was ten years older he had assisted in forming a company of volunteers to defend those rights by arms, of which company he was appointed a lieutenant; and then began the first labors of his life, labors which were destined to fill in fullest measure every obligation of a patriotic citizen, first as soldier, then as statesman, and last, and crowning all with illustrious and unfading renown, as jurist.

His career as a soldier, like all the other actions of his life, was of the most creditable character. It is quite true, as Gibbon says, that "mere physical courage, because it is such a universal possession, is not a badge of excellence, but he who does not possess it is sure to encounter the just contempt of his fellows."

In the year 1775, when he was not twenty years old, he walked ten miles from his father's house to an appointed muster field. "He was about six feet in height, straight and rather slender, with eyes dark to blackness, beaming with intelligence and good nature. He wore a plain blue hunting shirt and trousers of the same material, fringed with white, and a round black hat with a bucktail for a cockade." When the company had assembled he told them he had come "to meet them as fellow-soldiers who were likely to be called on to defend their country and their rights and liberties invaded by the British Crown; that soldiers were called for, and that it was time to brighten up their firearms and learn to use them in the field." It was thus early, in the first flush of his youthful vigor, with hope on his brow and love of country and of liberty in his heart, that he stepped across the threshold which divides youth from manhood, and began that almost unexampled career of public service which continued, with ever-increasing lustre, for sixty years, and ended only with his life.

Active military duty was soon offered him, and he doubtless accepted it with that joy of expected battle which is the common heritage of all the fighting races, and which only needs a just cause, like our Revolutionary struggle, to justify and sanctify it; but for its justification and sanctity such a cause it al-

ways, and in all quarters of the world, imperatively needs. Lieutenant Marshall was soon promoted to a captaincy, and it was on the field of Brandywine, a pastoral scene then and now as beautiful as the eye ever rested on, where Lafayette first shed his blood and Wayne won his first laurels, that John Marshall fought his first battle. He also bore an honorable part at Germantown; but it was only when the army retired to winter quarters in December, 1777, and he was appointed to act as deputy judge advocate that he came into personal relations with Washington, and began to secure that large measure of confidence and regard which thereafter steadily increased to the close of Washington's life.

The winter of 1777–1778 was one of the decisive epochs in the history of mankind. Washington commanded but a small army, often in need of food, always in need of clothing, never with adequate shelter against the bitter cold, never properly armed; but those soldiers found food and clothing and shelter and arms in the sacred fire of liberty, which burned brightly in all breasts. Their awful and appalling sufferings and sacrifices were irradiated with

"A light which never was on sea or land,"

enabling them to forecast the future and to behold, as in prophetic vision, their country taking her place among the independent nations of the earth as the result of their courage and fidelity. The words of Aristotle, which come to us across the centuries, are true of every soldier there, from the commander-in-chief to the private in the ranks: "Beauty of character shines thoroughly when one is seen bearing with patience a load of calamity, not through insensibility, but through nobleness and greatness of heart."

That was indeed a time which "tried men's souls" and tried, almost to the point of breaking, the great heart of him who bore alone the responsibility, which he could not share with any other, for the success of the war, and the maintaining of that independence which had been so bravely proclaimed. We now know something of the fortitude Washington displayed in that long and trying winter, and while we never can enter into the bit-

terness of soul he must have experienced from the cabals he discovered, the ingratitude he ignored, the calumny he withstood, the sufferings he could not prevent, we are sure he often rose to the true appreciation of the great work he was doing for us and for all men; and pacing his lonely chamber when all the camp around him was wrapped in silence and in slumber "save where on some rampart a ragged sentinel, crunching the crisp snow with bleeding feet, kept watch for liberty," he must have known it was ordained that "the gates of hell should not prevail" against him, for that was the Continental army and those were the hills of Valley Forge.

Mr. Burke tells us how an angel, lifting the curtain which hid the future from the gaze of the youthful Lord Bathurst, might have said to him, "Young man, there is America, which at this day serves for little more than to amuse you with stories of savage men and uncouth manners, yet shall before you taste death, show itself equal to the whole of that commerce which now attracts the envy of the world; and whatever England has been growing to in seventeen hundred years, you shall see as much added by America in the course of a single life."

As two Virginian youths lay sleeping in their huts that winter at Valley Forge I wonder if any such forecast of their country's future, or any forecast of their own, came to them in their dreams. Of these youths one was John Marshall, who was destined to lay broad and deep the foundations of his country's greatness, and thereby assist to secure the glory and the blessings of free institutions to untold generations of men; and the other was James Monroe, who was destined to proclaim the truth that this whole American continent, from end to end, and from sea to sea, must be regarded by all other nations as dedicated to liberty and to bequeath to us the duty of giving practical and complete effect to the noble and inspiring doctrine which bears his name.

From Valley Forge John Marshall followed the varying fortunes of Washington's command through the year 1778 and on June sixteenth, 1779, he was with General Wayne in the assault and capture of Stony Point, an achievement which

Charles Lee declared was "the most brilliant in the whole course of the war."

Immediately after the surrender at Yorktown Mr. Marshall's career as statesman began, for he had been previously elected a member of the General Assembly of Virginia, and his labors in peace were governed by the same object which inspired him as a soldier—that of moulding the colonies into one great and strong republic. His experience in the army of the evils attendant upon a divided authority, had convinced him of the necessity of one general government over all the States, possessing ample authority to insure the general safety, to promote the general welfare, and to perpetuate in peace the blessings of liberty secured by the war. He says he had imbibed these sentiments so thoroughly that they became a part of his being, and as in the army he was associated "with brave men from different States who were risking life fighting in a common cause believed by them to be the most precious, I was in the habit of considering America as my country and Congress as my government." From that habit he never departed to the last hour of his life.

The brilliancy, the wisdom, and the enduring value of his contributions to the welfare of his country as Chief Justice have naturally diverted attention from his valuable and fruitful labors as a statesman, but those labors ought never to be forgotten, as they help to exhibit in its true proportions that consistency of opinion which made him, from first to last, such a powerful factor on the side of liberty and Union. He was reelected to the State legislature in 1784 and again in 1787, and in the following year he was chosen a member of the convention called to reject or to ratify the Constitution of the United States. This last election clearly resulted from his personal popularity, as not only the State of Virginia, but also the county of Henrico, which elected him, was opposed to the adoption of the Constitution. He had always been the earnest advocate of its adoption, and he was "eminently fitted by his character and temper to secure without solicitation, and to retain without artifice, the public esteem. His placid and genial disposition, his singular modesty, his generous heart, his kindly and unpre-

tentious manners, the scrupulous respect he showed for the feelings of others, his freedom from pride and affectation, his candor, and his integrity, conciliated the confidence and fixed the regard of his fellow-men."

The convention, in which he was to display these qualities for the advantage of his country, met at Richmond the second day of June, 1788, and presented an assemblage of men rarely if ever surpassed in the qualities most honored in deliberative assemblies, the qualities of eloquence, experience, and character. Among its members were Patrick Henry and George Mason, Edmund Pendleton and James Madison, Edmund Randolph, George Nicholas, and Henry Lee. It was in such company that John Marshall, by the massive strength of his great arguments on behalf of the Union and the Constitution, succeeded in securing victory for them while extorting from his earnest and eloquent opponents extraordinary tributes of respect and regard.

Mr. Marshall was, throughout Washington's administration, its thorough and earnest supporter, and notwithstanding the almost universal unpopularity of the treaty Mr. Jay had negotiated with England, Mr. Marshall fearlessly advocated its ratification, demolishing, once for all, in a profound legal argument before the people of Richmond, the proposition that the Constitution, in giving Congress the power to regulate commerce, denied to the President the right to negotiate a commercial treaty. He was again elected to the General Assembly in 1795, and on the thirty-first day of May, 1797, was appointed one of the three special envoys President Adams was sending to France in the hope of preserving peace with that country, while maintaining the dignity and honor of his own. The sordid nature of the negotiations of the Directory, conducted through Talleyrand and his agents, was fully exposed, when it was shamelessly declared by them that to maintain peace it was "necessary to pay money—a great deal of money," and to this demand the true American answer was given at the banquet tendered Mr. Marshall on his return from his mission by members of the Congress then sitting at Philadelphia:

"Millions for defence, but not a cent for tribute."

His bearing through all the painful and disagreeable experiences of this mission justified the message Patrick Henry sent him: "Tell Marshall I love him because he acted as a republican and as an American." Those were indeed the two guiding and controlling convictions of his whole life—he was always an ardent republican and he was always an ardent American; and his masterly conduct of the negotiations with the Directory is another striking instance of the truth that, since this country became a nation, no other country has been as wisely and successfully served by its diplomatic representatives as the United States. Of Mr. Marshall's conduct of those negotiations President Adams declared: "It ought to be marked by the most decided approbation of the public. He has raised the American people in their own esteem; and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter."

Mr. Marshall's next public service was as a member of the last Congress which sat in Philadelphia, meeting in December, 1799, and which body, so competent a judge as Horace Binney has declared, "was perhaps never excelled in the number of its accomplished debaters or in the spirit for which they contended for the prize of the public approbation." In announcing the death of Washington, Mr. Marshall seems to have anticipated in some degree the doctrine afterwards associated with the name of President Monroe. He declared that "Washington was the hero, the patriot, and the sage of America, and that more than any other agency he had contributed to found his wide-spreading Empire, and to give to the Western World independence and freedom."

However improbable such an occurrence may now appear, it is undoubtedly true that Mr. Marshall changed the current of opinion upon a grave constitutional question by a speech in Congress, although it is true that his argument in the Robbins case so far from being an ordinary speech in debate has all the merit and nearly all the weight of a judicial decision. It separates the executive from the judicial power by a line so distinct and a discrimination so wise that all men can understand and approve it. He demonstrated that, under the circumstances, the sur-

render of Robbins to the British authorities was an act of political power, which belonged to the executive department alone; and before the session closed he was privileged to teach his associates as well as his successors in Congress, by a striking example, how, when the convictions of the individual conscience conflict with the behests of party, a true patriot will follow the former, in utter disregard of party discipline, and of possible calamitous consequences to his future political advancement. Although a strong supporter of President Adams' administration, Mr. Marshall voted without hesitation, contrary to the earnest desire of the president and in direct opposition to all those with whom he was in general political accord. Believing that the second section of "The Alien and Sedition Laws" ought to be repealed, he voted accordingly, and it has long since been universally acknowledged that he was right. Among other lessons he had learned from Washington was this: "The spirit of party unfortunately is inseparable from our nature, having its root in the strongest passions of the human spirit, but in governments of the popular form it is seen in its greatest rankness and is truly their worst enemy."

So far from Mr. Marshall's independence of party having estranged President Adams he very soon afterwards appointed him Secretary of State, and the duties of this important office he discharged with the same wisdom and firmness he had displayed in all other public stations. The right then asserted by both France and Great Britain, while at war with each other, to interfere in our affairs and to compel us to ally ourselves with the one or the other of the combatants, was denied in a dispatch which will always hold high rank among the important state papers of America. He said: "The United States do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with one or the other of those powers. The aggressions sometimes of the one and sometimes of the other have forced us to contemplate and prepare for war. We have repelled, and will continue to repel, injuries not doubtful in their nature and hostilities not to be misunderstood." With this clear and vigorous statement of the true position of his country he closed his career as a statesman.

He must have found that career singularly interesting and fruitful. In the legislature of his native State; in its constitutional convention; in the special mission to the French Directory; as a member of Congress, and as Secretary of State, he had been brought into association with almost every member of that great galaxy of statesmen to whose wisdom, integrity and patriotism we are indebted for the priceless blessings of liberty and union which we now enjoy, and those associations had undoubtedly broadened and widened and deepened his opinion of the true character of the National Government, and assisted to give to his judgments that stately impress, alike of consistency and of conclusiveness, which they maintained to the end.

On the 4th day of February, 1801, just a hundred years ago, he took his seat as Chief Justice of the Supreme Court of the United States. Soldier he had been and statesman, and now for the rest of his life he was dedicated to the administration of the law. Fortunately he came to this great office, which is among the greatest possible to be held by man, in the full maturity of his intellectual powers, and admirably equipped to meet every demand which might be made upon him. He was first of all a thorough lawyer, thoroughly well grounded in legal principles, and thoroughly familiar with the decisions of the courts in England and at home, and possessed of the incalculable advantage of having tried and argued many unimportant, as well as many important causes; for he had been engaged in active, laborious, and miscellaneous practice at the bar for twenty years. His public duties, with the one exception of his brief special mission to France, had not withdrawn him from the scene of his professional labors, or seriously interfered with his devotion to them. He had risen rapidly at the bar, for the legal questions then to be discussed were novel in their character and counsel in the argument of such causes were obliged to reason from general principles and seek to apply considerations of abstract justice, so that the needs of the time and the character of his mind were in most happy accord. He had enjoyed the advantage of practicing for several years at the bar of Fauquier county and in the adjacent counties, where he had acquired not only a considerable practice, but also that familiarity with

the different branches of the law and their practical application which is far more slowly and far less easily attained in a city. When, therefore, he removed to Richmond it is not surprising that he rapidly advanced to the position of the acknowledged leader of its bar. The secret of his success was explained by Mr. Wirt: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of the orator, deserves to be considered one of the most eloquent men in the world, if eloquence may be said to consist in seizing the attention with irresistible force and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends. He possesses one original and almost supernatural faculty, the faculty of developing a subject by a glance of his mind and detecting at once the very point on which every controversy depends."

The services of such an advocate were sure to be in great request, and the Duc de Liancourt, in his "Travels in America," speaks of him as being "the most esteemed and celebrated counsellor" at the Richmond bar; and it was from his acknowledged leadership of that bar that he was appointed to be Chief Justice of the United States.

I have dwelt upon these steps of his advance from his admission to the bar in 1781 to his national reputation as an eminent lawyer in 1801, because it has always seemed to me there was danger of overlooking his rank at the bar, at the time of his appointment, because of the inestimable value of his services on the bench where for more than thirty years he proclaimed and established the true canons of construction to be applied to the Constitution.

It is hardly possible for us at the beginning of the century just opening to appreciate the difficulties and the dangers which confronted the nation at the beginning of the century which has just closed. We are now secure of citizenship in a great, powerful and free nation, whose authority upon all questions affecting the national welfare is subject only to such constitutional limitations as the sovereign people have imposed. We are, in very sober truth, rich in resources beyond the dreams of any visionary, with all the material blessings the heart of man

can desire, clad in full panoply for peace or war, and enjoying a moral leadership of all the nations of this vast and undeveloped continent, which is destined soon to be the home of hundreds of millions of people of all creeds and of all races, blended and fused into a peaceful confederacy of American republics. How different was the outlook a hundred years ago! A small and scattered population was then slowly making its way from the Atlantic coast into the wilderness of the valley of the Ohio, and thereby separating itself by the almost impassable barrier of the Alleghanies from the settlements on the seaboard. The Constitution, as well as the Government created by it, was only twelve years old, and in that brief period eleven amendments of its provisions had been found to be necessary. A general distrust existed of its wisdom, and in many States there was an active and bitter hostility to it, magnifying its few imperfections and denying its manifold and transcendent merits. Party spirit, then as ever since our greatest peril, exulted in the prospect that it would soon be apparent that the Constitution was incapable of solving the almost insoluble problem, of reconciling the rights of thirteen self-governing and independent communities, each differing in many respects from every other, with such sovereignty in the General Government as was indispensable to the perpetuity of the free institutions confided by the fathers to its sheltering care, in those noble and memorable words graven by them, as with a pen of iron, over the entrance to the sources of the fundamental law, and which cannot be too often repeated, in which they declared that the Constitution was "ordained to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

The new nation stood at a parting of the ways, divided as in twain by two great contentions, each supported by names of imposing weight and authority, one party insisting that the National Government was a sovereign nation created by the people of the United States and subject as such sovereign nation only to the limitations of the Constitution,—limitations which the people had imposed and which they alone could alter or

remove. The other party insisted that the National Government was merely the accredited agent of thirteen independent sovereignties, which had delegated to such agent certain strictly defined powers which the States were at liberty to abrogate or withdraw, at their own good will and pleasure.

It is now universally realized that the decision of the question thus distinctly put in issue was one of the most important ever submitted to human judgment; and if it is regarded as an accident that at such a crisis in the history of free institutions John Marshall was chosen to be Chief Justice of the Supreme Court of the United States, then chance was as wise and far-seeing as any divine guidance of the nation could have been. It is true that it was an era of great statesmen and of great lawyers, broad-minded, high-hearted men, true patriots if ever such there were. We know them now possibly better than if we had lived with them, as we linger lovingly and proudly over the minutest details of their daily lives, but we know that among them all the fittest man for the great and enduring work then needing to be done was the man who was summoned to do it. Mr. Webster wrote of him years afterwards, "I have never seen a man of whose intellect I have a higher opinion," and his intellect never served him to better purpose than when he declared the wise and moderate doctrine that the Constitution should not have either a strict or a liberal construction, but one giving the natural and ordinary effect to its words. He said: "The intention of the instrument must prevail. This intention must be gathered from its words. Its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended, and those provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers."

To those memorable words are to be added these others equally memorable: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true;" and these declarations guided him, as with beacon lights, through his entire judicial career. Of these propositions no criticism could really be offered, nor from them was

any appeal to either passion or prejudice possible. They enabled the Chief Justice to rear upon them that enduring structure of the true meaning of the Constitution which is among the most priceless possessions of our inheritance, and which will enable coming generations to enjoy our privilege of living under a government of liberty regulated by law.

Soon after Mr. Marshall's entrance upon the duties of Chief Justice the Supreme Court was confronted with one of the most important questions ever submitted to any tribunal for decision: Was the extent and scope of the limitations the Constitution imposed upon the authority of the legislative department of the Government of the United States to be determined by its judicial department? Might the latter declare null and void, as in conflict with such limitations, a law deliberately enacted by the former? Many strong reasons existed for supposing this could not have been intended. One was because all legislative authority was expressly vested in Congress. Another was because the members of Congress represented the people and held direct and explicit mandates from them, renewed at briefly recurring intervals, to enact such laws as they judged to be wise and necessary. On the contrary, the justices of the Supreme Court were the nominees of the President, and enjoyed tenure of office during their lives. The assertion that the latter were at liberty to annul and set aside the legislation enacted by the former seemed to many ardent and sincere patriots a proposition destructive of the division of the powers of the government into three departments of coördinate dignity and authority. But listen to the calm and resistless strength with which the Chief Justice established on impregnable foundations the true doctrine: "The question whether an act repugnant to the Constitution can become a law of the land is a question deeply interesting to the United States but happily not of an intricacy proportioned to its interest. If an act of the legislature repugnant to the Constitution is void, does it notwithstanding its invalidity bind the courts and oblige them to give it effect? Or in other words, though it be not a law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory and would

seem at first an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. That is of the very essence of judicial duty. If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

In deciding that the judicial authority of the court extended to the issuing of process to the President he settled for all time the subjection of the head of the executive department to the law; and he effectually disposed of the argument that as the King of Great Britain was not subject to such process the President of the United States ought not to be, by saying:

"Of the many points of difference which exist between the first magistrate of England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the Constitutions of their respective nations, the court will only select two. It is a principle of the English Constitution that the King can do no wrong; that no blame can be imputed to him; that he cannot be named in debate. By the Constitution of the United States the President as well as every other officer of the Government may be impeached and may be removed from office for high crimes and misdemeanors. By the Constitution of Great Britain the crown is hereditary and the monarch can never be a subject. By the Constitution of the United States the President is elected from the mass of the people and on the expiration of the time for which he is elected, he returns to the mass of the people again."

By a course of reasoning equally irresistible he subjected the lawfulness of the ministerial acts of members of the Cabinet to

the decision of the courts: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to secure this high appellation if the laws furnish no remedy for the violation of a vested legal right. The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is accountable to his country in his political character and to his own conscience. To aid him in the performance of those duties he is authorized to appoint certain Cabinet officers, and so long as the subjects of their action are political, there exists no power to control their discretion, which is the discretion of the President. But when Congress imposes upon a Cabinet officer other duties and directs him to perform certain acts, when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law; is amenable to the law for his conduct; and cannot at his discretion sport away the vested rights of others."

Mr. Justice Story tells us that these epoch-making judgments were "the results of his own unassisted meditations." They established upon a basis which can never be successfully assailed that both the legislative and executive departments were subject to the law, which is the only enduring basis of government in the democratic ages. If the law could lay no restraining hand upon Congress, Congress would be a despotism. If the law could lay no restraining hand upon the President and the members of his cabinet, they would be despots. It is because neither the President nor Congress, nor the highest nor the humblest citizen of the land, is either above the restraints, or beneath the protection, of the law that ours is destined to be the final form of government, as notwithstanding all its defects, it is by far the best form of government under which men have ever been permitted to live. For of law in its widest sense, including the processes of evolution, not only in the material universe, but in the moral and spiritual universe as well, the familiar words of Hooker are always true: "There can be no less acknowledged

than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power."

The other labors of Chief Justice Marshall, in giving definite form and meaning to the provisions of the Constitution, were only comparatively less difficult and important; and we must not lessen our gratitude to him by failing to appreciate the gravity of those decisions and their steadily increasing influence in our national life. "We admit," he said, "as all must admit, that the powers of the Government are limited and are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means, by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Having settled the undoubted right of Congress to determine, in its unfettered discretion, what means were necessary to give effect to the powers the Constitution conferred upon it, he next addressed himself to securing for the means thus employed absolute freedom from interference by the authority of any State. He said that while there was no express provision on the subject the proposition rested "on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. If the States may tax one instrument employed by the General Government they may tax all the means employed by it, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States. The question is indeed a question of supremacy. The court has bestowed on the sub-

ject its most deliberate consideration. The result is a conviction that the States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the constitutional laws, enacted by Congress, to carry into execution the powers vested in the General Government. This is, we think, the inevitable consequence of that supremacy which the Constitution has declared."

His next great step forward was to withdraw the obligations of contracts from the power of the State legislatures to impair their validity, and to place them also beneath the protecting ægis of the Constitution. He said: "This court can be insensible neither to the magnitude nor to the delicacy of this question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a State is to be revised. But the American people have said, in the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts. In the same instrument they have also said that the judicial power shall extend to all cases, in law and equity, arising under the Constitution. On the judges of this court is imposed the solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink."

It is now recognized that one of his greatest services to his country was in withstanding a wave of great popular excitement, shared and fostered by President Jefferson himself, and declaring the true doctrine of the Constitution to be, that no man can be convicted of treason against the United States unless he is proven by the testimony of two witnesses, to the same overt act, of levying war against the nation, or of adhering to its enemies. In discharging this grave duty he recognized fully the obloquy to which he was exposing himself. "No man," he said, "is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those

who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

In the years to come it will probably be recognized that among his decisions none will surpass in permanent material advantage that decision which determined that the power to regulate commerce resided exclusively in Congress and must be kept inviolate from any intrusion by the States, under any guise whatsoever. He refused to admit that any rights possessed by the States may be used so as to obstruct the free course of a power given to Congress. "We cannot admit," he said, "it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and state governments as a vital principle of perpetual obligation. No power of legislation in the States can be allowed to restrain or interfere with any law which Congress may constitutionally pass,—it cannot interfere with any regulation of commerce."

I have felt it was due to this great jurist to allow him to state his conclusions, as expounder of the Constitution, in his own clear and persuasive language. For more than half a century the principles vindicated by him in these decisions "have borne the keen scrutiny of an enlightened profession and the sharp criticism of able statesmen, but they remain unshaken. All the judges who concurred in them have descended long since into honored graves, but these judgments endure, and gathering vigor from time and general consent" have acquired the force of constitutional sanctions. It is not too much to say that he found his country drifting rudderless without chart or compass, and he left it with its course as definite and certain as that of the fixed stars in their courses, and invested with all the sovereign powers necessary to a great nation.

In these historic and enduring labors let us never forget that the court, consisting of himself and his able, learned, and patriotic associates, enjoyed the assistance of a bar of unusual eloquence and ability. As we recall them our minds are filled with admiration of their great intellectual powers and of their absolute fidelity to the court, which it was at once their privilege and their duty to advise and to instruct. In those arduous labors of evolving, year by year, the true strength and grandeur of the Constitution we must never forget the part borne by the bar,—among others by Wirt, and Dallas and Dexter, by Pinckney and Ogden and Mason, by Binney and Sergeant, by Livingston and Wheaton, by Martin and Rodney and Rawle, by Taney and by Webster; and the reciprocal confidence, regard, and affection which existed between the bench and the bar in those memorable years of our judicial history should never be forgotten. It was only such an atmosphere which could have emboldened Mr. Wirt to indulge in flights of imagination when addressing the judges; and it was not only with courteous attention but with an entire appreciation of their beauty that the court listened to him when during the trial of Burr he described, in his vivid imagery, the startling change in the nature of Blennerhassett from his not permitting the winds of summer to visit his wife too roughly to allowing her "to shiver at midnight on the banks of the Ohio, and mingle her tears with the torrents that froze as they fell."

The Chief Justice has himself told us of the enjoyment of the court of Mr. Pinckney's argument in the case of the *Nereide:* "With a pencil dipped in the most vivid colors and guided by the hand of a master, a splendid portrait has been drawn of a single figure, composed of the most discordant materials of peace and war. The skill of the artist was exquisite—the garb in which the figure was presented was dazzling."

During Mr. Webster's argument on behalf of Dartmouth College he faltered and said: "It is, as I have said, a small college—and yet there are those who love it;" and here the feelings which he had thus far succeeded in keeping down broke forth. Every one saw it was wholly unpremeditated—a pressure on his heart which sought relief in tears. "The court-room

during those two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure, bent over as if to catch the slightest whisper. Mr. Justice Washington also leaned forward with an eager, troubled look, and the remainder of the court pressed as it were towards a single point."

It is quite apparent, from these instances, that the conception of Chief Justice Marshall of the dignity of his great office in no manner interfered with his appreciation of the assistance to be derived from the arguments of counsel, or of his enjoyment of their eloquence. His own lofty standard of the judicial character was, however, never relaxed. In the closing years of his life, as a member of the convention called to revise the constitution of his native State, he said: "I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary. Our ancestors thought so, we thought so until very lately, and I trust the vote of this day will show we think so still, and that we will not draw down this curse upon Virginia."

Let us fervently hope no such curse may ever be drawn down upon the United States. In a popular government like ours resting upon manhood suffrage, the forces of the reserve in the army of civilization must always be the judicial tribunals. It is upon them as our only refuge in the days of evil fortune that our rights to property, to liberty, and to life must in the last resort depend, and as long as the plain people have undiminished confidence in the integrity and impartiality of their judges, those rights will be secure, but no longer.

Shortly before his death, in reply to an address from the bar of Philadelphia, declaring that he had "illuminated the jurisprudence of his country and enforced with equal mildness and firmness its constitutional authority," the Chief Justice replied, with his unvarying modesty, that "if he might be permitted to claim for himself any part of their approval, it would be that he had never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that

duty required"—thus firmly maintaining to the end the two guiding principles with which he began his judicial career.

And now at last the long and spotless record of labor, of honor, and of life was completed, and in Philadelphia, on the sixth day of July, 1835, John Marshall entered into rest. It is impossible to describe the impression which his death produced. It was not that feeling which the death of a public man in an ordinary sense of the word produces, which stirred the hearts of the people,—"it was a better, a purer and more tranquil sentiment,"—a mingled feeling of gratitude for the past and of security for the future.

The bar of Richmond has left an enduring record of their appreciation of him, and of their veneration for him, which seems to me the best portrait of a perfect judge ever drawn. They declared that he was "never absent from the bench in term time even for a day; that he displayed such indulgence to counsel and suitors that everybody's convenience was consulted but his own; that he possessed a dignity sustained without effort, and apparently without care to sustain it, to which all men were solicitous to pay due respect; that he showed such equanimity, such dignity of temper, such amenity of manners that no member of the bar, no officer of the court, no juror, no witness, no suitor, in any single instance, ever found or imagined, in anything said, or done, or omitted by him, the slightest cause of offence." They added that "his private life was worthy of the exalted character he sustained in public station, and that the spotless purity of his morals, his social, gentle, cheerful disposition, his habitual self-denial and his boundless generosity towards others, caused him to be, highly as he was respected, yet more beloved."

He had indeed completed the circle of a good man's duty as husband and father, as citizen and soldier, as statesman and jurist; and he has left to all the coming generations of his countrymen an inspiring example of a happy union of wisdom and virtue and patriotism. Two generations of American citizens have come and gone since the nation stood by his open grave, and if we had not profited as we ought to have done by the lessons of his life, we have not wholly failed to realize

the lofty ideals he cherished for us. We are in a far greater degree than he foresaw a powerful, prosperous and united people, loyally accepting his construction of the fundamental law as the source of the national life and still venerating the Constitution in his own measured words, as "a sacred instrument;" and we have lived to see diffused through all sections of our country and among all classes of our countrymen such generous measures of political equality, of social freedom, and of physical comfort and well-being as were never dreamed of on the earth before.

But while our hearts are full of gratitude for these unexampled material blessings, let us, on this day of all days, when the memories of the fathers cluster so closely about us, acknowledge, as they always acknowledged, that nations cannot live by bread alone. It was because of such conviction that they cherished, and we have heretofore cherished, the Christian ideal of true national greatness; and our fidelity to that ideal, however imperfect it has been, entitled us in some measure to the divine blessing, for having offered an example to the world for more than an entire generation of how a nation could marvellously increase in wealth and strength and all material prosperity while living in peace with all mankind. And although many good and thoughtful people are just now greatly troubled at what seems to them an evil promise of the future, we must never for a moment, in dark days or in bright, despair of the republic. Differences of opinion may well exist as to the best methods of discharging the grave and serious duties unexpectedly devolved upon us by a war begun with the noble object of helping a struggling people to secure their independence; but let us trust that however we may differ as to methods we all believe that the true glory of America and her true mission in the new century, as in the old, is what a great prelate of the Catholic Church has recently declared it to be: to stand fast by Christ and his gospel; to cultivate not the Moslem virtues of war, of slaughter, of rapine, and of conquest, but the Christian virtues of self-denial and kindness and brotherly love, and that it is our mission, not to harm but to help to a better life every fellow-creature of whatever color and however weak or lowly; and then we may some day hear the benediction: "Inas-

much as ye did it to one of the least of these my brethren ye did it unto me."

The passing years bring with them great compensations, and among them is a serenity of judgment which enables us to recognize as literal practical truth that, however we may strive to persuade ourselves to the contrary, no nation ever has gathered or ever will gather grapes of thorns or figs from thistles; and, as the sense of separation of the world in which we are from the world whither we are going lessens day by day, we come at last to believe with a faith which never can be shaken that the true mission of nations as of men is to promote righteousness on earth; that conferring liberty is wiser than making gain; that new friends are better for us than new markets; that love is more elevating than hatred; that peace is nobler than war; that the humblest human life is sacred; that the humblest human right should be respected; and it is only by recognizing these truths, which can never fail to be true, that our own beloved country can worthily discharge the sacred mission confided to her and maintain her true dignity and grandeur, setting her feet upon the shining pathway which leads to the sunlit summits of the olive mountains and taking abundant care that every human creature beneath her starry flag, of every color and condition, is as secure of liberty, of justice and of peace as in the Republic of God.

In cherishing these aspirations and in striving to realize them, we are wholly in the spirit of the great Chief Justice; and we can in no other way so effectually honor his memory as by laboring in season and out of season to make this whole continent of America "one vast and splendid monument, not of oppression and terror, but of wisdom, of peace and of liberty, on which men may gaze with admiration forever."

II. PROCEEDINGS IN RICHMOND.

At the request of the State Bar Association of Virginia, and of the Bar Association of the City of Richmond, an address on the Life, Character and Influence of Chief Justice Marshall was delivered at Richmond on the 4th day of February, 1901, by Mr. Justice Gray of the Supreme Court of the United States.

ADDRESS OF MR. JUSTICE GRAY.

Gentlemen of the Bar of the Commonwealth of Virginia, and of the City of Richmond:

One hundred years ago to-day, the Supreme Court of the United States, after sitting for a few years in Philadelphia, met for the first time in Washington, the permanent capital of the Nation; and John Marshall, a citizen of Virginia, having his home in Richmond, and a member of this bar, took his seat as Chief Justice of the United States.

In inviting a citizen of another ancient Commonwealth to take part in your commemoration of that epoch in our national history, by addressing you on the Life, Character and Influence of Chief Justice Marshall, you have been pleased to mention that it was President John Adams, of Massachusetts, who gave Chief Justice Marshall to the Nation, and that I am a citizen of Massachusetts and a member of the court over which Chief Justice Marshall presided; and to refer to the most cordial relations formerly existing between your State and my own, now happily restored, and, as we all trust, being reëstablished in a closer degree.

Heartily reciprocating your kindly sentiments, and deeply touched in my inmost feelings and convictions, your invitation has had the force of a summons that could not be gainsaid.

Permit me, in this connection, to recall one or two allusions by Marshall himself to the sympathy which existed between

Virginia and Massachusetts in the trying times of the Revolutionary War and of the Continental Congress.

In the earliest known speech of his, (as described by a kinsman who heard it,) made in May, 1775, when he was under twenty years old, upon assuming command as lieutenant of a company of the Virginia militia, he told his men "that he had come to meet them as fellow-soldiers, who were likely to be called on to defend their country, and their own rights and liberties invaded by the British; that there had been a battle at Lexington in Massachusetts, between the British and Americans, in which the Americans were victorious, but that more fighting was expected; that soldiers were called for, and that it was time to brighten their fire-arms, and learn to use them in the field."

Many years afterwards, in a letter to a friend, (quoted by Mr. Justice Story, to whom it was perhaps addressed,) he wrote: "When I recollect the wild and enthusiastic notions with which my political opinions of that day were tinctured, I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances, as to judgment. I had grown up at a time when the love of the Union, and the resistance to the claims of Great Britain, were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our suffering fellow-citizens of Boston were identical; when the maxim, 'United we stand; divided we fall,' was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly, that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable in a common cause, believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and Congress as my government."

Before the adoption of the Constitution, one of the chief defects in the government of the United States was the want of a national judiciary, of which there was no trace other than in the tribunals constituted by the Continental Congress, under powers specifically conferred by the Articles of Confederation,

for the decision of prize causes, or of controversies between two or more States.

Among the objects of the Constitution, as declared in the preamble, the foremost, next after the paramount aim "to form a more perfect Union," is to "establish justice." It ordains that the judicial power of the United States shall be vested in "one Supreme Court," and in such inferior courts as Congress may from time to time establish; that the judicial power shall extend to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and to other classes of cases specified; that the Supreme Court, in cases affecting ambassadors, public ministers and consuls, or to which a State shall be party, shall have original jurisdiction; and, in all the other cases before mentioned, shall have appellate jurisdiction, with such exceptions and under such regulations as Congress shall make; and that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, 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."

On the 24th of September, 1789, the first Congress under the Constitution passed the Judiciary Act, which had been framed by Oliver Ellsworth, then a Senator from Connecticut. That act has always been regarded as a contemporaneous construction of the Constitution; and, with some modifications, remains to this day the foundation of the jurisdiction and practice of the courts of the United States. It provided that the Supreme Court should consist of a Chief Justice, and of five Associate Justices who should have precedence according to the date of their commissions; established the Circuit and District Courts; defined the jurisdiction, original and appellate, of all the Federal courts; and empowered the Supreme Court to reëxamine and reverse or affirm, on writ of error, any final judgment or decree, rendered by the highest court of a State in which a de-

cision in the case could be had, against a right claimed under the Constitution, laws or treaties of the United States.

President Washington, on the very day of his approval of that act, nominated John Jay, of New York, as Chief Justice; and John Rutledge, of South Carolina, William Cushing, of Massachusetts, Robert H. Harrison, of Maryland, James Wilson, of Pennsylvania, and John Blair, of Virginia, as Associate Justices of the Supreme Court; and the nominations were all confirmed by the Senate on the 26th of September. The commissions of Chief Justice Jay and Mr. Justice Rutledge were dated on that day, and those of the other Justices on successive days, in the order above named, thus determining their precedence. President Washington, in a letter to each of the Associate Justices, informing him of his appointment, remarked, "Considering the judicial system as the chief pillar upon which our National Government must rest;" and in a letter to the Chief Justice, enclosing his commission, said that the judicial department "must be considered as the keystone of our political fabric."

During the first twelve years of the Supreme Court, there were frequent changes in its membership: three by the appointees preferring high offices in the governments of their several States; three others by resignation; one by rejection by the Senate; and two by death.

Rutledge never sat in the Supreme Court as Associate Justice, and in 1791 resigned the office to accept that of Chief Justice of South Carolina. Harrison declined his appointment, preferring to become Chancellor of Maryland. James Iredell, of North Carolina, was appointed in 1790, in the stead of Harrison; and Thomas Johnson, of Maryland, in 1791, in the place of Rutledge. The other Associate Justices before 1801 were two appointed by President Washington: William Paterson, of New Jersey, in 1793, in the place of Thomas Johnson, resigned; and Samuel Chase, of Maryland, in 1796, upon the resignation of Blair; and two appointed by President John Adams: Bushrod Washington, of Virginia, in 1798, upon the death of Wilson; and Alfred Moore, of North Carolina, in 1799, upon the death of Iredell.

THE MARSHALL CENTENNIAL.

President Washington, in his eight years of office, appointed four Chief Justices of the United States; John Jay in 1789; John Rutledge in 1795; William Cushing and Oliver Ellsworth in 1796. Jay held the office for about five years and nine months; and for the first six months of that time, by the President's request, also acted as Secretary of State. Ellsworth held the office of Chief Justice a little more than four years and a half. But Jay, as well as Ellsworth, during the whole of his last year, ceased to perform his judicial duties, by reason of being employed on a diplomatic mission abroad. Rutledge, after sitting as Chief Justice for a single term, was rejected by the Senate; and Cushing, though confirmed by the Senate, declined the appointment, and remained an Associate Justice until his death in 1810. Ellsworth resigned in 1800, owing to ill health; and Jay resigned in 1795 to accept the office of Governor of the State of New York, and in 1800, towards the close of his second term of office as Governor, being in a depressed condition of health and spirits, and having finally decided to retire from public life, declined a reappointment as Chief Justice, offered him by President Adams on the resignation of Ellsworth.

John Marshall, then Secretary of State, was nominated as Chief Justice of the United States by President Adams on the 20th, confirmed by the Senate on the 27th, and commissioned on the 31st of January, 1801.

His characteristic letter of acceptance, addressed to the President, and dated February 4, 1801, was in these words:

"Sir: I pray you to accept my grateful acknowledgments for the honor conferred on me in appointing me Chief Justice of the United States.

"This additional and flattering mark of your good opinion has made an impression on my mind which time will not efface.

"I shall enter immediately on the duties of the office, and hope never to give you occasion to regret having made this appointment.

"With the most respectful attachment,

"I am, Sir,

"Your obedient servant,

"J. MARSHALL."

On the same day, as is stated on the record of the Supreme Court, his commission as Chief Justice, "bearing date the 31st day of January, A. D. 1801, and of the Independence of the United States the twenty-fifth," was "read in open Court, and the said John Marshall, having taken the oaths prescribed by law, took his seat upon the Bench."

In speaking of one who has been for a hundred years the central and predominant figure in American jurisprudence, little more can be expected, at this day, than to echo what has been better said by others. Almost the whole ground was covered, long ago, by Mr. Binney, in the admirable eulogy delivered before the Councils of the City of Philadelphia on the 24th of September, 1835, the eightieth anniversary of the Chief Justice's birth, and within three months after his death; and by Mr. Justice Story, in the interesting essay, first published in the North American Review in 1828, and again, with some changes, in the American National Portrait Gallery in 1833, and finally developed into his discourse before the Suffolk Bar on the 15th of October, 1835, and containing much information derived from the Chief Justice himself.

In the researches incited by your invitation, my first and most important discovery was a letter from Chief Justice Marshall, dated "Richmond, March 22d, 1818," and addressed to "Joseph Delaplaine, Esq., Philadelphia." Delaplaine was then publishing, in numbers, his Repository of the Lives and Portraits of Distinguished American Characters, which was discontinued soon afterwards, without ever including Marshall. The letter purports to have been written in answer to one "requesting some account of my birth, parentage, &c.," and contains a short autobiography.

My earliest knowledge of the existence of such an autobiography was obtained from a thin pamphlet, published at Columbus, Ohio, in 1848; found in an old bookstore in Boston; and containing (besides Marshall's famous speech in Congress on the case of Jonathan Robbins) only this letter, entitling it "Autobiography of John Marshall." The internal evidence of its genuineness is very strong; and its authenticity is put almost beyond doubt by a facsimile (recently shown me in your State

Library) of a folio sheet in Marshall's handwriting, which, although it contains neither the whole of the letter, nor its address, bears the same date, and does contain the principal paragraph of the letter, word for word, with the corrections of the original manuscript, and immediately followed by his signature.

An autobiography of Marshall is of so much interest, that no apology is necessary for quoting it in full. Except for one or two slips of the pen, corrected in the printed pamphlet, it is as follows:

"I was born on the 24th of September, 1755, in the county of Fauquier in Virginia. My father, Thomas Marshall, was the eldest son of John Marshall, who intermarried with a Miss Markham, and whose parents migrated from Wales, and settled in the county of Westmoreland in Virginia, where my father was born. My mother was named Mary Keith; she was the daughter of a clergyman of the name of Keith who migrated from Scotland, and intermarried with a Miss Randolph on James River. I was educated at home, under the direction of my father, who was a planter, but was often called from home as a surveyor. From my infancy I was destined for the bar; but the contest between the mother country and her colonies drew me from my studies and my father from the superintendence of them; and in September, 1775, I entered into the service as a subaltern. I continued in the army until the year 1781, when, being without a command, I resigned my commission, in the interval between the invasions of Virginia by Arnold and Phillips. In the year 1782, I was elected into the legislature of Virginia; and in the fall session of the same year, was chosen a member of the executive council of that State. In January, 1783, I intermarried with Mary Willis Ambler, the second daughter of Mr. Jacquelin Ambler, then treasurer of Virginia, who was the third son of Mr. Richard Ambler, a gentleman who had migrated from England, and settled at Yorktown in Virginia. In April, 1784, I resigned my seat in the executive council, and came to the bar, at which I continued, declining any other public office than a seat in the legislature, until the year 1797, when I was associated with General Pickney and Mr. Gerry in a mission to France. In 1798, I returned to the

United States; and in the spring of 1799 was elected a member of Congress, a candidate for which, much against my inclination, I was induced to become by the request of General Washington. At the close of the first session, I was nominated, first to the Department of War, and afterwards to that of State, which last office I accepted, and in which I continued until the beginning of the year 1801, when Mr. Ellsworth having resigned, and Mr. Jay having declined his appointment, I was nominated to the office of Chief Justice, which I still hold.

"I am the oldest of fifteen children, all of whom lived to be married, and of whom nine are now living. My father died when about seventy-four years of age; and my mother, who survived him about seven years, died about the same age. I do not recollect all the societies to which I belong, though they are very numerous. I have written no book, except the Life of Washington, which was executed with so much precipitation as to require much correction."

This brief outline of an autobiography, besides its intrinsic value as a whole, is notable in several particulars. It shows that John Marshall was of Welsh, and of Scotch, as well as of English descent; and this through persons who had not recently come over, but had all been in this country long enough to become truly Americans. It attests, over his own hand, that he was educated at home under his father's superintendence and direction, and was destined from infancy for the bar; and also that it was by the request of General Washington, and much against his own inclination, that he was induced to become a candidate for Congress.

Marshall passed his boyhood and early youth in the country, in a healthful climate and beautiful scenery, fond of field sports and athletic exercises, living in a house containing a good English library, the eldest of a large family of children, under the guidance and in the companionship of a father of strong natural abilities, and to whom, as he used to say, he owed the solid foundation of all his own success in life. As Mr. Binney says: "It is the praise and the evidence of the native powers of his mind, that by domestic instruction, and two years of grammatical and classical tuition obtained from other sources, Mr.

Marshall wrought out in after life a comprehensive mass of learning both useful and elegant, which accomplished him for every station that he filled, and he filled the highest of more than one description."

He was licensed to practice law in 1780, and soon became one of the leaders of the bar of Virginia. The Reports of Bushrod Washington and of Daniel Call show that hardly any one argued so many cases before the Court of Appeals of the State.

He was chosen in the spring of 1782 a representative in the legislature of Virginia, and in the fall of the same year a member of the executive council of the State. He also served in the legislature in the years 1784, 1787 to 1792 and 1795.

In the convention of Virginia of 1788 upon the adoption of the Constitution of the United States, Patrick Henry, George Mason and William Grayson were the principal opponents of the Constitution, and James Madison, Governor Randolph, George Nicholas, Edmund Pendleton and John Marshall its leading supporters; and at the close of its proceedings Marshall (then only thirty-three years of age) was made a member, both of the committee to report a form of ratification, and of the committee to report such amendments as by them should be deemed necessary to be recommended; and the only other persons who were on both committees were Randolph, Nicholas and Madison.

Patrick Henry said of him in that convention: "I have the highest veneration and respect for the honorable gentleman; and I have experienced his candour upon all occasions." And ten years after, when Marshall was a candidate for Congress, it being represented that Henry was opposed to him, he wrote and published a letter saying that he should give him his vote for Congress preferably to any citizen of the State, General Washington only excepted.

President Washington offered Marshall the District-Attorneyship for the District of Virginia in 1789, and the Attorney-Generalship, and the mission to France, in 1796. President Adams offered him the office of Associate Justice of the Su-

preme Court in 1798, upon the death of Mr. Justice Wilson, and before appointing Bushrod Washington.

In 1799, Marshall delivered in the House of Representatives the speech vindicating the right and the duty of the President to surrender Jonathan Robbins to the British Government for trial for a murder on a British ship, of which Mr. Binney justly says that it has all the merits, and nearly all the weight of a judicial sentence; and Mr. Justice Story, that it placed him at once in the front rank of constitutional statesmen, and settled then, and forever, the points of national law upon which the controversy hinged.

Mr. Wirt, himself eminent as a lawyer and as an orator, who began the practice of the law but ten years later than Marshall, and who knew him well, both at the bar and on the bench, was so impressed with his style of argument that he returned to it again and again in his letters, which are the more interesting because of the absolute contrast between the two men in that respect.

In the Letters of a British Spy, first published in 1803, speaking of Marshall at the bar, Mr. Wirt said: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world; if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends." "He possesses one original and almost supernatural faculty: the faculty of developing a subject by a single glance of his mind, and detecting, at once, the very point on which every controversy depends. No matter what the question, though ten times more knotty than 'the gnarled oak,' the lightning of heaven is not more rapid, nor more resistless, than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape, and take in its various objects with more promptitude and facility, than his mind embraces, and analyzes the most complex subject. Possessing this intellectual

elevation which enables him to look down and comprehend the whole ground at once, he determines immediately, and without difficulty, on which side the question may be most advantageously approached and assailed. In a bad cause, his art consists in laying his premises so remotely from the point directly in debate, or else in terms so general and so specious, that the hearer, seeing no consequence which can be drawn from them, is just as willing to admit them as not; but his premises once admitted, the demonstration, however distant, follows as certainly, as cogently, as inevitably, as any demonstration in Euclid. All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of his manner; the correspondent simplicity and energy of his style; the close and logical connection of his thoughts; and the easy gradations by which he opens his lights on the attentive minds of his hearers."

Again, in a letter of May 6th, 1806, to Benjamin Edwards, a friend of his youth, Mr. Wirt wrote: "Here is John Marshall, whose mind seems to be little else than a mountain of barren stupendous rocks, an inexhaustible quarry from which he draws his materials and builds his fabrics, rude and gothic, but of such strength that neither time nor force can beat them down; a fellow who would not turn off a single step from the right line of his argument, though a paradise should rise to tempt him."

Once more, on December 20, 1833, within two months of his own death, in a letter of advice to a law student, he wrote: "Learn (I repeat it) *to think—to think deeply, comprehensively, powerfully*—and learn the simple, nervous language which is appropriate to that kind of thinking. Read the legal and political arguments of Chief Justice Marshall, and those of Alexander Hamilton, which are coming out. Read them, *study them;* and observe with what an omnipotent sweep of thought they range over the whole field of every subject they take in hand—and that with a scythe so ample and so keen, that not a straw is left standing behind them."

Before Marshall became Chief Justice, very few cases of constitutional law were decided by the Supreme Court.

The most important one was the case of Chisholm against the State of Georgia, in which it was held in 1793, by Chief

Justice Jay and his associates, Mr. Justice Iredell dissenting, that the Supreme Court had original jurisdiction of an action brought against a State by a citizen of another State. That decision proceeded upon the ground that such was the effect of the Constitution, established by the people in their sovereign capacity. But it was inconsistent with the view which had been maintained by Marshall in the Virginia convention of 1788; and it was presently, as the Supreme Court has since said, reversed and overruled by the people themselves, in the Eleventh Amendment of the Constitution, which declared that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Two cases from the Virginia Circuit were argued at Philadelphia, in February, 1796, before Justices Cushing, Wilson, Paterson and Chase, just before the appointment of Chief Justice Ellsworth. In one of them, Ware against Hylton, the case of the British debts, Marshall was of counsel against the debts, and the court held them to be protected by the treaty of peace. In the other, Hylton against the United States, in which the court upheld the constitutionality of the carriage tax, Marshall is said by Judge Tucker to have been of counsel against the tax in the Circuit Court; and Mr. Wirt, in a letter to Francis W. Gilmer of November 2, 1818, more than twenty years after, spoke of Marshall as having argued this case in Philadelphia; but Mr. Wirt probably had in mind the case of the British debts.

John Marshall was Chief Justice of the United States for more than thirty-four years, from his taking the oath of office on February 4th, 1801, to his death on July 6th, 1835.

After his accession, the changes in the membership of the Supreme Court became much less frequent than they had been during the earlier years of the court. Of the Associate Justices on the bench at the time of his appointment, Moore continued to serve for three years; Paterson for nearly five years; Cushing and Chase for nearly eleven years; and Bushrod Washington for nearly twenty-nine years. William Johnson, appointed on the resignation of Moore in 1804, served thirty years, dying

within a year before Chief Justice Marshall; Livingston, appointed on the death of Paterson in 1806, served sixteen years; Todd, appointed in 1807, (under an act of Congress increasing the number of Associate Justices to six,) nineteen years; and Duvall, appointed in 1811, on the death of Chase, twenty-three years, resigning in January, 1835. Story, also appointed in 1811, on the death of Cushing, served nearly thirty-four years; and Thompson, appointed in 1823, on the death of Livingston, twenty years. Trimble, appointed in 1826, on the death of Todd, died in little more than two years; and McLean, appointed in his place in 1829, served thirty-two years. Justices Story, Thompson and McLean remained on the bench at the time of Chief Justice Marshall's death. The other Associate Justices at that time were Baldwin, appointed in 1830, on the death of Bushrod Washington; and Wayne, appointed January 5th, 1835, in the place of William Johnson.

Chief Justice Marshall's conduct in regard to the appointment of some of his associates is worthy of mention.

On the death of Mr. Justice Trimble in 1828, President John Quincy Adams offered his place to Henry Clay, who declined it, and (as Mr. Adams states in his dairy) "read me a letter from Chief Justice Marshall, speaking very favorably of J. J. Crittenden to fill the office of Judge of the Supreme Court, but declining to write to me." Crittenden was nominated by President Adams, but was not confirmed by the Senate.

In January, 1835, upon the resignation of Mr. Justice Duvall, President Jackson nominated Roger B. Taney as Associate Justice in his place. While the nomination was pending before the Senate, Chief Justice Marshall wrote a note to Mr. Leigh, then a Senator from Virginia, in these terms: "If you have not made up your mind on the nomination of Mr. Taney, I have received some information in his favor which I would wish to communicate." Taney's nomination as Associate Justice was indefinitely postponed by the Senate; but within a year afterwards, upon the death of Chief Justice Marshall, he was nominated and confirmed as Chief Justice of the United States.

Before Marshall's appointment, the practice appears to have been for all the justices to deliver their opinions *seriatim*—a

practice which tends to bring into prominence the subordinate points of view in which they differ, and to obscure the principal point on which they agree; and, while it sometimes makes the report of the case more interesting, tends to impair its weight as a precedent for the determination of future controversies. Under Marshall, all subordinate differences seem to have been settled in conference, or at any rate less often displayed to the public; and the opinion of the court was usually delivered by one justice, and in the majority of important, and especially of constitutional cases, by Marshall himself. During his time there were few dissenting opinions.

The only constitutional case in which Chief Justice Marshall dissented from the judgment of the court was Ogden against Saunders in 1827, which was decided by a bare majority of the court against the opinion of Marshall, Duvall and Story. But in Boyle against Zacharie in 1832, notwithstanding a change in the membership of the court, Marshall declared that the principles established in the former opinion were to be considered no longer open for controversy.

Chief Justice Marshall, as appears by letters from him to his associates on April 18, 1802, was originally of opinion that the justices of the Supreme Court could not hold Circuit Courts without distinct commissions as circuit judges. But in Stuart against Laird in 1803, apparently deferring to the opinions of his associates, he acted as circuit judge; and the Supreme Court, in an opinion delivered by Mr. Justice Paterson, affirmed his judgment, upon the ground that practice and acquiescence for several years, commencing with the organization of the judicial system, had fixed the construction beyond dispute.

Marshall's judicial demeanor is best stated in the words of an eye witness. Mr. Binney, who had been admitted to the bar of the Supreme Court in 1809, and who had often practiced before him, tells us:

"He was endued by nature with a patience that was never surpassed — patience to hear that which he knew already, that which he disapproved, that which questioned himself. When he ceased to hear, it was not because his patience was exhausted, but because it ceased to be a virtue.

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"His carriage in the discharge of his judicial business was faultless. Whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference; and the courtesy of his general manner was only so far restrained on the bench as was necessary for the dignity of office, and for the suppression of familiarity.

"His industry and powers of labor, when contemplated in connection with his social temper, show a facility that does not generally belong to parts of such strength."

"To qualities such as these, he joined an immovable firmness befitting the office of presiding judge in the highest tribunal of the country. It was not the result of excited feeling, and consequently never rose or fell with the emotions of the day. It was the constitution of his nature, and sprung from the composure of a mind undisturbed by doubt, and of a heart unsusceptible of fear."

"In him his country have seen that triple union of lawyer, statesman, and patriot, which completes the frame of a great constitutional judge."

He had not the technical learning in the common law of Coke, or of several of Coke's successors. But, in the felicitous words of Mr. Justice Story, "he seized, as it were by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities, as if the very minds of the judges themselves stood disembodied before him."

He had not the learning of Nottingham or of Hardwicke in the jurisdiction and practice of the court of chancery, or of Mansfield in the general maritime law. But his judgments show that he was a master of the principles of equity, and of commercial law.

He had not the elegant scholarship of Stowell. But it is not too much to say that his judgments in prize causes exhibit a broader and more truly international view of the law of prize. Upon the question of the exemption of ships of war and some other ships, it was observed by Lord Justice Brett in the Eng-

lish Court of Appeal in 1880, "the first case to be carefully considered is, and always will be, *The Exchange*," decided by Chief Justice Marshall in 1812.

The jurisdiction of the court over which he presided was not confined to one department or branch of the law; it included common law, equity, maritime law, the law of admiralty and prize, and, in some degree, the civil law of Spain and of France.

Beyond all this, the jurisdiction of his court extended to constitutional law, in a more comprehensive sense than ever belonged to the courts of any other country.

In England, there is no law of higher sanction than an act of Parliament; and Parliament has uncontrolled power to change or to repeal even Magna Charta. It is otherwise in this country.

One of the earliest and most important judgments of Marshall is Marbury against Madison, decided in 1803, in which the paramount obligation of the Constitution over all ordinary statutes was declared and established by a course of reasoning which may be indicated by a few extracts from the opinion.

"The Constitution is either a superior paramount law, unchangeable by ordinary means; or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society."

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that

rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

"The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument."

In the light of experience, it is curious to look back upon the doubt and apprehension entertained by some of the Northern Federalists with regard to Marshall shortly before he became Chief Justice. For instance, on the 29th of December, 1799, when he had just entered the House of Representatives, Oliver Wolcott, then Secretary of the Treasury under President Adams, wrote to Fisher Ames: "He is doubtless a man of virtue and distinguished talents; but he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance."

Why should he not "think much of the State of Virginia?" What State of the Union had produced such a galaxy of great men? And what American, worthy of the name, does not cherish a peculiar affection for the State of his birth and his home? But such an affection for one's own State is by no means incompatible with a paramount allegiance and devotion to the United States as one's country. There is no more striking illustration of this truth than Chief Justice Marshall himself.

It was upon writs of error to the highest court of Virginia in which a decision in the case could be had—at first in 1816, in the case of Martin against Hunter's Lessee, a case between private individuals; and afterwards in 1821, in the case of Cohens against Virginia, a criminal prosecution instituted by the State—that the Supreme Court, under the lead of Chief Justice Marshall, upheld and established its appellate jurisdiction under the Constitution and the Judiciary Act, to review the judgment of the State court against a right claimed under the Constitution or the laws of the United States. In the first case, indeed, perhaps because it came from his own State, he allowed Mr. Justice Story to draw up the opinion of the court. But in the second case he himself expressed the unanimous conclusion of the court in one of his most elaborate and most powerful judgments.

The idea that he would "read and expound the Constitution as if it were a penal statute" seems now almost ludicrous. Take, for instance, his judgments in the cases of McCulloch against Maryland in 1819, and of Wiltberger in 1820. In Wiltberger's case, he clearly stated the reasons and the limits of the rule that penal statutes are to be construed strictly. But in McCulloch's case, when dealing with the question what powers may be implied from the express grants to Congress in the Constitution, he said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could hardly be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which

might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is *a constitution* we are expounding."

In McCulloch's case, after full discussion, he thus defined the rule: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, 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 decree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Among his other greatest judgments are United States against Peters, on the sanctity of judgments of the courts of the United States; Fletcher against Peck, and Dartmouth College against Woodward, that a grant by a State is a contract, the obligation of which cannot afterwards be impaired; Gibbons against Ogden, and Brown against Maryland, on the paramount nature of the power of Congress to regulate commerce with foreign nations and among the several States; Sturges against Crowninshield, on the power of the States to pass insolvent laws; and Osborn against the Bank of the United States, on the subject of suits by the Bank of the United States.

But he gave due weight to the decisions of the courts of the several States, saying, in Elmendorf against Taylor: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally

recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States."

In the cases of Bollman and Swartwout in the Supreme Court, and in the trial of Aaron Burr in this Circuit, he set bounds to the doctrine of constructive treasons. As showing the pains taken by the Chief Justice, it may be interesting to note, what is not generally known, that on June 29th, 1807, after the indictments had been found against Burr and others, and more than a month before the trial, he wrote letters to each of his associates, asking their opinions upon questions of law that would arise, and saying: "I am aware of the unwillingness with which a judge will commit himself by an opinion on a case not before him, and on which he has heard no argument. Could this case be readily carried into the Supreme Court, I would not ask an opinion in its present stage. But these questions must be decided by the judges separately on their respective circuits, and I am sure there would be a strong and general repugnance to giving contradictory decisions on the same points. Such a circumstance would be disreputable to the judges themselves, as well as to our judicial system. This consideration suggests the propriety of a consultation on new and difficult subjects, and will, I trust, apologize for this letter."

His letters to Mr. Justice Story show that he often consulted him on admiralty cases pending in the Circuit Court.

One is apt to forget that Mr. Justice Story was originally a Democrat, and was appointed to the court by James Madison, a Democratic President. He soon became a devoted adherent of Chief Justice Marshall, and fully recognized his leadership.

In an article in the North American Review in 1828, he wrote: "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say of Chief Justice Marshall; for though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure that they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, and an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made, in which he has not delivered the opinion of the court; and in these few, the duty devolved upon others to their own regret, either because he did not sit in the cause, or from motives of delicacy abstained from taking an active part."

Five years later, in dedicating his Commentaries on the Constitution of the United States to Chief Justice Marshall, Mr. Justice Story said: "When I look back upon your judicial labors during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning and the solid principles which they everywhere display. Other judges have attained an elevated reputation by similar labors, in a single department of jurisprudence. But in one department, (it need scarcely be said that I allude to that of constitutional law,) the common consent of your countrymen has admitted you to stand without a rival. Posterity will assuredly confirm, by its deliberate award, what the present age has approved as an act of undisputed justice."

Upon two important points in which decisions made in Chief Justice Marshall's time have been since overruled, the later decisions are in accord with the opinions which he finally entertained.

The court, in 1809, in opinions delivered by him, decided that a corporation aggregate could not be a citizen, and could not litigate in the courts of the United States, unless in consequence of the character of its members, appearing by proper averments upon the record. In Louisville Railroad Company against Letson, in 1844, those decisions were overruled; and it appears by the opinion of the court, as well as by a letter from Mr. Justice Story to Chancellor Kent of August 31st, 1844, that Chief Justice Marshall had become satisfied that the early decisions were wrong.

In the case of The Thomas Jefferson in 1825, it was decided by a unanimous opinion of the court, delivered by Mr. Justice Story, that the jurisdiction of the courts of admiralty of the United States was limited by the ebb and flow of the tide. But an article published in the New York Review for October, 1838, by one who was evidently intimate with Chief Justice Marshall, tells us: "He said, (and he spoke of it as one of the most deliberate opinions of his life,) at a comparatively late period, that he had always been of opinion that we in America had misapplied the principle upon which the admiralty jurisdiction depended—that in England the common expression was, that the admiralty jurisdiction extended only on tide waters, and as far as the tide ebbed and flowed; and this was a natural and reasonable exposition of the jurisdiction in England, where the rivers were very short, and none of them navigable from the sea beyond the ebb and flow of the tide—that such a narrow interpretation was wholly inapplicable to the great rivers of America; that the true principle, upon which the admiralty jurisdiction in America depended, was to ascertain how far the river was navigable from the sea; and that consequently, in America, the admiralty jurisdiction extended upon our great rivers not only as far as the tide ebbed and flowed in them, but as far as they were navigable from the sea; as, for example, on the Mississippi and its branches, up to the falls of the Ohio. He also thought that our great lakes at the west were not to be considered as mere inland lakes, but were to be deemed inland navigable seas, and as such were subject, or ought to be subject, to the same jurisdiction." He thus foreshadowed the decision

made in 1851 in the case of The Genesee Chief, by which the decision in The Thomas Jefferson was explicitly overruled.

Among the most interesting records of the impression made by Chief Justice Marshall upon his contemporaries are entries written presently after his death (although not published until much later) in the diary of John Quincy Adams, who was then sixty-eight years old; had been a member of either House of Congress; charged with many a diplomatic mission abroad; Secretary of State throughout the administration of President Monroe, and himself President of the United States; had long before been an active member of the bar of the Supreme Court, and had declined the appointment of Associate Justice, offered him by President Madison before he appointed Mr. Justice Story; and who, as his diary shows, was not given to indiscriminate or excessive laudation.

In that diary, under date of July 10th, 1835, Mr. Adams wrote: "John Marshall, Chief Justice of the United States, died at Philadelphia last Monday, the 4th instant. He was one of the most eminent men that this country has ever produced. He has held this appointment thirty-five years. It was the last act of my father's administration, and one of the most important services rendered by him to his country. All constitutional governments are flexible things; and as the Supreme Judicial Court is the tribunal of last resort for the construction of the Constitution and the laws, the office of Chief Justice of that court is a station of the highest trust, of the deepest responsibility, and of influence far more extensive than that of the President of the United States. John Marshall was a Federalist of the Washington school. The Associate Judges from the time of his appointment have generally been taken from the Democratic or Jeffersonian party." "Marshall, by the ascendency of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given a permanent and systematic character to the decisions of the court, and settled many great constitutional questions favorably to the continuance of the Union."

In the same diary, again, a month later, Mr. Adams wrote: "The office of Chief Justice requires a mind of energy sufficient to influence generally the minds of a majority of his associates;

to accommodate his judgment to theirs, or theirs to his own; a judgment also capable of abiding the test of time and of giving satisfaction to the public. It requires a man profoundly learned in the law of nations, in the commercial and maritime law, in the civil law, in the common law of England, and in the general statute laws of the several States of the Union. With all these powers steadily exercised during a period of thirty-four years, Chief Justice Marshall has settled many questions of constitutional law, certainly more than all the Presidents of the United States together."

The late Mr. Justice Bradley, after a distinguished service of nearly twenty years on the bench of the Supreme Court, wrote in 1889 of Chief Justice Marshall as follows: "It is needless to say that Marshall's reputation as a great constitutional judge is peerless. The character of his mind and his previous training were such as to enable him to handle the momentous questions, to which the conflicting views upon the Constitution gave rise, with the soundest logic, the greatest breadth of view, and the most far-seeing statesmanship. He came to the bench with a reputation already established—the reputation not only of a great lawyer, but of an eminent statesman and publicist." "It may truly be said that the Constitution received its final and permanent form from the judgments rendered by the Supreme Court during the period in which Marshall was at its head. With a few modifications, superinduced by the somewhat differing views on two or three points of his great successor, and aside from the new questions growing out of the late civil war and the recent constitutional amendments, the decisions made since Marshall's time have been little more than the application of the principles established by him and his venerated associates."

"The American Constitution as it now stands," says Mr. James Bryce, in his book on The American Commonwealth, "is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work, but the work of the judges, and most of all of one man, the great Chief Justice Marshall." "His work of building up and working out the Constitution was accomplished

not so much by the decisions he gave, as by the judgments in which he expounded the principles of these decisions, judgments which for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and rarely equalled by the most famous jurists of modern Europe or of ancient Rome." "He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes; but he developed and applied this idea with so much prudence and sobriety, never treading on purely political ground, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed."

The very greatness and completeness of the work of Chief Justice Marshall tends to prevent our appreciating how great it was.

He was a great statesman, as well as a great lawyer, and yet constantly observed the distinction between law, as judicially administered, and statesmanship.

The Constitution of the United States created a nation upon the foundation of a written constitution; and, as expounded by Marshall, transferred in large degree the determination of the constitutionality of the acts of the legislature or the executive from the political to the judicial department.

Marshall grew up with the Constitution. He served in the legislature of Virginia before and after its adoption, and in the convention of Virginia by which it was ratified. He took part in its administration, abroad and at home, in a foreign mission, in the House of Representatives, and in the Department of State, before he became the head of the judiciary, within a quarter of a century after the Declaration of Independence, and less than twelve years after the Constitution was established.

During the thirty-four years of his Chief Justiceship he ex-

pounded and applied the Constitution, in almost every aspect, with unexampled sagacity, courage and caution.

He had an intuitive perception of the real issue of every case, however complicated, and of the way in which it should be decided.

His manner of reasoning was peculiarly judicial. It was simple, direct, clear, strong, earnest, logical, comprehensive, demonstrative, starting from admitted premises, frankly meeting every difficulty, presenting the case in every possible aspect, and leading to philosophical and profoundly wise conclusions, sound in theory and practical in result. He recognized that, next to a right decision, it was important that reasons for the decision should be fully stated so as to satisfy the parties and the public. And it may be said of him, as Charles Butler, in his Reminiscences, says of Lord Camden, that he sometimes "rose to sublime strains of eloquence; but their sublimity was altogether in the sentiment; the diction retained its simplicity, and this increased the effect."

It was in the comparatively untrodden domain of constitutional law, in bringing acts of the legislature and of the executive to the test of the fundamental law of the Constitution, that his judicial capacity was preëminently shown. Deciding upon legal grounds, and only so much as was necessary for the disposition of the particular case, be constantly kept in mind the whole scheme of the Constitution. And he answered all possible objections with such fulness and such power as to make his conclusions appear natural and inevitable.

The principles affirmed by his judgments have become axioms of constitutional law. And it is difficult to overestimate the effect which those judgments have had in quieting controversies on constitutional questions, and in creating or confirming a sentiment of allegiance to the Constitution, as loyal and devoted as ever was given to any sovereign.

You will, I hope, forgive me one personal anecdote. While I had the honor to be Chief Justice of Massachusetts, I was a guest of a Boston merchant at a dinner party of gentlemen, which included Mr. Bartlett, then the foremost lawyer of Massachusetts, and one of the leaders at the bar of the Supreme

Court of the United States. In the course of the dinner, the host, turning to me, asked, "How great a judge was this Judge Marshall, of whom you lawyers are always talking?" I answered, "The greatest judge in the language." Mr. Bartlett spoke up, "Is not that rather strong, Chief Justice?" I rejoined, "Mr. Bartlett, what do you say?" After a moment's pause, and speaking with characteristic deliberation and emphasis, he replied: "I do not know but you are right."

A service of nearly twenty years on the bench of the Supreme Court has confirmed me in this estimate. We must remember that, as has been well said by an eminent advocate of our own time, Mr. Edward J. Phelps, in speaking of Chief Justice Marshall: "The test of historical greatness—the sort of greatness that becomes important in future history—is not great ability merely. It is great ability, combined with great opportunity, greatly employed." None other of the great judges of England or of America ever had the great opportunity that fell to the lot of Marshall.

John Marshall, during his term of office as Chief Justice, undertook no other public employment, except that, at the beginning of that term, and at the particular request of President John Adams, he continued to hold the office of Secretary of State for the last month of his administration; and that, at seventy-four years of age, and after having been Chief Justice twenty-eight years, he was persuaded to serve as a member of the Virginia convention of 1829–30 to revise the constitution of the State.

At the time of becoming a member of that convention, he wrote to Mr. Justice Story an amusingly apologetic letter, dated Richmond, June 11th, 1829, in which he said: "I am almost ashamed of my weakness and irresolution, when I tell you that I am a member of our convention. I was in earnest when I told you that I would not come into that body, and really believed that I should adhere to that determination; but I have acted like a girl addressed by a gentleman she does not positively dislike, but is unwilling to marry. She is sure to yield to the advice and persuasion of her friends." I assure you I regret being a member, and could I have obeyed the dictates of my own judg-

ment I should not have been one. I am conscious that I cannot perform a part I should wish to take in a popular assembly; but I am like Molière's *Médecin Malgré Lui.*"

Mr. Grigsby tells us that "he spoke but seldom in the convention, and always with deliberation," and that "an intense earnestness was the leading trait of his manner." Some remarks of his on the judicial tenure may fitly be quoted, without comment.

Strenuously upholding, as essential to the independence of the judiciary, the tenure of office during good behavior, he said: "I have grown old in the opinion, that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular." "Is it not, to the last degree, important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a juryman or a judge, if he has one dollar of interest in the matter to be decided; and will you allow a judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man?" "And will you make me believe that if the manner of his decision may affect the tenure of that office, the man himself will not be affected by that consideration?" "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

The question of the weight, as a precedent, of the act of Congress of 1802, abolishing the circuit judgeships created by Congress in 1801, having been discussed by other members of the convention, and Chief Justice Marshall's opinion having been requested, he said, "that it was with great, very great repugnance, that he rose to utter a syllable upon the subject. His reluctance to do so was very great indeed; and he had, throughout the previous debates on this subject, most carefully

avoided expressing any opinion whatever upon what had been called a construction of the Constitution of the United States by the act of Congress of 1802. He should now, as far as possible, continue to avoid expressing any opinion on that act of Congress. There was something in his situation, which ought to induce him to avoid doing so. He would go no farther than to say, that he did not conceive the Constitution to have been at all definitively expounded by a single act of Congress. He should not meddle with the question, whether a course of successive legislation should or should not be held as a final exposition of it; but he would say this—that a single act of Congress, unconnected with any other act by the other departments of the Federal Government, and especially of that department more especially entrusted with the construction of the Constitution in a great degree, when there was no union of departments, but the legislative department alone had acted, and acted but once, even admitting that act not to have passed in times of high political and party excitement, could never be admitted as final and conclusive."

A discussion of the merits of his Life of Washington would be out of place on this occasion. But I may mention having been favored with a sight of his letter of November 25th, 1833, accepting the Presidency of the Washington National Monument Society, in which he said: "You are right in supposing that the most ardent wish of my heart is to see some lasting testimonial of the grateful affection of his country erected to the memory of her first citizen. I have always wished it, and have always thought that the metropolis of the Union was the first place for this national monument."

His letter to Delaplaine, containing the autobiography already quoted, contains another passage too characteristic to be omitted: "I received also a letter from you, requesting some expression of my sentiments respecting your repository, and indicating an intention to publish in some conspicuous manner the certificates which might be given by Mr. Wirt and myself. I have been ever particularly unwilling to obtain this kind of distinction, and must insist on not receiving it now. I have, however, no difficulty in saying, that your work is one in which the

nation ought to feel an interest, and I sincerely wish it may be encouraged, and that you may receive ample compensation for your labor and expense. The execution is, I think, in many respects praiseworthy. The portraits, an object of considerable interest, are, so far as my acquaintance extends, good likenesses; and the printing is neatly executed with an excellent type. In the characters there is of course some variety. Some of them are drawn with great spirit and justice; some are, perhaps, rather exaggerated. There is much difficulty in giving living characters, at any rate until they shall have withdrawn from the public view." And Mr. Wirt, then Attorney General, wrote a similar letter November 5th, 1818, to Delaplaine.

Marshall was, like Lord Camden and other eminent judges, a great reader of novels. On November 26th, 1826, he wrote to Mr. Justice Story that he had just finished reading Miss Austen's novels, and was much pleased with them, saying: "Her flights are not lofty, she does not soar on eagle's wings, but she is pleasing, interesting, equable and yet amusing."

To his latest years, he retained his love of country life, and his habits of exercise in the open air. He continued to own the family place in Fauquier County, where he had passed his boyhood, and usually visited it in the summer. And he had another farm three or four miles from Richmond, and often walked out or in.

Mr. Binney, in his sketches of the Old Bar of Philadelphia, incidentally mentions: "After doing my best, one morning, to overtake Chief Justice Marshall in his quick march to the Capitol, when he was nearer to eighty than to seventy, I asked him to what cause in particular he attributed that strong and quick step; and he replied that he thought it was most due to his commission in the army of the Revolution, in which he had been a regular foot practitioner for nearly six years."

You would not forgive me, were I to omit to mention the Quoit Club, or Barbecue Club, which for many years used to meet on Saturdays at Buchanan's Spring in a grove on the outskirts of Richmond. The city has spread over the place of meeting, the spring has been walled in and the grove cut down, and the memories of the club are passing into legend.

THE MARSHALL CENTENNIAL.

According to an account preserved in an article on Chief Justice Marshall in the number for February, 1836, of the Southern Literary Messenger, (which I believe has always been considered as faithfully recording the sentiments and the traditions of Virginia), the Quoit Club was coëval with the Constitution of the United States, having been organized in 1788 by thirty gentlemen, of whom Marshall was one; and it grew out of informal fortnightly meetings of some Scotch merchants to play at quoits. Who can doubt that, if those Scotchmen had only introduced their national game of golf, the Chief Justice would have become a master of that game?

There are several picturesque descriptions of the part he took at the meetings of the Quoit Club. It is enough to quote one, perhaps less known than the others, in which the artist, Chester Harding, visiting Richmond during the session of the State convention of 1829–30, when the Chief Justice was nearly seventy-five years old, and the last survivor of the founders of the Club, tells us: "I again met Judge Marshall in Richmond, whither I went during the sitting of the convention for amending the constitution. He was a leading member of a quoit club, which I was invited to attend. The battle-ground was about a mile from the city, in a beautiful grove. I went early, with a friend, just as the party were beginning to arrive. I watched for the coming of the old chief. He soon approached with his coat on his arm, and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint-julep, which had been prepared, and drank off a tumbler full of the liquid, smacked his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party, and could throw heavier quoits than any other member of the club. The game began with great animation. There were several ties; and, before long, I saw the great Chief Justice of the Supreme Court of the United States down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout."

In the summer and autumn of 1831, the Chief Justice had a severe attack of stone, which was cured by lithotomy, performed by the eminent surgeon, Dr. Physick, of Philadelphia, in October, 1831. Another surgeon, who assisted at the operation, tells us that his recovery was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case, and of the various circumstances attending it. Just before the operation, he wrote to Mr. Justice Story: "I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for so many years. I cannot be insensible to the gloom which lowers over us. I have a repugnance to abandoning you under such circumstances, which is almost invincible. But the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant." He concluded by saying that he had determined to postpone until the next term the question whether he should resign his office. After the operation, he wrote: "Thank Heaven, I have reason to hope that I am relieved. I am, however, under the very disagreeable necessity of taking medicine continually to prevent new formations. I must submit, too, to a severe and most unsociable regimen. Such are the privations of age." He continued to perform the duties of his office, with undiminished powers of mind, for nearly four years more, and ultimately died, in his eightieth year, of a disease of a wholly different character, an enlarged condition of the liver.

There are many testimonies to his great modesty, self-effacement and true humility, in any company, whether of friends or of strangers. Let me quote but one, recently made known to me by the kindness of the President of your Supreme Court of Appeals, (a kinsman of Chief Justice Marshall,) and which, with his permission, is given in his own words: "I have an aunt in Fauquier county, Miss Lucy Chilton, now in her ninety-first year. I asked her on one occasion if she had known Judge Marshall. She replied that she had spent weeks at a time in the same house with him. I then asked her what trait or

characteristic most impressed her. She replied without hesitation: 'His humility. He seemed to think himself the least considered person in whatever company he chanced to be.'" This quality in him may help us to understand the saying, that the great lawgiver and judge of the Hebrews — who, we are told, "was learned in all the wisdom of the Egyptians, and was mighty in words and in deeds" — was "very meek, above all men which were upon the face of the earth."

Chief Justice Marshall was a steadfast believer in the truth of Christianity, as revealed in the Bible. He was brought up in the Episcopal Church; and Bishop Meade, who knew him well, tells us that he was a constant and reverent worshipper in that church, and contributed liberally to its support, although he never became a communicant. All else that we know of his personal religion is derived from the statements (as handed down by the good bishop) of a daughter of the Chief Justice, who was much with him during the last months of his life. She said that her father told her he never went to bed without concluding his prayer by repeating the Lord's Prayer and the verse beginning, "Now I lay me down to sleep," which his mother had taught him when he was a child; and that the reason why he had never been a communicant was that it was but recently that he had become fully convinced of the divinity of Christ, and he then "determined to apply for admission to the communion of our church — objected to commune in private, because he thought it his duty to make a public confession of the Saviour — and, while waiting for improved health to enable him to go to the church for that purpose, he grew worse and died, without ever communing."

His private character cannot be more felicitously or more feelingly summed up than in the resolutions drawn up by Mr. Leigh, and unanimously adopted by the Bar of this Circuit, soon after the death of the Chief Justice: "His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social, gentle, cheerful disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments; his

kindness to his friends and neighbors; his exemplary conduct in the relations of son, brother, husband, father; his numerous charities; his benevolence towards all men, and his ever active beneficence; these amiable qualities shone so conspicuously in him, throughout his life, that, highly as he was respected, he had the rare happiness to be yet more beloved."

Let me add a few words from the address of Mr. William Maxwell before the Virginia Historical and Philosophical Society on March 2d, 1836, preserved in the Southern Literary Messenger: "He came about amongst us, like a father amongst his children, like a patriarch amongst his people—like that patriarch whom the sacred Scriptures have canonized for our admiration—'when the eye saw him, it blessed him; when the ear heard him, it gave witness to him; and after his words men spake not again.'"

The earliest and most lifelike description that we have of his face and figure is one given by the kinsman who was present on the occasion, already mentioned, of his taking command of a militia company in 1775, when not quite twenty years of age: "He was about six feet high, straight and rather slender; of dark complexion, showing little if any rosy red, yet good health; the outline of the face nearly a circle, and, within that, eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature; an upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair of unusual thickness and strength; the features of the face were in harmony with this outline, and the temples fully developed; the result of this combination was interesting and very agreeable. The body and limbs indicated agility rather than strength, in which, however, he was by no means deficient." A few words more may be quoted, completing the picture: "He wore a purple or pale-blue hunting-shirt, and trousers of the same material fringed with white. A round black hat, mounted with the bucks-tail for a cockade, crowned the figure and the man."

"This is a portrait to which," adds Mr. Binney, "in everything but the symbols of the youthful soldier, and one or two of those lineaments which the hand of time, however gentle,

changes and perhaps improves, he never lost his resemblance. All who knew him well will recognize its truth to nature."

Of all the portraits by various artists, that which best accords with the above description, especially in the "eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature," is one by Jarvis, (perhaps the best American portrait painter of his time, next to Stuart,) which I have had the good fortune to own for thirty years, and of which, before I bought it, Mr. Middleton, then the clerk of the Supreme Court, who had been deputy clerk for eight years under Chief Justice Marshall, wrote me: "It is an admirable likeness; better than the one I have, which has always been considered one of the best." This portrait was taken while his hair was still black, or nearly so; and, as shown by the judicial robe, and by the curtain behind and above the head, was intended to represent him as he sat in court.

The most important of the later portraits are those painted by Harding in 1828–30, and by Inman in 1831, with a graver expression of countenance, with the hair quite gray, and with deep lines in the face.

Harding's portraits were evidently thought well of, by the subject, as well as by the artist. One of them, afterwards bequeathed by Mr. Justice Story to Harvard College, was sent to him by the Chief Justice in March, 1828, with a letter saying, "I beg you to accept my portrait, for which I sat in Washington to Mr. Harding, to be preserved when I shall sleep with my fathers, as a testimonial of sincere and affectionate friendship;" and in the same letter he gave directions for paying Harding "for the head and shoulders I have bespoke for myself." Harding's principal portrait of Marshall was painted in 1830 for the Boston Athenæum, in whose possession it still is; it has the advantage of being a full length, showing that in his seventy-fifth year he retained the erect and slender figure of his youth; and the artist wrote of it in his autobiography: "I consider it a good picture. I had great pleasure in painting *the whole* of such a man."

Inman's careful portrait, in the possession of the Philadelphia

Law Association, has often been engraved, and is perhaps the best known of all.

The crayon portrait in profile, drawn by St. Memim in 1808, which has always remained in the family of the Chief Justice, and been considered by them an excellent likeness, and is now owned by a descendant in Baltimore; the bust by Frazee, bequeathed by Mr. Justice Story to Harvard College, and familiarly known by numerous casts; and that executed by Powers, by order of Congress, soon after the Chief Justice's death, for the Supreme Court Room—all show that, while his hair grew rather low on the forehead, his head was high and well shaped, and that, as was then not unusual, he wore his hair in a queue.

His dress, as shown in the full length portrait by Harding, and as described by his contemporaries, was a simple and appropriate, but by no means fashionable, suit of black, with knee breeches, long stockings, and low shoes with buckles.

You may think, my friends, that I have been led on to spend too much time in endeavoring to bring before you the bodily semblance of the great Chief Justice. Yet you must admit, as he did in his letter to Delaplaine, that portraits of eminent men are "an object of considerable interest."

But, after all, it is not the personal aspect of a great man, it is his intellect and his character, that have a lasting influence on mankind. *Ut vultus hominum, ita simulacra vultus imbecilla ac mortalia sunt. Forma mentis æterna; quam tenere et exprimere, non per alienam materiam et artem, sed tuis ipse moribus possis.*

Brethren of the Bar of the Old Dominion; Fellow-citizens of the United States:

To whatsoever professional duty or public office we may any of us be called, we can find, in the long line of eminent judges with whom Almighty Providence has blessed our race, no higher inspiration, no surer guide, than in the example and in the teachings of JOHN MARSHALL.

SUPREME COURT DECISIONS REFERRED TO.

Bank of United States *v.* Deveaux (1809) 5 Cranch, 61.
Bollman & Swartwout, ex parte (1807) 4 Cranch, 75.
Boyle *v.* Zacharie (1832) 6 Peters, 348, 635.
Brown *v.* Maryland (1827) 12 Wheaton, 419.
Chisholm *v.* Georgia (1793) 2 Dallas, 419.
Cohens *v.* Virginia (1821) 6 Wheaton, 264.
Dartmouth College *v.* Woodward (1819) 4 Wheaton, 518.
Elmendorf *v.* Taylor (1825) 10 Wheaton, 152.
The Exchange (1812) 7 Cranch, 116.
Fletcher *v.* Peck (1810) 6 Cranch, 87.
The Genesee Chief (1851) 12 Howard, 443.
Gibbons *v.* Ogden (1824) 9 Wheaton, 1.
Hans *v.* Louisiana (1890) 134 United States, 1.
Hollingsworth *v.* Virginia (1798) 3 Dallas, 378.
Hope Insurance Company *v.* Boardman (1809) 5 Cranch, 57.
Hylton *v.* United States (1796) 3 Dallas, 171.
Louisville Railroad Company *v.* Letson (1844) 2 Howard, 497.
McCulloch *v.* Maryland (1819) 4 Wheaton, 316.
Marbury *v.* Madison (1803) 1 Cranch, 137.
Martin *v.* Hunter's Lessee (1816) 1 Wheaton, 304.
Ogden *v.* Saunders (1827) 12 Wheaton, 213.
Osborn *v.* Bank of United States (1824) 9 Wheaton, 738.
Stuart *v.* Laird (1803) 1 Cranch, 299.
Sturges *v.* Crowninshield (1819) 4 Wheaton, 122.
The Thomas Jefferson (1825) 10 Wheaton, 428.
United States *v.* Peters (1809) 5 Cranch, 115.
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III. PROCEEDINGS IN PARKERSBURG.

These were similar to those which took place in Washington and Richmond. At the request of the West Virginia Bar Association an address was delivered before the Society on John Marshall day by Mr. Justice Brown; but he declined to allow its publication.

INDEX.

CASES AFFIRMED OR FOLLOWED.

1. These cases do not differ materially from the one just decided, (*ante*, 1), except as to the year for which the taxes were assessed. *Yazoo & Mississippi Valley Railroad Co.* v. *Adams*, 26.
2. The decision in this case follows that in No. 387, *ante* 109. *Neeley* v. *Henkel* (*No. 2*), 126.
3. *Hewitt* v. *Schultz*, *ante*, 139, followed in regard to the construction of the act of July 2, 1864, c. 217, to be observed in the administration of the grant of public lands to the Northern Pacific Railroad Company. *Moore* v. *Cormode*, 167.
4. *Hewitt* v. *Schultz*, *ante*, 139, again followed. *Moore* v. *Stone*, 180.
5. *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, and *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, affirmed and applied. *Mountain View Mining & Milling Co.* v. *McFadden*, 533.
6. The judgment below is affirmed on the authority of *Freeport Water Co.* v. *Freeport City*, *ante*, 587. *Danville Water Company* v. *Danville City*, 619.
7. So far as the contentions in this case are the same as those passed upon in *Freeport Water Company* v. *Freeport City*, *ante*, 587, and in *Danville Water Company* v. *Danville City*, *ante*, 619, they are governed by those cases. *Rogers Park Water Company* v. *Fergus*, 624.

See EJECTMENT, 4.
NATIONAL BANK, 4.

CHINESE RESIDENTS IN THE UNITED STATES.

1. Li Sing was a Chinaman who, after residing for years in the United States, returned temporarily to China, taking with him a certificate purporting to have been issued by the imperial government of China, at its consulate in New York, and signed by its consul, stating that he was permitted to return to the United States, that he was entitled to do so, and that he was a wholesale grocer. On his return to the United States by way of Canada, he presented this certificate to the United States Collector of Customs at Malone, New York, who cancelled it and permitted him to enter the country. Subsequently he was brought before the Commissioner of the United States for the Southern District of New York, charged with having unlawfully entered the United States, being a laborer. At the examination he set up that he had a right to remain here, and that he was a merchant. The Commissioner found that, on his departure from the United States, he was and had long been a laborer, and ordered his deportation. *Held*, that the decision of the Collector at Malone was not final, and that by the act of October 1, 1888, c. 1064, the certificate issued to him by the Chinese consul on his departure from the United States was annulled. *Li Sing* v. *United States*, 486.
2. *Fong Yue Ting* v. *United States*, 149 U. S. 698, affirmed and followed, especially to the points: (1) That the provision of the statute which puts the burden of proof upon the alien of rebutting the presumption arising from his having no certificate, as well as the requirement of

DISTRICT ATTORNEY.

See CLAIMS AGAINST THE UNITED STATES, 2.

DISTRICT OF COLUMBIA.

EJECTMENT.

12. This suit was brought by the State of Missouri against the State of Illinois and the Sanitary District of Chicago. The latter is alleged to be "a public corporation, organized under the laws of the State of Illinois and located in part in the city of Chicago, and in the county of Cook, in the State of Illinois, and a citizen of the State of Illinois." The remedy sought for is an injunction restraining the defendants from receiving or permitting any sewage to be received or discharged into the artificial channel or drain constructed by the Sanitary District, under authority derived from the State of Illinois, in order to carry off and eventually discharge into the river Mississippi the sewage of Chicago, which had been previously discharged into Lake Michigan, and from permitting the same to flow through said channel or drain into the Des Plaines River, and thence into the Mississippi River. The bill alleged that the nature of the injury complained of was such that an adequate remedy could only be found in this court, at the suit of the State of Missouri. The object of the bill was to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants, and the bill charged that the acts of the defendants, if not restrained, would result in the transportation, by artificial means, and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois River, which will poison the water supply of the inhabitants of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi River which lies within its territory. The bill did not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway, but it sought relief against the pouring of sewage and filth through it by artificial arrangements into the Mississippi River, to the detriment of the State of Missouri and its inhabitants. The defendants demurred to the bill for want of jurisdiction and for reasons set forth in the demurrer. This court *held* that the demurrer could not be sustained, and required the defendants to appear and answer. *Missouri* v. *Illinois and the Sanitary District of Chicago*, 208.

13. The legislation in respect of the United States court in the Indian Territory considered, it is *held* that an appeal does not lie directly to this court from a decree of the trial court in the Indian Territory, although the suit in which the decree is rendered may have involved the constitutionality of an act of Congress. Whether an appeal lies to this court from the Court of Appeals of the Indian Territory in such cases is a question which does not arise on this record. *Ansley* v. *Ainsworth*, 253.

14. The ruling in *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239, that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution and laws; and that it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or con-

STATUTE.

A. In General.

A governmental function in a statute granting powers to a municipal corporation cannot be held to have been granted away by statutory provisions which are doubtful or ambiguous. *Rogers Park Water Company* v. *Fergus*, 624.

B. Statutes of the United States.

See Constitutional Law, 2; Indian, 1;
Cuba; Jurisdiction, C;
Federal Question, 3; Public Land, 4.

C. Statutes of States and Territories.

Illinois *See* Jurisdiction, A, 12; Municipal Bonds.
Massachusetts. *See* Constitutional Law, 1.
Minnesota. *See* Railroad.
Mississippi. *See* Corporation, 1.
Oregon. *See* Absent Defendants, 1.

TAX AND TAXATION.

1. The city of New Orleans having collected school taxes and penalties thereon, and not having paid over these collections, judgment creditors of the school board of the city, whose claims were payable out of these taxes, were entitled, if the school board failed to require it, to file a creditor's bill against the city for an accounting. *New Orleans* v. *Fisher*, 185.
2. The city was bound to account not only for school taxes but also for the interest thereon collected by way of penalty for delay in payment. *Ib.*
3. As the collections were held in trust, the statute of limitations constituted no defense. *Ib.*
4. Jurisdiction of the actions in which the judgments were recovered against the school board could not be attacked on the creditors' bill. *Ib.*
5. No demand for an accounting as of a particular date being alleged or proven, interest on the amount found due prior to the filing of the creditors' bill is allowed only from the latter date. *Ib.*

WILL.

1. At the trial of this case before the jury, the main issue was upon the validity of the will of Adjutant General Holt. Tecumseh Sherman, a son of General Sherman, was called to prove that the signature of his mother as a witness was genuine. He was not inquired of as to the genuineness of the signature of his father, because his uncle, Senator Sherman, had testified that that signature was genuine. Subsequently Mr. Randolph testified that he was familiar with the signature of General Sherman, giving his sources of knowledge, and that he was of opinion, (giving his reasons for it,) that it was not his signature. Tecumseh Sherman was recalled to prove that the objection found to the signature of his father was not an unusual feature in his signature,