# UNITED STATES REPORTS

## VOLUME 181

---

CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1900

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING CO.
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1901

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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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.

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PHILANDER CHASE KNOX, Attorney General.*
JOHN KELVEY RICHARDS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.



* Mr. Knox was appointed Attorney General in the place of Mr. Griggs, who had resigned. His commission is dated April 5, 1901, and on the 9th of that month he took the oath of office.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1900.



## EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 175. Argued February 26, 27, 1900.—Decided April 8, 1901.

Although the Interstate Commerce Commission found as a fact that the competition at Nashville, which forms the basis of the contention in this case, was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or to abandon all Nashville traffic, nevertheless they were forbidden by the Act of February 4, 1887, c. 104, 24 Stat. 379, to make the lesser charge for the longer haul; but since that ruling of the commission was made it has been settled by this court in *Louisville & Nashville Railroad Company* v. *Behlmer*, 175 U. S. 648, and other cases cited, that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point; and it follows that the construction affixed by the commission to the statute upon which its entire action in this case was predicated was wrong.

The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that

a competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that, incidentally, the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it.

It is plain that all the premises of fact upon which the propositions of law decided by the Circuit Court of Appeals rest, are at variance with the propositions of fact found by the commission, in so far as that body passed upon the facts, and this court accordingly reversed the decree of that court, and ordered the case remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the commission be enforced, and to dismiss the application made for that purpose with costs, the whole to be without prejudice to the right of the commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced and to hear and determine the controversy according to law.

The Board of Trade of Chattanooga, Tennessee, a chartered corporation, petitioned the Interstate Commerce Commission for relief under the act to regulate commerce. The defendants, the East Tennessee, Virginia and Georgia Railway, and numerous other rail and steamship companies, were alleged to be common carriers subject to the act to regulate commerce, and engaged in the transportation of passengers and freight by all rail or partly by rail and water from Boston, New York, Philadelphia, Baltimore and other places on the eastern seaboard to Chattanooga, Nashville and Memphis in the State of Tennessee.

It was alleged that the defendants conveyed freight from the eastern seaboard through and beyond Chattanooga to the cities of Nashville and Memphis for a lesser rate to such long distance points than was charged by them for like freight to Chattanooga, the shorter distance. This it was averred was a violation of section 4 of the act, prohibiting a greater charge for the shorter than for the longer haul, under substantially similar circumstances and conditions. And the disregard of the statute in the particular just stated, it was asserted, necessarily gave rise to violations of other provisions of the act to

Counsel for Parties.

regulate commerce, viz., of section 1, which forbids unjust and unreasonable charges, and of section 3, making unlawful the giving of undue or unreasonable preferences.

It is unnecessary to consider the complaint of the lesser charge to Memphis, the longer, than to Chattanooga, the shorter, distance, since this grievance was in effect held by the commission to be without substantial merit; and its conclusion on this subject was not reviewed by either of the courts below, and it is not now seriously, if at all, questioned. After hearing, the commission made elaborate findings of fact, and stated the legal conclusions which were deduced therefrom. 4 Inters. Com. Rep. 213; 5 I. C. C. Rep. 546. An order was made forbidding the defendant carriers from charging a greater compensation for the transportation for the shorter distance to Chattanooga than was demanded to Nashville, the longer distance. The execution, however, of this order, was suspended until a date named, so that the carriers might have opportunity to apply to the commission to be relieved from the operation of the order. No application to be exempted having been made, and the carriers not having conformed to the behests of the commission, this proceeding to compel obedience was commenced in the Circuit Court. In that court additional testimony was taken, but it was all merely cumulative of that which had been adduced before the commission. The Circuit Court, 85 Fed. Rep. 107, whilst not approving the reasoning by which the commission had sustained the order by it entered, nevertheless on other grounds affirmed the command of the commission. The Circuit Court of Appeals for the Sixth Circuit, to which the case was taken, whilst it held that the commission had misapplied the law, and although it did not approve of the reasoning given by the Circuit Court for its decree, nevertheless affirmed the action of that court. 99 Fed. Rep. 52.

*Mr. Edward Baxter* for appellant.

*Mr. L. A. Shaver* for appellee. *Mr. Assistant Attorney General Boyd* was on his brief.

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

To comprehend the contentions which are made on this record it is essential to give a summary of the condition as depicted in the findings of the commission, and upon which the relief which it granted was based.

The state of affairs was as follows: Freight from the eastern seaboard to Cincinnati and other western points, north of the Ohio River, was controlled by the classification and tariff of rates prevailing in what was denominated as the northern or Trunk Line territory. On the other hand, the area south of the Ohio River, which was denominated the southern territory, was governed by the classification and tariff of rates prevailing in that territory; such classification and tariff giving rise in most instances to a higher charge than that which prevailed in the northern territory. This general difference between the rates in the northern and those in the southern territory the commission found arose from inherent causes, and although they might in some aspects disadvantageously influence traffic in the southern territory, were yet the result of such essentially normal conditions as to give rise to no just cause of complaint. On this subject the commission said:

"There may be some disadvantage to Chattanooga from this circumstance, since an article of a given class under the first-named system may be in a lower class under the other system, but the injury, if any, resulting from differences of that character is not believed to be serious.

"The general range of rates in the territory covered by the Southern Railway and Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly from the much greater volume of traffic in the latter section; and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and like methods of traffic construction."

The grievance alleged arose in this wise: Where freight destined to a point in the southern territory instead of being sent

by the southern route was shipped from the eastern seaboard, by the northern or trunk line, *via* Cincinnati or other trunk line points north of the Ohio River, it would be classified and charged for according to the northern trunk line rates. But such freight thus shipped through the trunk line or northern route bound for Chattanooga or other southern points on leaving Cincinnati and on entering the southern area, for the purpose of completing the transit, became subject to the southern classification and rates. Thus, irrespective of the mere form and considering the substance of things, the charge on freight shipped in this way was made according to the northern classification and rate for the transportation in the northern territory to points on the Ohio River, plus the southern classification and rates from those points to the place in the southern territory to which the freight was ultimately destined, this being equivalent to the rate which the merchandise would have borne had it been shipped so as to subject it wholly to the southern territory rates.

This was, however, not universally the case. The single exception (eliminating Memphis from view) was this: The Louisville and Nashville Railroad, operating from Cincinnati to Nashville, instead of causing the merchandise shipped from the eastern seaboard through Cincinnati to Nashville to bear the southern territory classification and rate from Cincinnati to Nashville, submitted the traffic between Cincinnati and Nashville to the northern instead of to the southern territory rates. It hence followed that merchandise shipped from the eastern seaboard to Nashville through the northern territory bore a less charge than it would have borne if shipped to Nashville through the southern territory.

To compete with the Louisville and Nashville Railroad for Nashville traffic, the carriers in the southern territory fixed their rate to Nashville so as to make it as low as that charged to that point by the Louisville and Nashville Railroad. It hence came to pass that freight shipped from the eastern seaboard to Chattanooga paid the southern rate, whilst freight shipped to Nashville, although it passed through Chattanooga, went on to Nashville at the lower rate there prevailing, which

lower rate was caused by the action of the Louisville and Nashville Railroad in exceptionally reducing its charge to Nashville. We say, by the action of the Louisville and Nashville Railroad, because the findings of the commission expressly establish that the exceptional rate to Nashville, which was established by the Louisville and Nashville Railroad, was not caused by water competition at Nashville, but was exclusively the result of the action of the Louisville and Nashville Railroad in exceptionally charging a lower rate to Nashville different from that which it demanded for traffic to other points through the southern territory. That the other carriers through the southern territory, including those operating from Chattanooga to Nashville, were, in consequence of this condition at Nashville, compelled either to adjust their rates to Nashville to meet the competition or abandon all freight traffic to Nashville, was found by the commission to be beyond dispute. On both these subjects the commission said, p. 219:

"There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

* * * * * * * *

"The lower rates accepted by the carriers engaged in the transportation of eastern merchandise to Nashville *via* Chattanooga are not forced upon them by any water competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between Cincinnati and Nashville. The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers *via* Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet

at Nashville is distinctly the competition of the trunk lines and the Louisville and Nashville system whose northern termini are at points on the Ohio River which receive trunk-line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic seaboard reaching Nashville by way of Cincinnati, etc., all of which are interstate carriers subject to the act to regulate commerce. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. Acceptance of the rates so fixed by the rail lines *via* Cincinnati was the necessary condition upon which the lines *via* Chattanooga could compete for Nashville traffic."

Although the commission thus found that the competitive conditions at Nashville rendered it absolutely necessary for the other roads to adjust their charges, so as to meet the competition, if they wished to engage in freight traffic to Nashville, it nevertheless held that the carriers had no lawful right to consider the competition at Nashville in adjusting their rates to that place. This was predicated solely upon the fact that the competition existing at Nashville was caused by carriers who were subject to the act to regulate commerce, and under the view which the commission entertained of the law to regulate commerce, competition of that character could not be availed of by a carrier as establishing substantially dissimilar circumstances and conditions, without a prior application by the carrier to the commission, for the purpose of obtaining its sanction to taking such competitive conditions into consideration for the purpose of fixing rates to the competitive point. The commission, in support of this construction of the statute, referred to a previous opinion by it announced in the case of the *Georgia Railroad Commission* v. *Clyde Steamship Company et al.*, 4 Inters. Com. Rep. 120; 5 I. C. C. Rep. 324. The proposition decided in the case cited, which it was held governed the case at bar, was thus stated:

"'The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the

circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the act to regulate commerce. In other cases under the fourth section the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of this commission.'"

Applying this proposition, the commission said:

"We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding."

The order entered by the commission was confined solely to the greater charge to Chattanooga, the shorter, than to Nashville, the longer, distance. Omitting mere recitals, it was adjudged that certain named defendants, "or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville, in the State of Tennessee, be and they severally are hereby required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville. That for the purpose of enabling said defendants to apply to the commission for relief under the proviso clause of the fourth section of the act to regulate commerce, this order is hereby suspended until the first day of February, 1893; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned the question of further suspending this order until the hearing and determination of such application will be duly considered."

The record makes it clear that in allowing this order the commission thought that its literal enforcement would bring about an injustice, and therefore that the order was entered solely because it was deemed that the technical requirements of the

statute must be complied with. It is also patent from the reasons given by the commission for allowing the order that the commission refrained from considering or passing on any other question arising, either expressly or by implication, from the complaint, such as the reasonableness *per se* of the rates in controversy or the discrimination which might be produced by them. And it also obviously appears that the examination of the issues was thus confined solely to the alleged violation of the long and short haul clause, because it was deemed that all questions as to reasonableness of rates *per se* or discrimination arising therefrom could more properly be considered by the commission when application was made by the carriers to be relieved from the restraints of the long and short haul clause within the time and in accordance with the permission granted by the order, which was rendered. The commission on these subjects said:

"In justice to the various parties in interest, however, it should be added that this disposition of the case is not intended to preclude the defendants from applying to the commission for relief from the restrictions imposed by the fourth section of the act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the 'special cases' to which the proviso clause of that section should be applied.

"It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point *via* Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic seaboard, the varying systems of classifications by which they are severally affected, and the greater

volume of traffic at the lower rates prevailing in the trunk-line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and the allowance of the same rate to the shorter-distance point might reduce their revenues below the limits of fair compensation. Without in any sense prejudging the case, we hold that the defendants may invoke its consideration in an appropriate proceeding.

"Any such intimation, however, should not be understood as covering an implied indorsement of the present disparity of rates as between Chattanooga and Nashville, for no such inference is intended. The suggestion here made goes no further than the propriety of an unprejudiced investigation when permission to deviate from the general rule of the statute is applied for by these carriers on account of the special circumstances by which they are surrounded. It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard then as insuperable.

* * * * * * * *

"We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided. If the carriers engaged in Nashville transportation through Chattanooga act upon the suggestion above made, and apply for relief from the restrictive rule laid down in the fourth section, the subject can be more fully considered in disposing of that application."

After reciting the fact that the case had been on both sides presented to the commission under the assumption that the

rights of the parties could be adequately adjusted by determining only the controversy arising from the long and short haul clause of the act, the commission added:

"The questions which may arise if permission is sought to depart from the general rule relating to long and short hauls was not specially discussed. On this ground, also, it would seem suitable to allow opportunity for a further hearing before fixing maximum rates on shipments to Chattanooga."

Taking into view the terms of the order and the reasons given by the commission for considering only one aspect of the controversy and excluding all others, it is obvious that that body construed the act to regulate commerce as meaning that, however controlling competition might be on rates to any given place, if it arose from the action of one or more carriers who were subject to the law to regulate commerce, the dissimilarity of circumstance and condition provided in the fourth section could not be produced by such competition unless the previous assent of the commission was given to the taking by the carrier of such competition into view in fixing rates to the competitive point. This in effect was to say that the dissimilarity of circumstance and condition prescribed in the law was not the criterion by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance unless the assent of the commission was asked and given. This in substance but decided that the dissimilarity of circumstances and conditions prescribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the commission. In other words, that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or of a discretion flowing from or exercised by the commission. This logical result of the construction of the statute adopted by the commission was well illustrated by the facts found by it and to which the theory announced was in this case applied. Thus, although the commission found as a fact that the competition at Nashville was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer

haul to Nashville than was asked for the shorter haul to Chattanooga or to abandon all Nashville traffic, nevertheless they were forbidden to make the lesser charge for the longer haul. In other words, they were ordered to desist from all Nashville traffic, unless they applied to the commission for the privilege of continuing such traffic by obtaining its assent to meet the dominant rate prevailing at Nashville. But since the ruling of the commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute which relieves from the long and short haul clause arises from the command of the statute and not from the assent of the commission; the law, and not the discretion of the commission, determining the rights of the parties. It follows that the construction affixed by the commission to the statute upon which its entire action was predicated was wrong. *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164; *Louisville & Nashville Railroad Company* v. *Behlmer*, 175 U. S. 648, 654, 655.

Although it thus appears that the commission erred in its construction of the statute, nevertheless, it is insisted that the action of the commission should be affirmed. This contention is supported by propositions which are stated in argument in many different forms, but are really all reducible to the following summary:

Granting that the commission wrongfully held that the carriers had no right of their own motion to avail of the competition at Nashville as producing the dissimilarity of circumstance and condition provided in the statute, nevertheless the order made by the commission was right, because as there was a difference between the rate charged to Nashville and that exacted to Chattanooga, there necessarily resulted an undue preference in favor of Nashville and a discrimination against Chattanooga,

falling within the inhibition of the third section of the act to regulate commerce. And, it is argued, even conceding this to be erroneous, as it was established by the proof that the Nashville rates were adequate, the Chattanooga rates were consequently unreasonably high, and hence were *per se* unreasonable. Assuming this proposition to be without foundation, it is insisted, as Chattanooga was a point at which various railroads centered, it was therefore in a position where, if competition had been allowed full play, it would have a rate at least as low as that at Nashville; and as the proof showed that the higher rate prevailing at Chattanooga was fixed by consent or agreement among the carriers, therefore Chattanooga by the effect of such agreement was deprived of the benefits of competition; the deduction being that the carriers who thus by agreement prevented the normal forces of competition from exerting their proper influence at Chattanooga, should not be allowed to avail of the competition at Nashville to charge a lesser rate to that point than they did to Chattanooga. Besides, it is urged that as it was shown that the lower rate at Nashville was caused by the conduct of the Louisville and Nashville Railroad in exceptionally making lower charges from Cincinnati to Nashville that road should not be permitted to give a preference to Nashville and then avail itself of the preference thus given to discriminate against Chattanooga, which would be the case if the difference of rates on freight passing through Chattanooga to Nashville were allowed to continue. This proposition being predicated on the assertion that it was established by proof that the line between Chattanooga and Nashville over which the traffic *via* the southern territory, passing through Chattanooga from the Atlantic seaboard, moved to Nashville was in legal effect to be considered the Louisville and Nashville Railroad, since that corporation was the owner of a majority of the stock of such line between Chattanooga and Nashville, and, therefore, in effect, controlled it.

Pausing for a moment to generally consider the foregoing contentions, it becomes manifest that in so far as they embody propositions of law, they concede the error of the legal construction applied by the commission and yet invoke a seemingly

different construction by which the erroneous rule of the commission is to be in substance upheld. It is also clear that the propositions of fact which they embody cover the field of inquiry which the commission excluded from view, and which that body held could not be ascertained from the record before it, but must be developed from the new inquiry which it was proposed to make when leave to depart from the restrictions of the long and short haul clause was invoked by the carriers at the hands of the commission. Indeed, it is substantially accurate to say that the propositions of fact now asserted not only do this, but in effect are repugnant to the conclusions of fact found by the commission on the branch of the controversy to which the commission actually extended the inquiry by it made. It might well suffice to allow the result just stated to which the propositions necessarily lead to serve as a demonstration of their unsoundness. Inasmuch, however, as the legal contention embodied in the propositions was in substance adopted by the Circuit Court upon the assumption that its action in so doing was in accord with the decision of this court in the case of *Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, 168 U. S. 144, and as some of the propositions of fact received the sanction of the Circuit Court of Appeals and were made the basis of its decree enforcing the order of the commission, we will proceed to analyze them to the extent necessary to determine our duty in relation to them.

Coming to do so, it is at once apparent that the contentions divide themselves into two classes, the first, a proposition of law involving the construction of the act to regulate commerce and the others embracing ultimate deductions from the facts proven. The legal proposition is this, that where in consequence of competitive conditions existing at a particular point, the dissimilarity of circumstance provided in the fourth section of the act arises, it cannot justify a carrier on his own motion in charging a lesser rate for the longer haul to the competitive point than is asked for the shorter haul to the non-competitive point, if in doing so a preference in favor of the competitive point arises or a discrimination against the non-competitive point is produced. That is to say, it is insisted that the provision as to substan-

tially dissimilar circumstances and conditions of the fourth section and the commands of the third section as to discrimination and undue preference being found in the one statute must be construed together, so that the dissimilarity of circumstance and condition cannot be availed of if either discrimination or preference will arise from doing so. We quote the exact language in which this proposition is stated by counsel, reproducing the italics by which the import of the contention is emphasized:

"*Fifth.* That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discriminations practiced against Chattanooga and in favor of Nashville, *brings the case within the evil which the act to regulate commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrongs which the law was enacted to remedy.*"

It is argued that this proposition is sustained by the opinions in the *Alabama Midland* case, 168 U. S. 144, and in *Louisville & Nashville Railroad Co.* v. *Behlmer*, 175 U. S. 648, in both of which cases, as we have seen, the right of the carrier to take into view on his own motion competition which substantially affected traffic and rates as the producing cause of dissimilarity of circumstance and condition was upheld.

The portion of the opinion relied upon in the *Alabama Midland* case is found on page 167, and is as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases

there is no absolute rule which prevents the commission or the courts from taking that matter into consideration."

The expressions in the *Behlmer* case which are relied upon are found on page 674 of the opinion in that case, and are as follows:

"It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered."

The reasoning which we have thus quoted in the opinions in question, it is insisted, maintains the doctrine that although competition of the character therein described may serve to engender dissimilarity of circumstance and condition which a carrier can avail of of its own motion, it does not necessarily do so. Whether it can be allowed to produce this effect, it is argued, must depend upon all the surrounding circumstances, such as the preference or discrimination which may arise from allowing it to be done and the degree to which the interests of the public may be injuriously affected by permitting it to do so. To support this view, it is argued, "that to hold otherwise would be placing Congress in the absurd position of laying down a rule and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist. In other words, enacting a law and providing at the same time that it should be of no effect."

But in substance this reasoning only amounts to the assertion

that the settled construction of the statute, by which it has been held that real and substantial competition gives rise to the dissimilarity of circumstance and condition, pointed out in the fourth section, is wrong, and should be overruled. The language of the opinions which is relied upon must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the cases and which was decided; that is, the right of the carrier to take the competitive conditions into consideration as creating dissimilarity of circumstance and condition. The right of a carrier to do so could not have been sustained if the proposition now asserted had not necessarily been decided to be unsound. The summing up or grouping of the various provisions of the act which was made in the passages relied upon but served to point out that the provisions of the statute allowing competition to become the cause of dissimilarity of circumstance and condition could operate no injurious effect in view of the other provisions of the act protecting against discrimination and preference; that is, the undue preference and unjust discrimination against which the other provisions of the statute were aimed. True it is that all of the provisions of the statute must be interpreted together, and because this is the elementary rule the argument now pressed upon our attention is unsound. If it were adopted, it would follow of necessity that competition could never create such a dissimilarity of circumstance and condition as would justify the lesser charge to the competitive point than was made to the non-competitive point. This would be the inevitable consequence, since under the view which the argument assumes it would be impossible for the lesser rate to prevail to the competitive point without creating a preference in favor of that point, and without giving rise to a discrimination against the non-competitive point to which the higher rate was asked. Thus the reasoning conduces to the deduction which it is advanced to refute; that is, the assumption that the statute at one and the same time expressly confers a right, and yet specifically destroys it. This is plainly the consequence flowing from the argument that competition, "however forceful" it may be, cannot produce dissimilarity of circumstance and condition if dis-

crimination and preference is held to necessarily arise from the charging of the lesser rate to the longer distance competitive point.

It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to cause them to operate harmoniously. In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer* case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opin-

ions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not "undue" or the discrimination "unjust." This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play.

That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of

the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places. But no condition of this character is here in question, since the commission find as follows:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence."

And the fact thus established was not controverted either in the opinion of the Circuit Court or in that of the Circuit Court of Appeals, and is not now denied. Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public.

The Circuit Court in enforcing the order of the commission did not seemingly adopt the full scope of the proposition which we have just considered, but applied it in a modified form. Thus, it concluded that although the charge of the lesser rate to the longer point, in some instances, might be justified by the dissimilarity of circumstance and condition arising from competition, and therefore would not *per se* necessarily produce a preference, it would do so if by comparison between the dissimilarity of circumstance and condition and the dissimilarity of charge it was found that the one was disproportionate to the other.

After referring to the previous rulings of the commission maintaining that competition by carriers subject to the act could not be taken into view by a carrier in fixing rates to the competitive points without the previous assent of the commission, the court (85 Fed. Rep. 117) quoted the following statement of the commission in an opinion announced on December 31, 1897:

"Since then, however, the Supreme Court of the United States, by its decision in the case, *Interstate Commerce Commission* v. *Alabama Midland Railway Company*, (decided Nov. 8, 1897,) 168 U. S. 144, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law, as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs."

The court thereupon said:

"Now, I do not understand that such a conclusion follows from that decision. On the contrary, I suppose that when a violation of the long and short haul provision is charged, com-

petition is one of the elements which enter into the determination whether the conditions are similar, and if a dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such literal construction. If it were, then if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply, a result contrary to the manifest intent. In other words, my opinion is that the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made. But the long and short haul clause is only one of the specific provisions employed for the general purpose of the act. The third section underlies the fourth and supplies the principles on which it rests; so that, if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

But this reasoning, whilst it does not apparently wholly rest on the erroneous view which we have previously refuted, in substance but applies it. Indeed, it not only does this, but it more markedly destroys one provision of the statute by the other, since it in effect declares that the greater the competition at any given point the lesser power has this fact to produce the dissimilarity of circumstance and condition provided in the statute. That such is the conclusion to which the reasoning resolves itself must be the case, when it is considered that the more active competition is at a particular point the lesser the rate will be to that point, and the greater, therefore, the disparity between the charge to the competitive point than that made to the non-competitive one. The proposition then is this, that the greater and more potential is the influence of competition on rates and traffic, the less will be its force to en-

gender dissimilarity of circumstance and condition; that is to say, that the causes specified in the statute are to be allowed to produce their influence in inverse ratio to their strength and importance.

As the Circuit Court only affirmed the order of the commission, which directed the carriers to desist from charging a greater compensation for the shorter haul to Chattanooga than for the longer haul to Nashville, there is no room for the conclusion that it found affirmatively that independently of the charge to Nashville the rate to Chattanooga was *per se* unreasonable. For, of course, a decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul, would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point. Indeed, it cannot be held that the order rested upon the unreasonableness *per se* of the rate to Chattanooga, without implying that the court directed and commanded the carrier to bring about a preference and discrimination by charging the same price for the carriage of traffic to Nashville, the much more distant point, than was exacted for the carriage to Chattanooga.

Coming then to the propositions of fact, we repeat that each and every one of them either involve considerations which were wholly excluded from view by the commission, under the construction of the statute which was applied, because it was deemed that they would present themselves for consideration when the carrier petitioned the commission to be relieved from the restrictions of the long and short haul clause, and moreover that these propositions of fact are not in harmony with the findings made by the commission on the particular subject which it passed on. That the propositions of fact referred to are amenable to the considerations we have just stated is indisputable, when it is considered that taken together they assert the existence of conditions which the commission decided could not be ascertained in the state of the record before it, but could only be arrived at by a further unprejudiced ex-

amination, which, under the view taken, it was unnecessary to make until a future time. And that the facts now relied on are irreconcilable with what was found by the commission on the subject which it passed on is likewise clear. Thus, the contention that the rate to Chattanooga is shown to have been absolutely fixed by agreement, and therefore to be abnormally high, is necessarily repugnant to the express finding of the commission that the rates in the southern territory, whilst originally the offspring of agreement, were also the result of the volume of business in that territory, and although they might give rise to some disadvantage, did not do so to the extent of making the rates in and of themselves a just subject of complaint. So, also, the insistence that it is shown that Chattanooga by its position was entitled to at least an equality of rates with Nashville is repugnant to the finding of the commission, that whilst it was shown that some reduction would be just at Chattanooga, the degree of that reduction could not be determined without a further investigation embracing the relation of Chattanooga to other points and without a careful readjustment of the rates to such points. Again, the assertion that the road from Chattanooga to Nashville growing out of the stock ownership was in legal effect the Louisville and Nashville Railroad, is necessarily antagonistic to the express finding of the commission, that the carriers through Chattanooga to Nashville were placed in a position where they must either meet the competition at Nashville or abandon all traffic to that point. The question which then arises is, shall this court now pass upon all the issues which the commission excluded from view, because of a mistake in law committed by that body, and in doing so not only overthrow the findings of fact made by the commission, but also adopt new findings antagnostic to those which the commission made, and this for the purpose, not of affirming the order entered by that body, but to enable us to reach a result which the commission itself declared could only be justly arrived at after a further and unprejudiced investigation by it of the situation which the controversy involves?

True, it is insisted that such original action is not required at

our hands, because, it is asserted, the Circuit Court of Appeals considered and passed on the propositions, relied upon, and the action of that court relieves this court from the duty of entering upon an original investigation of the whole evidence to determine the entire field of controversy.

It requires only, however, a brief reference to the opinion of the Circuit Court of Appeals to show that this contention is unfounded. In substance, that court stated in its opinion that it considered that the rates to Chattanooga, which was in the southern territory, had been fixed by agreement of the carriers as had been the other rates in that territory; that as Nashville, which was also in the southern territory, was given a low rate, because of the action of the Louisville and Nashville Railroad in exceptionally lowering its rates from Cincinnati to that point, the situation at Chattanooga entitled it to the same rates. The court, moreover, thought that the Louisville and Nashville Railroad, which owned the line from Cincinnati to Nashville, was in no position, as the owner of a majority of the stock in the road from Chattanooga to Nashville, to avail of the competition at Nashville as a basis for charging the lesser rate for the longer haul through Chattanooga to Nashville. It was besides concluded that where a rate to a particular point was the product of agreement, which stifled competition, such rate could not become the basis upon which to predicate the right of a carrier to charge a lesser sum for the carriage of freight passing through that point to a more distant place, because of the competition at such more distant place. The court summed up its conclusions as follows (99 Fed. Rep. 63):

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the interstate commerce act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality

in respect to eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the south, this is no ground for refusing to do justice to Chattanooga. The truth is, that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates, when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of readjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse."

The decree which was entered, however, did not declare the rates charged to Chattanooga to be unreasonable, but simply affirmed the order of the commission directing that no greater sum be charged for the carriage of freight to Chattanooga, the shorter, than was exacted to Nashville, the longer, distance. As we have already shown, such a decree is not responsive to the conclusion that the rates to Chattanooga were in and of themselves unreasonable, since the right to continue to exact them was sanctioned, provided the traffic to Nashville was either abandoned or the rate to Chattanooga made the same as to Nashville.

Without taking at all into view the legal propositions announced by the Circuit Court of Appeals in its opinion, and conceding, without passing upon such questions, that they were all correctly decided, it is plain that all the premises of fact upon which the propositions of law decided by the Circuit Court of Appeals rest are at variance with the propositions of fact found by the commission, in so far as that body passed upon

the facts. From this it results that to decide the case in the aspect in which it is now presented we would be obliged to go into the whole evidence, as a matter of original impression, in order to determine the complex questions which the case presents. Among those which of necessity would arise for decision would be whether the original agreement fixing rates to the southern territory, made long since and acted on consecutively for years, was of such a nature as to cause those rates to be illegal, although they might be found to be just and reasonable in and of themselves. If not, whether Chattanooga was from its situation properly embraced in the southern territory, and, if not, whether the Louisville and Nashville Railroad had violated the law by exceptionally reducing its rates to Nashville. If it had not, did it follow, because the condition at Nashville gave that city an exceptionally low rate, that Chattanooga was in a position to be entitled, as a matter of right, to as low or a lesser rate?

To state these issues is at once to demonstrate that their decision, as a matter of first impression, properly belonged to the commission, since upon that body the law has specially imposed the duty of considering them. Whilst the court has in the discharge of its duty been at times constrained to correct erroneous constructions which have been put by the commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where, under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the commission upon such subjects. This rule is aptly illustrated by the opinion in *Louisville & Nashville Railroad Co.* v. *Behlmer*, (1900) 175 U. S. 648, in which case, after pointing out the same error of construction adopted and applied by the commission in the present case, the court declined to undertake an original investigation of the facts, saying (p. 675):

"If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the commission, and were

not weighed by the Circuit Court of Appeals, because both the commission and the court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & Pacific Railway* v. *Interstate Commerce Commission*, *ubi supra*, the court found the fact to be that the commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the commission the Circuit Court of Appeals, whilst considering that the legal conclusion of the commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238):

"'If the Circuit Court of Appeals was of opinion that the commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order and remand the cause to the commission in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defence considered, in the first instance at least, by the commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all the facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was.'

"We think these views should be applied in the case now under review."

Counsel for Parties.

*The decree of the Circuit Court of Appeals should be reversed with costs and the case be remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the commission be enforced, and to dismiss the application made for that purpose with costs, the whole to be without prejudice to the right of the commission to proceed upon the evidence already introduced before it or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law.*

MR. JUSTICE HARLAN dissented.

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## INTERSTATE COMMERCE COMMISSION *v.* CLYDE STEAMSHIP COMPANY.

## SAME *v.* WESTERN AND ATLANTIC RAILROAD COMPANY.

## SAME *v.* CLYDE STEAMSHIP COMPANY.

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

Nos. 68, 69, 70. Argued November 5, 6, 1900. — Decided April 8, 1901.

*East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Commerce Commission*, *ante* 1, followed.

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

*Mr. L. A. Shaver* for appellants. *Mr. Assistant Attorney General Beck* was on his brief.

*Mr. Edward Baxter* for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

These cases, with others of like character, originated in complaints brought before the Interstate Commerce Commission by the Railroad Commission of the State of Georgia in the names of the members of that body. Each complaint averred that the defendant carriers were guilty of wrong in that they were illegally charging a greater rate to certain shorter distance points than they were asking to certain longer distance points, in violation of the long and short haul clause of the fourth section of the act to regulate commerce, and, as ancillary to this complaint, that the rates exacted by the defendant carriers were unreasonable and amounted to both an undue preference and an unjust discrimination.

In case No. 68 the complaint was that the rates charged by the defendants for freight transportation, by continuous carriage, from the city of New York and other eastern seaboard points to Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain, towns and stations situated on the line of the Georgia Railroad between Augusta, the eastern terminus of that road, and Atlanta, its western terminus, were greater in each case than the amounts charged and received for freight carried to the city of Atlanta, the longer distance point.

In case No. 69 the complaint was that the rates of freight charged by the defendants for freight transportation, by continuous carriage, from the city of Cincinnati and other Ohio River points to Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun, towns and stations situated on the Western Atlantic Railroad between Chattanooga, the northern terminus of that road, and Atlanta, the southern terminus, were greater on each class than the amount charged and received for freight carried to Atlanta, the longest distance point.

In case No. 70 the complaint was that the rates of freight charged by the defendants for freight transportation by continuous carriage from the city of New York and other eastern points to West Point, La Grange, Hogansville, Grantville and Newman—towns and stations on the Atlanta and West Point Railroad, Atlanta being the eastern terminus of said road and the town of West Point its western terminus—were greater on each class than the amount charged and received for freight to

a longer distance point, viz., the city of Opelika, situated further west on a connecting railroad known as the Western Railroad of Alabama.

After issues made by answers and hearing had upon evidence introduced before the commission, that body entered an order in each case, in substance commanding the defendants to cease and desist from charging and receiving any greater compensation in the aggregate for the transportation of property between the points of initial shipments mentioned in the complaint and the shorter distance points therein referred to than was exacted to the more distant points specified in the various complaints. The order, however, contained a proviso that it should not be operative until a date designated to enable the defendants to apply, under the fourth section of the act, to be relieved from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation for a lesser than for a longer haul, under substantially similar circumstances and conditions. 5 I. C. C. Rep. 326; 4 Inter. Com. Rep. 120.

The defendant carriers, not having availed of the permission thus accorded, and refusing to obey, the commission, in due time, began proceedings in equity in the Circuit Court of the United States for the Northern District of Georgia to enforce obedience to its orders. In the Circuit Court additional testimony was taken. All the cases were considered and passed on together. The court decided that the commission had erroneously construed the statute in holding that competition which was actual and substantial in its effect upon rates, if resulting from the action of other carriers who were subject to the act to regulate commerce, could not produce the dissimilarity of circumstances and conditions provided in the fourth section of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the commission. It moreover found that the rates in controversy were in and of themselves just and reasonable, and did not give rise either to undue preference or unjust discrimination. The court, therefore, declined to enforce the order of the commission. 88 Fed. Rep. 186. On appeal to the Circuit Court of Appeals the decrees of the Circuit Court were affirmed. 93 Fed. Rep. 83.

In deciding the *Alabama Midland* case, 168 U. S. 144, 164, we had occasion to refer to the opinion announced by the commission in the cases now under review, because the ruling of the commission in the matter which was examined in the *Midland* case was like the one made in the present cases. The opinion by which the commission sustained the ruling by it made in the *East Tennessee, Virginia and Georgia* case, which we have just examined and decided to be erroneous, was also expressly predicated on the opinion which the commission had previously expressed in these cases. It follows that the error committed by the commission, in interpreting the statute in these cases, has been at least twice heretofore pointed out in the decisions of this court, and hence further examination of the subject is unnecessary. It will be seen from an inspection of the able opinions of the courts below that they expounded the statute in entire accord with the construction which we had previously given to it, and which we have again applied in the *East Tennessee, Virginia and Georgia* case. Despite, however, the error of law which the commission committed in these cases, and in consequence of which error it made no investigation of the facts but postponed the performance of its duty on this subject until a further application was made for relief, it is now urged that we should enter into an original investigation of the facts for the purpose of considering a number of questions as to discrimination, as to preference, as to reasonableness of rates, as to the relation which the rates at some places bore to those at others, in order to discharge the duty which the statute has expressly in the first instance declared should be performed by the commission. In the *East Tennessee, Virginia and Georgia* case, just decided, following the ruling made in *Louisville & Nashville Railroad* v. *Behlmer*, 175 U. S. 648, 667, and previous cases, we have held that, where the commission by reason of its erroneous construction of the statute had in a case to it presented declined to adequately find the facts, it was the duty of the courts, on application being made to them, to enforce the erroneous order of the commission not to proceed to an original investigation of the facts which should have been passed upon by the commission, but to correct the error of law

committed by that body, and after doing so to remand the case to the commission so as to afford it the opportunity of examining the evidence and finding the facts as required by law. The investigation which we have given the questions which arise in these cases and the consideration which we have bestowed on the issues which were involved in the case of the East Tennessee, Virginia and Georgia Railroad have served but to impress upon us the necessity of adhering to that rule, in order that the statute may be complied with both in letter and spirit. Acting in accordance with this requirement, whilst affirming the decree below which refused to enforce the order of the commission, we shall do so without prejudice to the right of the commission, if it so elects, to make an original investigation of the questions presented in these records.

*The decrees of the Circuit Court of Appeals and of the Circuit Court must be modified by providing that the dismissal of the bills shall be without prejudice to the right of the Interstate Commerce Commission, if it so elects, to make an original investigation of the questions contained in the records pertinent to the complaints presented to that body, and, as so modified, said decrees must be affirmed, and it is so ordered.*

MR. JUSTICE HARLAN dissented.

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## LOMBARD *v.* WEST CHICAGO PARK COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 160. Argued January 31, 1901.—Decided April 8, 1901.

The question whether the benefit accruing to each particular tract of real estate assessed by the park commissioners for the payment of the Douglas boulevard equalled the sum of the assessment placed thereon, was foreclosed by the findings of fact of the trial court, to which the case was submitted without the intervention of a jury.

Statement of the Case.

The power of the State of Illinois to levy a special assessment in proportion to benefits, for the execution of a local work, and the authority to confer on a municipality the attribute of providing for such an assessment, is not denied.

Where a special municipal assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the complete work.

The Supreme Court of Illinois decided a local, and not a Federal question, when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment, which had been set aside, was made.

The West Chicago Park Commissioners, in virtue of authority vested in them by the laws of the State of Illinois, proposing to improve Douglas boulevard, and requiring a special assessment to enable them to pay for the work, applied, as the law directed in such case, to the municipal authorities of West Chicago to cause such special assessment to be levied and collected according to law. In March, 1893, the town, acting on this request, adopted an ordinance providing for executing the work and for a special assessment on the abutting property to pay for the same. The only provision of this ordinance which it is essential to note for the purposes of the issues which are now before us is the second section thereof, which provided that the sum of the assessment when made should be payable in instalments, the first being twenty per cent of the whole, and the deferred portions to bear interest at a rate fixed in the ordinance. Following the requirements of the state laws, after the passage of this ordinance, application was made to the county court of Cook County to take the necessary steps to execute the provisions of the ordinance. Pursuant to the directions of the Illinois statutes the court appointed commissioners, who examined and made a full report on the work, and exhibited an assessment roll stating the sum due by the abutting property; the amount assessed on each piece being stated to have been fixed in accordance with the benefits which it was ascertained would result to each piece from the performance of the contemplated work. After notice to those concerned to appear and urge objections, if any they had, to the assessment roll, and after due proceedings in which am-

ple opportunity was afforded to resist the assessment, the court passed a decree of confirmation fixing the amount due by each piece of property in accordance with the report of the commissioners, and declaring that the sum assessed against each piece of property did not exceed the benefit conferred on the property. This decree, however, did not in all respects uphold the assessments made by the commissioners, as it sustained the objections of certain property holders on the ground that the sum assessed against them exceeded the benefits, and as to these objecting property holders, the amount assessed was reduced to correspond with what the court concluded was the actual benefit shown to result. J. L. Lombard was the owner of a piece of property within the assessment district, which had, it seems, been omitted from the roll returned by the commissioners. The decree recited that this property (describing it) had been by consent found to be within the district, and would be benefited to a certain amount, and the sum of this benefit was by consent awarded against the property as described. The assessment, the decree of confirmation provided, was to be paid in instalments as specified.

The collection of the assessment proceeded according to the roll, and the execution of the proposed improvement was undertaken. Some of those who were assessed paid; others did not; and on proceedings being taken as authorized by the laws of Illinois to enforce payment, a controversy arose which, in its final stage, was considered by the Supreme Court of the State of Illinois, and the court decided that the assessment was void and could not be enforced. The reasoning by which the court so decided was this: That under the statutes of Illinois there was no authority to provide for a payment of a special assessment in instalments, and therefore, as the ordinance had fixed that method of payment, it was void. *Culver* v. *The People*, 161 Illinois, 89. And the principle of this case was applied in subsequent cases. *Farrell* v. *The Town of West Chicago*, 162 Illinois, 280; *Connor* v. *Town of West Chicago*, 162 Illinois, 287; *White* v. *Town of West Chicago*, 164 Illinois, 196. The improvement had in the mean while been constructed. The West Chicago Park Commissioners, after the decisions in ques-

tion, dismissed the previous proceedings which had taken place in relation to the assessment. In July, 1895, an act was passed by the legislature of Illinois, which authorized park authorities, whenever a special assessment had been declared void by a court of competent jurisdiction, to "collect a new special assessment on property benefited by said improvement or completed portion thereof in the same manner as in other cases, and the lots, blocks, tracts or parcels of land found benefited by said improvements, or the completed portion thereof, shall each severally be liable to pay for said benefits to the same extent and the same proportion as in other cases." Hurd's Statutes of Illinois, 1899, chap. 105, sec. 20, p. 1244.

After the passage of this law the West Chicago Park Commissioners in July, 1896, adopted an ordinance providing an assessment to pay for the work of improving Douglas boulevard, which had been completed, as above stated. The first section of the ordinance, by way of preamble, recited the occurrences substantially as above stated. The second and third sections were as follows:

"SEC. 2. That a new special assessment on the property benefited by said improvement, to the amount that the same may be legally assessed for, be levied to pay the cost of said boulevard improvement above specified, and the remainder of such cost be paid by general taxation, viz., from the general funds of this board, all in accordance with an act of the general assembly of the State of Illinois, entitled 'An act to enable the park commissioners or park authorities to make local improvements, and provide for the payment thereof,' approved June 24 and in force July 1, 1895.

"SEC. 3. That the estimate of the cost of the said improvement be made by this commission and spread of record."

Subsequently the park commissioners made an estimate and report, and application was made to the county court of Cook County for the enforcement of an assessment roll prepared by the park commissioners in accordance with the estimate. This roll stated the total amount of the cost of the work, and charged the individual proprietors in the aggregate with a large portion of the total amount because of the special benefits conferred by

the work upon them, the remainder—an insignificant part—of the cost was charged to the public, because of the general benefit to the public which, it was found, had been produced by the doing of the work. The sum charged against the individual property holders was distributed among them, and this distribution was shown by a statement containing the name of the owners, the lot owned by him, the total amount of the assessment, the sum to be deducted from this total in consequence of the instalments which had been paid on the former and void assessment, the net result of the benefit after making this deduction being stated in a separate column. To this roll was appended the certificate of the park commissioners, as required by law, that—

"Before entering upon their said duties they examined the locality where the said completed improvement has been made, and the lots, blocks, tracts and portions of land which are specially benefited thereby, and did estimate what proportion of the total cost of said completed improvement is of benefit to the public, and what proportion thereof is of benefit to the property benefited, and did apportion the same between the said park district and such property, so that each should bear its relative equitable portion; . . . that having found said amounts they did apportion and assess the amount so found of benefit to said property upon the several lots, blocks, tracts and parcels of land in the proportion in which they are benefited by said completed improvement, and that no lot, block, tract or parcel of land has been assessed the greater amount than it has been actually benefited thereby; that said assessment roll also shows the credit to which each lot, block, tract of land so specially assessed is entitled to, if any, for or on account of payments on previous assessments or instalments thereof, and the net amount of benefits assessed thereon."

The amount of the assessment against the individual lot owners for benefits in the new roll differed from the sum assessed in the previous one. Indeed, the new roll disregarded the reductions which had been decreed in the previous proceedings as to certain of the lot owners, since it increased the amount due by these owners over the sum fixed by the previous decree.

The property of Lombard, which had been placed upon the previous roll by consent at a particular amount, was placed upon the new roll for a larger sum than that shown in the previous roll. After publication of notice of the filing of the roll the present plaintiffs in error appeared in the county court of Cook County and objected to the confirmation of the roll. The objections which were urged were numbered from 1 to 18, and denied the validity of the new roll upon many grounds, all of which involved purely matters of local and non-Federal concern. They subsequently filed a motion to cancel the assessment on eight specified grounds, none of which involved the Constitution or laws of the United States. And this is also true of amended objections which were filed. Later, additional objections were filed, numbered from 1 to 5. The first charged, in general terms, that the assessment and the proceeding to confirm the same were in violation of the Fourteenth Amendment to the Constitution of the United States; the second, that as the proceeding was not authorized by any valid ordinance at the time the work was done, to confirm the assessment under the assumption that it was sustained by the act of 1895 would be a violation of the Fourteenth Amendment to the Constitution of the United States; the third charged that as the ordinance under which the previous assessment was made had been held to be void, there was no authority for doing the work at the time when it was done, and hence to enforce the subsequent ordinance would also violate the Fourteenth Amendment; the fourth but reiterated that as the work was completed before the Illinois act of 1895 had been passed, to construe that law as authorizing the assessment would also violate the Constitution of the United States; and the fifth repeated in different form the same proposition by asserting that the law of 1895, if held to be retroactively applicable to the work which had been completed at the time of its passage, would be repugnant to the Fourteenth Amendment to the Constitution.

On the hearing by objections to evidence, by motions to strike out, and by additional pleadings, the grounds above stated were repeated, but were all overruled. Following this, it is stated in the bill of exceptions—

Statement of the Case.

"And thereupon all the said motions and legal objections having been disposed of, the said cause came on to be tried upon the objections triable by a jury; and thereupon it was stipulated in open court by the petitioners and by said objectors that the said cause should be submitted to the court for trial without a jury upon the said issues and upon the same evidence in all respects which has been offered upon the said motions and legal objections as hereinbefore set forth, without recalling witnesses or introducing or recalling or offering the said testimony, the same to be treated as having been offered upon the said issues, which was all the evidence offered on the said hearing. And thereupon the objectors contended that it was shown by the said evidence that the property of the said objectors and each of them, severally, was assessed more than its proportionate share of the cost of the said improvement; but said objections were overruled, and the court found the issues for the petitioners. . . ."

The decree which was entered expressly found that in each particular case the property assessed was benefited to the sum of the assessment. An appeal was taken from this decree to the Supreme Court of the State of Illinois, and on such appeal errors were assigned numbered from 1 to 20. They repeated in various forms of statement all the objections of a Federal nature which had been previously urged and asserted, besides a number of grounds of purely local concern. The Supreme Court of Illinois decided that although it was settled by a course of decisions in that State that there must exist authority for making a special assessment at the time the levy was made and before the work was done, yet the original ordinance under which the first assessment which had been declared illegal was made afforded such an authority. Construing its former opinions, the court said that whilst it had declared the previous assessment to be void because it provided for a payment in instalments contrary to the state statutes, nevertheless the ordinance to the extent that it directed an assessment, remained, albeit it had been held that the provision as to payment by instalments could not be enforced. The court then reviewed all the various objections to the form of the assessment, and held them to be without merit.

It moreover decided that, as the previous assessment had been set aside because of the instalment feature, the sums fixed therein were not conclusive, and on the new assessment it was competent to reëxamine the question of benefits and to restate the amounts due, even although in doing so it was ascertained that a larger sum was assessable upon some portions of the property than had been decreed by the order which confirmed the previous assessment. As to the property of Lombard, the court decided that the proof established that a change in condition had caused the property to be justly assessed for a larger proportion of benefit than had been attributed to it by consent in the first assessment. 181 Illinois, 136. To this decision the present writ of error is prosecuted.

*Mr. Nathan Grier Moore* for plaintiffs in error. *Mr. John P. Wilson* and *Mr. William B. McIlvaine* filed a brief for same.

*Mr. Robert A. Childs* for defendant in error. *Mr. Charles Hudson* was on his brief.

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

The assignments of error contained in the record are nine in number, and eleven in addition have been made since the record was filed in this court. The question whether the benefit accruing to each particular piece of property assessed equalled the sum of the assessment placed thereon was foreclosed by the findings of fact of the trial court, to which court the case was submitted without the intervention of a jury. It is suggested, although under the statutes of Illinois a special assessment can only be made for the amount of the benefit shown to exist, this is of no concern in this case since this levy is not a special assessment, but is a special tax. Where a special tax is imposed under the law of Illinois, it is asserted, no inquiry into the benefits can be had, and, therefore, there arises no question whether the levy was invalid, as exceeding the benefits to be derived,

since all investigation into the amount of the benefits was, as a matter of law, excluded. But this proposition is plainly an afterthought. From the statement of the case which precedes, it is apparent that the objectors to the assessment considered that their defence raised the issue of benefit, that they tendered proof, submitted the question to the trial court without a jury and had an award against them. It is plain, also, that this contention was not raised by the assignment of errors in the Supreme Court of Illinois, and such question was not by that court in any way considered. Putting out of view questions of form, the principal contentions made in the Supreme Court of Illinois, as shown by the assignment of errors in that court, were as follows: That as under the law of the State of Illinois, an authority existing at the time the work was done was necessary to justify an assessment, a violation of the Fourteenth Amendment would be brought about by holding that authority for the assessment was supplied by the Illinois act of 1895, since such law was enacted after the work was completed, and that as the previous ordinance had been declared void by the Supreme Court of Illinois, to hold such void ordinance to be an authority for the subsequent assessment would also violate the Fourteenth Amendment, since it would amount to a want of due process of law and a denial of the equal protection of the laws. And these propositions, stated in varying form, really express every substantial issue raised by the twenty assignments which are here pressed. We do not take up each assignment in detail to show that this is the case, since a statement of them all, as summed up in argument of counsel, is in the margin,[1] and renders a more detailed enumeration unnecessary.

[1] "1st. As the court will see, this is a hard case. The controversy arises out of an effort to compel a ribbon of land 125 feet wide, along the margin of a boulevard 250 feet in width, decorated and ornamented as a park, to pay the entire cost of its improvement, although it is made for the general benefit of the inhabitants.

"2d. The original ordinance for the improvement was declared by the Supreme Court, in a direct proceeding, to be *void*, and so utterly without effect as to form no basis for an adjudication thereon by the county court.

"3d. The constitution and laws of the State, as uniformly construed, permit no such charge to be created against private property without a previ-

The power of the State of Illinois to levy a special assessment in proportion to benefits, for the execution of a local work, and the authority to confer on a municipality the attribute of providing for such an assessment, is not denied.

It is no longer open to question that where a special assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work. *Spencer* v. *Merchant*, 125 U. S. 345.

With these two propositions in mind it is certain that if the power flowing from the ordinance which the Supreme Court of the State of Illinois upheld existed, prior to the work, the assessment was valid. So, also, if the authority was only given subsequent to the work, it was, from the point of view of the Constitution of the United States, legally conferred. In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned. The contention advanced,

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ous valid ordinance providing that the cost be paid by special assessment or special tax.

"4th. The previous assessment having been extinguished completely by the decision of the Supreme Court, there remained no authority of law to charge this property. The legislature thereupon passed a law, after the work had been completed, providing that, notwithstanding the said provisions of the constitution of the State, the work previously completed *might* be charged upon the private property by a procedure therein for the first time provided.

"5th. On the application for such an assessment the property owners protested, setting up the provisions of the Constitution of the United States in denial of the right.

"6th. The courts of the State, although they had held the original ordinance *void*, so as to confer no jurisdiction on the courts even to consider it, held that it was *valid* for the purpose of creating a charge on property of plaintiffs in error.

"7th. If the ordinance was in fact valid, then the original judgment of confirmation, reducing this assessment, was valid and effectual, and should have been applied here.

"8th. By the whipsawing process we have referred to, the courts of the State have held that the ordinance of March 28, 1893, was *void*, so as to deprive plaintiffs in error of the benefits of its adjudication reducing the amount of their assessment; but *valid* for the purpose of creating a charge upon their property."

therefore, amounts to this, that a violation of the Constitution of the United States has been produced by the exercise of a power which, whatever view may be taken, could be brought into play without giving rise to a conflict with such Constitution. But in effect, it is asserted, this deduction is inapposite to this case, since the proposition here relied upon is that the Supreme Court of the State of Illinois maintained the assessment on a void ordinance, and, therefore, in effect decided that a valid assessment could be made where there was no authority whatever for the levy. This, however, rests upon an entirely false assumption, since it is manifest that the court below held that there was a valid ordinance, that is, one which sufficiently conferred the authority to make the assessment. Whether the ordinance was or was not valid, and the extent to which it was so, having regard to the state constitution and laws, was wholly a state and not a Federal question, and we are not concerned with it. Accepting the conclusion of the Supreme Court of the State of Illinois as to the existence of the ordinance by virtue of the state law and constitution, the proposition pressed upon us comes to the result which we have above indicated, and, therefore, is obviously without merit. Indeed, the misconception involved in the argument was pointed out in *Castillo* v. *McConnico*, 168 U. S. 674. There it was asserted that a particular assessment was void because of a mistake in the name of the person whose property had been assessed. The Supreme Court of Louisiana, interpreting the statutes of that State, otherwise decided. It was urged, however, that such decision was in conflict with many prior rulings of that court, and therefore a Federal question was presented. But it was held that as it was within the power of the State of Louisiana, without violating the Constitution of the United States, to direct the assessment without giving the name of the owner, by an adequate description of the property assessed, the decision of the Supreme Court of the State of Louisiana raised no Federal question. The court said (p. 683):

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amend-

ment and matters which may or may not be essential under the terms of the state assessing or taxing law. The two are neither correlative or coterminous.

"The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the State, and as it is solely the result of such authority may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question, within the final jurisdiction of the courts of last resort of the several States."

And the principle thus inculcated not only disposes of the argument which we have previously considered, but also makes it clear that the Supreme Court of Illinois decided a local and not a Federal question when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment which had been set aside was made. The theory lying at the foundation of all the arguments advanced to show that the court below committed error of a Federal nature is this, and nothing more, that the equal protection of the laws was denied by the Supreme Court of Illinois, because that court, although it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that because it is considered that there was inconsistency in the reasoning by which the Supreme Court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided in the courts of last resort of the several States would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same

court in former cases. In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the Supreme Court of the State of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale of our jurisdiction, we have not even approached its consideration.

*Judgment affirmed.*

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## DAINGERFIELD NATIONAL BANK *v.* RAGLAND.

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

No. 200. Submitted March 18, 1901.—Decided April 8, 1901.

*Brown* v. *Marion National Bank*, 169 U. S. 416, followed on the point that "if an obligee actually pays usurious interest as such, the usurious transaction must be held to have occurred then, and not before, and he must sue within two years thereafter."

THE case is stated in the opinion of the court.

*Mr. J. M. Turner* for plaintiff in error.

No appearance for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court.

At various times between January 1, 1895, and May 22, 1896, the defendant in error, G. W. Ragland, with sureties, executed promissory notes to the Daingerfield National Bank, for various sums of money loaned to said Ragland. The bank was a national banking association doing business in Daingerfield, Morris County, Texas. Each original note embraced not only the amount of the loan but interest to the date of maturity of the note, calculated at a rate higher than that allowed by law. Certain of the notes were renewed from time to time, the additional interest for the extended period being added, calculated

also at a usurious rate. The first payment made upon any of the notes so executed was on November 1, 1896, and all the notes were fully paid prior to February 14, 1898.

On March 28, 1898, Ragland filed a petition in the district court of Morris County, Texas, to recover twice the amount of the interest so as aforesaid paid by him, basing his right to recover upon the provisions of section 5198 of the Revised Statutes of the United States. After deducting as an offset the amount of a note executed by Ragland which had been assigned to the bank by the payee thereof, there was found due to Ragland upon the cause of action stated in his petition the sum of $252.05, and for that amount with interest judgment was entered in favor of Ragland in October, 1898. On appeal to the Court of Civil Appeals the judgment was affirmed, and a motion for rehearing was overruled. 51 S. W. Rep. 661. An application made to the Supreme Court of Texas for an allowance of a writ of error was dismissed for want of jurisdiction. Thereafter the Chief Justice of the Court of Civil Appeals allowed a writ of error, and the case is now here for review.

In the assignments of error contained in the record it is conceded by counsel for the plaintiff in error, and the record fully establishes, that the interest, the subject of this controversy, was paid to the plaintiff in error less than two years before Ragland commenced his action. The sole contention in this court is that the courts of Texas erroneously held that the limitation of the statute did not begin to run until the usurious interest was paid. That the courts below, however, did not commit error in this regard is shown by *Brown* v. *Marion National Bank*, (1898) 169 U. S. 416, where, construing sections 5197 and 5198 of the Revised Statutes, it was held that the "usurious transaction," from the date of which the limitation of the statute begins to run, is the time when the usurious interest was actually paid, and not the time when it was *agreed* that it should be paid. This refutes the argument relied on at bar, that the inclusion of the usurious interest as principal in the notes amounted to payment of the interest within the meaning of the statute.

*Judgment affirmed.*

## EASTERN BUILDING &c. ASSOCIATION *v.* WELLING.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 190. Argued March 11, 1901.—Decided April 8, 1901.

After the Supreme Court of South Carolina had construed the mortgage contract in accord with the claim of the plaintiffs, and gave judgment accordingly, in an application for a rehearing it was set up for the first time that this was in conflict with the Constitution of the United States. *Held*, that this came too late.

The assertion that, although no Federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the Constitution of the United States was relied on, nevertheless it is the duty of this court to look into the record, and determine whether the existence of such a claim was not necessarily involved, was unsound, as shown by authority.

THIS action was commenced in the Court of Common Pleas of Darlington County, South Carolina, by Welling and Bonnoitt to recover of the Eastern Building and Loan Association of Syracuse, New York, the penalty provided by the statutes of South Carolina for wrongfully failing to enter in the proper office satisfaction of a mortgage which had been executed by Welling and Bonnoitt to the association.

The controversy presented by the issue joined was whether the mortgage in question secured merely the payment of seventy-eight promissory notes, each maturing monthly, and aggregating $6065.10, or whether in addition such mortgage secured the payment of the dues and assessments upon certain shares of stock in said association which had been subscribed for by Welling and Bonnoitt. The trial court ruled that the mortgage secured only payment of the notes. A judgment entered in favor of the plaintiff upon the verdict of a jury was subsequently affirmed by the Supreme Court of South Carolina. 34 S. E. Rep. 409. Thereupon a writ of error was allowed.

*Mr. William Hepburn Russell* for plaintiff in error. *Mr. William Beverly Winslow* and *Mr. D. A. Pierce* were on his brief.

*Mr. Henry A. M. Smith* for defendants in error.

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

The Federal questions asserted to be presented by the record are in substance the following:

1. That the Supreme Court of South Carolina, by its decision, refused full faith and credit to public acts of the State of New York;

2. That by such decision the obligation of a contract was impaired; and,

3. That the decision deprived the plaintiff in error of its property without due process of law.

While in various forms, in the trial court, the association in effect claimed that the law of its incorporation formed a part and parcel of the mortgage contract, and that the decisions of the courts of New York respecting the powers and contracts of associations thus incorporated should be given effect, nowhere does it appear that it was claimed that to refuse to concur in the view stated would operate to deny the protection of the Constitution of the United States. The trial court disposed of the case solely upon what it regarded as the plain import of the terms of the contract, irrespective of the laws of New York and the decisions of the New York courts, yet in the numerous exceptions predicated on the rulings of that court there was not contained, either directly or indirectly, any contention that rights of the association protected by the Constitution of the United States had been invaded. It was not until after the Supreme Court of South Carolina construed the mortgage contract in accord with the claim of the plaintiffs, and that court had hence affirmed the judgment of the trial court and remitted the cause to that court, that, in an application for a rehearing, numerous grounds were set forth in which were contained assertions that the adverse decision of the Supreme Court of the State was in conflict with several clauses of the Constitution of the United States. But this came too late. *Bobb* v. *Jamison*, 155 U. S. 416; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 540, and cases cited.

Syllabus.

The assertion that although no Federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a concluded line of authority. *Spies* v. *Illinois*, 123 U. S. 131, 181; *French* v. *Hopkins*, 124 U. S. 524; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Baldwin* v. *Kansas*, 129 U. S. 52; *Leeper* v. *Texas*, 139 U. S. 462; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Columbia Water Power Co.* v. *Columbia Street Railway Co.*, 172 U. S. 475.

The error involved in the argument arises from failing to observe that the particular character of Federal right which is here asserted is embraced within those which the statute requires to be "specially set up or claimed." The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially in the latest case cited, *Columbia Water Power Co.* v. *Columbia Street Railway Co.*, *supra*.

*Dismissed for want of jurisdiction.*

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## PYTHIAS KNIGHTS' SUPREME LODGE *v.* BECK.

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

No. 194. Submitted March 13, 1901.—Decided April 8, 1901.

*Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658, sustained and followed as to the relations of the trial court to the jury in regard to its finding.

The question whether the deceased did or did not commit suicide was one of fact, and after the jury had found that he did not, and its finding had been approved by the trial court and by the Court of Appeals, this court would not be justified in disturbing it.

On April 5, 1895, a certificate of membership, in the amount of $3000, was issued by the Supreme Lodge to Frank E. Beck, payable on his death to his widow, Mrs. Lillian H. Beck. The application for membership con-

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tained this stipulation: "It is agreed that, if death shall result by suicide, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors or by the use of narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation of or attempt to violate any criminal law, then there shall be paid only such a sum in proportion to the whole amount of the certificate as the matured life expectancy at the time of such death is to the entire expectancy at date of acceptance of the application by the board of control." It was on the conduct of Beck before he committed suicide an instruction was asked for, which the trial court, in its charge to the jury referred to as follows: "Here is an instruction asked, which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed he cannot recover. But if a man contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply." *Held*, that this instruction correctly states the law.

The plaintiff, in her proofs of loss, stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that, while standing alone, it would justify a verdict for the defendant, yet, if explained, and the jury were satisfied that the death did not result from suicide, she was not concluded by this declaration. *Held*, that there was no error in this ruling.

On April 5, 1895, a certificate of membership, in the amount of $3000, was issued by the plaintiff in error to Frank E. Beck, payable on his death to his widow, Lillian H. Beck. The application for membership contained this stipulation:

"It is agreed that, if death shall result by suicide, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors or by the use of narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation of or attempt to violate any criminal law, then there shall be paid only such a sum in proportion to the whole amount of the certificate as the matured life expectancy at the time of such death is to the entire expectancy at date of acceptance of the application by the board of control."

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On October 31, 1896, he was killed by the discharge of a gun at the time held in his hands. After his death a coroner's jury found that he died "by shooting himself in the head with a double barrel shotgun, with the purpose and intent of committing suicide, while temporarily insane, due probably to the use of intoxicants. That the shooting was done in the outside water closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself." Proofs of death were furnished by his widow, in which question 14 and answer were as follows: "14. Was death caused by suicide or violence or from other than natural causes? A. Suicide."

On April 13, 1897, an action was commenced in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark, by his widow to recover $3000, the amount of the insurance. This action was removed by the defendant to the Circuit Court of the United States for the District of Montana. The answer set up specifically that the insured died from "self-destruction and suicide," and further, "that prior to said Beck taking his own life said Beck was attempting to and did violate the criminal laws of the State of Montana." In the Circuit Court a trial was had, which resulted in a verdict and judgment for plaintiff. The judgment was taken by the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, and by that court affirmed May 16, 1899, 36 C. C. A. 467, to reverse which judgment of affirmance this writ of error was sued out.

*Mr. Carlos S. Hardy* for plaintiff in error.

*Mr. C. B. Nolan* for defendant in error.

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

The principal question discussed by counsel for plaintiff in error, and the important question in the case, is whether the trial court erred in refusing a peremptory instruction to find a

verdict for the defendant. It is said that the testimony established the fact of suicide, and that there was no sufficient doubt in respect thereto to justify a submission of the question to a jury. We have recently had before us a case coming, like this, from the trial court, through the Court of Appeals, *Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658, in which the action of the trial court in directing a verdict was vigorously attacked as an invasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the lower courts, and the considerations which then controlled us compel a like action in the present case. We said that a trial court had the right, under certain conditions, to direct a verdict one way or the other, (citing several cases to that effect,) but added:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43.

"Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions." p. 660.

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Whether the deceased committed suicide was a question of fact, and a jury is the proper trier of such questions. It is not absolutely certain that the deceased committed suicide. The following are the facts, at least, from the testimony, the jury was warranted in finding them to be the facts: The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable, and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic, who had worked in the family for two or three years but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily, his reply was that "a man that has as much trouble as he had, the sooner the end came the better," and a similar remark at another time, that such a man "would be better off dead than living." Two days before his death his wife left her home and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking. There were two guns in his house, one a single barrel shotgun, belonging to his wife, and one a double barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who soon came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hack driver, who had brought the policeman, called out that the deceased had gone into the back yard and into a water closet. The hack driver heard him go into the closet, and after a minute or so heard him step outside, and immediately the gun was discharged, and on examination

he was found with the upper part of his head shot off. It was so dark that no one saw the circumstances of the shooting. Whether it was accidental or intentional is a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture. There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found, or indeed looked for. Under those circumstances it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from the careless conduct of a drunken man as from an intentional act. At any rate, the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the Court of Appeals, we are not justified in disturbing it.

Neither can it be said that death came "in violation of or attempt to violate any criminal law." Before he left home with the gun he said he was going hunting. While from his conduct he apparently changed his mind, and doubtless went to the house where his wife was stopping with the view of persuading or compelling her to return home, and may have intended violence against her if she refused, yet the death resulted not as a consequence of any violation or attempt to violate the criminal law. In this respect the court charged the jury as follows:

"Here is an instruction asked which I refuse, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed he cannot recover. But if a man contemplating

that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

This instruction correctly states the law. The death must in some way come as a consequence of the violation or attempted violation of the criminal law, and the stipulation does not apply when it is simply contemporaneous and in no manner connected with the alleged violation or attempt to violate. For instance, if the deceased had started with the avowed intent to kill his wife, and while walking down the street a tree had fallen and killed him, the fact that he was starting upon an intentional violation of the law would not make this stipulation applicable, because the cause of his death would be entirely disconnected from the criminal act. So here, whatever may have been the general thought and purpose running in his mind as he went to the house where his wife was, his act in going into and stepping out of the water closet was in no manner connected with or part of an attempt to carry out any criminal purpose, and at that time came the shot, intentional or accidental, which killed him.

These are the substantial matters presented in the record. There are one or two minor questions. For instance, when the undertaker was on the witness stand, the defendant produced a gun and asked him to show the jury how the mark which he said he found on the face of the deceased could be caused, and the gun was used for that purpose. On cross-examination it appeared that his arm was not long enough to reach the trigger, and, therefore, to fire it off in the position in which he had placed it he needed a pencil or something of that kind. Subsequently, the plaintiff introduced testimony tending to show the length of the arm of the deceased and the improbability of his being able to reach the trigger, with his face on the muzzle, as described by the undertaker, which testimony was objected to on the ground that the gun had not been identified as the one which had caused the death, but the objection was overruled and the testimony admitted. There was testimony subsequently offered by her as to its identity, but that testimony was, to say the least, not clear and satisfactory, so that it cannot be said

that the gun was fully identified as the one which caused his death. Still, we cannot think that this furnishes a sufficient ground for reversing the judgment. The defendant produced the gun, and while it cannot be said that the mere production carried with it a declaration that this was the gun which caused the death, yet it certainly suggested the fact, and if not so it ought to have offered testimony to that effect. It presented the gun for use and illustration before the jury, and there was no material error in permitting the plaintiff to use the same gun for the purposes of other illustration, especially when she followed that with testimony tending, although, perhaps, only slightly, to identify it.

Another matter is this: The plaintiff in her proofs of loss stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this matter the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that while standing alone it would justify a verdict for the defendant, yet if explained and the jury were satisfied that the death did not arise from suicide, she was not concluded by this declaration. We see no error in this ruling. None of the elements of estoppel enter into the declaration. The condition of the defendant was not changed by it, and if under a misapprehension of facts she made a statement which was not in fact true, she could explain the circumstances under which she made the statement and introduce testimony to establish the truth.

Some other matters are mentioned in the brief of plaintiff in error, but nothing that we deem of sufficient importance to deserve notice. We see no error in the judgment, and it is

*Affirmed.*

# TEXAS & PACIFIC RAILWAY COMPANY *v.* HUMBLE.

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

No. 177. Argued March 7, 8, 1901. — Decided April 8, 1901.

Where a married woman had resided in Arkansas for many years, and, just as she was leaving the State to join her husband, who had taken up his residence in Louisiana, was injured through the alleged negligence of the defendant railway company, and brought an action to recover damages in a state court in Arkansas, which, on the application of the company, was removed into the Circuit Court of the United States for the Western District of Arkansas, the rule of decision was the law of Arkansas, the place of the wrong, and of the forum, and not the law of Louisiana.

By the law of Arkansas, plaintiff was entitled to bring the action in her own name and without joining her husband. And if her husband should subsequently bring suit in Louisiana on the same cause of action, it is not to be assumed that the courts of that State would not recognize the binding force of the judgment in Arkansas.

By the legislation of Arkansas the earnings of a married woman arising from labor or services done and performed on her sole account are her separate property, and although the statutes may not have deprived the husband of the services of the wife in the household, in the care of the family, or in and about his business, they have bestowed on her, independently of him, her earnings on her own account, and given her authority to acquire them.

As the evidence in this case tended to show that plaintiff for some years had been carrying on business on her own account, which had been suspended by reason of temporary illness for a short time just previous to the accident, the Circuit Court did not commit reversible error in instructing the jury that, if they found for the plaintiff, they might take into consideration in assessing her damages, among other things, her age and earning capacity before and after the injury was received, as shown by the proofs.

On this record the earning capacity referred to presumably had relation to earnings on plaintiff's own account, and if defendant wished this made more explicit, it should have so requested.

THIS was an action brought by Emma Humble against the Texas and Pacific Railway Company in the circuit court of Miller County, Arkansas, to recover compensation for personal injuries sustained by her in the defendant's station at Texarkana, Arkansas, on April 9, 1898, by reason of defendant's negligence, and removed on defendant's petition to the

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United States Circuit Court for the Western District of Arkansas. Plaintiff obtained judgment, which was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 97 Fed. Rep. 837, and thereupon this writ of error was sued out.

The evidence, in addition to establishing the circumstances of the infliction of the injury, tended to show that Mrs. Humble had been a resident of Arkansas for nearly ten years; that she had kept a boarding house, and a hotel at Pine Bluff, in said State, for some years, conducted by her as her sole and separate business, and in her name, until she left Pine Bluff for Texarkana, in October, 1897, where she remained until April 9, 1898, and during this time began to run a hotel, but became temporarily ill, and gave it up. Her husband had taken up his residence in Louisiana at the time of the injury, and she had then started to go to him.

Prior to the trial, the railway company moved the court to compel Mrs. Humble to make her husband a party plaintiff, but the court overruled the motion, and defendant excepted. Defendant objected to all evidence tending to show that plaintiff's capacity to labor was diminished by the injury, and saved an exception to its admission.

At the close of the evidence defendant requested the court to give the jury certain instructions, of which the third, fourth, sixth and seventh are as follows:

"3. The plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor or earn money at and just before she was injured.

"4. In this case the plaintiff being a married woman and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money.

"6. The plaintiff being a married woman, and her husband not having joined her in this suit, and she and her husband having her present and prospective home in the State of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in future has been lessened by the injury, and by the law of that State she cannot recover such damages.

"You will, therefore, allow nothing as damages for any diminished capacity to labor and earn money.

"7. Plaintiff cannot recover anything on account of her diminished capacity to labor.

"Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession or occupation.

"And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

The court declined to give these instructions, and each of them, and the defendant excepted to the refusal of each.

The court instructed the jury as follows: "If you should find for the plaintiff, in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs, her physical condition before the injury, and her physical condition after the injury, and the nature and character of the injury she received, whether it be permanent or temporary in its nature, and find for her such sum as will fairly and reasonably compensate her therefor, including therein fair and reasonable compensation for any physical and personal pain and suffering she may have undergone as the result thereof."

Defendant excepted to so much of this portion of the charge as allowed the jury to "take into consideration her age and earning capacity before and after the injury was received as shown by the proofs."

*Mr. John F. Dillon* for plaintiff in error. *Mr. Winslow F. Pierce* and *Mr. David D. Duncan* were on his brief.

*Mr. Oscar D. Scott* for defendant in error.

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

Plaintiff in error contends that the judgment should be reversed because the Circuit Court erred in declining to direct the joinder of the husband; in applying the law of Arkansas in the trial of the case and not that of Louisiana; and in allowing impaired earning power to be considered as an element of recovery.

The statutes of Arkansas provided that a married women "might maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property." S. & H. Dig. § 5641.

This action was brought in the state court and removed on defendant's application. That transfer could not deprive plaintiff of the right secured to her by the local law to prosecute the suit in her own name and for her own benefit; and indeed by section 721 of the Revised Statutes, the law of Arkansas furnished the rule of decision. In some jurisdictions it is held under similar statutes that the wife *must* sue alone under such circumstances, and that to make the husband a co-plaintiff works a fatal misjoinder. The Circuit Court was right then in not attempting to compel a joinder which the statute had expressly dispensed with.

But it is said that under the laws of Louisiana compensation for personal injuries to a married woman belongs to the husband; that he alone can sue therefor; and that, therefore, error was committed in the admission of evidence, the refusal of instructions, and in the charge of the court. We do not think the point as now presented was made below. The objection to evidence, the sixth instruction refused, (which referred to the law of Louisiana,) and the part of the charge excepted to, related to diminished capacity to labor. And the motion as to Humble was that he should be joined as a plaintiff. The answer simply raised the issue whether or not Mrs. Humble received any injuries to her person by reason of the acts complained of. It was nowhere insisted that the action could not be maintained because not brought by the husband alone.

However, whether the objection be that under the laws of Louisiana she could not recover in her own name at all, or could not, except her husband was a co-plaintiff, because the damages claimed were community property, we agree with the Circuit Court of Appeals that plaintiff's rights in suing in Arkansas for an injury sustained there did not differ from those of any married woman domiciled in that State; that the legislature of Arkansas had determined by whom a suit might be brought for per-

sonal injuries sustained by a married woman; had enlarged the rights of married women in respect of damages recoverable by them on account of personal injuries sustained within the State; and that these laws necessarily enured to the benefit of every married woman who subsequently sued in the courts of the State for personal injuries there sustained, and must be held to have been intended to have, and to have, a uniform operation throughout the State.

The argument *ab inconvenienti* is pressed, that Humble might sue for the same injury in Louisiana, and that this judgment could not be pleaded in bar, although only covering damages particularly pertaining to the wife. In other words, that the Louisiana courts would decline to give any faith and credit to the recovery in Arkansas permitted by the jurisprudence of the latter State in the name of the wife only. We must decline to be moved by the supposed hardship suggested. These injuries were inflicted and this action was brought in the State of Arkansas. The place of the wrong and the place of the forum concurred, and the law of that place governed. If an action should be brought in Louisiana, the fact that the law of Arkansas differed from that of Louisiana would not prevent its application unless opposed to some general public policy, the existence of which is not to be assumed. *Northern Pacific Railroad Company* v. *Babcock*, 154 U. S. 190.

This brings to us the point on which the chief stress of the argument was laid. The Circuit Court charged the jury that if they found for plaintiff they might take into consideration in assessing the damages "her age and earning capacity before and after the injury was received, as shown by the proofs," and refused an instruction to the contrary, and exceptions were duly preserved.

In view of the evidence was plaintiff entitled to be allowed anything for diminution of earning capacity?

Section 7 of Article 9 of the constitution of Arkansas provides:

"The real and personal property of any *feme covert* in this State acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may

choose, be and remain her separate estate and property and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband."

Sections 4940, 4945, 4946, 4949 and 5641 of Sandels & Hill's Digest of the Statutes of Arkansas are as follows:

4940. "The real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole*; and the same shall not be subject to the debts of her husband."

4945. "The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person; that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account; that which a married woman in this State holds or owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her, in her own name, and shall not be subject to the interference or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent."

4946. "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

4949. "In an action brought or defended by any married

woman, in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character or property, if judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate or property."

5641. "Where a married woman is a party, her husband must be joined with her, except in the following cases:

"*First.* She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this State.

"*Second.* She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property.

"*Third.* Where the action is between herself and her husband she may sue and be sued alone."

The particular point before us may not have been passed on by the Supreme Court of Arkansas, but that tribunal has recognized this legislation as intended for the protection of the wife's property against the husband's creditors, and has held that the earnings of a married woman arising from labor or services done and performed on her sole account become her separate property. *Sellmeyer* v. *Welch*, 47 Ark. 485; *Rudd* v. *Peters*, 41 Ark. 177; *Hoffman* v. *McFadden*, 56 Ark. 217.

Granting that the statutes have not deprived the husband of the services of the wife in the household, in the care of the family, or in and about his business, yet they have bestowed on her, independent of him, her earnings on her own account, and given her authority to acquire them. They proceed upon the difference between the discharge of marital duties and independent labor.

As the results of her earning capacity when exerted for herself belong to her, deprivation of that capacity must be to that extent her individual loss. The husband may recover for loss of services belonging to him, but not for loss of the wife's poten-

tiality to earn for herself, nor for her expectation of life in that connection; and if he cannot, she can.

The precise question arose under statutory provisions not materially different from those in Arkansas in *Harmon* v. *Old Colony Railroad Company*, 165 Mass. 100, and it was decided that in an action by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor might be considered as an element of the damages. The reasoning of the opinion seems to us so convincing that we quote from it at length.

The Supreme Judicial Court, after referring to the statutes of 1846, 1855, 1857 and 1874, said:

"By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his; subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right in these respects is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her the right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him

during such time as she may choose to perform labor on her sole and separate account. By the common law, the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modified the common law, his right to her services is abridged, though his obligation to support her remains. It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which perhaps may require her absence for ten years, thus amounting to a desertion, which would be in violation of her matrimonial duties. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent, as, for example, in fixing the domicil, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us, the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect of this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances, the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case."

Counsel for plaintiff in error earnestly urges, however, that the Arkansas statute was adopted in 1873, and was nearly identical with an act of New York of 1860; that a different construction had been put on that act by the courts of New York; and that this construction should be followed in the present instance. But the statutes of Massachusetts, in the particulars material here, were in force long prior to 1873, and we are not advised that the statutes of Arkansas were transcribed from the statute book of New York rather than from that of some other State. We do not regard this as a case for the adoption of a construction by presumption. Nor need it be conceded that the deci-

sions of the courts of New York are opposed to the rulings of the Circuit Court on the facts of this case.

In *Filer* v. *New York Central Railroad Company*, 49 N. Y. 47, the decision was that unless the wife was actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she had lost by reason of the injury, she had sustained no consequential damages.

In *Brooks* v. *Schwerin*, 54 N. Y. 443, there was evidence that the plaintiff before the injury took care of her family and, also, that she was working out by the day and earning ten shillings a day. To proof of these facts defendant objected on the ground that her time and services belonged to her husband, and could not form ground of damages in the action. The court overruled the objection and defendant excepted. The defendant also excepted to the refusal of the court to charge as requested by him, "that the plaintiff cannot recover for the value of her time and services while she was disabled; such services and time belong, in law, to the husband." It was held that the rulings of the court were proper, and Earl, C., said:

"If the defendant had requested the court to charge that the plaintiff could not recover for the loss of services to her husband in his household in the discharge of her domestic duties, the request could not properly have been refused. But the request was broader, and proceeded upon the idea that all her time and services belonged to her husband, and that she could not recover anything for the value of her time, or for the loss of any service while she was disabled. She was earning in an humble capacity ten shillings a day, and so far as she was disabled to earn this sum, the loss was hers, and the jury had the right to take it into account in estimating her damages."

In *Blaechinska* v. *Howard Mission*, 130 N. Y. 497, it was ruled that recovery could not be had by a married woman, in an action to recover damages for injuries sustained through defendant's negligence, for loss of her services in the discharge of household duties, and of other services rendered by her to her husband, and *Brooks* v. *Schwerin* was distinguished, because in

that case the wife worked for a stranger, while in this she worked for her husband.

In the present case the evidence tended to show that before the plaintiff was injured she had been engaged for some years in business on her own account, supporting herself and her children, which business had been discontinued for a few months, was renewed, and then given up on account of temporary illness, from which she had in substance recovered, when the injuries sustained incapacitated her from further work.

Under these circumstances we think the Circuit Court did not err in refusing to charge that plaintiff could not recover for diminished capacity to labor because there was "no evidence showing any capacity to labor or earn money at and just before she was injured." To pin the evidence of capacity down to the very point of time when the injury was inflicted upon her was refining too much on the principle involved.

This loss of ability to make earnings outside the discharge of household duties and irrespective of her husband was under the statutes of Arkansas her loss, and not her husband's, and the mere fact that at the moment of the injury she happened to be out of business should not deprive her of the benefit of the rule which would have been otherwise applicable, according to *Filer* v. *Railroad Company* and *Brooks* v. *Schwerin*.

We have assumed, as the jury presumably did, that the earning capacity referred to in the charge had relation to earnings on plaintiff's own account, and if defendant wished this to have been made more explicit, it should have so requested.

The third paragraph of the seventh instruction refused was, "And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery." But this was not asked as an independent proposition, and the exception was saved to the refusal to give the entire instruction, which as a whole was erroneous and properly refused.

We find no reversible error, and the judgment is

*Affirmed.*

# BROWNE *v.* CHAVEZ.
# BROWNE *v.* CHAVEZ.

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

Nos. 165 and 247. Argued March 6, 1901.—Decided April 8, 1901.

While a *scire facias*, for the purpose of obtaining execution, is ordinarily a judicial writ to continue the effect of a former judgment, yet it is in the nature of an action, and is treated as such in the statutes of New Mexico. After a judgment is barred under those statutes, the writ of *scire facias*, giving a new right and avoiding the statute, cannot be maintained.

This case was brought here both by writ of error and appeal. As there was no trial by jury and the issues were only questions of law determined by the trial court on demurrer, the writ of error is dismissed, and the cause considered on the appeal.

On the 7th of October, 1885, the firm of Browne, Manzanares & Company, composed of L. P. Browne, since deceased, and F. A. Manzanares, recovered judgment against Francisco Chavez, 2d, in the District Court of Bernalillo County, for the sum of $4170, damages and costs. No action was taken in respect of this judgment, and no execution was issued upon it, so far as this record discloses. September 30, 1895, a writ of *scire facias* was sued out and service had. The defendant filed two pleas; the first suggesting the death of one of the plaintiffs since the rendition of the judgment, which plea was abandoned; the second, the plea of the statute of limitations, to which a demurrer was interposed by plaintiffs, which was overruled by the court. Plaintiffs thereupon refused to plead further and stood by their demurrer, whereupon the court rendered judgment dismissing the writ.

The statutes referred to are as follows:

An act of January 23, 1880, compiled in 1884 as sections 1860 and 1861, as follows:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their

causes accrue, and not afterwards, except when otherwise specially provided.

"SEC. 1861. Actions upon any judgment of any court of record of any State or Territory of the United States, or the Federal courts of the United States, within fifteen years."

An act of February 10, 1887, compiled in 1897 as sections 3085–6, as follows:

"SEC. 3085. That hereafter it shall not be necessary to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this Territory, except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.

"SEC. 3086. An execution may issue at any time, on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same."

An act of February 24, 1891, as follows:

"SECTION 1. That so much of the laws of the Territory of New Mexico as is compiled as section 1861 of the Compiled Laws of the Territory of New Mexico of 1884 be and the same is hereby repealed, and the following be and is hereby substituted therefor:

"SEC. 2 '(1861). Actions founded upon any judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterward, and actions founded upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: *Provided*, That actions may be brought upon any existing judgment which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred.'"

This section was brought forward as section 2914 of the Compiled Laws of 1897.

*Mr. William B. Childers* for plaintiff in error and appellant.

*Mr. Bernard S. Rodey* for defendant in error and appellee.

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

The writ of *scire facias* has been, among other things, customarily used to obtain execution on a judgment which has become dormant. At common law it lay in real actions and on a writ of annuity, if the plaintiff did not take out execution within a year and a day, and it was given, under the same circumstances, in personal actions, by the statute of Second Westminster, 13 Edw. I, St. 1, c. 45, before which act, the plaintiff was put to a new action on his judgment. Foster on Scire Facias, 2, and cases cited.

The writ in this case was taken out to obtain execution of the judgment in question. That judgment was recovered October 7, 1885, and no execution had been issued thereon. The writ was dated September 30, 1895. The statute provided that "actions founded upon any judgment of any court of the Territory of New Mexico," and "upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal courts, may be brought within seven years from and after the rendition of such judgment and not afterward: *Provided*, That actions may be brought upon any existing judgment, which, but for this proviso, would be barred within one year from and after the passage of this act and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred." It thus appears that this judgment was barred according to the terms of the act some years before the writ was issued, but it is contended that although that was so, the bar did not apply to the writ of *scire facias*, by the use of which the judgment could be revived and an execution issued upon it notwithstanding the lapse of time.

It is argued that *scire facias* is not included in the words "all actions," barred by the statute, because a proceeding by *scire facias* is not an action, and because to hold it to be would

be inconsistent with another statutory provision that actions should be commenced by "the filing in the proper clerk's office of the petition, declaration, bill or affidavit." Compiled Laws, 1884, § 1867. But we think that the averments in the writ are equivalent to a petition or declaration; and while it is true that a *scire facias* for the purpose of obtaining execution is ordinarily a judicial writ to continue the effect of the former judgment, yet it is in the nature of an action because the defendant may plead to it; and in many cases it has been classified as in substance a new action. Foster, 13; Coke Litt. 291*a*; *Fenner* v. *Evans*, 1 T. R. 267; *Winter* v. *Kretchman*, 2 T. R. 45; *Holmes* v. *Newlands*, 5 Q. B. 367; *Owens* v. *Henry*, 161 U. S. 642; *Kirkland* v. *Krebs*, 34 Md. 93; *Potter* v. *Titcomb*, 13 Maine, 36; *Gonnigal* v. *Smith*, 6 Johns. 106; *Cameron* v. *Young*, 6 How. Pr. 372; *Murphy* v. *Cochran*, 1 Hill, 339.

In *Fenner* v. *Evans* a *scire facias* had been issued to revive a judgment entered prior to the act of 17 Geo. III, c. 26, and execution had been taken out upon it. The *scire facias* and the execution were both set aside, the court holding that *scire facias* was an action within the second section of that act providing "that no action shall be brought on any such judgment already entered," etc.

By section forty of chapter twenty-seven, 3 & 4 Will. IV, it was provided that "no action, or suit, or other proceeding, shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. . . ." And it was held that no *scire facias* could be sued out to revive such a judgment after the lapse of twenty years. Foster, 14, 29; *Farran* v. *Beresford*, 10 Cl. & F. 319; *Farrell* v. *Gleeson*, 11 Cl. & F. 702. In these cases it was ruled that *scire facias* on a judgment was not a mere continuation of a former suit but created a new right.

In many jurisdictions provision is made for the revival of judgments by *scire facias* within a specified time, but our at-

tention is called to no such provision in these statutes. The reference to revivor in such cases treats *scire facias*, if used as an action. It was enacted by the act of 1887, now §§ 3085 and 3086 of the Compiled Laws of 1897, that it should not be necessary "to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this Territory, except in cases where such judgment had been rendered for a period of five years or more, . . . " and that an execution might issue at any time, "on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same." Assuming that *scire facias* lies under the code of New Mexico to revive a judgment, it is included in the word "action" in this section, and we think it may properly be assumed to have been used in the same comprehensive sense in the act of 1891, prescribing the limitation on "all actions founded upon any judgment."

We agree with the Supreme Court of New Mexico that the construction contended for is unreasonable and would defeat the manifest object of the legislature, and that, after a judgment is barred under the statutes of New Mexico, a *scire facias* giving a new right and avoiding the statute cannot be maintained.

*Writ of error in No.* 165 *dismissed; judgment in No.* 247 *affirmed.*

# HANCOCK MUTUAL LIFE INSURANCE COMPANY *v.* WARREN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 196. Argued and submitted March 19, 1901.—Decided April 8, 1901.

*Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Waters-Pierce Company* v. *Texas*, 177 U. S. 28; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389, approved and affirmed.

Section 3625 of the Revised Statutes of Ohio dealing with the subject of answers to interrogatories in applications for policies of life insurance, applicable to all life insurance companies doing business in the State of Ohio, and in force at the time the policy of insurance sued on in this case was issued, was within the power of the State over corporations, and not in violation of the Constitution of the United States.

THIS action was brought in the Common Pleas Court of Delaware County, Ohio, on a policy of insurance issued September 27, 1895, by the John Hancock Mutual Life Insurance Company on the life of George E. Warren and for the benefit of William M. Warren. The insurance company resisted payment on the ground that the policy had been fraudulently obtained by the decedent, in that the answers made by him in his application made a part of the policy, and which were expressly warranted to be complete and true, the policy providing that if any of the statements were untrue it should be void, were false, and that he made them for the purpose of defrauding the insurance company, which would not have issued the policy had it known of the falsity of the answers.

Section 3625 of the Revised Statutes of Ohio provided that: "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would

not have been issued; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer." Rev. Stat. Ohio, 1898, p. 1900.

The trial judge charged the jury as follows: "This law being in force at the time this policy of insurance was taken out, is applicable to the policy of insurance involved in this case. And is applicable to the questions and answers in the application that by the terms of the policy are made express warranties as well as those that are not." The defendant duly excepted to that portion of the charge, and to other portions of the same purport. The defendant also requested the court to give the jury the following instruction: "The policy or contract upon which this action is based and the application made by George E. Warren for the same, constitute a warranty that all answers by said Warren contained therein are true, and if any one or more of said answers is untrue, though made without actual fraud, and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the contract is void *ab initio*, and your verdict will be for the defendant." The court declined to give this instruction, and defendant duly excepted.

The jury returned a verdict for the plaintiff, and judgment was entered thereon, which was affirmed by the Circuit Court, and finally by the Supreme Court of Ohio. *The John Hancock Mutual Life Insurance Company* v. *Warren*, 59 Ohio St. 45.

*Mr. George K. Nash*, *Mr. W. Z. Davis* and *Mr. Louis G. Addison* for plaintiffs in error submitted on their brief.

*Mr. John S. Jones* for defendant in error. *Mr. W. B. Jones*, and *Mr. F. M. Marriott* were on his brief.

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

In *State* v. *Ackerman*, 51 Ohio St. 163, it was ruled that as foreign insurance companies and associations, whether incorporated or not, before commencing business in the State, were

required to obtain a certificate of authority to do so, which conferred on the company or association receiving it the right and privilege of carrying on its business in the State, the privilege so conferred was a franchise. In the course of the opinion the court quoted with approval, from Spelling on Extraordinary Relief, as follows: "Where, by statute, the legal exercise of a right, which at common law was private, is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but has become a matter of public concern, that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function. . . . There is no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals. But now, by statute, in almost, if not quite all the States, stringent requirements as to security of the persons dealing with insurers and the making and filing reports of public officers for public information, are provided, and must be strictly observed and complied with before any person, association or corporation may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right."

In the present case the Supreme Court of Ohio sustained the constitutionality of section 3625 of the Revised Statutes, which was in force at the time this policy was issued, upon the ground that the State had a right "to prescribe the terms and conditions upon which it grants such franchise, and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby, and must accept the burdens with the benefits." The legal effect was held to be the same "as if the section was copied into and made a part of the policy." And it was said that the statute had also been held constitutional in *National Life Insurance Co.* v. *Brobst*, 56 Ohio St. 728, where no opinion seems to have been delivered.

The section in question applies to all life insurance companies doing business in the State of Ohio, and the State can certainly

do with foreign corporations what it may do with corporations of its own creation.

In *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, we held that provisions in the Revised Statutes of Missouri, that "in all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount inserted therein on said property," etc.; and "that no condition of any policy of insurance contrary to the provisions of this article shall be legal or valid," were not in conflict with the Constitution of the United States. And this was affirmed in *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389.

In *Waters-Pierce Oil Company* v. *Texas*, 177 U. S. 28, where a statute of Texas was assailed on the ground that it took away the liberty of contract, Mr. Justice McKenna, delivering the opinion of the court, said: "The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is, has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations." And as the state court had held that the statute was a condition imposed on the oil company on doing business within the State, it was said of it that "whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it." And see *Tullis* v. *Railroad Company*, 175 U. S. 348; *Equitable &c. Assurance Society* v. *Clements*, 140 U. S. 226.

It was for the legislature of Ohio to define the public policy

of that State in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations.

*Judgment affirmed.*

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## WHITNEY *v.* HAY.

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

No. 112. Argued November 15, 16, 1900.—Decided April 8, 1901.

Doctor and Mrs. Piper, each somewhat advanced in years, were without children and had no kin to whom the husband wished to bequeath his estate. They desired the comforts and happiness of a home in which they could have the sympathy, attention and care of younger people, upon whom they could look as their children. The property in question in this suit was purchased by the Doctor, in execution of an agreement in parol between him and the appellee, whereby Piper and his wife were to become members of Hay's household in Washington, and to be supported, maintained and cared for by Hay during their respective lives, in consideration of which Piper was to convey by will, or otherwise, to Hay all of his property of every kind and wherever situated. In part execution of that agreement Piper purchased the lots in question in this suit and built a house thereon, and in further execution of it he put Hay in possession of the lot and house to be occupied by Hay and his family in connection with Piper and his wife. While Hay was in the actual occupancy of the premises as his home, (which occupancy existed when this suit was brought,) Piper, in violation of his agreement, put the title to the property in his niece, the plaintiff in error. The bill alleged the foregoing facts, and that the transfer to the plaintiff in error was made solely for the purpose of defrauding the defendant in error. *Held:*

(1) That the alleged agreement with Piper was proved to have been just as stated by Hay;

(2) That the failure of Piper to invest Hay with the legal title was such a wrong to the latter as entitled him to the protection which would

Statement of the Case.

be given by a decree specifically declaring that the defendant holds the title in trust for him;

(3) That such relief is consistent with the objects intended to be subserved by the Statute of Frauds;

(4) That the alleged agreement, being one which a court of equity would specifically enforce, if it had been in writing, and it having been partly performed by Hay in reliance of performance by Piper, and Hay being ready and willing to do what, under the agreement, remained to be done by him during the lives of Doctor and Mrs. Piper, he was entitled to the decree of the court below in his favor.

This suit was brought to obtain a decree declaring that the defendant Whitney held in trust for the plaintiff Hay the title to certain lots, with the building thereon, situate on Corcoran street in the city of Washington.

By a final decree in the Supreme Court of the District the relief asked was given—that court adjudging that the defendant Whitney, within a time named, make, execute and acknowledge a deed of conveyance of the premises to the plaintiff Hay, and that in default thereof the decree should have the same effect as if such conveyance had been made.

Upon appeal to the Court of Appeals of the District the decree of the Supreme Court was affirmed, an elaborate opinion on behalf of the appellate court being delivered by Mr. Justice Shepard. 15 App. D. C. 164, 173.

The principal facts upon which the plaintiff relies in support of his suit will appear from the following statement based upon the record:

Circumstances not necessary to be detailed brought Piper and Hay into each other's society while the latter was in the West, with the result that Doctor and Mrs. Piper conceived and expressed the warmest affection for Mr. and Mrs. Hay and in many ways indicated that they wished the latter to stand in the relation to them of son and daughter.

As early as May 27, 1883, Hay and wife received a letter written by Mrs. Piper for herself and husband, which was addressed "Dear Son Edwin and Daughter Florence." It closed with these words: "Do be careful Daughter Florence. As ever most affectionately, Father and Mother Piper." These relations continued during 1883, 1884 and 1885. And on the

23d day of December, 1885, Doctor Piper wrote to Hay, addressing him as "My Dear Boy." After referring to Hay's then recent sickness, he said: "I wish that we were in Washington to look after you a little—perhaps we could help you some in that direction. By the way, what do you think of our looking to your city as a residence for the few years still perhaps left to us? Suppose I could command, say twenty-five thousand dollars certainly, and perhaps nearly as much more, what would you think it? We have no relations or friends to whom we owe anything as to the final disposition of our property." That letter thus closed: "Good night, with much love to you all son, daughter, grandchildren and all."

Under date of January 11, 1886, Piper again wrote Hay, addressing him as "Dear Son, Ned." And on the 14th of January, 1886 another letter, signed "Father and Mother Piper," and addressed to "Darling Edwin and Florence," was written as Piper and wife were about to leave Chicago for San Francisco, in which city the Doctor was to appear as an expert witness in the matter of handwriting. In that letter, which was written by Mrs. Piper for herself and husband, Hay and wife were informed that a will had been prepared and left in the custody of Judge Charles H. Wood of Chicago, by which "we bequeath to you the whole of our property with the exception of a few legacies amounting to about five hundred dollars." In the same letter it was said: "In case of Dr.'s death Edwin and I are appointed executors of the Dr.'s will. In case of our death by accident on the journey, Edwin will attend to all business connected with all property left by us, which with the exception of the legacies goes to Edwin as above stated. He will of course find the will deposited as above said with Judge Wood, and with it a schedule of property, and also a key to box in safe deposit vault of First National Bank, containing property as set forth in schedule above noticed. Edwin will look after this matter as soon after our death as possible, as there are some things in the papers and the will which will need immediate attention." The following postscript was added: "In case we are killed on our journey, going or returning, Edwin will

find in connection with the will what we would desire to have done with our remains."

Under date of June 6, 1886, they wrote to "Dear Son Edwin and Daughter Florence" about the case upon which the Doctor had been engaged as an expert in handwriting, saying: "He has been very busy with a case which I wrote you about in my last, for this, which required an immense amount of work, he received $5000; of course this is not to be mentioned to anybody but *our children.* The case was won." That letter closed with these words: "Good night from us both dear children. May heaven's choicest blessing be showered upon you. As ever affectionately, Mother and Father Piper."

Two days later, June 8, 1886, they wrote another letter addressed to "Dear Son Edwin and Daughter Florence," in which they said: "And now dear children I need not tell you how much we want to see you and the darling children. . . . When we meet, which we shall do some time if nothing providential prevents, when I trust all can be arranged to the satisfaction of you our dear children and ourselves. . . . Mr. Hyde, to whom we introduced you, is an excellent man, knows nothing of the relation we bear to each other particularly; only of course we tell him as we do everybody that you and yours are very dear to us, and that we look upon you as our children; we did not enter into further particulars." That letter closed with these words: "We *both* send you oceans of love dear ones, let us hear soon, and believe us to be now and ever, on this side and the *other* if permitted, your affectionate, father and mother, R. U. and E. F. Piper."

Other letters of like character were written during August and September, 1886. Under date of October 5, 1886, Piper and wife wrote to Hay, saying: "We rejoice to hear that you are all well, and thank you again dear, dear children for your loving words, which we well know come from your loving hearts; we fully appreciate them all, I cannot tell you in words how much. . . . We shall be most happy to come to Washington, when it is convenient all round, more of that dear Edwin and Florence, if we reach Chicago in safety. Write us when you can, it is always a joyful event to us to receive your dear letters.

We long to see you all, and if we live shall come when you are ready; in the meantime may heaven shower upon you and yours its choicest blessings. Dr. always reiterates *all I say.* I write *all* letters for him as that helps a little. As ever most affectionately, Father and Mother Piper." "We know you and Florence are truly happy in each other, dear Edwin, and that is one reason why we love you both so much. As ever affectionately, Mother and Father Piper."

Hay received another letter under date of November 7, 1886, addressed to him as "Dear Son Edwin," in which it was said: "The Dr. sends you the duplicate of a draft. The Dr. says: My legal friends here tell me that it would be evidence of property in the hands of an administrator in case of my death, and of course you would know how to collect it." Upon the back of that letter was the following endorsement: "The draft is for $5300, fifty-three hundred dollars. We have also with us four trunks, containing clothes, and valise, microscope in box, and two valises."

Under date of November 19, 1886, Hay and wife received another letter addressed "Dear Daughter and Son," in which these passages occurred: "Dr. is anticipating great enjoyment from rides with Edwin, Jr. Now from Dr. He wishes me to say: We have now, in safety deposit vaults, twenty thousand dollars in cash, besides as you know the house built two years since which is worth ten thousand dollars. Dr. is anxious about investment and wishes you were here to consult him about it. Would you think it best to invest more here? Please write on receipt of this what you think of the matter, or is best to wait until we come to W. and then invest? Please answer at once. As ever dear children, Father and Mother Piper."

Shortly after that letter was written a girl was born to Hay and wife, and was named for Mrs. Piper. Under date of December 15, 1886, Mrs. Piper, addressing Hay and wife as "Dear, Dear Children," on behalf of "Father and Mother Piper," wrote: "We are both much pleased with your kind thoughtfulness in naming the dear little one for us both, the Piper for Dr. and the Elizabeth for me. . . Would you both not rather call her Elizabeth Frances Piper Hay, you could then call the darling

Frances, rather than by the perhaps old-fashioned name of Elizabeth." This request of Mrs. Piper was complied with, and the baby was named Elizabeth Frances Piper Hay. Later, January 17, 1887, Mrs. Piper wrote: "Dr. has for several weeks called me grandma, and I am very proud of the title; I forget sometimes to call him grandpa, but shall soon become accustomed to doing so."

According to the evidence of Hay several letters followed in relation to Doctor and Mrs. Piper coming to Washington. The result was that Hay and his wife consented to their coming to Washington. Under date of March 11, 1887, Mrs. Piper wrote to Hay: "I feel, however, that the Dr. must go somewhere before that time, and if it is not perfectly convenient for us to come to Washington at present, we will wait and take a short trip to Colorado or somewhere else. Now my dear son and daughter, tell us the exact truth with regard to this matter, as there *should surely be no hesitation in stating facts between us.* Our best love to darling Florence, and the babies, and a large share from us both for yourself. As ever affectionately, Father and Mother Piper."

This was followed by another letter, dated March 18, 1887, in which it was said: "I feel very anxious about him, I am still; and as physicians and friends all insisted that a change was better for him than anything else, and he is so much attached to you all, that I ventured to press the matter to our children, so I am sure you will appreciate. If we live and Dr. is able, I think we will start for W. some time next week, today being Friday the 18th. I would not come now as you are situated did I not feel so anxious about the Dr., and I cannot get him started for any other place now, although he did think he would go to Colorado, but he dreads going among strangers. As ever affectionately, Father and Mother Piper."

Doctor and Mrs. Piper arrived at Washington on the 25th of March, 1887, stopping at Hay's residence. Being asked under what conditions or arrangements they came to his home, Hay testified: "Pursuant to the conversations we had had and the communications that had passed between us prior to their arrival, they came to live with us as a mother and father would

come to live with children, and their dwelling with us was conditioned upon a covenant and agreement entered into that in consideration of permitting them to reside with us in this relationship during the balance of their lives and the services and care to be given to them that he would build a house in the city of Washington, District of Columbia, in which we should live together, and that at his death, not only the house, but all of his property should be willed to me." Hay further testified: "And Dr. Piper further stated that should I be taken away he would provide for Mrs. Hay and the children as if they were his grandchildren and she his daughter, and that should both of us be taken away during his lifetime he would likewise provide for the children, and that he would rear and raise them, and upon this Mrs. Piper and Doctor Piper, Mrs. Hay and myself shook hands, and the Doctor himself called upon Heaven to witness the sincerity of the agreement." Being asked whether it was part of any agreement with Doctor and Mrs. Piper that they were to pay board at his house, Hay testified: "No; such a thing as board was absolutely never considered for a moment, nor, in fact, did the Doctor ever, for himself or his wife, pay one cent of money to me or Mrs. Hay for anything, but especially for board. Such was not the condition nor the agreement nor the understanding, as we were not breaking up our family and our family relations to take boarders, as there was no necessity to do such a thing. . . . The Doctor paid nothing whatever toward the running expenses of my house in any way whatever or for anything, except, it occurs to me, at one time while we were away during a few weeks in the summer he asked if the hired manservant might return to wait upon him; and, if so, he would pay to him the sum of $10 per month. I don't know how much the Doctor paid, but it was not more than two months' wages."

Believing that the arrangement with Dr. Piper and his wife was to last during their lives, and desiring to make home as pleasant and agreeable as possible, Hay incurred considerable expense in furnishing proper apartments for them. The painting and papering were renewed. Rooms were set apart for their exclusive use, toward the furnishing of which the Doctor

paid nothing. In expectation of their coming to his house as their permanent home, Hay had a bay window constructed on the front of his house, and erected a back building, so as to give an additional and larger dining room, a sleeping room, and a hall and bath room. The situation of Piper and wife in their new home was thus described by Hay in his deposition: "Doctor and Mrs. Piper were taken into our family just the same as if they had been our own father and mother; if anything, they were treated better than blood relations could possibly have been treated, as it was the constant desire of both Mrs. Hay and myself to make life as pleasant for them as it possibly could be under any circumstances, and so we put ourselves out in order to do so, notwithstanding that in prior communications they insisted that there should be no change in the relationship in our family and their family affairs."

Being asked what change, if any, was caused by the presence of Piper and wife in his home, Hay said: "The daily care of their rooms, the additional preparation and provision of food, and the especial manner of cooking it necessary to satisfy the Doctor, he being exacting in this particular. . . . There were certain meats that the Doctor did not eat, steak being the favorite meat for himself, and it having always to be provided for him; the cooking of a number of other dishes, different from what we had been accustomed, entailing additional and extra labor upon the cook." He further testified: "Everything was done for the pleasure of Doctor and Mrs. Piper. We were at home in the evenings, and brought in friends whom we thought would be congenial to the Doctor in his peculiar tastes. Doctor Piper, being a universally well read man, was ready to converse upon almost every subject. . . . Originally he graduated as a doctor of medicine and surgery, and in his early days was the author of a wonderful book in its time, entitled 'Piper's Surgery.' Being an artist, he was the first among the etchers in our country, and this book contains upwards of eighteen hundred illustrations, produced entirely with his pen. This book was used during the war in the army. Since that time he has illustrated a book upon 'Trees,' and has done very much fine microscopic work, and so he became interested in

everything that could come under it, and finally got into handwriting, the use of the camera lucida being his method of examination. Since that time he had lost all other occupations, except that of being an expert in handwriting, and also a microscopic for the examination of food and of blood, and has been engaged in many cases that are recorded in the books. . . . As the letters indicated, the Doctor did not seem to be well, but he has always been complaining. . . . He required constant and particular attention, so much so that a physician was called in regularly and constantly for the purpose of frequently looking the Doctor over, and he continued his attentions to Dr. Piper during the years he was with us. . . . They were perfectly contented and happy, and when a few weeks afterwards, to wit, in August, 1887, we were away at the seashore, many, many affectionate letters were written by them. The following is from one dated August 8, 1887, speaking of the Doctor: 'He says, tell the dear children with much love that he rejoices in their happiness, and I assure you that he will do everything possible to promote it, and be assured I will second all his efforts.'" This last letter was addressed to "Dear Daughter Florence and Son Edwin" and was signed, "As ever affectionately, Father and Mother Piper."

The circumstances under which the lots in question were purchased and a house erected thereon may be thus summarized: Shortly after Dr. Piper reached Washington he insisted upon the purchase of a lot and the building of a house upon it to be occupied by the Hay family, in connection with himself and wife. His avowed purpose was to have a house in which all could live, and in which everything would be according to their liking. After looking at many lots, the one on Corcoran street was purchased, and attention was at once given to the preparation of plans for a residence. Hay drew the plans and submitted them to Dr. Piper before engaging the service of an architect. They were not revised by the Doctor, he saying that "whatever Mrs. Hay wanted was satisfactory to him," and that everything should be done as she desired. The plans were such as to give a double house, with a hall through the center. The sitting room, parlor, and the dining room, as an "assem-

bly" place for the whole family, were to be on the first floor. On the second floor it was arranged that upon the left of the hall, fronting north, the Doctor should have a sitting room; back of that a sleeping room and a bath room, all of which were for their exclusive use, apart from the rest of the house.

As soon as the lot was purchased and paid for by Doctor Piper's check, and the plans for building were completed, and the ground broken for the house to be built, Piper insisted upon employing an attorney to write a will that would cover this and all other property owned by him. In the presence of Hay and the attorney engaged to write the proposed will, Mr. W. A. Cook, the Doctor referred to a former will made by him and deposited with Mr. Wood in Chicago, and stated "that as he had acquired additional property in the District of Columbia since that time and wishing everything to be exactly right in the matter that he would make another will, so he instructed Mr. Cook, in my presence, to make a will, including this property in the District of Columbia, No. 1512 Corcoran street and the lots upon which it stands, and all of his property wherever situated, especially naming that in Chicago, and devising all the same to me, in trust for his wife, and at her death to belong to myself, my heirs and assigns forever." Subsequently to this interview with the attorney, the Doctor informed Hay that the will had been prepared and witnessed by three persons, and that he had "deposited it in the safe deposit company on the Avenue." Hay did not know what became of that will.

The statements of Hay in reference to the making of that will are sustained by the testimony of Mr. Cook, who stated in his deposition that he had prepared for Dr. Piper a will, which was duly signed, acknowledged and attested by witnesses, and by which the property in dispute on Corcoran street was devised to Hay. Dr. Piper stated to Mr. Cook "that the house [on P street] belonging to Mr. Hay was not a sufficient house, and that he ought to have a better and larger house, and he proposed to buy a lot, to which I have referred [on Corcoran street], and have a house erected on it suitable for Mr. Hay, and for his own accommodation, and one that would exist absolutely in Mr. Hay when completed." Again, the same wit-

ness: "He, Doctor Piper,. said he was exceedingly pleased with the disposition that he had made of the house in giving it to Mr. Hay; that he had no regret in doing so; that his comforts and enjoyments had been greater after the giving of the house and after it was occupied by Mr. Hay than his comforts and enjoyments had been previously, and that if he had it to repeat he would make the same will and the same disposition of the property."

The work upon the house was watched with great interest by Doctor Piper and his wife. Quite a number of changes were made during its progress. They were made, Hay testified, "at the request of Mrs. Hay—the Doctor acceded to her wishes as he said he wished to have everything as Mrs. Hay desired it, because the house was being built for us and it should be in accordance with our ideas." The original intention was to have the house heated by furnace. But that was changed to steam heat at an expense of $1000, of which Hay paid $700.

The house having been completed possession was delivered by Doctor and Mrs. Piper to Hay and wife. The latter moved into it on the first day of August, 1888, and have been in possession ever since. Hay furnished the house completely with the exception of Dr. Piper's sitting room which was fitted up by the latter with furniture brought from Chicago. In addition to the furniture taken from the P street house, Hay was compelled to supply other furniture to the amount of about $1200. He also paid for gas fixtures and mantels throughout the house; also for chandeliers. Going from the P street house into the house on Corcoran street necessitated the employment by Hay of two additional servants. Substantially, the entire expense arising from the occupancy of the new house was met by Hay.

*Mr. A. S. Worthington* for appellant. *Mr. B. F. Leighton* was on his brief.

*Mr. Jeremiah M. Wilson* and *Mr. A. A. Hoehling, Jr.*, for appellee. *Mr. E. B. Hay* was on their brief.

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

It appears from this statement that Doctor and Mrs. Piper, each somewhat advanced in years, were without children and had no kin to whom the husband desired to bequeath his estate. They longed for the comforts and happiness of a home in which they would have the sympathy, attention and care of younger people upon whom they could look as their children.

The bill alleged that the property in question was purchased by Doctor Piper in execution of an agreement in parol between him and Hay, whereby Piper and his wife were to become members of Hay's household in Washington and to be supported, maintained and cared for by Hay during their respective lives, in consideration of which Piper was to convey by will or otherwise to Hay all of his property of every kind and wherever situated; that in part execution of that agreement Piper purchased the lots in question and built a house thereon; that in further execution of it Piper put Hay in possession of the lot and house to be occupied as a home by the latter and his family in connection with Piper and his wife; and that while the plaintiff was in actual occupancy of the premises as his home—and he was still in such occupancy when this suit was brought—Piper, in violation of his agreement and for the purpose solely of defrauding the plaintiff, put the title to the property in his niece, the defendant Whitney.

Was there any such agreement between Piper and Hay? If so, was there such part performance of it as entitled the plaintiff to a conveyance from Piper, had he lived until the decree was passed? These are the questions for determination in this case.

In the allegations of his bill and in every essential fact Hay is so thoroughly sustained by witnesses that we do not hesitate to declare that the agreement with Piper is proved to have been just as stated by him. There can be no reasonable doubt as to its subject-matter, or its terms. There was no element of fraud or misrepresentation on the part of Hay. The terms of the agreement between him and Piper were clear and definite; its provisions fair, just and reasonable; the consideration mutual and entirely adequate. What Hay asked was not in any sense inequitable. That which he undertook to do in execu-

tion of the agreement was done by him promptly and in such way as to give no cause for complaint or objection by Piper. And all that he did had reference to and was consistent with the agreement, and can be referred to nothing else. His plans of life were materially altered in order that he might take care of Piper and wife during their respective lives. Piper put Hay in actual possession of the premises in question in execution of his agreement with Hay. But he failed to do that which was vital to Hay, namely, to put the absolute title to the property in him. Under all the circumstances, the failure of Piper to invest Hay with the legal title was such a wrong to the latter as entitled him, under the established principles of equity, to the protection which would be given by a decree specifically declaring that the defendant holds the title in trust for him. We are of opinion that such relief is consistent with the objects intended to be subserved by the Statute of Frauds; for the decree in favor of Hay does not charge Piper upon his parol contract with him, but rests upon the equities arising out of the acts and conduct of the parties subsequent to the making of the original agreement.

Referring to the Statute of Frauds and to the mischiefs intended to be reached by it, Mr. Justice Story says: "It is obvious that courts of equity are bound, as much as courts of law, by the provisions of this statute; and therefore they are not at liberty to disregard them. That they do, however, interfere in some cases within the reach of the statute is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent of it." A case of such interference is when a court of equity enforces the specific performance "of a contract within the statute, where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and

the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice." 1 Story's Eq. Juris. §§ 754, 759.

This rule finds illustration in cases in this court; in *Neale* v. *Neales*, 9 Wall. 1, 9, where it was said that "the statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed;" in *Brown* v. *Sutton*, 129 U. S. 238–9, which was a suit to enforce the specific performance of an oral engagement to convey certain real estate to the promisee, in consideration of her taking care of the promisor during the remainder of his life, as she had done in the past, the court holding that there had been such "part performance in its execution" as to bring the case within the exception made by that doctrine in the requirement of the Statute of Frauds that the sale of the lands must be in writing; and in *Townsend* v. *Vanderwerker*, 160 U. S. 171, 184, where it was said that "the general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so changed the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defence, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a *quantum meruit* for the value of his services." "Courts of equity," said Lord Cottenham, "exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing

the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were. It is not necessary, in this case, to adopt any such course of proceeding; for I think an agreement for a lease sufficiently proved, and that acts of part performance are proved, so as to take the case out of the Statute of Frauds; and I think the defences set up have wholly failed." *Mundy* v. *Jolliffe*, 5 My. & Cr. 167, 177.

To the like effect are numerous other American and English cases which are familiar to the profession and need not be cited. They all proceed upon the ground that, although in a suit to enforce the specific performance of a parol agreement in reference to land the defendant cannot be directly charged upon the alleged contract itself, he may be held—the evidence clearly showing part performance, in substantial particulars, of such agreement—to do what justice requires to be done under the equities arising from acts done after the making of the agreement and in execution of its provisions. To refuse under some circumstances to compel the full execution of an agreement of that kind which has been partly performed would make the statute an instrument of fraud, and that a court of equity will not permit. "It is not arbitrary or unreasonable," said the Lord Chancellor in *Maddison* v. *Alderson*, L. R. 8 App. Cas. 467, 476, "to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract."

The alleged agreement being one which a court of equity would specifically enforce if it had been in writing, and it hav-

ing been partly performed by Hay in reliance upon performance by Piper, and Hay being ready and willing to do what, under the agreement, remained to be done by him during the lives of Doctor and Mrs. Piper, he was entitled to the decree rendered in his favor; and it is

*Affirmed.*

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## WESTERN UNION TELEGRAPH COMPANY *v.* CALL PUBLISHING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 117. Argued and submitted December 4, 1900.—Decided April 15, 1901.

Where there is dissimilarity in the services rendered by a telegraph company to different persons, a difference in charges is proper, and no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that the difference is so great as, under dissimilar conditions of service, to show an unjust discrimination; and the recovery must be limited to the amount of the unreasonable discrimination.

There is no body of Federal common law, separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statutes enacted by the several States.

The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment.

Questions of fact, when once settled in the courts of a State, are not subject to review in this court.

THIS was an action commenced on April 29, 1891, in the district court of Lancaster County, Nebraska, by the Call Publishing Company to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error, for telegraphic services rendered. According to the petition the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called The Lincoln Daily Call. The Nebraska State Journal was another newspaper published at the same time in the same city, by the State Journal Com-

Statement of the Case.

pany. Each of these papers received Associated Press dispatches over the lines of defendant. The petition alleged:

"4th. That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that while the defendant demanded, charged and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such dispatches, amounting to 1500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month, it charged and collected from the said State Journal Company for the same, like and contemporaneous services only the sum of $1.50 per 100 words daily per month.

"Plaintiff alleges that the sum so demanded, charged, collected and received by the said defendant for the services so rendered the plaintiff, as aforesaid, was excessive and unjust to the extent of the amount of the excess over the rate charged the said State Journal Company for the same services, which excess was three dollars and fifty cents per one hundred words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company.

"That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services or to do without the same; that plaintiff could not dispense with such dispatches without very serious injury to its business."

The telegraph company's amended answer denied any unjust discrimination; denied that the sums charged to the plaintiff were unjust or excessive, and alleged that such sums were no more than a fair and reasonable charge and compensation therefor, and similar to charges made upon other persons and corporations at Lincoln and elsewhere for like services. The defendant further claimed that it was a corporation, engaged in interstate commerce; that it had accepted the provisions of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal and other purposes," approved July 24, 1866; that it had constructed its lines under the au-

thority of its charter and that act, and denied the jurisdiction of the courts of Nebraska over this controversy. A trial was had, resulting in a verdict and judgment for the plaintiff, which judgment was reversed by the Supreme Court of the State. 44 Nebraska, 326. A second trial in the district court resulted in a verdict and judgment for the plaintiff, which was affirmed by the Supreme Court of the State, (58 Nebraska, 192,) and thereupon the telegraph company sued out this writ of error.

*Mr. Rush Taggart* for plaintiff in error. *Mr. John F. Dillon* was on his brief.

*Mr. Franklin W. Collins* and *Mr. John M. Stewart* for defendant in error submitted on their brief.

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

The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that, therefore, there being no controlling statute or common law, the state court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal company. In the brief of counsel it is said: "The contention was consistently and continuously made upon the trial by the telegraph company that, as to the state law, it could not apply for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject." The logical result of this contention is that persons dealing with

common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not, and if there be neither statute nor common law controlling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loath to hold that in the absence of Congressional action there are no restrictions on the power of interstate carriers to charge for their services; and if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce.

It may be well at this time to notice what the exact rulings of the state court were: The charge to the plaintiff was $5 per 100 words, and to the State Journal Company $1.50 per 100 words. When the case came to the Supreme Court for examination of the proceedings in the first trial it appeared that no proper exceptions to the instructions had been preserved, and the only question, therefore, for consideration was the sufficiency of the evidence to sustain the verdict, and the court held that the mere fact of a difference in charge was not sufficient to invalidate the contract made with the plaintiff, and that there was no satisfactory evidence that the difference in the charge was unreasonable. In the course of its opinion the court said:

"There was no evidence tending to show that the charge to the Call Company was in itself unreasonably high, that the charge to the Journal Company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff, without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference

in conditions, and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate. . . . As we have already stated, a considerable difference in the absolute rate charged the Call Company and the Journal Company was shown, but there was also shown a difference in conditions affecting the expense and difficulty of rendering the services which at common law would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this State. There was no evidence to show that the rate charged the Call Company was unreasonably high. There was no evidence to show that the rate charged the Journal Company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent it is permitted to measure one against the other, and to say that to the extent of one dollar or to the extent of one thousand dollars the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof, a verdict must be based upon the proof and a verdict must be founded upon evidence and not upon the conjecture of the jury, or its

general judgment as to what is fair, without evidence whereon to found such judgment."

Under this construction of the law the first judgment was reversed and the second trial proceeded upon the lines thus laid down by the Supreme Court. On that trial the court charged:

"You are instructed that not every discrimination in rates charged by a telegraph company is unjust. In order to constitute an unjust discrimination there must be a difference in rates under substantially similar conditions as to service; the rate charged must be a reasonable rate; under like conditions it must render its services to all patrons on equal terms; it must not so discriminate in its rates to different patrons as to give one an undue preference over another.

"It is not an undue preference to make one patron a less rate than another where exist differences in conditions affecting the expense or difficulty in performing the services which fairly justify the difference in rates, and where it is shown that a difference in rate exists, but there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions.

"In this action there is shown to exist, not only, on the one hand, a difference in the rates charged to the patrons of the telegraph company, the Call Publishing Company and the State Journal Company, but, on the other hand, also a difference in the conditions under which the telegraph services were rendered to the two companies, and the question that you have particularly to direct your attention to is how far this difference in condition justified the difference in rates charged; to what extent, if any, the difference in rates charged the rival companies was disproportioned to the difference in conditions under which the services were rendered. If you find such disproportions to have existed, and that by reason thereof the amount charged the plaintiff was in excess of what a reasonable rate would be under the circumstances, then you are to find, if facts have been presented to you by which you can find,

the amount of such excess as the amount which the plaintiff would be entitled to recover.

"The burden of proof is upon the plaintiff to show by a preponderance of the evidence the existence of the discrimination claimed by it; also that the differences in conditions shown are disproportionate to the difference in charges made, as well as all the other material allegations of its petition.

"You should approach this case, not in an attitude as if you were charged with the duty of determining rates for the telegraph company. Its stock is the property of private individuals, who have elected officials for that purpose. They are there to manage the affairs of their corporation in their own way, so long as what they do is within reason. Courts of law are maintained to correct abuses, and it is only after the plaintiff has convinced you that the telegraph company has abused its privileges that the court will interfere. The telegraph company is a common carrier, and is said to exercise *quasi*-public functions. On the other hand, the Call Publishing Company has certain legal rights. It embarks in an enterprise in the city of Lincoln. It has for a competitor the State Journal Company, and perhaps others. In its race for success it ought not to be unfairly handicapped. For the purpose of getting the news both it and The Journal use the Associated Press dispatches. In fixing its charges to these two competing companies for these dispatches it is the duty of the telegraph company not to unjustly discriminate in favor of either, as explained to you in these instructions; and, as before stated to you, if the plaintiff has been able to convince you that the defendant has so discriminated, then the telegraph company would be required to answer to the plaintiff in whatever damages the plaintiff has satisfied you he has suffered.

"In arriving at your verdict you should consider whatever evidence there is going to show charges made by the telegraph company to other persons or in other places for like services under like conditions; the increased cost of operating plant occasioned by increased work, if any; the difference of volume of business between the telegraph company's day and night work, as it would be a reasonable discrimination for the com-

pany to make this difference the basis for a difference in charges; the difference in charges between day and night services generally, as shown by the evidence; also the difference in the character of the night and day work; the time required to perform it, as shown by the evidence; the charges made by the company for other services unless made under circumstances and conditions different from those under consideration, so as not to furnish a fair criterion as to charges; the general operating expenses of the company as affected by rates charged, as well as all other facts before you which may aid you in arriving at a conclusion. However, this is to be understood: that for the plaintiff to recover it must show the discrimination; that the discrimination was unjust, as explained in these instructions; and, further, you must be able from the evidence furnished you to measure the damages, if any, sustained by the plaintiff. You are not to fix the damages in any haphazard manner, nor by mere speculation, but by reasons sustained by the evidence and showing in a reasonable way the amount thereof.

"The jury are instructed that the defendant telegraph company is not presumed to have unjustly discriminated against any of its patrons and in favor of certain other of its patrons, but, on the contrary, it is presumed to have properly and justly established its rates according to the various kinds of service it may be called upon to render, considering its duty to the public and to its stockholders."

And it was under these instructions that the jury returned a verdict for the plaintiff. The case, therefore, was not submitted to the jury upon the alleged efficacy of the Nebraska statute in respect to discriminations, but upon the propositions distinctly stated, that where there is dissimilarity in the services rendered a difference in charges is proper, and that no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and that the recovery must be limited to the amount of the unreasonable discrimination.

No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate com-

merce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no Federal common law, and that such has been the ruling of this court; there was no Federal statute law at the time applicable to this case, and as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company.

This court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States. It has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free, and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no Federal common law different and distinct from the common law existing in the several States. Thus, in *Smith* v. *Alabama*, 124 U. S. 465, 478, it was said by Mr. Justice Matthews, speaking for the court:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton* v. *Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State." p. 478.

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent: "The common law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent, 471. As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having been used time

out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom. This unwritten, or common, law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification." 1 Blackstone, 67. In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment.

But this question is not a new one in this court. In *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, 275, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the interstate commerce act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of common law applicable to common carriers."

In *Bank of Kentucky* v. *Adams Express Co.*, and *Planters' Bank* v. *Express Co.*, 93 U. S. 174, 177, the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of tran-

sit the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Mr. Justice Strong, delivering the opinion of the court, after describing the business in which the companies were engaged, said:

"Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers."

And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common-law rule in respect to common carriers controlled.

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the Circuit Court in the Northern District of Iowa, in *Murray* v. *Chicago & Northwestern Railway*, 62 Fed. Rep. 24, in which is collated a number of extracts from opinions of this court, all tending to show the recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute. It would serve no good purpose to here repeat those quotations; it is enough to refer to the opinion in which they are collated.

It is further insisted that even if there be a law which controls there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226–242; *Hed-*

*rick* v. *Atchison, Topeka & Sante Fé Railroad*, 167 U. S. 673, 677; *Gardner* v. *Bonestell*, 180 U. S. 362.

These are the only questions of a Federal nature which are presented by the record, and finding no error in them the judgment of the Supreme Court of Nebraska is

*Affirmed.*

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## WHITNEY *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 133. Argued March 1, 1901.—Decided April 15, 1901.

In reviewing questions arising out of Mexican laws relating to land titles, it is difficult to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country in 1846–1848.

Looking through the provisions to which its attention has been called the court finds nothing in them providing in terms, or by inference, for a general delegation of power by the supreme executive to the various governors to make a grant like the one set up in this case; and it holds that the appellants have not borne the burden of showing the validity of the grant which they set up, either directly, or by facts from which its validity could be properly inferred within the cases already decided by this court.

THE appellants in this case come here on appeal from a judgment of the Court of Private Land Claims rejecting their claim, which arose under a grant of land in New Mexico called La Estancia grant, consisting of some 415,000 acres, made in 1845 by Governor Armijo to one Antonio Sandoval, under whom they claim. Upon the trial it appeared that Sandoval in 1845 was a Mexican citizen of high distinction residing in the Territory of New Mexico. By petition, dated December 5, 1845, and presented on the 7th of that month, Sandoval petitioned the governor of New Mexico for a grant of land in the name of the supreme authority of the Mexican nation, the land being described in the petition, and the petitioner stating that it was

vacant land in a condition of *mortmain*, and might be granted without prejudice to any third party. He stated in his petition that he had for the last thirty years and more been rendering services to the country, both by personal service and property, and without ever having been paid anything in the way of compensation for such services, and in consideration of all of which he asked and prayed the governor for the sake of justice to accede to his prayer. On December 7, 1845, Governor Armijo granted the petition, and placed the following memorandum thereon:

"This government being convinced of the valuable services Don Antonio Sandoval has rendered, and is now rendering the country, as well during the time to which he refers as also during the six years he served administering the prefecture of the second district, with the salary of one thousand five hundred dollars, of which not even a half real has been paid to him, the sum due him amounting to nine thousand dollars, and the statements in this petition being true, I do, in the exercise of the power in me vested by the laws, and also in consideration of all the premises and as a just title acquired, make to him the grant for the land he solicits, with all the dimensions and pasture land he asks, that he may enjoy the same in the name of the supreme government of the Mexican nation and under my concession, free and exempt from all tax or tribute.

"MANUEL ARMIJO."

Following the memorandum is a written certificate signed by the comptroller of the departmental treasury of New Mexico and acting treasurer of the same, certifying that Antonio Sandoval, during the period of forty years, as appears from the record of the books of the treasury, has been serving the nation as a military and civil officer, and has loaned during that time numerous sums of money to the nation without receiving one half real interest, and that there are now due him large sums as appears from the interest entries in the office and the evidences in possession of the parties interested on account of salaries and loans. Then follows the written certificate of Jose Baca y Ortiz, dated at La Estancia, December 15, 1845, in which

Counsel for Parties.

he certifies that on that day he, accompanied by witnesses, placed Antonio Sandoval, *through his agent, Juan Antonio Aragon,* in juridical possession of the granted lands.

On July 8, 1848, Sandoval conveyed, by a deed of gift, the above described land to his nephew, Gervacio Nolan. This conveyance was acknowledged before the clerk of the county of Bernalillo, Territory of New Mexico, on July 8, 1848.

After the passage of the act of Congress, July 22, 1854, establishing the office of surveyor general in New Mexico, and on July 12, 1855, Nolan, the grantee of Sandoval, filed in the office of the surveyor general the papers above described, upon which he asked for the approval of that officer, and that he would recommend the grant for confirmation by Congress. Nolan died in 1858, before anything was done in regard to his petition. After his death his widow and children, by guardian, applied to the surveyor general, stating the fact of his death, and asked that the grant of the land should be confirmed to them as the present owners, and that a patent should be issued in their favor. Testimony was taken in 1861, relating to the petition, before the then surveyor general, but no final action was had in the case until it was submitted to Surveyor General Proudfit, who, on January 4, 1873, reported that in his opinion the title was perfect in the legal representatives of Nolan, deceased, and recommended that it be confirmed by Congress. Congress did not, however, confirm the grant, and under instructions from the Commissioner of the General Land Office the case was reëxamined by Surveyor General Julian, who, in a report to the Commissioner, dated July 21, 1886, recommended the rejection of the claim by Congress for the reasons therein stated by him. This report was concurred in by the Commissioner, and by him transmitted on December 17, 1886, to Mr. Lamar, Secretary of the Interior. No further action seems to have been taken. The appellants herein take title from the widow and children of Nolan by conveyance dated September 23, 1880.

*Mr. John H. Knaebel* for appellants. *Mr. Ernest Knaebel* was on his brief.

*Mr. Matthew G. Reynolds* for the United States. *Mr. Solicitor General* was on his brief.

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

The judges of the court below, while rejecting the claim of appellants, differed widely in regard to the grounds upon which such rejection should be placed. Mr. Justice Sluss, in an opinion that was concurred in by Mr. Justice Fuller, said that the case was to be decided under the Mexican colonization law of August 18, 1824, and the regulations of November 21, 1828, which in his judgment had not been totally repealed by the law of April 4, 1837, and the grant, being subject to the first named law and to the regulations above mentioned, could not be valid for a greater quantity than eleven square leagues, nor become a perfect title until the grant had been approved by the departmental assembly.

It appears that eleven square leagues would embrace about 50,000 acres of land, and hence a grant of 415,000 acres would, under the law and regulations, be far beyond the power of the officials to make to any one person.

Mr. Justice Murray, while concurring in the conclusion to reject the claim, was of opinion that the law of 1824 and the regulations of 1828 had been entirely repealed by the law of April 4, 1837, but he did not think that the governor had the power merely as representative of the supreme executive to make the grant, and there was no evidence of any special power having been delegated to him.

Mr. Chief Justice Reed also concurred in the conclusion to reject the claim but did not agree with all that was said in the opinion of Mr. Justice Sluss, being himself of opinion that, while the law of 1824 was repealed by that of 1837, the regulations of 1828 were not thereby wholly repealed. He thought that the grant in this case was made, not under the law of 1824, but under the regulations of 1828; that the law regulated the matter of the disposition of the public lands *within the States*, and conferred upon the executive the power to make all necessary

regulations for the disposition of such lands *within the Territories*, of which New Mexico was one, and the question in his judgment was, not whether the law remained in force but whether the regulations continued operative when the grant was made; that it was manifest the law which governed the matter within the States might be repealed without at all affecting the regulations established by the executive governing the same subject within the Territories. Being subject to those regulations, we suppose the quantity of the grant was an insuperable bar to its validity, in the view of the Chief Justice.

Mr. Justice Stone dissented from the decree rejecting the claim, and was of opinion that the making of the grant in question was within the competency of the supreme executive, and that Governor Armijo was his appropriate ministerial agent in its execution.

In reviewing questions arising out of Mexican laws relating to land titles we recognize what an exceedingly difficult matter it is to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country by the American forces in 1846–1848. This difficulty exists because of the frequent political changes which took place in that country from the time the Spanish rule was first thrown off down to the American occupation. Revolutions and counter-revolutions, empires and republics, followed each other with great rapidity and in bewildering confusion, and emperors, presidents, generals and dictators, each for a short period, played the foremost part in a country where revolution seems during that time to have been the natural order of things. Among the first acts of each government was generally one repealing and nullifying all those of its predecessors.

If, however, the validity of this grant were to be decided under the provisions of the colonization law of 1824, and the regulations passed in 1828, it seems to us there would be little difficulty in determining that the appellants had failed to make out their case. The provisions of the act of 1824 were plainly violated in this grant, because it contained more than eleven square leagues. This was prohibited by that law. Reynolds'

Compilation of Spanish & Mexican Land Laws, pp. 121, 122, sec. 12; Hall's Mexican Law, p. 149, sec. 498.

And also, before the grant in question was made, there had been a previous one, dated November 28, 1845, conveying to Sandoval the land embraced in what was called the Bosque del Apache grant, which also exceeded eleven square leagues in extent, the grant being made by the same governor (Armijo), although juridical possession was not delivered until March 7, 1846. Having obtained a grant of more than eleven square leagues before he made his petition for the grant now in issue, he had acquired all that the law of 1824 permitted him to take, and the subsequent grant was not valid. *United States* v. *Hartnell*, 22 How. 286.

Another objection to the title is that there is no record of its existence in the archives of New Mexico. Although no question is made as to the genuineness of the papers set forth in the foregoing statement of fact, namely, the petition of Sandoval, its allowance by Governor Armijo, the certificate of the comptroller and acting treasurer, and the certificate of the delivery of juridical possession by the justice of the peace, yet none of these came from the archives of the country, and there is no record that the departmental assembly ever concurred in the grant, as is necessary under the law of 1824. Reynolds, p. 142, sec. 5. If the approval of that body could not be obtained, the governor was to report to the supreme government, forwarding the proceedings in the matter for its consideration. Sec. 6. Nothing of this kind appears in the archives or in the records of the assembly. Nor has there been produced even from the hands of the claimants any approval of the grant by the assembly. No matter how formal and complete the written documentary evidence of title may be, yet when coming from private hands it is insufficient to establish a Mexican grant if there is nothing in the public records to show that it ever existed. *Peralta* v. *United States*, 3 Wall. 434, 440. Mr. Justice Davis, in delivering the opinion of the court in that case, said:

"The Mexican nation attached a great deal of form to the disposition of its lands, and required many things to be done before the proceedings could ripen into a grant. But the im-

portant fact to be noticed is, that a *record* was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the government to ascertain with accuracy what portions of the public lands had been alienated. *The record was the grant*, and without it the title was not divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession; but this 'titulo' did not divest the title, unless record was made in conformity with law."

The title here is incomplete because there is no evidence whatever of approval by the assembly, or, failing in that, any record of further proceedings to obtain the approval of the supreme government.

In *United States* v. *Teschmaker*, 22 How. 392, Mr. Justice Nelson said, at page 405: "We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or its absence accounted for to the satisfaction of the court."

In *Berreyesa* v. *United States*, 154 U. S. 623, the court held that the case came within the principle of those cases in which it had decided adversely to claims made under alleged Mexican grants, all because it did not appear that a grant from the Mexican government had been "deposited and recorded in the proper public office among the public archives of the republic." See also *United States* v. *Ortiz*, 176 U. S. 422; *United States* v. *Elder*, 177 U. S. 104.

In this case, as we have said, there is no record or mention of the case in the archives in New Mexico. The papers came from private hands, the claimant Nolan presenting them to the surveyor general in 1855, when he applied to that officer for his recommendation to Congress for a confirmation of the grant. That they have remained in the surveyor general's office since that time does not make them a record or an archive of the government within the meaning of those cases above cited.

The certificate of Baca, the justice of the peace, certifying to his delivery of juridical possession to Sandoval on December 15, 1845, bears the indorsement that it was recorded in book letter B, pages 166, 167, and is certified to by the recorder Dona-

ciano Vigil at Santa Fé, November 17, 1849. This book has been lost, but it was kept in obedience to a provision contained in what is called the "Kearney Code," providing for the recording of papers brought to the recorder by parties, which affected or constituted their title to lands they claimed to own. The book was not an original archive of the country. The certificate of record indorsed upon the paper shows that it was produced from private hands, and no presumption that any papers relating to this grant were recorded in or placed among the archives of the government of New Mexico arises from the fact that a record of this paper was made pursuant to the provisions of the Kearney Code. There is no proof that this paper or any document connected with the grant under discussion had ever been delivered to the recorder for record and retained by him in his official custody from 1849 until it had been turned over to the custody of the surveyor general upon the creation of that office in 1854. The language contained in the report of Surveyor General Proudfit would negative any such presumption, because he says that the papers were filed in his office July 12, 1855, by Gervacio Nolan, the claimant himself. The fact, however, would have been immaterial in any event. The paper would not have been a document found in the records or archives of New Mexico, because it came from private hands and was by the claimant delivered to the recorder, and his keeping it thereafter and turning it over to the surveyor general would not have constituted it a record or a paper found among the archives and turned over to that officer.

It does appear from the evidence that there may have been some loss or destruction of papers which constituted a part of the records or archives of New Mexico in the possession of the territorial librarian in the year 1869 or 1870. The history of the transaction is stated by the witness Bond, and it would seem from his account that it was extremely doubtful whether any really important papers relating to grants of land had in fact been destroyed, although some of them may have been. Unless we should regard this possibility as a sufficient excuse in every case of a land grant in New Mexico for the failure to show any archive title or record of title of such

grant, it cannot be admitted in this particular case. That it is not a sufficient excuse has been decided by this court. *United States, Applts.*, v. *Castro et al.*, 24 How. 346. The appellants did prove by the witness Tipton, whose great experience in connection with the surveyor general's office in New Mexico is well known, that he had not seen in the archives of the government any record of grants made by Armijo or signed by him, although the witness knew nothing about the condition of the archives prior to the spring of 1876. We think this is insufficient to show the destruction of all archives pertaining to grants made by Armijo about this time (1845).

Taking all these objections to the title into consideration we think it clear that no case for confirmation under the colonization law of August, 1824, and the regulations of 1828 was made out.

In the early history of these Mexican land titles it had been supposed that the colonization law and the regulations above mentioned were all that were in force in Mexico after their dates. *United States* v. *Cambuston*, 20 How. 59, 63; *United States* v. *Vallejo*, 1 Black, 541, 552; *United States* v. *Vigil*, 13 Wall. 449, 450.

Subsequently, the claim was urged that that law and the regulations had been repealed by virtue of the law of April 4, 1837. Reynolds, p. 222. See also law of April 17, 1837, p. 224 of Reynolds' Compilation.

The claim was urged by way of argument by counsel, and referred to by Mr. Justice Lamar in his opinion in *Interstate Land Grant Company* v. *Maxwell Land Grant Company*, 139 U. S. 569, 578. Again, in *United States* v. *Coe*, 170 U. S. 681, 696, Mr. Justice McKenna, in speaking of the colonization law of August 18, 1824, said that "by a law passed April 4, 1837, all colonization laws were certainly modified and may be repealed."

The weight of the argument of counsel for appellants rests upon the assumption and assertion that this grant was not made under the law of 1824 or the regulations of 1828, nor under the law of 1837 above mentioned, but that it was made by the supreme executive of Mexico through his trusted minister and agent, Governor and Commandant-General Manuel Armijo,

who in making such grant was not restricted by any prescribed rules or limitations. This broad proposition counsel has sought to maintain by reference to the various acts of Mexico subsequent to 1828, and up to the making of this grant.

Treating Armijo as the *alter ego* in New Mexico of the supreme executive of Mexico, and claiming for the latter full and absolute power to dispose of the public lands in accordance with the views held by that officer, counsel ask that the same presumption of the validity of grants made by Governor Armijo should be indulged, which was accorded to the grants of certain officials in the Louisiana and Florida cases, herein referred to. We think no such presumption ought to obtain in this case.

In *United States* v. *Cambuston*, *supra*, Mr. Justice Nelson, in speaking of the difference between the cases involving Spanish titles in the Territories of Louisiana and Florida, such as *United States* v. *Arredondo*, 6 Pet. 691, 729; *Delassus* v. *United States*, 9 Pet. 117, 134; *United States* v. *Peralta*, 19 How. 343, 347, and those which involved Mexican titles, said:

"But no such presumptions are necessary or admissible in respect to Mexican titles granted since the act of the 18th of August, 1824, and the regulations of the 21st of November, 1828. Authority to make the grants is there expressly conferred on the governors, as well as the terms and conditions prescribed, upon which they shall be made. The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise; and they are to be substantially complied with, except so far as modified by the usages and customs of the government under which the titles are derived, the principles of equity, and the decisions of this court. 17 How. 542."

The case was decided under the act of Congress of the 3d of March, 1851, to adjudicate private land claims arising under our treaty with Mexico, and the decision, as is seen from the above extract, proceeds upon the assumption that the law of 1824 and the regulations of 1828 furnished the rule of decision. Their existence is denied by counsel for the appellants, and it is upon the assumption of their non-existence that his argument rests. Assuming, however, that the law and regulations were

not in force, we still cannot base a presumption that the governor was authorized by the supreme executive to make the grant simply because the governor exercised the power. The difference between the act relating to Spanish titles to lands above referred to and the act of 1891 under which Mexican titles to lands have been examined by the Court of Private Land Claims, and by this court, is clearly recognized and enforced in *United States* v. *Ortiz*, 176 U. S. 422. In that case it was held that under the provisions of the act establishing the Court of Private Land Claims, (sec. 13, act of March 3, 1891, c. 539; 26 Stat. 854,) the burden of showing the existence of the grant was upon the person claiming under it, and that no presumption of authority on the part of the granting officer existed, as in the case of the above mentioned territories. This last case was approved in the *Elder* case, 177 U. S. 104, where it was again held that the claimant must prove his title by a preponderance of evidence, and no presumption of authority existed.

And in *Hays* v. *United States*, 170 U. S. 637, 647, 648, this difference is also pointed out by Mr. Justice White. Speaking of the act of 1891, he said:

"But in the act of 1891 the court is required to be satisfied not simply as to the regularity *in form*, but it is made essential before a grant can be held legally valid that it must appear that the title was 'lawfully and regularly derived,' which imports 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." Page 648.

We are not satisfied that there was a general power on the part of the governor of a territory at any time to make a valid grant of lands in all cases and simply as the agent of the supreme executive, such as is contended for by counsel for the appellants. No evidence that the governors legally had that power has been given other than the fact that they sometimes exercised it. It appears, however, that for some years prior to 1845 grants of land were made not only by governors, but even by alcaldes, prefects, justices of the peace, and by judges of first instance, so that, in the language of one of the judges of the

court below, "it was a poor officer, indeed, who did not assume to be able to dispose of the public domain belonging to the nation." Hence the reluctance to presume the validity of a power because of its exercise. It may be that in some particular period of those disturbed times, and up to 1846, the supreme executive of the Mexican nation exercised arbitrary and irresponsible power, and granted the public lands according to his own views of what was proper and needful for the nation, and upon occasion delegated such power to a governor, but the exercise of that kind of power was in violation of the ordinary and general laws which had been adopted by the nation, and no presumption that the supreme executive had delegated his power to a governor or political chief of a province or state can be indulged for the purpose of upholding a grant of land made by the governor in violation of the constitution or laws which had theretofore been adopted or passed.

Counsel also urges that such power is to be found in the "Bases of 1835," the "constitution of 1836," and the "Bases of 1843," not to speak of the "Plan of Tacubaya," and the attending laws or decrees, in which it is contended there are specific provisions plainly expressive of the intimate representative and ministerial relations which the governor and commandant general bore the supreme executive. It might be assumed that the relations between the supreme executive or Dictator and his governors and commandants general were intimate and confidential, but such relations of intimacy and confidence do not take the place of an actual delegation of power to the governors to make grants of this description; nor do we find any such delegation in the various provisions contained in the Bases of 1835 or of 1843 and the constitution above referred to. The governor does not assume to make the grant by virtue of any special or general delegation of authority to him by the supreme executive, but he asserts in his grant above quoted that he makes it "in virtue of the power in me vested by the laws," etc.

Section 10 of the "Bases for the New Constitution," law of October 23, 1835, Reynolds, p. 201, simply provides that the executive power of the departments shall reside in the gov-

ernors in subordination to the supreme executive of the nation. The same law divides the national territory into departments on the basis of population, etc., and provides that there shall be governors and departmental boards for the government of these departments. This obviously gives no authority to the governor to make a grant of the public lands within his territory according to his own unrestrained views of propriety. It does not assume to alter the general laws in relation to the disposition of the public lands or of the manner in which they shall be disposed of. The same may be said regarding the constitution of 1836, which entrusts the interior departments to the governors in subordination to the general government. Reynolds, pp. 203, 204. The law of March 20, 1837, Reynolds, p. 211, subdivision 17, p. 215, provides that the governors shall be the usual channels of communication between the supreme powers of the nation and the departmental councils (juntas), and between the latter and the officials of the department. This provision does not tend to show the power contended for.

In fine, looking through the provisions to which our attention has been called by counsel, and without specific reference to each one of them, we may say in regard to all of them that we find therein nothing providing in terms or by inference for the general delegation of power by the supreme executive (assuming that he himself had it) to the various governors to make a grant like this. The appellants are, therefore, compelled to show some specific delegation of authority from the supreme executive for making such a grant. If that were shown, we might say, following the case of *United States* v. *Castillero*, 23 How. 464, the other conditions therein mentioned being fulfilled, that the grant was a valid one and ought to have been confirmed by the court below, and within the case of *United States* v. *Osio*, 23 How. 273, if there had been a special delegation of power it would follow that the conditions contained in such special delegation must be fulfilled before title passed. The necessity for showing what the special power was becomes evident from these cases.

What we have already said as to the absence of all record in

Statement of the Case.

the archives, relating to the grant, applies to the case as here considered.

Looked at from any point of view we do not think the appellants have borne the burden of showing the validity of their grant, either directly or by facts from which its validity could be properly inferred within the cases already decided by this court. The judgment of the court below must, therefore, be

*Affirmed.*

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## BAKER *v.* CUMMINGS.

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

No. 207. Argued March 19, 20, 1901. — Decided April 15, 1901.

The question in this case involves the construction and effect of the decision of this court in the case of *Baker* v. *Cummings*, 169 U. S. 189, between the same parties, and growing out of the same transaction which is the subject of the litigation in this case.

Matters which have been fully investigated between the parties and determined by the court, shall not be again contested, and the judgment of the court upon matters thus determined shall be conclusive on the parties, and never subject to further inquiry.

This doctrine applies to this case.

THE petitioner (plaintiff below) commenced this action at law in the Supreme Court of the District of Columbia on December 19, 1889, to recover from the defendant the sum of $2712.81 with interest at six per centum from July 31, 1889, and annexed to his declaration a bill of particulars of his demand. Plaintiff claimed in his declaration that the money was due, among other things, on an account stated between the parties. The plaintiff obtained judgment in the trial court for the amount of his claim, which was reversed by the Court of Appeals of the District.

A case between the same parties and growing out of the same transaction has already been before this court and decided. 169 U. S. 189. The question in this case involves the construction

and effect of that decision, and therefore a writ of certiorari was applied for and granted, and the case brought here.

Soon after the commencement of this action and before pleading to the declaration filed therein, Cummings, the defendant, commenced a suit on the equity side of the Supreme Court of the District against Baker for the purpose of enjoining him from the further prosecution of this action, and to obtain a full and complete accounting under the order and direction of the court between complainant and Baker in respect to the partnership dealings alleged and set up in the bill, and he prayed that the defendant should be decreed to pay to him the amount which should be found due him and for other relief. In his bill the complainant alleged the formation of a copartnership on January 1, 1876, between the parties, to prosecute the practice of the law in the city of Washington, terminable by mutual consent, each to share equally in all the profits and losses of the business, and it was averred that the partnership continued until September 1, 1889, when it was dissolved. It was then alleged that the terms of the dissolution were agreed upon through false and fraudulent representations of Baker as to the condition of the partnership affairs in relation to what were called "the inspector cases," made to the complainant, with the facts in regard to which the defendant was, as the complainant alleged, much more familiar than the complainant, and that, based upon the misrepresentations, terms of agreement for dissolution were arrived at, and in carrying out the same the complainant assigned by a written assignment his claims under the partnership to all moneys then due or that might thereafter become due arising from those cases, and as consideration therefor the complainant received from the defendant the sum of $15,000; that instead of the amount stated by the defendant to be due the partnership in relation to the cases mentioned, a very much larger amount was due, and instead of there being only a certain named amount of claims in cases where no Congressional appropriation had been made, as stated by the defendant, a very much larger amount existed to his knowledge, of which the complainant was ignorant, and upon the faith of these untrue and fraudulent statements the com-

plainant assigned by a written assignment all his interest in the cases for a sum largely below the amount actually belonging to him under the terms of the partnership.

The complainant then alleged the commencement of an action at law by Baker against him to recover $2712.81, and stated that appended to the declaration in that action was a bill of particulars of Baker's claim, and that all of the items in that bill of particulars originated in and grew out of the partnership dealings of the parties and not otherwise, and that only by a full, proper and complete accounting and discovery, under the order and direction of a court of equity, could a proper adjustment be had of the rights of the complainant and defendant growing out of their partnership dealings.

Complainant further alleged that the action at law was not yet at issue, but that the time for pleading thereto had nearly approached, and that the complainant could not, under the rules at law, incorporate in his plea the equitable defences herein set forth, and which in a court of equity would avail against Baker's demand, and especially that the equitable right of the complainant to have discovery in the premises and to have the said assignment cancelled and held for naught was not cognizable by a court of law, and that if the defendant (Baker) were therefore permitted to prosecute his action at law against the complainant, the latter would be deprived of his defences to that suit which were set up in the bill, and the complainant therefore alleged that he was entitled to have the defendant enjoined from prosecuting his action at law, and to have the court order and direct a full and complete accounting between the complainant and defendant in respect to their partnership dealings. An order was thereupon issued restraining the further prosecution of this action, which order was subsequently and about February 1, 1892, dissolved.

To this bill the defendant Baker filed an answer February 10, 1890, denying all allegations of fraud in the settlement between the parties or in the procuring of the assignment, and also alleging that he furnished the complainant with all needed data, and all the data and information which existed in connection with the facts within his control, and that the settlement was

made with full knowledge of all the facts on the part of the complainant, and that after such settlement was made he left in the possession of the complainant papers and accounts plainly showing the whole transaction and all the facts in regard to the case, an examination of which would give all necessary information about the partnership affairs. He also alleged that the complainant was endeavoring, after a lapse of more than three years and with a full knowledge of all the facts, to attack this settlement as void, and he alleged that the claim made by the complainant was old and stale, and he pleaded the statute of limitations in his behalf, and alleged that the claim did not accrue nor was any demand made to show whether error or otherwise were made within the period of three years.

After the injunction restraining the further prosecution of this action had been dissolved, and on February 10, 1892, the defendant filed a plea to the declaration herein, in which he denied, (1) that he was indebted to the plaintiff; (2) he alleged that he never promised as set up in the declaration; (3) that the plaintiff's cause of action did not accrue within three years; (4 and 5) a set-off of $35,873.35. This set-off was alleged to have arisen out of the dealings between the parties in the partnership already mentioned.

The plaintiff Baker joined issue upon the plea on August 24, 1892. Further proceedings in this action were delayed by mutual consent until the trial of the suit in equity. Upon that trial the complainant obtained a decree for thirty-odd thousand dollars, after deducting the amount claimed to be due the plaintiff in this action. That decree was affirmed by the Court of Appeals of the District, and the case was taken by appeal to this court, where the decrees of the courts below were reversed and the case remanded with instructions to the Supreme Court to dismiss the bill. The dismissal was general, and not "without prejudice" or any similar expression. 169 U. S. 189. After the entry of the decree dismissing the bill on the mandate of this court in the equity suit, Baker, the plaintiff herein by leave of the court filed in this action a replication to the plea of set-off, setting up the commencement of the equity suit, and stating the issues involved therein and the decree made upon the deci-

sion of this court dismissing the bill, and claimed that judgment as *res adjudicata* of the matters of set-off contained in the fourth and fifth counts of the defendant's plea. Then by a series of pleadings, too long and too technical for repetition, the final question was raised by demurrer as to whether the plaintiff's replication of *res adjudicata* to the defendant's plea of set-off was good or not. Upon the argument of the demurrer the Supreme Court held that the replication was good; that the merits of the whole case had been decided in the equity suit, and that the judgment in that suit was a bar to all claims of set-off on the part of the defendant Cummings in the action at law. The parties came to trial after the argument and decision upon the demurrer, and having waived a jury the following stipulation was filed:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained:

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this action to recover the sum of $2712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to; that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the Supreme Court of the District of Columbia, the same being known and numbered on the dockets of said court as equity cause No. 12,263; the record, decrees and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set-off herein are re-

spectively the identical items set up, referred to and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause and of the record and proceedings of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein, but if the court shall be of opinion that any of said items of set-off and counter claim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon, and also any other remedy which they may by law be entitled to."

Upon this stipulation in connection with the record in the equity suit, the Supreme Court held that the defendant Cummings could not in this action set up in bar to plaintiff's action any of the items of set-off attached to his plea, and therefore judgment was rendered for the plaintiff for the amount claimed by him. On appeal to the Court of Appeals the judgment was reversed, and a new trial granted, Mr. Chief Justice Alvey dissenting.

*Mr. Clarence A. Brandenburg* for petitioner.

*Mr. Holmes Conrad* opposing. *Mr. Franklin H. Mackey* was on his brief.

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

A perusal of the record in this case demonstrates at least how conservative Congress has heretofore been in relation to the adoption of any amendment of the law relating to pleading

and procedure in the District of Columbia. The last of the series of pleadings herein by which the question of the validity of the defence of *res adjudicata* was finally brought before the court is denominated "defendant's joinder of issue on plaintiff's second sur-rejoinder to defendant's fourth rejoinder to plaintiff's third replication." Replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters and demurrers abound, and they all seem to have been regarded as properly filed for the purpose of presenting the question whether the decree in the equity case was *res adjudicata* or not. In reading these pleadings we seem to be transported back to the days when the practice of the special pleader had become a science by itself. In spite of the pleadings, however, the question before us is a simple one.

The plaintiff brought this action to recover from the defendant a certain amount of money alleged to be due on an account stated between the parties. The defendant, before pleading in the action, commenced a suit in equity for an accounting between himself as complainant and the defendant in the equity suit in relation to all partnership matters, and, as a part of the relief, prayed the cancellation of a written assignment made by complainant of his interest in the inspector cases of the partnership to the defendant, procured, as complainant alleged, by fraud. It was alleged that the items of the claim of Baker, the plaintiff in this action, arose out of the partnership transactions, and they were included in the issue made in the equity suit. There was a full hearing in that suit in regard to all the matters between the parties, including those arising in this action. At the end of the hearing the trial court entered a decree in favor of the complainant for over $30,000, after deducting the amount claimed against him by the plaintiff herein. That decree was affirmed by the Court of Appeals, but upon appeal here both decrees were reversed and the cause remanded to the lower court with instructions to dismiss the bill. The court, upon the receipt of the mandate, did dismiss the bill with costs. The plaintiff in this action then proceeded with his case and set up, by leave of the court, the decree in the equity suit as an adjudication of all the matters relating to the validity of the defendant's set-off to his demand, and the question is, Shall

the adjudication be treated as conclusive upon those matters, or shall the inquiry be again entered upon as to the facts upon which the set-off rests?

Stated generally and without detail, the theory of the law is that matters which have once been fully investigated between the parties and determined by the court shall not be again contested, and that the judgment of the court upon matters thus determined shall be conclusive on the parties and never subject to further inquiry. The whole doctrine has been lately gone over in this court in *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, and the law in regard to it is so well settled that other citations are not required. The question is not what the doctrine is, but does it apply to the particular case?

We have to inquire, therefore, whether the decree in the equity suit did cover and conclude the matters in difference, regarding the defendant's set-off in this action? If it did, that decree must be treated as conclusive, and the judgment of the court below refusing to give that character to it must be reversed.

It appears by the stipulation between the parties that the several items of account set forth in the defendant's plea of set-off in this action are respectively the identical items set up, referred to and claimed by complainant in the equity cause. The record in the equity cause is made a part of the record herein, and the facts upon which the complainant proceeded are set forth in the report of that case in this court, already referred to. The mandate from this court in that case, which by stipulation of counsel has been included in the record herein, sets forth our decree, which reversed the decree of the Court of Appeals with costs, and ordered that the cause be remanded to that court with directions to set aside the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill. There was added the usual formula directing that such further proceedings be had in the cause in conformity with the opinion and decree of this court as ought to be had, etc. The proceedings, however, which were thus directed to be taken were simply to reverse the judgment of the lower court and to dismiss the

bill. It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal. *Walden* v. *Bodley*, 14 Pet. 156, 161; *Hughes* v. *United States*, 4 Wall. 232, 237; *Durant* v. *Essex Company*, 7 Wall. 107; *Bigelow* v. *Winsor*, 1 Gray, 299, 301; *Foote* v. *Gibbs*, 1 Gray, 412; Coop. Eq. Pl. 270; 1 Herman on Estoppel, secs. 151, 152.

It cannot be disputed that if the bill had been dismissed upon the merits it would be conclusive against the right of the defendant in this action to set up in bar of plaintiff's recovery any of the items of set-off and counter claim pleaded by defendant. He contends, however, that for the purpose of determining the ground upon which the bill was dismissed, it is proper to resort to the opinion of the court, even though the record show an absolute dismissal, and that the opinion in this case shows the bill was not dismissed upon the merits, but only because of his (complainant's) laches in seeking the aid of a court of equity to set aside and cancel the written assignment made by the defendant herein to the plaintiff, and which, as the defendant alleges, was procured by fraud; that when relief was denied on the ground of such laches, the only effect of the denial and the consequent dismissal of the bill was to leave the complainant at full liberty to fight out the issue of fraud in this action.

We do not think this is a correct statement of the case. Assuming that defendant is right in his contention that he can look at the opinion for the ground of dismissal, we think it appears therefrom that the bill was in truth dismissed upon its merits. The court really went into an elaborate examination of the status of the complainant in the equity case with reference to his claim of right to avail himself of the alleged fraud, not only in respect to his laches technically so-called, but also with regard to his affirmative treatment of the defendant after he had, as this court decided, acquired full knowledge of all the facts which constituted what he claimed to be the fraud in the case. After he had acquired such knowledge, the complainant deliberately decided to, and did, procure the defendant's check

for $15,000 or substitutes therefor which he had himself taken, (the consideration given complainant for the sale) to be cashed, and complainant used the money for his own purposes. Not only laches on the part of the complainant formed the bar to the maintenance of the equity suit, but, as the court held, it was his whole conduct relative to the transaction after it had been completed, and his affirmance of the contract that precluded any right on his part to recover for any alleged fraud. His right to recover at all, upon the facts as found by the court from the evidence, was passed upon and decided.

Some expressions may be found in the opinion tending to show that the court was proceeding upon the ground merely of the complainant's laches in failing to resort early enough to the court for relief. But an examination of the whole of the opinion will show that the court was not confining itself to any such narrow ground, and on the contrary was examining the whole conduct of complainant, both his omissions and his affirmative and positive acts, for the purpose of determining whether the complainant had any cause of action against the defendant. For the purpose of such examination we make copious extracts from that opinion. After a full statement of the case the opinion, as reported in 169 U. S. at page 196, proceeds as follows:

"The controverted issue arising from the foregoing unquestioned facts is this:

"Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated; whilst Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve partnership, not only establishes the want of foundation for Cummings' assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred.

"It results from the foregoing that the facts as to the controverted matters are embraced in a narrow compass, and that

the whole case really resolves itself into two issues: 1st. Does the proof establish that the purchase and sale in question was as claimed by Cummings, or as asserted by Baker? In that question is necessarily embraced the further one of whether Cummings, at the time of the sale, had actual knowledge of the fraudulent representations claimed to have been made by Baker. This is, in terms, included, because it would be impossible in reason to declare that one had been deluded or deceived by misrepresentations into entering into a contract if he had actual knowledge when the contract was made that the alleged inducing representations were false. 2d. Conceding that Cummings was misled by the fraudulent representations of Baker as alleged, did he immediately after the sale, and before the collection by him of the cash consideration of the sale, discover that the representations were untrue, and thereby become aware that he had been grossly deceived and defrauded, and did he, with such knowledge, say nothing about the matter, collect the cash consideration, remain silent, and continue in partnership with Baker, occupying the same office for years, and only assert that he had been deceived when a dissolution of the partnership was threatened, and he was pressed to pay a sum which Baker claimed Cummings owed him? This latter inquiry assumes a twofold aspect, for although in the bill, in the opinions below, and in the argument at bar, the efficient misrepresentation, which it is asserted rendered the assignment void, was the fraudulent statement as to the sum of the fees on the claims then allowed and appropriated for, nevertheless it is also, as we have seen, asserted in the bill and contended in argument that there was a misrepresentation as to the pending claims not yet acted upon by the Department, and which were then unappropriated for by Congress.

"We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that, if there was fraud and misrepresentation, Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration because if it be found that such was the case, the question whether the fraud originally existed will become immaterial,

in view of the defences of limitation and laches. Moreover, in reviewing the question of knowledge, we will do so in the order stated, that is, first, discovery of the alleged fraud and misrepresentation as to the amount of fees collected and in process of collection from claims appropriated for at the time of the sale; and, second, discovery of the misrepresentation as to the amount of pending claims from which further fees were expected. Here, also, it is to be premised that if the first proposition be found to be well taken, an examination of the second will be wholly unnecessary. This, obviously, is the case, for, as the statute of limitations began to run from the time when suit might have been brought to annul the sale, it results that the discovery of the falsity of *any* material and fraudulent representation by which the sale had been induced, gave rise to the right to commence an action to rescind, and therefore fixed the period when the statute of limitations commenced its course."

And again on page 206:

"Our conclusion is, that the evidence not only clearly but beyond all question or dispute overwhelmingly shows that if the false representations as to the earned fees were made as alleged, there was entire knowledge thereof by Cummings. And, for reasons heretofore stated, this conclusion renders unnecessary any inquiry into the question of when Cummings discovered the falsity of the alleged representations as to the amount of pending claims. . . . That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the Statute of Limitations of Maryland of 1715, c. 23, s. 2, in force in the District of Columbia. 1 Kilty's Statutes, 111; Comp. Laws Dist. Col. c. 42, s. 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity.

"Apart, however, from the bar of the statute of limitations,

the facts as to the full knowledge of the fraud, if any existed, by Cummings more than three years before the filing of his bill, and his conduct after he obtained it, his permitting Baker to go on and prosecute the claims as if they were his own, debars Cummings from invoking a court of conscience to put him in a much better position than he could possibly have occupied if he had spoken and asserted his rights in due season.

"There cannot be a doubt that the right existed in Baker to have dissolved the partnership at any time. If this right on his part had been exercised, Cummings would not have been in a position to have availed himself of the labors of Baker in prosecuting the future claims to a successful culmination, and would not therefore have been a participant in the profits arising therefrom. If with a full knowledge of the fraud Cummings chose to remain silent, to permit Baker to go on with the prosecution of the claims, to incur the expenditure of time and labor not only in the cases in which he was successful but in the cases in which he failed, Cummings cannot in conscience be allowed to reap the rewards which he could not possibly have obtained had he spoken with reasonable promptness, when the knowledge of the fraud, if it existed, was brought home to him in the most pointed and unequivocal way."

And the court winds up the opinion with the following remark:

"Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings."

From this last extract it seems to be clear that the court had in fact examined the evidence as to the alleged fraud and had concluded it was not proved. The result of the whole opinion is to say in substance that while we have read the evidence in the case and do not think there is even a preponderance of it in favor of a finding of fraud, yet notwithstanding that fact we will place our judgment upon the ground that the evidence shows the complainant has himself so acted in the case, both by his neglect and, among other things, by his drawing the money

on the check, that he has affirmed the contract after he knew all the facts upon which he now founds his allegation of fraud; that he has waived the fraud and all benefit that he might otherwise have urged by reason of it. A waiver of all right to question the validity of a contract may be founded upon the claiming and acceptance of a benefit under it after full knowledge of all the facts. 2 Pom. Eq. Juris. 2d ed. sec. 897, and cases cited in note 1. From all this we think no other conclusion is accurate than to say the decision of this court was based upon the merits of the case within the meaning of that expression when used to distinguish a decision of the court upon the merits from a decision based upon a lack of jurisdiction or defect of parties or anything of that nature. Here there was no lack of jurisdiction, the parties were before the court, and full power to grant relief entirely commensurate with the plaintiff's rights existed in the court. It is therefore incorrect to say that by the dismissal of the complainant's bill he has simply been remitted to his less effective remedy at law. This is to ignore the weight and effect of the opinion upon the matters just discussed and to open for another contention a subject which we think the decree in the equity case has closed for all time. It cannot be that after the determination of an investigation such as has been had in the equity case, and the entry of a decree thereon dismissing the bill, the matter can again be opened for contest in this action at law.

*For these reasons, we think the judgment of the Court of Appeals of the District of Columbia should be reversed and the case remanded to that court with instructions to reinstate the judgment of the Supreme Court of the District in favor of the plaintiff, and it is so ordered.*

Mr. Justice Brewer did not hear the argument and took no part in the decision of this case.

# WERLING *v.* INGERSOLL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 168. Argued and submitted March 6, 1901.—Decided April 15, 1901.

When Congress, under the act of March 2, 1827, granted to the State of Illinois alternate sections of land throughout the whole length of the public domain, in aid of the construction of a canal to connect the waters of the Illinois River with those of Lake Michigan, it also granted by implication the right of way through reserved sections; but this implication would not extend to ninety feet on each side.

The State of Illinois never took title to a strip of land ninety feet wide on each side of the route of that canal through the public lands, so far as related to the sections reserved to the United States by the act of March 2, 1827.

The State, in constructing the canal, proceeded under that act, filed its map thereunder, and constructed the canal with reference thereto.

THE plaintiffs in error have brought this case here to review the final judgment of the Supreme Court of the State of Illinois affirming the judgment of the circuit court of La Salle County in favor of the defendants in error (plaintiffs below) in an action of trespass involving the title to lands in that county on the south side of the Illinois and Michigan Canal. The action was brought for the purpose of testing the title and was tried by the court upon an agreed statement of facts, a jury being waived. It appears from this statement that the plaintiffs in error are the agents of the State of Illinois and acted as such in taking down and removing the fence hereinafter spoken of. The Illinois and Michigan Canal is owned by the State of Illinois and runs in a direction northeast and southwest through section 10, township 33 north, range 3 east, in La Salle County, Illinois. The lands in question are in this section, which was one of the sections of land reserved to the United States under the act of Congress approved March 2, 1827, hereinafter mentioned.

The plaintiffs in error claim that the State of Illinois owns a strip of land through that section on the south side of the canal,

ninety feet in width, contiguous to such south side. The defendants in error claim that the land which is owned by the State south of the canal is bounded on the south by a line seventeen instead of ninety feet south of the canal line; or in other words, they claim that the north line of their land runs up to within seventeen feet of the south side of the canal. The ownership of the land between these points from seventeen to ninety feet south of the canal is disputed, the plaintiffs in error claiming it for the State and the defendants in error claiming it for Mrs. Ingersoll, one of the defendants in error, who has had possession of the land for more than twenty years prior to November, 1897, and had prior to that time erected a fence on the line she claimed as her north line. This seventeen feet strip it would seem has been occupied by the tow path.

In order to test the question of title the plaintiffs in error, acting for the State, removed this fence, and thereupon the defendants in error sued them in trespass, claiming the fence was on their line and was their property. The question depends upon the construction of two acts of Congress in connection with the action of the state authorities in relation thereto. They are (1) the act of March 30, 1822, chapter 14; and (2) the act of March 2, 1827, chapter 51. They are, so far as is material, set forth in the margin.[1]

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[1] Act of March 30, 1822. Chap. XIV, 3 Stat. 659.

An Act to authorize the State of Illinois to open a canal through the public lands, to connect the Illinois River with Lake Michigan.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the State of Illinois be, and is hereby, authorized to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois River with the southern bend of Lake Michigan; and ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for, and the use thereof forever shall be, and the same is hereby, vested in the said State for a canal, and for no other purpose whatever; on condition, however, that if the said State does not survey and direct by law said canal to be opened, and return a complete map thereof to the Treasury Department, within three years from and after the passing of this act; or if the said canal be not completed, suitable for navigation, within twelve years thereafter; or if said ground shall ever cease to be occupied by, and used for, a canal, suitable for navi-

Statement of the Case.

The plaintiffs in error claim that the title to the strip of land ninety feet wide through section 10 passed to the State by virtue of the act of 1822, while the defendants in error claim that the act of 1827 takes the place of the act of 1822, as to the grant of lands, and that under the act of 1827 every alternate section of the land along the line of the canal was reserved to the United States, and it is agreed that section 10 was among the sections so reserved.

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gation; the reservation and grant hereby made shall be void and of none effect. . . .

SEC. 2. *And be it further enacted*, That every section of land through which said canal route may pass, shall be, and the same is hereby, reserved from future sale, until hereafter specially directed by law; and the said State is hereby authorized and permitted, without waste, to use any materials on the public lands adjacent to said canal, that may be necessary for its construction.

Act of March 2, 1827. Chap. LI, 4 Stat. 234.

AN ACT to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to the State of Illinois, for the purpose of aiding the said State in opening a canal to unite the waters of the Illinois River with those of Lake Michigan, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of said canal to the other; and the said lands shall be subject to the disposal of the legislature of the said State, for the purpose aforesaid, and no other. . . .

SEC. 2. *And be it further enacted*, That, so soon as the route of the said canal shall be located and agreed on by the said State, it shall be the duty of the Governor thereof, or such other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular sections to which the said State will be entitled, under the provisions of this act, and report the same to the Secretary of the Treasury of the United States.

SEC. 3. *And be it further enacted*, That the said State under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole, or any part of the said land, and to give a title in fee simple therefor, to whomsoever shall purchase the whole or any part thereof.

Statement of the Case.

After the passage of the act of Congress of 1822 the General Assembly of the State of Illinois on February 14, 1823, passed an act in which provision was made for the appointment of a board of commissioners to consider, devise and adopt such measures as might be requisite to effect a connection by a canal and locks between the navigable waters of Illinois River and Lake Michigan. It was made the duty of these commissioners to cause that part of the territory of the State which may lie open or contiguous to the probable courses and ranges of the canal to be explored and examined for the purpose of fixing and determining the most proper and eligible route for the same, and to cause all necessary surveys, etc., to be made, and to make calculations and estimates of the cost, and to make a plain and comprehensive report of all their proceedings under the act to the General Assembly of the State at the commencement of the next session.

On January 18, 1825, the General Assembly of the State amended a prior act, and appropriated about two thousand dollars for the payment of the actual expenditures made and liabilities incurred by the canal commissioners appointed under the act of 1823. On January 17, 1825, the General Assembly incorporated the Illinois and Michigan Canal Company, and provided that the officers should obtain subscriptions to the stock, which should amount to a million dollars, and in a convenient time thereafter, and after ten per centum of the capital stock should have been paid in, the commissioners should proceed to construct a canal to connect the waters of the Illinois River and Lake Michigan, and the corporation was directed to proceed as rapidly to the completion of that object as might be deemed practicable and expedient, having in view the ultimate permanency of the work and the facility and safety of the communications. The size of the canal which the State had in contemplation is shown by reference to the fifth section of the act, wherein it is provided that the canal shall be of a width of forty feet at the summit, twenty-eight at the bottom, and of sufficient depth to contain water at least four feet deep. There is nothing in the record to show that these dimensions

were ever altered, although the act was repealed the next year, January 20, 1826.

In the preamble of the repealing act it was stated that the corporation had not performed any act by which the right of the General Assembly to repeal its charter could be taken away, and it was stated that it was believed that the highly important object of the act referred to could be promoted with greater advantage to the public by having the contemplated canal constructed under the direction of the State, and therefore the act of incorporation was repealed.

The Governor of the State was directed by the second section of the repealing act to endeavor to ascertain the best terms on which loans could be obtained on behalf of the State for the purpose of constructing the canal and to report the same to the General Assembly at its next session.

Pursuant to such direction, and on December 5, 1826, the Governor reported that capitalists were reluctant to commit themselves to any specific terms on which they would be willing to make a loan, but from the best information which he had received it was confidently believed that if Congress would make a liberal grant of land there would be no difficulty on the part of the State in obtaining a loan at six per centum, and the Governor suggested the propriety of adopting measures at that session to commence the work, predicated upon a liberal grant of land by Congress, which it was expected that body would make. The General Assembly at the same session adopted a memorial to Congress, in which it asked for a grant of land belonging to the United States for the purpose of aiding the construction of the canal, and in this memorial the following language was used:

"Your memorialists have caused the route to be explored and estimates to be made of the probable expense of the work; from which it appears that the cost of constructing the canal will not be less than $600,000, and may possibly amount to $700,000. To the end, therefore, that your memorialists may be enabled to commence and complete this great and useful work we pray your honorable body to grant to this State the respective townships of land through which the contemplated

canal may pass, the avails of which to be appropriated exclusively to the construction of said canal upon such terms and conditions as to your honorable body may seem proper."

Congress on March 2, 1827, passed the act already set forth. On January 22, 1829, the General Assembly passed an act providing for the construction of the Illinois and Michigan Canal, and for the appointment of commissioners to effect that object. By the fifth section the canal commissioners were directed to cause "those parts of the territory of this State which is upon or contiguous to the probable course or range of said canal to be explored and examined for the purpose of fixing and determining the most popular and eligible route for the same; . . . and as soon thereafter as they may be able to command sufficient funds and deem it expedient, shall commence the work of opening a canal, and constructing locks, aqueducts and dams and embankments, to effect a navigable communication between Lake Michigan and the Illinois River."

By the sixth section the canal commissioners were directed as soon as practicable, and in conjunction with the authorities of the Government, to select alternate sections of land granted to the State by the act of Congress of 1827, and when the selection was made it was provided by section seven that the commissioners should proceed to sell the lands thus selected and to make returns of the proceeds of such sale to the auditor of public accounts.

On September 23, 1829, the canal commissioners obtained from the secretary of state of the State of Illinois a map of the proposed route of the canal which had been made by J. Post and R. Paul, in the years 1823 and 1824, when proceeding under the act of Congress of 1822 and the state statute of 1823. This map was obtained for the purpose of using the same in aid of their work of examining and locating the canal route from Lake Michigan to the Illinois River, but the duty of determining and adopting a route rested with the commissioners appointed under this state act of 1829, no route having up to that time been adopted.

During the years 1823 and 1824 the State through its above named engineers, Post and Paul, had surveyed and marked through the public lands of the United States the route of the

canal "connecting the Illinois River with *the southern bend of Lake Michigan*," though it did not return a map thereof to the Treasury Department within three years from March 30, 1822; but some time between December 25 and the end of the year 1829 the State did return to the Treasury Department of the United States "a complete map of the route of the canal connecting the Illinois River with Lake Michigan." The map filed in 1829 is known as the Thompson map, and is the first and only one, so far as the record shows, ever filed with the Treasury Department. It was filed in December, 1829, under the provisions of the act of 1827. This fact appears from the certificate of the Commissioner of the General Land Office, and also from that of the secretary of the canal commissioners of the State. Both officials assert that the map was filed "under the provisions of the act of Congress approved March 2, 1827." The general route is said to agree in substance with that laid down on the map made by Messrs. Paul and Post.

The State commenced the construction of the canal in the year 1837, and completed it in 1847, upon the route as shown by the Thompson map filed in the Treasury Department.

*Mr. Howard M. Snapp* for plaintiffs in error.

*Mr. William M. Springer*, for defendants in error, submitted on his brief.

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

The plaintiffs in error claim that upon the passage of the above mentioned act of Congress of 1822 the State of Illinois immediately became vested with the title to a strip of land ninety feet wide on each side of the route of the canal through the public lands of the United States from Lake Michigan to the Illinois River, and that the act of Congress of March 2, 1827, did not alter or in any way affect the provisions of the act of 1822 or take away the title which they claim had already vested in the State upon the passage of that act; that although the title

to any specific portion of land under the act 1822 was in the nature of a float until the route of the canal was surveyed and adopted and a map thereof made and filed in the Treasury Department, yet when that was done the title to the ninety feet on each side of the canal was vested in the State as of the date of the passage of the act.

The various land grants made by Congress to railroads are cited for the purpose of showing that the act of 1822 constituted a grant of lands *in præsenti* and absolute in character, although to be thereafter identified by future action. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733, 741; *Railroad Company* v. *Baldwin*, 103 U. S. 426; *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570; 146 U. S. 615; 168 U. S. 1.

The language of the act of 1822, it will be observed, is somewhat peculiar and differs from that generally used in the land grants to railroads, which usually contain the expression that "there be and is hereby granted" to the railroad companies the lands mentioned, or words of similar import. In this act it is provided that "ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States except in cases hereinafter provided for, and the use thereof forever shall be and the same is hereby vested in the State for a canal, and for no other purpose whatever—on condition, . . . if said ground shall ever cease to be occupied by and used for a canal suitable for navigation, the reservation and grant hereby made shall be void and of none effect. . . ."

By this language the strict technical title is not conveyed to or vested in the State. It is simply a provision withdrawing from sale this strip of land and vesting the use of it for a canal, and for no other purpose whatever, in the State, with a condition that if not so used the reservation and grant are to be void. If proceedings had in fact been taken under this act, the route surveyed and a map thereof made and filed in the Treasury Department in compliance with the provisions of the act, then the use of the land designated on the map so filed, for the purpose mentioned in the act of 1822, would very likely have vested in the State as of the date of such act. The action of the authorities

on the part of the State, after the passage of the act of 1827 and up to the filing of the map in 1829, shows, however, that it was the act of 1827 and not that of 1822 which was in their contemplation when the map was filed in the Treasury Department.

During 1823 and 1824 a route was surveyed and marked through the public lands of the United States for a canal connecting the Illinois River "*with the southern bend of Lake Michigan*," but it does not appear that the route was ever adopted or that a map of such route was ever filed. The map which was filed in 1829 purported to show the route of a canal connecting the Illinois River with Lake Michigan, omitting the expression "with *the southern bend* of Lake Michigan," which latter description, it is said, would, if closely and technically followed, have taken the canal into the State of Indiana. The route of the canal laid out on the map filed did connect the canal with the waters of Lake Michigan in the State of Illinois, but not in terms with *the southern bend* of that lake. It is claimed, however, that the two descriptions, "the southern bend of Lake Michigan" and "the waters of Lake Michigan," are substantially identical, and that the route of the canal as marked on the map of 1829 is in all material matters the same as that surveyed under the act of 1822. However this may be, it cannot be denied that between 1822 and the passage of the act of Congress in 1827 no route had been adopted for the canal and no work of construction had been commenced thereon, although, as already stated, a route had been surveyed and marked, yet none had been adopted, and none was adopted until after the passage of the state act of January 22, 1829. This appears by the fifth section of that act, in which the canal commissioners were authorized to explore, examine and determine and fix upon the most proper and eligible route for a canal, and to cause maps, surveys, profiles, etc., to be made, and thereafter, when they deemed it expedient and funds could be secured, they were authorized to commence the work of constructing the canal. The sixth section of the same act had special reference to the selection of the land granted by the Congressional act of 1827.

The filing of a map with reference only to the act of 1827,

specifying both the sections reserved to the United States and those granted to the State under that act, would not thereby fix and identify lands which had been mentioned but not identified, in a different and prior act, and which were not referred to in any way in the map filed under the act of 1827. No lines showing the boundary of a strip ninety feet wide on each side of the canal were ever placed on the map which was filed in the Treasury Department in 1829, the only map which was ever filed there. That map showed the proposed route and also the sections granted to the State and those reserved to the United States, and the right of way along the route would be taken to be for a canal of the proposed width as stated in the acts of the General Assembly, and which width was accepted and acquiesced in by Congress and the Government.

It was not until 1848, eleven years after the work of construction was commenced and a year after the completion of the canal, as is stated by counsel for plaintiffs in error in his brief, that a survey was made of the ninety feet strip on each side of the canal from one end to the other, and the lines of that survey marked on maps under the directions of the canal commissioners, and the maps and profiles of the survey filed in the office of the state canal commissioners, but not with the Commissioner of the General Land Office or in the Treasury Department at Washington. This action of the canal commissioners was a mere *ex parte* assertion made by state officials upon their own maps, nearly twenty years after the filing of the map in the Treasury Department, indicating a possible claim of right on behalf of the State, but never laid down on any map filed in Washington.

The differences between the two acts in question and their inconsistent provisions are noticeable. That of 1822 provides for the use of land through the whole of the public domain ninety feet wide on each side of the canal. That of the act of 1827 grants a quantity of land equal to one half of five sections in width on each side of such canal, and reserves each alternate section to the United States, etc. In the sections reserved, therefore, no title to or use of the ninety feet on each side of

the canal is given, while in the alternate sections not reserved to the United States the whole title is granted to the State. The third section of the act of 1827 gives power to sell and give title in fee to the land granted, while the act of 1822 grants no title, and provides for resuming possession of the land if at any time the same is not used for a canal. The filing of a map under the act of 1827 would clearly not be a fulfilment of the provisions as to the filing made in the act of 1822.

The Congressional act of 1827, nevertheless, implies by its language and subject-matter the consent of Congress to a right of way through the public lands, and the subsequent state act of 1829, in the eleventh section, showed the width of the canal contemplated, which was the same as the prior and repealed act of 1825 provides for. Of course, a towpath would be added. These two acts show the intention of the parties to proceed thereafter with reference to the act of 1827 and not under that of 1822. Work was not in fact commenced until in 1837.

When Congress under the act of 1827 granted the alternate sections to the State throughout the whole length of the public domain, in aid of the construction of the canal, it also granted by a plain implication the right of way through the reserved sections, for it cannot be presumed the Government was granting all these alternate sections to the State for the purpose avowed, and yet meant to withhold the right to pass through the sections reserved to the United States along the route of the proposed canal. But the implication would not extend to the ninety feet on each side. It would extend to the land necessary to be used for the canal of the width contemplated, and that had been asserted in an act of the general assembly in 1825 and was subsequently reiterated in another act of that body (1829).

Upon all the facts in the case it is plain that the act of 1822 was mutually abandoned by the parties so far as concerned the land grant after the passage of the act of 1827, and that the right of way through the reserved sections was treated and regarded as impliedly granted by the latter act, under which the larger grant was made, and that the map was filed under that act, and none was ever filed under the act of 1822. The State

never took title to the strip of land ninety feet wide on each side of the route of the canal through the public lands, so far as related to the sections reserved to the United States by the act of 1827, of which section ten herein involved was one.

It is not a question of forfeiture of the grant under the act of 1822. There was no forfeiture; it was a mutual abandonment of that act for the act of 1827. Taking all the facts into consideration, the State never acquired an absolute title to the ninety feet strip, as by the language of the act of 1822 the use only was granted, and it required a subsequent filing of a map as provided for in that act before the right to the use was acquired and made definite and fixed as to any particular land, and before that time arrived the act of 1827 was passed, which was to a certain extent inconsistent with the former act, and the State in fact thenceforth proceeded under the later act and filed its map thereunder and constructed the canal with reference thereto.

We think the judgment of the Supreme Court of Illinois was right, and it is therefore

*Affirmed.*

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## ST. PAUL GAS LIGHT CO. *v.* ST. PAUL.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 183. Argued March 21, 1901.—Decided April 15, 1901.

A by-law or ordinance of a municipal corporation may be such an exercise of legislative power, delegated by the legislature as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the Constitution of the United States.

In this case, as no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of such a contract did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court.

Statement of the Case.

THE charter of the St. Paul Gas Light Company was granted in 1856, and it expires in 1907. The corporation was empowered to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas. It may be assumed, for the purposes of the question arising on this record, that the corporation discharged its duties properly under its charter, and that from the time the charter became operative the company has lighted the city in accordance with the contracts made for that purpose from time to time with the municipal authorities. The charter did not purport to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one. It may also be assumed for the purposes of this case that the rights which the corporation asserts on this record were not foreclosed by any of the contracts which it made, at different periods, with the city. The question which here arises concerns only section 9 of the charter, which is as follows:

"SEC. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: Provided, That whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per centum per annum on the amount of the sum of the original cost of said street

lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing the same."

Under the foregoing section the gas company, by direction of the city, constructed street lamps, and up to January 1, 1897, they numbered 3362. The interest on the cost of these lamps, at the rate fixed by section 9, was regularly paid by the city up to January 1, 1897. About, or shortly after that date, in certain portions of the city, the use of electricity for lighting the streets was by direction of the municipality substituted for gas, and hence the street gas lamps in those portions of the city which were lighted by electricity were no longer used. It is fairly to be deduced from the record that either by its original charter or by amendments thereto the gas company was empowered to supply electricity as well as gas, and in virtue of this power it constructed an electrical plant and contracted with the city to supply the electric lights in those portions of the city where the use of gas had been dispensed with. The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps. As the result of this disagreement the city, in 1897, passed the following ordinance:

"Resolved, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light

Company on account of the cost of the purchase and equipment of said gas street lamp posts."

Thereupon the gas company commenced this suit to recover the interest on the cost of the construction of the lamps referred to in the ordinance. Without going into unnecessary detail it is adequate to say that the complaint alleged that the city was obliged by section 9 of the charter of the company to pay the interest on the cost of the lamps, although they were no longer in use for lighting purposes. The ordinance of the city which we have reproduced was expressly referred to in the complaint, and it was therein alleged that the ordinance in legal purview amounted to action by the State impairing the obligations of the contract, embodied in section 9 of the charter, and was hence void because repugnant to the Constitution of the United States. After answer and due proceedings the case was decided by the trial court in favor of the gas company. On appeal the judgment of the trial court was reversed by the Supreme Court of Minnesota, and a final judgment was ordered against the gas company. To this judgment of the Supreme Court of the State this writ of error is prosecuted.

*Mr. F. W. M. Cutcheon* for plaintiff in error. *Mr. George C. Squires* was on his brief.

*Mr. James E. Markham* for defendant in error.

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

The Supreme Court of Minnesota held that the charter of the gas company did not impose on the city the obligation to pay the interest on the cost of constructing the lamps not used. Construing the whole charter, the court decided that, as it provided for contracts between the parties from time to time for the supply of lights, the sole obligation imposed was that the interest on the cost of the construction of the lamps should be paid by the city only during the time it was agreed that the lamps should be used and not during the life of the charter. We

excerpt in the margin an extract from the opinion of the Supreme Court of Minnesota which more fully expresses the reasoning by which the court sustained the construction of the contract which was expounded.[1]

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[1] "It seems to us that it would be unreasonable to hold that if at the inception of the fifty years which this charter was to run the city had ordered such street lamps to be erected, had used them ten years under a contract for lighting the streets which expired at the end of that time, and then, on account of some such contingency, had ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, connecting pipes and meters for forty years more, and to permit them to incumber the streets for that length of time, although the city had not a particle of use for such street lamps during all of that time. Again, it would be unreasonable to hold that the city council might, under section 9, compel the gas company to erect street lamps, and then, after using them a month or a year, abandon the use of gas for street lighting purposes, and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps than eight per cent per annum, during such use, on the cost of erecting the same.

"But we are of the opinion that section 9 does not give the council the right in its discretion to compel the erection of street lamps regardless of how long the city may use them, and without protecting the gas company by stipulating a length of time during which the city shall use them.

"Section 9 provides that whenever the city 'by resolution of its board of aldermen directs lamps to be erected and lighted in the streets of the city,' the gas company shall erect the same and keep them in repair; but, as we have seen, the city has no power under the charter to compel the streets to be lighted except by making for that purpose a contract voluntary as to both parties. When making such a contract the gas company can refuse to contract for lighting any street lamps except those already erected, and before the city can compel the erection of more lamps it must first make a contract for lighting them. In making such a contract, the gas company can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the eight per cent per annum to be paid during that time will renumerate the gas company for erecting the lamps. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to pay.

"This, in our opinion, is the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We therefore hold that the city is not liable for such compensation for street lamps after it has ceased the use of the same and abandoned the use of gas in lighting its streets."

Opinion of the Court.

Because the Supreme Court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the state court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose. *Houston & Texas Central Rd.* v. *Texas*, 177 U. S. 66, 77, and cases cited. In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what obligations arose from it? and, Has there been state legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation. As, however, the authority to review the judgment of the Supreme Court of Minnesota in this case, and in doing so to interpret the contract and enforce its obligations, arises solely because of the assertion that the obligations of the contract have been impaired by subsequent legislation, we will first consider whether, under any view which may be taken of the contract, there is shown on this record any act of state legislation which can be properly said to have impaired the obligations of the contract in the constitutional import of these words. That is to say, we propose first to consider, even although it be conceded *arguendo* that the Supreme Court of the State of Minnesota erroneously decided that the contract relied upon did not impose the duty on the city to pay interest on the cost of construction of the unused gas lamps, whether there has been any state legislation impairing the obligation of such contract. Whilst it is not pretended that there is any law of the State of Minnesota by which the obligation of the contract was

impaired, it is asserted that such consequence results from the ordinance adopted by the municipal council of the city of St. Paul, the text of which ordinance has been reproduced in the statement of the case.

It is no longer open to question that "a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States." *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Company*, 125 U. S. 18, 31; *Hamilton Gas Light & Coke Company* v. *Hamilton City*, 146 U. S. 258; *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1.

Referring to the ordinance in question from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to, the first, a command by the city to the gas company to "forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;" and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If then there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts

cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error.

It is argued, however, that, as under the charter of the city of St. Paul the comptroller of the city was empowered to audit the claims of the gas company as a prerequisite to the appropriation by the city council of the necessary money to pay such claims, therefore the ordinance, to the extent that it deprived the comptroller of the power to audit, divested him

of an attribute which he could otherwise have exercised on behalf of the claim if he favored its payment, and hence the ordinance impaired the contract obligations. But it is not pretended that the effect of the auditing by the comptroller would have been to authorize the payment of the claim, or indeed that it was anything but advisory; since even after he had audited, the payment could not have been procured without the passage of an appropriation by the council for that purpose. A large number of cases were cited in the argument at bar, under the assumption that they sustain the proposition that wherever a mere denial of contract liability is made by a municipality, such denial is an impairment of the obligations of the contract, since it is a refusal to comply with the contract and hence is a disregard of the obligations which the contract created. We do not stop to refer to all these cases thus relied upon, because we think it results from the statement of the proposition that it is without foundation. However, we briefly advert to a few of the cases to show how inapposite they are to the proposition which they are cited to maintain. Thus, in *Murray* v. *Charleston*, 96 U. S. 432, the decision which was under review had given effect to an ordinance of the city of Charleston deducting a sum of taxation from the bonds held by the complainant. In *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, the decision of the state court gave effect to a municipal ordinance which provided for the construction by the city of a new waterworks plant which was to become a competitor with the contracting company. In *McCullough* v. *Virginia*, 172 U. S. 102, it was expressly held, although the state court had rested its decision on the ground that there was no contract, in view of the previous decisions of this court and of the state court, relating to the contract which was under consideration, that the necessary effect of the ruling was in substance to give effect to an act of the legislature of Virginia, passed subsequent to the contract, and which impaired its obligations. In *Houston & Texas Central Railroad Co.* v. *Texas*, 177 U. S. 66, 74, this court, after noticing the fact that the state court had decided the case "without reference to the act of 1870 which the plaintiff in error [the railroad company] alleges to be an impairment of the contract set

Counsel for Parties.

up by it in the pleadings," said: "We think the judgment of the court did give effect to that act." And the soundness of this conclusion the opinion then proceeded to demonstrate, it being apparent that the legislative act of impairment which the court found had been given effect to by the state decision was not a mere denial of liability, but amounted to an impairment of the substantial rights conferred by the contract.

As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court.

*Dismissed for want of jurisdiction.*

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## CODLIN *v.* KOHLHAUSEN.

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

No. 234. Argued and submitted April 11, 1901.—Decided April 15, 1901.

Judgment awarding a peremptory writ of mandamus directing the execution of certain county bonds for the construction of a courthouse and jail having been rendered in October, 1897, the case taken on error to the appellate tribunal in 1898, and affirmed in 1899, and the bonds having been, in the mean time, issued and sold and the building constructed, and the county officials, who were the original respondents below, and are appellants here, having gone out of office before this appeal was taken, the court is of opinion that the rule approved in *Mills* v. *Green*, 159 U. S. 651, and in cases there cited, should be applied.

MOTION to dismiss. The case is stated in the opinion of the court.

*Mr. Andrieus A. Jones* for the motion.

*Mr. R. E. Twitchell* opposing, submitted on his brief.

Opinion of the Court.

THE CHIEF JUSTICE: This was a petition filed by appellees in the District Court for Colfax County, New Mexico, praying for a writ of mandamus directed to Codlin, chairman, and Salazar, clerk, of the Board of County Commissioners of the county of Colfax, commanding them to officially sign and execute certain bonds and deliver them to the designated agent of the county for sale, for the construction of a courthouse and jail.

The alternative writ of mandamus was issued and due return made, whereupon, and after hearing, the District Court ordered the peremptory writ to issue, which was done, and the writ served, October 23, 1897.

The case was carried on error to the Supreme Court of the Territory in June, 1898, and it appears from an affidavit in that court that the mandate of the District Court was obeyed and the bonds issued and sold; and from an affidavit in this court that the proceeds were used in the construction of the courthouse and jail, which were completed on or about January 1, 1899. That affidavit also states that Codlin ceased to be chairman or a member of the Board of County Commissioners in January, 1899, and that Salazar ceased to be clerk during or prior to March, 1899.

The Territorial Supreme Court affirmed the judgment of the District Court, August 28, 1899. 9 N. Mex. 565. An appeal from the judgment of affirmance to this court was allowed January 2, 1900, and the record filed here March 28.

We think the cause comes within the rule applied in *Mills* v. *Green*, 159 U. S. 651, 653, and cases cited, and the order must be

*Appeal dismissed without costs to either party.*

# NEW ORLEANS *v.* EMSHEIMER.

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

No. 337. Submitted December 10, 1900.—Decided April 15, 1901.

Where a bill in equity was demurred to on the ground that the Circuit Court had no jurisdiction as such, and also on the ground that the remedy was at law, and the demurrer was sustained and the bill dismissed on the latter ground, without prejudice to an action at law, the city of New Orleans, defendant below, was not aggrieved in a legal sense by its own success, and cannot bring the decree in its favor here on a certificate of jurisdiction.

THIS was a motion to dismiss or affirm. It was submitted on the 10th of December, 1900. On the 17th of that month, the consideration was ordered to be postponed until the record should be printed, or so much thereof as would enable the court to act understandingly without referring to the transcript.

*Mr. Richard De Gray*, in behalf of *Mr. J. D. Rouse*, and *Mr. William Grant* submitted in support of the motion.

*Mr. Samuel L. Gilmore*, *Mr. Frank B. Thomas* and *Mr. Branch K. Miller* submitted in opposition.

THE CHIEF JUSTICE: Emsheimer filed his bill against the city of New Orleans, on behalf of himself and others similarly situated, in the Circuit Court for the Eastern District of Louisiana, seeking to collect certain certificates of indebtedness issued by the Board of Metropolitan Police of New Orleans through an accounting; to which the city demurred on the grounds that the Circuit Court had no jurisdiction as such for want of proper averments of diverse citizenship; that necessary parties were lacking; and that the remedy was at law, and not in equity.

The Circuit Court held that the averments in respect of citizenship were sufficient, but sustained the demurrer on the

ground that there was no equity in the bill, and dismissed the bill "for want of equity with full reservation of complainant's right to sue and proceed at law."

Subsequently an appeal was granted to this court, on application of the city, "for the sole and exclusive purpose of having a review of the finding, decision, and decree of the court overruling the said first ground of the said demurrer, by which the jurisdiction of this court and the sufficiency of the averments of the bill purporting to show the same are put at issue."

Defendant below sought no affirmative relief, but simply to defeat the suit. In this it succeeded, and the decree is a bar to another suit in equity on this cause of action so long as it stands unreversed.

The decree did not injure defendant but sustained its contention, and defendant is in no position to complain that it is aggrieved by its own success. The decree cannot be reversed at its instance because put on one of the grounds it urged rather than another.

If complainant brings an action at law, and the question of Federal jurisdiction is in issue, or if this decree should be hereafter reversed and Federal and equity jurisdiction sustained, it will be time enough if final judgment or decree passes against defendant in the Circuit Court for the question of jurisdiction to be certified. *United States* v. *Jahn*, 155 U. S. 109; *Smith* v. *McKay*, 161 U. S. 355.

*Appeal dismissed.*

# ATHERTON *v.* ATHERTON.

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

No. 17. Argued December 15, 1899.—Decided April 15, 1901.

A husband and wife had their matrimonial domicil in Kentucky, which was the domicil of the husband. She left him there, and returned to her mother's at Clinton in the State of New York. He filed a petition against her in a court of Kentucky for a divorce from the bond of matrimony for her abandonment, which was a cause of divorce by the laws of Kentucky; and alleged on oath, as required by the statutes of Kentucky, that she might be found at Clinton, and that Clinton was the post-office nearest the place where she might be found. The clerk, as required by those statutes, entered a warning order to the wife to appear in sixty days, and appointed an attorney at law for her. The attorney wrote to her at Clinton, advising her of the object of the petition, and enclosing a copy thereof, in a letter addressed to her by mail at that place, and having on the envelope a direction to return it to him, if not delivered in ten days. A month later, the attorney, having received no answer, made his report to the court. Five weeks afterwards, the court, after taking evidence, granted the husband an absolute decree of divorce for the wife's abandonment of him. *Held*, that this decree was a bar to the wife's petition for a divorce in New York.

This was a suit brought January 11, 1893, in the Supreme Court of the State of New York, by Mary G. Atherton against Peter Lee Atherton, for a divorce from bed and board, for the custody of the child of the parties, and for the support of the plaintiff and the child, on the ground of cruel and abusive treatment of the plaintiff by the defendant. The defendant appeared in the case; and at a trial by the court without a jury at June term, 1893, the court found the following facts:

On October 17, 1888, the parties were married at Clinton, Oneida County, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, in the house with the defendant's parents, had a child born to them on January 8, 1890, and there continued to reside as husband and wife until October 3, 1891. Then, owing

to his cruel and abusive treatment, without fault on her part, she left him, taking the child with her, and in a few days thereafter, returned to her mother at Clinton, and has ever since resided there with her mother, and is a resident and domiciled in the State of New York, and has not lived or cohabited with the defendant. When she so left him and went to Clinton, she did so with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and this purpose and intention were understood by the defendant at the time, and were contemplated and evidenced by an agreement entered into, at Louisville, October 10, 1891, by the parties and one Henry P. Goodenow, under advice of counsel, which is copied in the margin.[1] The defendant con-

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[1] The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustee contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

1. The child is hereby committed for its nurture, education and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

The domicil of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893 and 1894 the grandmother is to have the child and control its abode, travel and custody from January 1st to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first four and last two months of the year; that of the mother during the other months of the year.

2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in instalments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of the child. During the rest of each year, he is to himself at his sole expense provide for the support of the child. The expense of conveying the child, with a proper attendant in the journey, to the mother, Mary G. Atherton, is to be

tinued to reside in Louisville, and is a resident of the State of Kentucky.

The defendant, in his answer, besides denying the cruelty charged, set up a decree of divorce from the bond of matrimony, obtained by him against his wife March 14, 1893, in a court of Jefferson County in the State of Kentucky, empowered to grant divorces, by which "This action having come on to be heard upon the pleadings, report of attorney for the absent defendant, and the evidence and the court being advised, it is considered

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borne by the father, Peter Lee Atherton, and the like expense, on the journey back to the grandmother, is to come out of the sum provided for the child's support.

3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month, until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

4. The following provisions are made for the termination of this agreement, and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton.

*a.* This agreement as to the child is to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, in like manner terminate at her death.

*b.* This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and in any event on the 8th day of January, 1904.

*c.* If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson circuit court shall decide the question of fitness, and confirm or reject such nomination.

*d.* A successor to said successor may under similar circumstances be in like manner chosen.

*e.* If, during the existence of this agreement, Mary G. Atherton being then joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

*f.* If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement,

by the court that the plaintiff, Peter Lee Atherton, has resided in Jefferson County, Kentucky, continuously for ten years last past; and that he and the defendant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson County, Kentucky; that while the plaintiff and defendant were thus residing in Jefferson County, Kentucky, to wit, in the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this State for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be and they are hereby dissolved."

By the record of that decree, duly verified, the following appeared: On December 28, 1892, the plaintiff filed a petition under oath, containing the same statements as the decree, and also stating "that the said defendant may be found in Clinton, State of New York, and that in said Clinton is kept the post-office which is nearest to the place where the defendant may be found." On the same day, pursuant to the requirements of the statutes of Kentucky, the clerk made an order, warning the defendant to appear within sixty days and answer the peti-

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each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

*g*. If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement.

Witness the signatures of all the parties this October 10th, 1891.

HENRY P. GOODENOW.
MARY G. ATHERTON.
PETER LEE ATHERTON.

tion, and appointing John C. Walker, an attorney of the court, to defend for her and in her behalf, and to inform her of the nature and pendency of the suit. On February 6, 1893, Walker filed his report, in which he stated: "On this, the 5th day of January, 1893, I wrote to said defendant, Mary G. Atherton, at Clinton, in the State of New York, fully advising her of the objects and purposes of this action, stating therein a substantial copy of the petition, &c., plainly directed said letter to her at said place, paid the postage, had printed on the envelope enclosing it, 'If not delivered in ten days return to Jno. C. Walker, attorney at law, No. 516 West Jefferson street, Louisville, Ky.' Said letter has not been returned to me. I have received no answer thereto from said defendant or any one else for her, and do not know nor am I advised of any defence to make for her, and make none, only that which the law in such cases makes for non-resident defendants." The agreement of October 10, 1891, before mentioned, and certain depositions, set forth in full, taken at various dates from February 23 to March 3, 1893, were filed in the cause in Kentucky before the hearing.

It was agreed that either party might refer to any statute of the State of Kentucky, or decision of its courts.

The Supreme Court of New York found that the wife "was not personally served with process within the State of Kentucky, or at all, nor did she in any manner appear, or authorize an appearance for her, in the said action and proceeding;" and that before the commencement of that suit, and ever since, she had ceased to be a resident of Kentucky, and had become and was a resident of the State of New York, domiciled and residing in Clinton, with her child.

The court decided that the decree in Kentucky was inoperative and void as against the wife, and no bar to this action; and gave judgment in her favor for a divorce from bed and board, and for the custody of the child, and for the support of herself and the child.

That judgment was affirmed by the general term of the Supreme Court of New York, and by the Court of Appeals of the State. 82 Hun, 179; 155 N. Y. 129.

The defendant sued out this writ of error, on the ground that the judgment did not give full faith and credit to the decree of the court in Kentucky, as required by the Constitution and laws of the United States.

*Mr. Alexander Pope Humphrey* for plaintiff in error. *Mr. George M. Davie* was on his brief.

*Mr. William Kernan* for defendant in error.

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

The first section of the fourth article of the Constitution of the United States is as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This section was intended to give the same conclusive effect to the judgments of all the States, so as to promote certainty and uniformity in the rule among them. And Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Rev. Stat. § 905, reënacting act of May 26, 1790, c. 11, 1 Stat. 122; *Huntington* v. *Attrill*, (1892) 146 U. S. 657, 684.

By the General Statutes of Kentucky of 1873, c. 52, art. 3, courts of equity may grant a divorce for abandonment by one party of the other for one year; petitions for divorce must be brought in the county where the wife usually resides if she has an actual residence in the State; if not, then in the county of the husband's residence; and shall not be taken for confessed,

or be sustained by confessions of the defendant alone, but must be supported by other proofs.

By the Civil Code of Practice of Kentucky of 1876, tit. 4, c. 2, art. 2, if a defendant has been absent from the State four months, and the plaintiff files an affidavit stating in what country the defendant resides or may be found and the name of the place wherein a post-office is kept nearest to the place where the defendant resides or may be found, the clerk may make an order warning the defendant to defend the action within sixty days; and shall at the same time appoint, as attorney for the defendant, a regular practising attorney of the court, whose duty it shall be to make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and to report to the court the result of his efforts; and a defendant against whom a warning order is made, and for whom an attorney is appointed, is deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

In accordance with these statutes, on December 28, 1892, the husband filed in a proper court of Kentucky a petition, under oath, for a divorce from the bond of matrimony, alleging his wife's abandonment of him ever since October, 1891, and that she had been absent from the State for more than four months, and might be found at Clinton in the State of New York, and that in Clinton was kept the post-office nearest the place where she might be found; and the clerk entered a warning order, and appointed an attorney at law for the defendant. On January 5, 1893, that attorney wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and enclosing a copy thereof, in a letter addressed to her by mail at that place, and having printed on the envelope a direction to return it to him, if not delivered within ten days. On February 6, 1893, the attorney, not having received that letter again, or any answer from the defendant, or in her behalf, made his report to the court. And on March 14, 1893, the court, after taking evidence, including an agreement made by the parties in Kentucky, October 10, 1891, as to the domicil, custody and support

of their child, granted to the husband an absolute divorce for his wife's abandonment of him.

There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the State of Kentucky. The Court of Appeals of that State has held that, under its statutes, a wife residing in the State was entitled to obtain a decree of divorce against a husband who had left the State, or who had never been within it; and Chief Justice Robertson said: "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the State, deprive his abandoned wife of a power of obtaining a divorce at home." *Rhyms* v. *Rhyms*, (1870) 7 Bush, 316; *Perzel* v. *Perzel*, (1891) 91 Kentucky, 634. That court has recognized that the regulation of divorce belongs to the legislature of the domicil of the parties. *Maguire* v. *Maguire*, (1838) 7 Dana, 181, 185–187. And the same court, where husband and wife had lived together in Kentucky, and she abandoned him, and he became a *bona fide* citizen of Indiana, held that a divorce from the bonds of matrimony, obtained by him against the wife in that State, by proceedings on constructive service, and according to the laws of that State, determined the status of the parties in Kentucky. *Hawkins* v. *Ragsdale*, (1882) 80 Kentucky, 353.

There is a weight of authority in accord with the views maintained by the Court of Appeals of Kentucky, although there are some decisions of learned courts to the contrary.

The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage.

The rule as to the notice necessary to give full effect to a

decree of divorce is different from that which is required in suits *in personam.*

In *Pennoyer* v. *Neff*, (1877) 95 U. S. 714, 734, this court, speaking by Mr. Justice Field, while deciding that a judgment of a state court on a debt could not be supported without personal service on the defendant within the State or his appearance in the cause, took occasion to say: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which the proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicil in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. 2 Bishop on Marriage and Divorce, § 156."

In *Cheeley* v. *Clayton*, (1884) 110 U. S. 701, which involved the validity of a decree of divorce, obtained in Colorado by a husband domiciled there, against his wife for unjustifiably refusing to live with him, this court said: "The courts of the State of the domicil of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offence for which the divorce is granted; and a divorce so obtained is valid everywhere.

Story, Conflict of Laws, § 230*a*; *Cheever* v. *Wilson*, 9 Wall. 108; *Harvey* v. *Farnie*, 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that State. *Burlen* v. *Shannon*, 115 Mass. 438; *Hunt* v. *Hunt*, 72 N. Y. 218. But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires." 110 U. S. 705. In that case the decree of divorce was held void, because the notice required by the laws of the State had not been given; and the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the State of Illinois, was given no weight, because, as this court said, it was hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicil in another State; or how, if the Colorado court had jurisdiction to render the decree of divorce, and did render it upon the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce. 110 U. S. 709.

In *Harding* v. *Alden*, (1832) 9 Greenl. 140, the husband and wife lived together in Maine. He deserted her, and took up a residence in North Carolina, and there married and lived with another woman. The first wife then moved to and resided in Providence, Rhode Island, and there filed a libel in the Supreme Judicial Court for an absolute divorce against him for his desertion and adultery; and the court, after service of a citation on him, and two continuances of the cause, decreed a divorce as prayed for. The husband was never an inhabitant of Rhode Island. The wife afterwards married another man. The Supreme Judicial Court of Maine, in an opinion delivered by Mr. Justice Weston, held that the divorce in Rhode Island dissolved the bond of marriage between the parties; and said:

"If we refuse to give full faith and credit to the decree of the Supreme Judicial Court of Rhode Island, because the party libelled had his domicil in another State, and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection. In the case before us, it is agreed that the party injured was at the time an inhabitant of Rhode Island, residing in Providence, and this fact is recited in the decree. It appears that by order of the court a citation was served upon the defendant in person; and that a continuance was twice granted, to give him an opportunity to appear in defence. This shows a due regard to that principle of justice, which gives to the party accused the right to be heard. The decree was rendered by the highest judicial tribunal in that State. As it belongs to that tribunal to declare, authoritatively and definitively, what the law of the State is, we are bound to infer that by that law the bonds of matrimony, previously existing between the libellant and her former husband, were thereby dissolved; and that such is the effect of the decree within the State of Rhode Island." 9 Greenl. 148. "There would be great inconvenience in holding that a divorce decreed in the State where the injured party resided might not be held valid through the Union, where the right of citizenship is common, where the party accused had established his domicil in another State, and there committed adultery. And this is the only objection to the efficacy of the decree in question; it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this State. It would require that the wife, abandoned and dishonored, should seek the new domicil of the guilty husband, *animo manendi*, before she could claim the benefit of the law to be relieved from his control. In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood, that the ground upon which we place our decision is limited to the dissolution of the marriage. In the libel, alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly

or an annual allowance, to be paid by the husband, and the courts of this or any other State had been resorted to to enforce it, a different question would be presented." 9 Greenl. 151.

Chancellor Kent, in his Commentaries, says of that case that it was there held "that a decree of divorce did not fall within the rule that a judgment rendered against one not within the State, nor bound by its laws, nor amendable to its jurisdiction, was not entitled to credit against the defendant in another State; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, *so far as related to the dissolution of the marriage*, though not as to other parts of the decree, such as an order for the payment of money by the husband." And the Chancellor adds, "This is an important and valuable decision." 2 Kent Com. 110, note.

In *Ditson* v. *Ditson*, (1856) 4 Rhode Island, 87, (of which Judge Cooley, in his Treatise on Constitutional Limitations, 403, note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits,) the Supreme Court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown; and said: "It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister States; that a State cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other States, as related to them, are interested in that status; and in such a matter has a right, under the general law,

judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a State of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners or domiciled inhabitants of other States have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions." 4 Rhode Island, 105, 106.

The statutes of Massachusetts provided as follows: "When an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State. In all other cases, a divorce decreed in any other State or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this State." That provision made no change in the law, but, in the words of the Commissioners upon whose advice it was first enacted, "is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." Gen. Stat. of 1860, c. 107, §§ 54, 55; Rev. Stat. of 1836, c. 76, §§ 39, 40, and note of Commissioners; *Ross* v. *Ross*, 129 Mass. 243, 248.

In *Hood* v. *Hood*, (1865) 11 Allen, 196, the husband and wife, after living together in Massachusetts, removed to Illinois, and there lived together; the wife, "under circumstances as to which there was no evidence," and afterwards the husband,

came back to Massachusetts, and, while they were living there in his brother-in-law's house for a few weeks, he signed an agreement, reciting that they had separated, and promising to pay her a certain weekly sum so long as she should remain single. She continued to reside in Massachusetts; and he obtained in Illinois a decree of divorce from her for her desertion, upon such notice as the laws of Illinois authorized in the case of an absent defendant. It was held by the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Hoar, that both parties had their domicil in Illinois, and were subject to the jurisdiction of its courts; and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to contradict it on a libel afterwards filed by her in Massachusetts; and her libel was dismissed. And in *Hood* v. *Hood*, (1872) 110 Mass. 463, it appearing that such dismissal was upon the ground of the validity of the previous decree of divorce in Illinois, it was adjudged that that decree could not be impeached by the wife in a writ of dower by her against third persons, the court saying: "The decree in favor of her husband, dismissing her libel, was then forever conclusive against her, as between themselves. It severed the relation between them; or rather estopped her from averring anything to the contrary of the decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record, is that they are good only between the parties of record and their privies. They cannot be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that, it is a judgment that is operative and conclusive as to all the world."

The like view has been affirmed by courts of other States. *Thompson* v. *State*, (1856) 28 Alabama, 13; *Leith* v. *Leith*, (1859) 39 N. H. 20, 39–43; *Shafer* v. *Bushnell*, (1869) 24 Wisconsin, 372; *Gould* v. *Crow*, (1874) 57 Missouri, 200; *Van Orsdal* v. *Van Orsdal*, (1885) 67 Iowa, 35; *Smith* v. *Smith*, (1891) 43 La. Ann. 1140; *In re James*, (1893) 99 California, 374; *Dunham* v. *Dunham*, (1896) 162 Illinois, 589, 607–610.

In *Shaw* v. *Shaw*, (1867) 98 Mass. 158, the husband and wife, domiciled in Massachusetts, left the State to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme cruelty, and she left him and returned to Massachusetts, and continued to reside there. It was held that while they were in Pennsylvania the domicil of both parties remained in Massachusetts, and that the wife might maintain a libel in Massachusetts for the cause occurring in Pennsylvania, although the husband before it occurred had left Massachusetts with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in Massachusetts.

In a very recent case, the Court of Errors of New Jersey maintained the validity of a divorce obtained in the State of Utah by a husband, having his *bona fide* domicil there, against a wife whose domicil was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah, and personal service upon the wife in New Jersey in time to enable her to make defence, if she wished to do so. Mr. Justice Gummere, speaking for the Court of Errors, said that, at least, "interstate comity requires that a decree of divorce, pronounced by a court of the State in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister State, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that State, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defence thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the State in which it is sought to be enforced recognizes as a sufficient cause for divorce." *Felt* v. *Felt*, (1899) 14 Dickinson (59 N. J. Eq.).

In New York, North Carolina and South Carolina, the opposite view has prevailed, either upon the ground that the rule

as to notice is the same in suits for divorce as in ordinary suits *in personam*, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libellee, from the bond of matrimony. *People* v. *Baker*, (1879) 76 N. Y. 78; *O'Dea* v. *O'Dea*, (1885) 101 N. Y. 23; *In re Kimball*, (1898) 155 N. Y. 62; *Irby* v. *Wilson*, (1837) 1 Dev. & Bat. Eq. 568; *McCreery* v. *Davis*, (1894) 44 So. Car. 195.

In *People* v. *Baker*, 76 N. Y. 78, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the State of Ohio; they afterwards lived together in the State of New York; the wife, upon notice by publication, and without personal appearance of the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterwards married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the Court of Appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: "Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" The court admitted that "if one party to a proceeding is domiciled in a State, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that State;" but held that, without personal appearance or actual notice, the decree could not affect the matrimonial relation of the defendant in another State. The court recognized that the law was settled otherwise in some States, and said: "It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdiction of the tribunal giving it."

The authorities above cited show the wide diversity of opin-

ion existing upon this important subject, and admonish us to confine our decision to the exact case before us.

This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.

The husband always had his domicil in Kentucky, and the matrimonial domicil of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that the wife might be found at Clinton in the State of New York, and that at Clinton was the post-office nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to the wife to appear in sixty days, and appointed an attorney at law to represent her. The attorney, on January 5, 1893, wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and enclosing a copy thereof, in a letter addressed to her by mail at Clinton, and having printed on the envelope a direction to return it to him, if not delivered in ten days. There is a presumption of fact, though not of law, that a letter, put into the post-office, and properly addressed, is received by the person to whom it is addressed. *Rosenthal* v. *Walker*, (1884) 111 U. S. 185. On February 6, 1893, the attorney, having received no answer, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted the husband an absolute decree of divorce for his wife's abandonment of him.

The court of New York has indeed found that the wife "was

not personally served with process within the State of Kentucky, or at all." It may be doubted whether this negatives her having received, or had knowledge of, the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice, as to bind her by the decree in the State of the domicil.

The court in New York found that the wife left the husband and went to Clinton with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and that this purpose and intention were understood by the husband at the time, and were contemplated and evidenced by the agreement executed by the parties in Kentucky, October 10, 1891. But that agreement was among the proofs submitted to the court in Kentucky, and may well have been considered by that court, as the preamble to the agreement states, as simply intended to provide for the interest of their child, recognizing that the parties had ceased to live together as husband and wife, but "without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue." The agreement contains no mention of the domicil of either husband or wife, but declares that the domicil of the child is to be the State of Kentucky, and is taken up with providing that its custody shall be half of each year with the mother, and the other half with the paternal grandmother, and with providing for the support and custody of the child, in various future contingencies, including the divorce and second marriage of the husband or of the wife.

We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband,

as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicil, (which he denied,) and would disprove his own ground of action that she had abandoned him in Kentucky.

The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and that therefore their

*Judgments must be reversed, and the case remanded to the Supreme Court of New York for further proceedings not inconsistent with this opinion.*

MR. JUSTICE PECKHAM, with whom THE CHIEF JUSTICE concurred, dissenting.

I think this case was rightly decided by the Court of Appeals of New York, and I therefore dissent from the judgment and the opinion of the court herein.

I think if the husband had, at his domicil in Kentucky, been guilty of such misconduct and cruelty towards his wife as entitled her to a divorce, she had a legal right for that reason to leave him and to acquire a separate domicil, even in another State. If, under such circumstances, she did leave him, and did acquire a separate domicil in New York State, the Kentucky court did not obtain jurisdiction over her as an absent defendant, by publication of process or sending a copy thereof through the mail to her address in New York.

It has long been held that the wife upon such facts could acquire a separate domicil. In *Cheever* v. *Wilson*, 9 Wall. 108, 123, 124, it was so decided, and the case of *Ditson* v. *Ditson*, 4 R. I. 87, was therein cited with approval upon that proposition. It was said in the Rhode Island case that "Although as a general doctrine the domicil of the husband is by law that of the wife, yet when he commits an offence, or is guilty of such dereliction of duty in the relation as entitled her to have the marriage either partially or totally dissolved, she not only may but *must*, to avoid condonation, establish a separate domicil of her own. This she may establish, nay, when deserted, or compelled to leave her husband, necessity frequently compels her to establish it in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicil of her own." This is also held in *Hunt* v. *Hunt*, 72 N. Y. 217, where many of the authorities are collected.

By the statute of New York in force at the time the parties were therein married, the court had jurisdiction to grant a limited divorce on the complaint of a married woman, where the marriage had been solemnized in the State and the wife was an actual resident therein at the time of exhibiting her complaint. By virtue of this statute and of the wife's residence in New York at the time of exhibiting her complaint, (if such residence were legally acquired, as already stated,) the court in that State had jurisdiction of an action for divorce against her husband, and jurisdiction over the husband was complete when he appeared in the suit. Having the right to acquire a residence in the State, it was open to her to prove in the divorce case which she instituted in New York the facts which justified her leaving her husband's home in Kentucky and in acquiring a separate domicil in New York, and the decision of the Kentucky court, that it had jurisdiction over her in her husband's suit, was not conclusive against her upon that question. The New York court entered upon the inquiry and found the fact that she was justified by her husband's acts in leaving his home and in acquiring a new domicil for herself, and that the Kentucky court

therefore obtained no jurisdiction over her. It also found the facts necessary to warrant it in granting to her a divorce under the laws of New York, and it granted one accordingly. This I think the New York court had jurisdiction to do, and it did not thereby refuse the constitutional full faith to the Kentucky judgment.

That a husband can drive his wife from his home by conduct which entitles her to a divorce, and thus force her to find another domicil, and then commence proceedings in a court of his own domicil, for a divorce, which court obtains jurisdiction over her only by a service of process in the State of her new domicil, through the mail, and that on such service he can obtain a judgment of divorce which shall be conclusive against her in her action in the court of her own domicil, seems to me to be at war with sound principle and the adjudged cases. The doctrine of status, even as announced in the opinion of the court, does not reach the case of a husband by his misconduct rendering it necessary for the wife to leave him. I therefore dissent.

I am authorized to state that the CHIEF JUSTICE concurs in this dissent.

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## BELL *v.* BELL.

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

No. 39. Argued April 25, 26, 1900. — Decided April 15, 1901.

A decree of divorce from the bond of matrimony, obtained in the State of Pennsylvania, in which neither party is domiciled, upon service by publication and in another State, is entitled to no faith and credit in that State.

A decree for a divorce and alimony may be affirmed *nunc pro tunc* in case of death of the husband after argument in this court.

THIS was an action brought December 22, 1894, in the Supreme Court for the county of Erie and State of New York, by Mary G. Bell against Frederick A. Bell, for a divorce from the bond of matrimony for his adultery at Buffalo in the county of Erie in April and May, 1890, and for alimony.

Statement of the Case.

The defendant appeared in the case, and pleaded a decree of divorce from the bond of matrimony, obtained by him January 8, 1895, in the court of common pleas for Jefferson County in the State of Pennsylvania, for her desertion.

The plaintiff replied, denying that the court in Pennsylvania had any jurisdiction to grant the decree; and alleging that no process in the suit there was ever served on her, and that neither she nor her husband ever was or became a resident or citizen of the State of Pennsylvania.

The present action was referred to a referee, who found the following facts: The parties were married at Bloomington in the State of Illinois on January 24, 1878, and thereafter lived together as husband and wife at Rochester, and afterwards at Buffalo, in the State of New York. In August, 1882, the plaintiff went to Bloomington on a visit to her mother. In her absence, the defendant packed up her wearing apparel and other property in trunks, and had them put in the stable, preparatory to sending them to her at Bloomington. In September, 1882, the plaintiff, accompanied by her mother, returned to the defendant's house, stayed there three or four days, and then left, with her mother, for Bloomington; and since then the plaintiff and defendant have not lived together, and she has always claimed her residence as being at Buffalo.

On January 8, 1895, the court of common pleas of Jefferson County in the State of Pennsylvania granted to the husband, on his petition filed April 9, 1894, alleging that he was and had been for a year a citizen of that State and a resident of that county, a decree of divorce from the bond of matrimony for her desertion, which, under the laws of Pennsylvania, was a ground for dissolving marriage. The subpœna in that action was not served upon the wife, but she was served by publication according to the laws of Pennsylvania, and she received through the mail a copy of the subpœna and of a notice of the examiner that he would attend to the duties of his appointment on December 14, 1894, at his office in Brookville in Jefferson County. She did not appear in person or by attorney, and judgment was rendered against her by default.

At the time of the beginning of that action, and of the ren-

dering of that decree, the wife was a resident of the State of New York, and the husband was not a *bona fide* resident of the State of Pennsylvania. On January 31, 1894, the husband and his sister presented a petition, upon oath, to the surrogate of Erie County for the probate of the will of their mother, in which he was described as residing at Buffalo in the county of Erie and State of New York. No evidence was offered to show that he actually changed his domicil from New York to Pennsylvania.

The referee also found the husband's adultery as alleged; and reported that the wife should have judgment for a divorce from the bond of matrimony, and for alimony in the sum of $3000 during her life, from the commencement of this action, payable quarterly, and for costs. The court confirmed his report, and rendered judgment accordingly for a divorce, alimony and costs. That judgment was affirmed by the general term, and by the Court of Appeals. 4 N. Y. App. Div. 527; 157 N. Y. 719.

The defendant sued out this writ of error, upon the ground that the judgment below did not give full faith and credit to the judgment in Pennsylvania, as required by the Constitution and laws of the United States.

After the argument of the case in this court, the defendant died; and the plaintiff moved that judgment be entered *nunc pro tunc.*

*Mr. Henry H. Seymour* for plaintiff in error.

*Mr. Charles B. Wheeler* for defendant in error.

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

The question in this case is of the validity of the divorce obtained by the husband in Pennsylvania. No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce

must have had a *bona fide* residence within the State for one year next before the filing of the petition. Penn. Stats. March 13, 1815, c. 109, § 11; May 8, 1854, c. 629, § 2; *Hollister* v. *Hollister*, 6 Penn. St. 449. The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. *Thompson* v. *Whitman*, 18 Wall. 457. The referee in this case has not only found generally that at the time of those proceedings the wife was a resident of the State of New York, and the husband was not a *bona fide* resident of Pennsylvania; but has also found that on January 31, 1894, some ten weeks before he filed his petition in Pennsylvania, he described himself, under oath, in a petition for the probate of a will in Erie County in the State of New York, as a resident of that county; and that no evidence was offered that he actually changed his domicil from New York to Pennsylvania. Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicil in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other State. *Leith* v. *Leith*, (1859) 39 N. H. 20; *People* v. *Dawell*, (1872) 25 Michigan, 247; *Sewall* v. *Sewall*, (1877) 122 Mass. 156; *Litowitch* v. *Litowitch*, (1878) 19 Kansas, 451; *Van Fossen* v. *State*, (1881) 37 Ohio State, 317; *Gregory* v. *Gregory*, (1886) 78 Maine, 187; *Dunham* v. *Dunham*, (1896) 162 Illinois, 589; *Thelen* v. *Thelen*, (1899) 75 Minnesota, 433; *Magowan* v. *Magowan*, (1899) 12 Dickinson, (57 N. J. Eq.) 322.

The death of the husband, since this case was argued, of itself terminates the marriage relation, and, if nothing more had been involved in the judgment below, would have abated the writ of error, because the whole subject of litigation would be at an end, and no power can dissolve a marriage which has already been dissolved by act of God. *Stanhope* v. *Stanhope*, (1886) 11 Prob. Div. 103, 111. But the judgment below, rendered after appearance and answer of the husband, is not only for a divorce, but for a large sum of alimony, and for costs. The wife's rights to such alimony and costs, though depending on the same grounds as the divorce, are not impaired by the husband's death, should not be affected by the delay in entering judgment here

while this court has held the case under advisement, and may be preserved by entering judgment *nunc pro tunc*, as of the day when it was argued. *Downer* v. *Howard*, (1878) 44 Wisconsin, 82; *Francis* v. *Francis*, (1879) 31 Grattan, 283; *Danforth* v. *Danforth*, (1884) 111 Illinois, 236; *Mitchell* v. *Overman*, (1880) 103 U. S. 62.

*Judgment affirmed nunc pro tunc, as of April* 26, 1900.

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## STREITWOLF *v.* STREITWOLF.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 109. Argued and submitted November 14, 15, 1900. — Decided April 15, 1901.

A decree of divorce from the bond of matrimony, obtained in the State of North Dakota, in which neither party is domiciled, upon service by publication and in another State, is entitled to no faith and credit in that State.

August Streitwolf and Elizabeth Streitwolf were married at New Brunswick in New Jersey on June 3, 1877, and lived there as husband and wife until August 3, 1896. On August 17, 1896, the wife filed against the husband in the Court of Chancery in the State of New Jersey a bill for divorce for his extreme cruelty, and for alimony; a subpœna returnable August 29, 1896, was served upon the husband personally in New Jersey; and in November, 1896, after a hearing, an order was made for the payment of alimony *pendente lite*.

On August 9, 1897, the husband filed against the wife in the district court of the Sixth Judicial District of the State of North Dakota a suit for a divorce from the bond of matrimony for her extreme cruelty and habitual intemperance; and caused to be personally served on her in New Jersey on August 17, 1897, a copy of the summons and complaint therein, directing her to

answer within thirty days after service of the summons upon her, or be defaulted.

On August 19, 1897, the husband filed in the suit in New Jersey an answer denying the allegations of the wife's bill, but saying nothing of the suit in North Dakota.

On September 7, 1897, the wife filed in the suit in New Jersey a petition, supported by affidavits, for an injunction against the suit in North Dakota, denying the husband's allegations in that suit, alleging that the domicil of both parties was still in New Jersey, and that his pretended residence in North Dakota was wholly fictitious and fraudulent, and intended only to give a colorable jurisdiction to the court of North Dakota for the purpose of the suit therein; and further alleging that the wife had not in anywise appeared in that suit, and that a decree against her in that suit would be a bar to her suit in New Jersey, and that the practical effect, and doubtless the object of the proceeding, would be to withdraw the adjudication and settlement of her marital rights from the court of New Jersey and transfer the same to the court of North Dakota. On September 8, 1897, a temporary injunction was issued accordingly, to continue until the husband should have fully answered the bill and until the further order of the court.

On October 7, 1897, the husband submitted to the judge of the court in North Dakota his own *ex parte* deposition, and the *ex parte* depositions of other witnesses taken in the city of New York on October 4, 1897; and obtained from that court a decree of divorce from the bond of matrimony for his wife's cruelty and habitual intemperance, which recited that "the plaintiff now is and for more than ninety days prior to the commencement of this action has been in good faith a resident of the State of North Dakota," and that "the court has full power and jurisdiction, both of the subject-matter of the action, and the parties plaintiff and defendant therein."

On January 11, 1898, the wife filed against the husband in the Court of Chancery of New Jersey a supplemental bill, repeating the allegations of her petition for an injunction, and alleging the granting of the injunction, and its service upon the husband's counsel in New Jersey and in North Dakota on the 13th and

15th of September, 1897, and that the decree in North Dakota was void for want of jurisdiction of the subject-matter and of the wife as a party, and was procured by fraud and in contempt of the Court of Chancery of New Jersey.

In April, 1898, the husband filed an answer to the supplemental bill, alleging that at and for more than ninety days preceding the commencement of his suit in North Dakota, he was a resident and citizen and domiciled in good faith in that State; setting forth §§ 2737, 2742, 2743, 2755–2757 of the Civil Code of North Dakota of 1895; and insisting that the decree in North Dakota was a valid judgment, rendered with full jurisdiction over the subject-matter and the parties, and was entitled to full faith and credit under the Constitution and laws of the United States.

The wife filed a general replication to the answer. The evidence tended to show, and the Court of Chancery of New Jersey found, the following facts:

In November, 1896, the husband sold out his business in New Brunswick, rented the building and furniture to the grantee of the business, and went to New York and boarded there for a while, and then went to Europe on a pleasure tour, and returned to New York in the following March, and remained there until May 5, 1897. In April, 1897, negotiations were going on between him and his wife for a settlement of their difficulties, which entirely failed before the 1st of May. About that time he became acquainted with a firm of lawyers, Hoggatt & Caruthers, who had an office in New York, and were attorneys engaged in the business of procuring divorces; and he talked with them, and found that they had an office and a representative in Mandan, North Dakota. Streitwolf had never been in Mandan, knew nobody there, and had no connections, directly or indirectly, with Mandan, or with anybody in North Dakota. On May 6, 1897, without informing anybody where he was going, or that he intended to change his residence, he left New York and went to Mandan; arrived there on Sunday morning, May 9, and in the afternoon of the same day was introduced by a travelling companion to one Voss, who represented Hoggatt & Caruthers in Mandan. He took board at a boarding-house, stayed

there a few weeks, and then went to the Yellowstone Park. He wrote to nobody that he was at Mandan, dated no letters there, and gave no notice to anybody of his residence there. But while in the Yellowstone Park he wrote to his son that he was taking a trip through that country. In July he came back to New York, and was there a week or more; and sought and obtained an interview with his son, who was then living with his mother in Jersey City and working in New York city; and in that interview stated that he was going to Germany to get a legacy that had been left to him, and invited his son to go with him, and his son promised to give him an answer on the evening of July 30. The son went to the rendezvous on that evening, and his father was not there. About that time Streitwolf went to Mandan, and neither his son nor any other person, as far as appears, had the slightest idea that he had been away from home with a view to changing his residence, or adopting a new home. He arrived at Mandan in August, and on August 9, three days from his arrival, commenced his suit against his wife for divorce, and took measures to have the papers served upon her in New Jersey.

The court held that the husband had no *bona fide* domicil in North Dakota, that the judgment there was obtained by fraud and imposition on the court, and that the court there had no jurisdiction; and issued a perpetual injunction against setting up that judgment.

The decree was affirmed by the Court of Errors and Appeals of the State of New Jersey. 13 Dickinson (58 N. J. Eq.) 563. The husband sued out this writ of error.

*Mr. Alan H. Strong* for defendant in error.

*Mr. Willard P. Voorhees* and *Mr. Robert Adrain* for plaintiff in error, submitted on their brief.

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

This case must follow *Bell* v. *Bell*, *ante*, 175. The law of

Statement of the Case.

North Dakota requires a domicil in good faith of the libellant for ninety days as a prerequisite to jurisdiction of a case of divorce. *Smith* v. *Smith*, 7 North Dakota, 404, 413. The facts in evidence warranted, and indeed required, the finding that the husband had no *bona fide* domicil in the State of North Dakota, when he obtained a divorce there, and it is not pretended that the wife had an independent domicil in North Dakota, or was ever in that State. The court of that State, therefore, had no jurisdiction.

*Judgment affirmed.*

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## LYNDE *v.* LYNDE.

## LYNDE *v.* LYNDE.

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

Nos. 305, 369. Submitted November 5, 1900.—Decided April 15, 1901.

A decree of the highest court of a State, giving full faith and credit to a decree in another State for alimony, cannot be reviewed by this court on writ of error sued out by the defendant.

The refusal of the highest court of a State to give effect to so much of a decree in another State, as awards alimony in the future, and requires a bond, sequestration, a receiver and injunction, to secure payment of past and future alimony, presents no Federal question for the review of this court.

This was an action brought May 26, 1898, in the Supreme Court for the county and State of New York, on a decree of the Court of Chancery of New Jersey of December 28, 1897, by which it was ordered that the plaintiff was entitled to recover of the defendant the sum of $7840 for alimony at the rate of $80 per week from February 11, 1896, to the date of the decree, and the further sum of $80 per week permanent alimony from the date of the decree, the said weekly payments to be valid liens on the defendant's real estate; that the defendant give bond to the plaintiff in the sum of $10,000 to secure the

payment of the sums of money directed to be paid; and to pay costs, taxed at $136.07, and a counsel fee of $1000; and that on his default to pay any of the "foregoing sums of money" or to give bond, application might be made for the issue of a writ of sequestration against him, or for an order appointing a receiver of his property, and enjoining his transfer thereof. The record showed the following material facts:

On November 18, 1892, the plaintiff in this action filed her bill for a divorce in the Court of Chancery of New Jersey, setting forth her marriage with the present defendant on March 25, 1884, in New Jersey, where she has since resided; and praying for a divorce from the bond of matrimony for desertion for two years, and for reasonable alimony. The defendant was not served with process other than by publication, and did not appear or answer the bill. On August 7, 1893, a decree of divorce was entered, not mentioning alimony.

On February 10, 1896, the plaintiff, alleging that this decree was incomplete through the neglect of her counsel, filed a petition in that court, praying for an opening and amendment of the decree by allowing reasonable alimony. Upon this petition, a rule to show cause was entered, and it was ordered that copies of the petition and affidavits accompanying it be served on the defendant.

In answer to the rule, the defendant appeared generally, and filed an affidavit, declaring that he was a resident of New York, "that this defendant was by the decree of this court divorced from said petitioner" on August 7, 1893, "and since that time has been married again to another woman," "that the decree for divorce in said cause was purposely drawn without providing for or reserving any alimony;" and "that he is financially unable to pay alimony."

On October 26, 1896, the Court of Chancery of New Jersey amended the decree of August 7, 1893, by ordering that the petitioner "have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and for such other relief in the premises touching alimony as may be equitable and just; and this court reserves the power to make such order or decree as may be necessary to allow and

compel the payment of alimony to the petitioner by defendant, or to refuse to allow alimony." 6 Dickinson (54 N. J. Eq.) 473. On appeal this order was affirmed by the New Jersey Court of Errors and Appeals. 10 Dickinson (55 N. J. Eq.) 591. Thereupon an order of reference, based on all prior proceedings, and on notice to the solicitor for the defendant, was made by the Court of Chancery to a master to find the amount of alimony, if any, due to the plaintiff. Neither the defendant nor his solicitor appeared at the hearing before the master; and on December 28, 1897, the Court of Chancery, confirming the master's report, made the decree now sued on.

That court, on its being made to appear that a certified copy of this decree was personally served on the defendant, and that he refused to comply with said decree, ordered that a receiver be appointed to take possession of all the defendant's real and personal property in New Jersey to apply it to the payment of the plaintiff's claim. The receiver, however, was "unable to obtain possession of any property or assets of said defendant in the State of New Jersey;" nor had the defendant "complied with said decree in any respect."

The Supreme Court of New York decreed that the plaintiff was "entitled to a judgment against the defendant, enforcing against said defendant the decree of the Court of Chancery of New Jersey, dated December 28, 1897," and the order appointing a receiver, and enjoining the defendant from transferring his property; also that the plaintiff was entitled to judgment that the defendant pay her $8976.07, "being alimony, counsel fee and costs, due under said decree," and interest thereon from its date; also the "sum of $4400, being the amount of weekly alimony which has accrued since said decree in accordance with the terms thereof," and interest thereon; also $80 a week from the date of this decision "as and for permanent alimony," bearing interest until paid; that he give bond "in the sum of $100,000 to secure payment of the several sums of money aforesaid;" and that, if the defendant fail to comply with this decision, "a receiver be appointed, ancillary to the receiver heretofore appointed by the Court of Chancery of New Jersey

as aforesaid, of the real and personal property of the defendant within the State of New York."

On appeal by the defendant to the Appellate Division, the decree was modified so as to allow the plaintiff to recover only $8840 alimony, the amount declared by the New Jersey court as due and payable at the date of its decree. Thus modified, the judgment of the Supreme Court was affirmed. 41 N. Y. App. Div. 280.

From the judgment of the Appellate Division both parties appealed to the Court of Appeals, which affirmed the judgment of the Appellate Division. 162 N. Y. 405. Each party sued out a writ of error from this court.

*Mr. George S. Ingraham* for Charles W. Lynde.

*Mr. James Westervelt* and *Mr. Matthew C. Fleming* for Mary W. Lynde.

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

The husband, as the record shows, having appeared generally in answer to the petition for alimony in the Court of Chancery in New Jersey, the decree of that court for alimony was binding upon him. *Laing* v. *Rigney*, 160 U. S. 531. The court of New York having so ruled, thereby deciding in favor of the full faith and credit claimed for that decree under the Constitution and laws of the United States, its judgment on that question cannot be reviewed by this court on writ of error. *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Missouri* v. *Andriano*, 138 U. S. 496. The husband having appeared and been heard in the proceeding for alimony, there is no color for his present contention that he was deprived of his property without due process of law. Nor does he appear to have made any such contention in the courts of the State. His writ of error, therefore, must be dismissed.

By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of an-

other State that it has in the State where it was rendered, it was long ago declared by this court: "The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle* v. *Cohen*, 13 Pet. 312, 325; *Thompson* v. *Whitman*, 18 Wall. 457, 463; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292; *Bullock* v. *Bullock*, 6 Dickinson (51 N. J. Eq.) 444, and 7 Dickinson (52 N. J. Eq.) 561.

The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of $7840 for alimony already due, and $1000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of $80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

The decree for the payment of $8840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the State, and involved no Federal question.

On the writ of error of the wife, therefore,

*The judgment is affirmed.*

# BRYAN *v.* BERNHEIMER.

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

No. 58. Submitted October 31, 1900.—Decided April 15, 1901.

A bankrupt, nine days before the filing of a petition in bankruptcy against him, made a general assignment for the benefit of his creditors which was an act of bankruptcy. After the filing of the petition in bankruptcy, the assignee sold the property. After the adjudication in bankruptcy, and before the appointment of a trustee, the petitioning creditors applied to the District Court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The court ordered that the marshal take possession, and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or, failing to do so, be decreed to have no right in it. The purchaser came in, and propounded a claim, stating that he bought the property for cash in good faith of the assignee, submitted his claim to the court, asked for such orders as might be necessary for his protection, and prayed that the creditors be remitted to their claim against the assignee for the price, or the price be ordered to be paid by the assignee into court and paid over to the purchaser, who thereupon offered to rescind the purchase and waive all further claim to the property. *Held*, that the purchaser had no title in the property superior to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court, bringing in the assignee if necessary.

This was a summary petition to the District Court of the United States for the Middle District of Alabama, sitting in bankruptcy, for an order to Bryan, the marshal of the District, to take immediate possession of property of David Abraham, a bankrupt, in the hands of Louis Bernheimer. The material facts, as appearing by the record, were as follows:

On October 29, 1898, Abraham made a general assignment of all his property, consisting of his stock of goods and book accounts, in a storehouse numbered 106 Dexter Avenue in Montgomery, Alabama, for the equal benefit of all his creditors, to one H. C. Davidson, who had the assignment recorded, and caused to be filed an inventory, and an appraisement of the

property at the sum of $7900, in a court of Alabama, according to the laws of the State, (Civil Code of Alabama of 1896, c. 113,) and forthwith took possession of the property.

On November 7, 1898, certain creditors of Abraham filed in the District Court of the United States, sitting in bankruptcy, a petition alleging that said assignment was an act of bankruptcy, and praying that he might be adjudged a bankrupt.

On December 12, 1898, Abraham, after due notice to him, was adjudged a bankrupt. On the same day, the petitioning creditors presented to the District Court a petition, alleging the assignment to Davidson, and the adjudication in bankruptcy, and that upon the filing of the petition for that adjudication the court obtained jurisdiction over Abraham's estate, and it was the duty of Davidson, as his assignee, to hold all his property subject to the orders of the court; but that Davidson, disregarding the authority and jurisdiction of the court, had sold and disposed of the property at much less than the aforesaid appraisement, and the purchasers had been in possession of the property for several days, selling and disposing thereof at retail and at bankrupt prices; and that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged, and their dividends out of the estate greatly lessened; and praying for an order to the marshal of the District to take possession of, and to hold until further order of the court, all the property owned by Abraham at the time of his assignment to Davidson, wherever the same might be found, and all property sold by Davidson to Louis Bernheimer or to any one else, and being in the storehouse numbered 106 Dexter Avenue in Montgomery, and to hold it until the further order of the court. On the filing of this petition, the District Court made the order therein prayed for, reciting "it further appearing from said petition that it is necessary to the interest of the creditors of the said Abraham that this court take possession of all the property and effects of said Abraham." And on the same day the marshal, pursuant to that order, seized the stock of goods in Bernheimer's possession.

On December 13, 1898, the District Court, on a petition of

the marshal for instructions concerning the goods seized by him, ordered that notice be given to Bernheimer to appear in ten days, and to propound any claim that he had to the goods so seized, or, on failing to do so, be decreed to have no claim or right to them; and directed the marshal to retain possession of the goods until the further order of the court.

On December 17, 1898, the petitioning creditors presented another petition to the District Court, further alleging that on or about November 17, 1898, after the filing of the petition in bankruptcy against Abraham, and in disregard of the proceedings thereon pending, Davidson turned over and delivered to Bernheimer the whole stock of goods, then worth about $10,000, and Bernheimer, with knowledge of the pending proceedings in bankruptcy, took possession of the goods, sold large quantities thereof, and received large sums of money therefor, before the rest was taken by order of the court into the hands of the marshal; and praying for an order that Bernheimer file with the referee in bankruptcy an account of the moneys so received by him.

On December 22, 1898, Bernheimer, in obedience to the order of December 13, came into the District Court, and propounded a claim to the stock of goods. The claim stated the assignment to Davidson, and the petition for an adjudication of bankruptcy, and that the petitioning creditors afterwards filed a petition in the court of bankruptcy, praying that Davidson be required to appear and show cause why he should not be restrained from selling the goods so assigned to him; that, in obedience to a rule issued on that petition, Davidson appeared and showed cause satisfactory to the court; and that the court, on the ground that the petition was not sworn to, nor any bond given, discharged the rule against him, declined to grant the restraining order, and dismissed the petition without prejudice. The claim further stated that Davidson thereupon proceeded to sell the goods by public auction, and the claimant, acting in good faith and under the advice of counsel, bought the goods from Davidson at the sale by public auction for the sum of $3500, which was a fair and reasonable price, and paid the price, in cash to Davidson, and took and kept possession of the goods

until deprived thereof by the marshal; that the claimant never intended to interfere in any way with the process of the court, or with any property of the bankrupt; that if he was deprived of these goods, and Davidson was allowed to keep the money paid him by the claimant as their price, the claimant's position would be one of great hardship and loss; that Davidson, under the terms of the assignment to him, would be compelled to pay that money to Abraham's creditors, and the goods purchased in good faith by the claimant would also be held and sold again for the benefit of those creditors. Bernheimer's claim concluded as follows: "Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises, and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also that, in default of such order, or if he is mistaken in the relief prayed for, your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant, as purchase money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods."

On December 24, Bernheimer, in answer to the petition of December 17, filed an account as therein requested, showing that he had received, from sales of the goods, sums amounting to $2768.40; that at the time of his purchase from Davidson he also bought the exemptions allowed to the bankrupt under the laws of Alabama and the Bankrupt Act of 1898, amounting to the sum of $1,000; and that, deducting that sum and necessary expenses, he had a net balance in his hands of $1434.80.

On the same 24th of December, the petitioning creditors demurred to the claim of Bernheimer, because it showed no title in Bernheimer good as against their rights; because the alleged sale by Davidson to Bernheimer was made with knowledge by both of the filing of the petition in bankruptcy, and after the court of bankruptcy had acquired jurisdiction of the property; because the deed of assignment to Davidson was an act of bank-

ruptcy, void as against the petitioning creditors; and because Bernheimer asked the court to settle and decide questions between him and Davidson which it had no jurisdiction to try and determine.

On the same day, the District Court sustained the demurrer; and, Bernheimer declining to plead further, adjudged and decreed "that the said Louis Bernheimer acquired no title to the said goods, or to the proceeds of the sales thereof made by him, under the purchase of said goods from H. C. Davidson as assignee of said bankrupt, superior to the title of said bankrupt estate;" and that Bernheimer pay over to the marshal, to await the further order of the court, all the proceeds, to be ascertained by a referee in bankruptcy, of the sales made by him of those goods.

Bernheimer appealed to the Circuit Court of Appeals, which, considering the case as if before it on a petition for revision of the decree of the District Court, reversed that decree; and ordered the cause to be remanded to that court, with instructions to dismiss the petition against Bernheimer, to vacate all orders made thereon, and to restore to him the goods taken from his possession; and further ordered that all costs, counsel fees, expenses and damages, occasioned to him by the marshal's seizure and detention of the property, be fixed and allowed by the court of bankruptcy, and paid by the petitioning creditors. 93 Fed. Rep. 767; 35 C. C. A. 592.

The marshal, in behalf of the petitioning creditors, thereupon obtained a writ of certiorari from this court. 175 U. S. 724.

*Mr. John D. Rouse*, *Mr. Gustave F. Mertins* and *Mr. William Grant* for petitioner.

*Mr. Robert E. Steiner*, *Mr. Thomas H. Clark* and *Mr. Gordon McDonald*, opposing.

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

The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made

him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent. Bankrupt Act of July 1, 1898, c. 541, § 3; *West Co.* v. *Lea*, 174 U. S. 590.

Nine days after this assignment, certain creditors of Abraham filed a petition in the District Court of the United States to have him adjudged a bankrupt, alleging this assignment as an act of bankruptcy. After the filing of that petition, Davidson sold the property to Bernheimer, and the District Court, after the adjudication of bankruptcy, and on petition of the same creditors, alleging that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged, and their dividends out of the estate greatly lessened, and praying for an order to the marshal to take possession of the property, ordered the marshal to do so; and on his petition for instructions as to the property so seized, ordered notice to Bernheimer to appear in ten days, and to propound any claim that he had to the property, or, on failing to do so, be decreed to have no right to it. In obedience to that order, Bernheimer came into court, and propounded a claim to the property under the sale by Davidson to him, alleging that if he was deprived of it, and Davidson was allowed also to keep the price paid, his position would be one of great hardship; submitting his claim to the court, and asking it to make such orders as might be necessary for his protection; and praying that the creditors be remitted to their claim against Davidson for such price, or, if the claimant was mistaken in the relief he prayed for, for an order that such price be paid by Davidson into court and paid over to the claimant, who thereupon offered to rescind the purchase and to waive all further claim to the property.

The District Court sustained a demurrer of the petitioning creditors to this claim, and decreed that Bernheimer had no title superior to the title of the bankrupt estate. On his appeal from that decree, the Circuit Court of Appeals reversed it, and ordered the property to be restored to him, with costs, counsel fees, expenses and damages, occasioned to him by the seizure.

The marshal, in behalf of the petitioning creditors, thereupon obtained this writ of certiorari.

The case, as the opinion of the Circuit Court of Appeals states, presents this question: "Did the District Court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods, and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him, to appear before that court within ten days and propound any claim he had to the goods, or any part thereof; or, failing therein, that he be decreed to have no claim or right thereto?"

The Bankrupt Act of 1898, § 2, invests the courts of bankruptcy "with such jurisdiction, at law and in equity, as to enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms;" to make adjudications of bankruptcy; and, among other things "(3) appoint receivers or the marshals, upon application of the parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The exception refers to the provisions of section 23, by virtue of which, as adjudged at the last term of this court, the District Court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Mitchell* v. *McClure*, 178 U. S. 539; *Hicks* v. *Knost*, 178 U. S. 541.

The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself.

Opinion of the Court.

Nor is it a petition under § 3*e* or § 69 of the Bankrupt Act of 1898, each of which relates to applications to take charge of and hold property of a bankrupt after the petition and before the adjudication in bankruptcy. The provisions of those sections, requiring the applicants to give bond for damages, have no application to a case where there has been an adjudication of bankruptcy, and the property thereby brought within the jurisdiction of the court of bankruptcy.

But it is a petition filed after an adjudication of bankruptcy and before the appointment of a trustee; and must rest on the authority given to the court of bankruptcy, by clause 3 of section 2, to "appoint receivers or the marshals, upon application of parties in interest, in case the courts will find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Does this include property of the bankrupt in the hands of third persons?

The Bankrupt Act of March 2, 1867, c. 176, § 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of his property, the court might issue a warrant to the marshal commanding him "forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court." 14 Stat. 536; Rev. Stat. § 5024. It was held by the Court of Appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. *Doyle* v. *Sharpe*, 74 N. Y. 154. But that decision was overruled by this court, and Mr. Justice Miller in delivering its opinion said:

"The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee, a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed

beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secret his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it." *Sharpe* v. *Doyle*, 102 U. S. 686, 689, 690. A like decision was made in *Feibelman* v. *Packard*, 109 U. S. 421.

These considerations are equally applicable to an application, after the adjudication in bankruptcy and before the qualification of a trustee, for an appointment of the marshal, under clause 3 of section 2 of the Bankrupt Act of 1898, to take charge of "the property" of the bankrupt "after the filing of the petition and until it is dismissed or the trustee qualified." It is true that under this provision the appointment is only to be made "in case the courts shall find it absolutely necessary for

the preservation of the estates." But that condition of things is shown, in the present case, by the allegation of the application, and the finding of the court of bankruptcy, that it was necessary to the interest of the creditors of the bankrupt to take immediate possession of his property.

In the opinion in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 538, it was indeed said: "The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him." But the remark, "can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant," was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment.

Moreover, the consent of the proposed defendant, Bernheimer, to this mode of proceeding is shown by the terms of his claim, in which, not protesting against the jurisdiction of the court of bankruptcy, he expressly submitted his claim to that court, and asked for such orders as might be necessary for his protection.

Considering that the property was not held by Davidson under any claim of right in himself, but under a general assignment which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; and that Bernheimer consented to the form of proceeding; we are of opinion that Bernheimer had no title superior to the title of the bankrupt's estate; that the District Court, as a court of bankruptcy, was authorized so to decide in this proceeding; and that the decree of the Circuit Court of Appeals, directing the goods to be restored to Bernheimer, must be reversed.

The question remains what further order should be made. It is manifestly inequitable that Bernheimer should lose both the goods themselves and the price which he had paid to Davidson for them. His equities in that respect, and the rightful claim of the bankrupt's creditors against him, may depend upon many circumstances, and can be best settled in the District Court, which has authority, under clause 6 of section 2 of the Bankrupt Act of 1898, to bring in Davidson if necessary for the complete determination of the matter.

*Judgment of the Circuit Court of Appeals reversed, and case remanded to District Court for further proceedings in conformity with this opinion.*

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## RASMUSSEN *v.* IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 215. Submitted March 18, 1900.—Decided April 22, 1901.

The provision in the statute of March 13, 1899, of Idaho that "whenever the governor of the State of Idaho has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other State or Territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit the importation from them of any sheep into the State, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper," does not conflict with the Constitution of the United States.

This case distinguished from *Railroad Company* v. *Husen*, 95 U. S. 465.

On March 13, 1899, the legislature of Idaho passed an act, the first section of which contains the following:

"Whenever the governor of the State of Idaho has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other State or Territory or that conditions exist that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the State, except under such restrictions as, after

consultation with the state sheep inspector, he may deem proper." Session Laws, Idaho, 1899, p. 452.

Subsequent provisions of the statute prescribed penalties for its violation. On April 12, 1899, the Governor of Idaho issued the following proclamation:

"PROCLAMATION.

"*Scheduling certain Localities on Account of Scab or Scabbies.*

"STATE OF IDAHO, EXECUTIVE OFFICE.

"Whereas, I have received statements from reliable wool growers and stock raisers of the State of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities or districts, viz., in the county of Cache, State of Utah; the county of Box Elder, in the State of Utah; and the county of Elko, in the State of Nevada; and,

"Whereas, it is known that sheep from said districts are annually moved, driven or imported into the State of Idaho, and if so moved would thereby spread infection and disease on the ranges and among the sheep of this State, which act would result in great disaster:

"Now, therefore, I, Frank Steunenberg, governor of the State of Idaho, by virtue of authority in me vested, and after due consultation with the state sheep inspector, do hereby prohibit the importation, driving or moving into the State of Idaho of all sheep now being held, herded or ranged within said infected districts, viz., the county of Cache, in the State of Utah; the county of Box Elder, in the State of Utah, and the county of Elko, in the State of Nevada, or which may hereafter be held, herded or ranged within said infected districts, for a period of sixty days from and after the date of this proclamation; after the termination of said sixty days sheep can be moved into this State only upon compliance with the laws of the State of Idaho regarding the inspection and dipping of sheep."

Under this statute and the accompanying proclamation the plaintiff in error was arrested, tried and convicted in the District Court of the Fifth Judicial District sitting in and for the

county of Oneida, State of Idaho. His conviction was sustained by the Supreme Court of the State, 59 Pac. Rep. 933, and to reverse such judgment of conviction this writ of error was sued out.

*Mr. Arthur Brown* and *Mr. Henry P. Henderson* for plaintiff in error.

*Mr. Samuel H. Hays* and *Mr. Frank Martin* for defendant in error.

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

The judgment of the Supreme Court of Idaho establishes that there is no conflict between this legislation and the constitution of the State, and it is not within the province of this court to review that question. *Merchants' &c. Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited in the opinion.

The single question, therefore, for our consideration is whether this legislation conflicts with the Federal Constitution. Plaintiff in error relies largely on *Railroad Company* v. *Husen*, 95 U. S. 465. In that case the validity of an act of the State of Missouri was presented. The act provided that "no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the first day of March and the first day of November in each year by any person or persons whatsoever." It was held to be in conflict with the constitutional grant of power to Congress to regulate commerce between the States. In the opinion the police power of the State, the power by which the State prevents the introduction into its midst of noxious articles, was fully recognized, but attention was called to the fact that there was an absolute prohibition of the bringing in of Texas, Mexican or Indian cattle during eight months of the year, without reference to the actual condition of the cattle, and it was said:

"Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural

persons and to all transportation companies, 'you shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December (November) 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not. . . . Such a statute, we do not doubt, is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure." p. 473.

It will be perceived that the act was an absolute prohibition operative during eight months of each year. It was an act continuous in its force; provided for no inspection, and was predicated on the assumption that the State had the right to exclude for two thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.

In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the state sheep inspector, to be necessary. The executive acted on the authority thus conferred, and, after consultation with the state sheep inspector and examination of the matter, found that the scab was epidemic in certain localities in Utah and Nevada, and that if sheep from those localities were moved therefrom into Idaho they would spread infection and disease among the sheep of the State, and thereupon forbade the introduction of sheep from such localities for the space of sixty days. It will be perceived that this is not a continuous act, operating year after year irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the State before any order of restraint is issued. Whether such restraint shall be total or limited, and for what length of time, are matters to be determined by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act

of the State of Idaho contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and providing for only such restraints upon the introduction of sheep from other States as in the judgment of the State was absolutely necessary to prevent the spread of disease. The act, therefore, is very different from the one presented in *Railroad Co.* v. *Husen*, *supra*, and is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor. There being no other Federal question in the case the judgment of the Supreme Court of Idaho is

*Affirmed.*

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## SCOTT *v.* DEWEESE.

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

No. 148. Argued January 24, 25, 1901.—Decided April 15, 1901.

Section 5142 of the Revised Statutes of the United States, providing for the increase of the capital stock of a national bank, and declaring that no increase of capital stock shall be valid until the whole amount of the increase is paid in, and until the Comptroller of the Currency shall certify that the amount of the proposed increase has been duly paid in as part of the capital of such association, does not make *void* a subscription or certificate of stock based upon capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank; certainly, the statute should not be so applied in behalf of a person sought to be made liable as shareholder, when, as in the present case, he held, at the time the bank suspended and was put into the hands of a receiver, a certificate of the shares subscribed for by him; enjoyed, by receiving and retaining dividends, the rights of a shareholder; and appeared as a shareholder upon the books of the bank, which were open to inspection, as of right, by creditors.

As between the bank and the defendant, the latter having paid the amount of his subscription for shares in the proposed increase of capital was entitled to all the rights of a shareholder, and therefore, as between himself and the creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him.

That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the

whole amount of the proposed increase of capital had been paid in, was a matter between it and the Government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a shareholder, who became such by paying into the bank the amount subscribed by him, from the individual liability imposed by section 5151.

Upon the failure of a national bank the rights of creditors attach under section 5151, and a shareholder who was such when the failure occurred cannot escape the individual liability prescribed by that section upon the ground that the bank issued a certificate of stock before, strictly speaking, it had authority to do so.

If a subscriber to the stock of a national bank becomes a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position.

THE case is stated in the opinion of the court.

*Mr. Hiram F. Stevens* for plaintiff in error. *Mr. C. N. Sterry*, *Mr. Eugene Hagen* and *Mr. I. E. Lambert* by leave of court filed a brief on that side.

*Mr. William S. Shirk* for defendant in error.

MR. JUSTICE HARLAN, delivered the opinion of the court.

This case went off in the Circuit Court upon a motion for a judgment in favor of the plaintiff upon the pleadings. The motion was sustained and judgment was entered in accordance with the prayer of the petition. That judgment was affirmed in the Circuit Court of Appeals, Judge Sanborn dissenting. 89 Fed. Rep. 843, 856; 60 U. S. App. 720, 743. The case is here upon writ of error sued out by the defendant Scott.

The case made by the petition is substantially as follows:

The First National Bank of Sedalia, Missouri, was organized on the 30th of October, 1865, with a capital stock of $100,000 and thereafter, until the 24th day of October, 1885, continued to do a banking business.

On the day last named the bank, pursuant to the provisions of

the act of Congress approved July 12, 1882, 22 Stat. 162, c. 290, extended the period of its succession for a term of twenty years from and after the 30th of October, 1885; and on the 24th of October, 1885, the Comptroller of the Currency issued his certificate stating that the bank had complied with the provisions of the act of Congress in thus extending the period of its existence, and was authorized to have succession until the close of business on the 30th of October, 1905.

On the 6th of September, 1890, the bank increased its capital stock in the sum of $150,000; and on the 17th of January, 1891, the Comptroller of the Currency certified that it had increased its stock to the above extent in accordance with the provisions of the act of May 1, 1886, 24 Stat. 18, c. 73, and that such increase was approved; also, that the increase had been duly paid in as part of the capital stock of the company.

The bank continued to do a banking business upon the basis of a capital stock of $250,000 until the 4th day of May, 1894, on which day it became insolvent, closed its doors, and ceased to do business.

On the 10th of May, 1894, the original plaintiff, W. A. Latimer, was duty appointed receiver of the bank by the Comptroller of the Currency under the laws relating to national banking associations. The defendant in error Deweese was after that date substituted in his place as receiver.

In winding up and settling the affairs of the bank the Comptroller of the Currency determined that it was necessary to enforce the individual liability of stockholders and to collect from them an amount equal to 75 per cent of their stock at par value; and on the 13th day of April, 1895, that officer made an assessment and requisition upon shareholders for the sum of $187,500, to be paid by them ratably on or before the 15th day of May, 1895, and made demand upon the defendant Scott for $75 upon every share of the capital stock of the bank held or owned by him at the time of the failure of the bank as above stated, payable on or before the 15th day of May, 1895. The receiver was directed to enforce against shareholders the payment of the amounts assessed against them.

At the time of the failure and suspension of the bank the de-

fendant Scott was the owner and holder of fifty shares of its capital stock of the par value of $100 each. The amount ratably due by him as such shareholder under the above assessment was $3750.

On the 17th day of April, 1895, the receiver of the bank notified the defendant of the assessment and requisition and demanded payment of the same; but he did not pay that sum or any part thereof. Hence this action.

Judgment was asked for the sum of $3750, with interest from May 15, 1895, as well as for costs of suit.

The defendant in his answer admitted the organization of the bank and the extension of the period of its incorporation as alleged; also that the bank continued to do a banking business as set out in the petition, and that it had become insolvent and closed its doors. He also admitted the appointment and qualification of the receiver and the allegations of the petition as to the order of the Comptroller of the Currency.

Further answering, he alleged, that on September 6, 1890, the bank by a vote of the owners of two thirds of its capital stock, voted to increase that stock in the sum of $150,000; that it notified the Comptroller that the whole amount of such increase had been paid in; that on January 17, 1891, that officer—then knowing that more than the entire capital of the bank was loaned, directly and indirectly, to its president, and that the amount so loaned had been steadily increased for several years up to the date just named by adding the interest which was not paid to the notes evidencing the loans or the renewals thereof, and who based his action wholly upon the notification from the bank—issued a certificate stating that the amount of the increase of capital was $150,000, that the same was paid in, and that such increase was approved; that thereafter, until May 24, 1894, the bank continued to do business with a pretended capital of $250,000;

That "in September, 1890, the officers of said bank informed and represented to defendant as follows: That said bank contemplated increasing its capital stock from one hundred thousand dollars to two hundred and fifty thousand dollars; that said intended increase of capital was made desirable on account

of the increasing business of said bank; that said bank was in a flourishing condition and earning large dividends upon its capital stock, and then had a surplus of fifty thousand dollars over and above its capital stock and all liabilities; that from said surplus such dividends would be declared as would make each of the two thousand five hundred shares of stock worth the sum of one hundred and eight dollars;"

That relying upon such representations the defendant—never having held or owned any stock in the bank—subscribed for fifty shares of the proposed increase of $150,000, and in October, 1890, deposited in the bank the sum of $5400;

That it was the understanding between the defendant and the bank that that sum was to be held by it and applied in payment of defendant's subscription for fifty shares, when all of the proposed increase was subscribed and the money therefor paid into the bank, "and the issues of the shares of said increase could be legally made;"

That the bank gave to the defendant a receipt for said sum of $5400, and about October 25, 1890, delivered to him a certificate for fifty shares of "its said pretended increase of capital;" and,

That the "bank then, falsely and fraudulently and with intent to deceive defendant, represented to defendant that the said increase of capital had been lawfully made, and that the full amount thereof had been subscribed for and paid in in full, and defendant, deceived by said representations, and relying thereon, accepted and retained said certificate, and that defendant held and claimed as owner said certificate thereafter and until the closing of said bank, and in the years 1891 and 1892 received and retained alleged dividends aggregating eighteen per cent of the par value of said certificate; that said alleged dividends were paid out of the money paid as aforesaid by defendant to said bank."

The defendant further alleged that in September, 1890, and for many months prior thereto and afterwards, the bank was in fact wholly insolvent, had no surplus whatever, and at the time of the increase of the stock all of its capital had been lost —its liabilities irrespective of its capital stock and alleged sur-

plus exceeding its assets—and it was earning no dividends upon its capital;

That said pretended increase of stock was never of any value or validity whatever; that only about *two thirds of the increased stock was ever paid;* that the officers of the bank made false entries in its books and records for the purpose of showing an apparent surplus, and declaring a dividend to themselves therefrom, turning the dividends into the bank in pretended payment for a large part of the increased stock;

That the whole transaction was a sham for the purpose of bolstering up an insolvent institution by obtaining large sums of money from the subscribers for the increased stock, and for the further purpose of "watering" its capital stock and permitting its officers to appropriate to themselves, without paying anything therefor, a large part of such pretended increase, of all of which defendant had no knowledge whatever until long after the bank had closed its doors on May 4, 1894, nor had defendant any information whatever that could in any way have created a suspicion thereof;

That the books and records of the bank during all the time after October 25, 1890, had shown, and it had been made by them to appear, that all of the pretended increase of capital was paid in; and that from a time prior to the last-named date until the bank closed its books and records were systematically, skilfully and cunningly falsified by its officers, and so kept that the defendant could not by the utmost diligence have ascertained the true condition of the bank; and,

That as soon as he discovered that the increased stock was not fully paid in, defendant disclaimed and denied that he was or ever had been a stockholder of the bank.

Such being the case made by the pleadings, we are to inquire whether there was error in giving judgment against the defendant.

By section 5151 of the Revised Statutes, "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."

Within the meaning of that section, was the defendant, in view of the facts stated in the pleadings, to be deemed a shareholder of the bank when it suspended and was put into the hands of a receiver?

The defendant admits in his answer that he held, and for three years and more previous to that date had held, a certificate for fifty shares of the bank's stock, and exercised the rights of a shareholder by receiving dividends for the years 1891 and 1892 aggregating eighteen per cent of the par value of the stock standing in his name on the book of the association. He thus enjoyed the privileges of a shareholder.

The defendant, however, contends that although he may have exercised the rights of a shareholder in holding a certificate of shares and in receiving and retaining dividends, he was not a shareholder within the meaning of section 5151 so as to become individually liable, to the extent prescribed by that section, for the contracts, debts and engagements of the bank.

That position is supposed to be justified by section 5142 of the Revised Statutes declaring that "any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association." That section was modified, in some respects, by the act of May 1, 1886, c. 73, which provided "that any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwith-

standing the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided." Under this last statute the bank proceeded when by the vote of two thirds of its shareholders it determined to increase its stock by $150,000. 24 Stat. 18, § 1.

The defendant lays great stress on the words in section 5142, "no increase of capital shall be valid until the whole amount of such increase is paid in," and until the Comptroller shall certify that the amount of the proposed increase "has been duly paid in as part of the capital of such association." But does it follow that one who claimed to be a shareholder in respect of an increase of the bank's capital, and who was recognized as such by the bank, particularly if he held a formal certificate stating that he was a shareholder, can escape liability, under section 5151, by simply proving—after the bank has suspended and has been placed into the hands of a receiver—that the *whole* amount of the proposed increase was not in fact "paid in" as required by section 5142, although the contrary was certified by the Comptroller upon the bank's report to that officer? We think not.

The literal construction insisted upon by the defendant might produce results which we cannot suppose were ever contemplated by Congress. Referring to that construction the court below well said: "If this contention is well founded, then, as already said, it follows that if all the shares but one had been subscribed and paid for, nevertheless the holders of the certificates for the full-paid shares could not be heard to assert that they were the owners of valid shares, which would be a most unjust result. If this is the true meaning of the statute, it is made possible for parties in control of a national bank, with the approval of the Comptroller, to authorize the increase of the capital stock, to obtain subscription and payment in full for all the shares but one or two, and then, if that be desirable, to deny to the holders of these full-paid certificates, any participation in the control of the bank, or in case the bank becomes insolvent,

to shield these holders of certificates from liability to creditors. Certainly a construction of the statute having such results should not be adopted unless the statute as a whole imperatively demands it."

The primary object of the provision that "no increase of capital shall be valid until the whole amount of such increase is paid in" was to prevent the "watering" of stock, that is, prevent banking business being done upon the basis of an increased capital which did not in fact exist. If this prohibition be disregarded by a national bank, the conduct of its business could no doubt be controlled by the representatives of the Government so far as might be necessary to compel obedience to the law. Rev. Stat. § 5205. But the statute does not, in terms, make *void* a subscription or certificate of stock based upon increased capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank. Certainly, the statute should not be so applied in behalf of a person sought to be made liable as a shareholder, when, as, in the present case, he held, at the time the bank suspended and was put into the hands of a receiver, a certificate of the shares subscribed for by him; enjoyed, by receiving and retaining dividends, the rights of a shareholder; and appeared as a shareholder upon the books of the bank which were open to inspection, as of right, by creditors. Rev. Stat. § 5210. As between the bank and the defendant, the latter having paid the amount of his subscription for shares in the proposed increase of capital was entitled to all the rights of a shareholder, and therefore, as between himself and creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him. That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the whole amount of the proposed increase of capital had been paid in, was a matter between it and the Government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a

shareholder, who became such by paying into the bank the amount subscribed by him, from the individual liability imposed by section 5151.

In *National Bank* v. *Matthews*, 98 U. S. 621, 629, it appeared that a national bank had made a loan of money, the repayment of which by the borrower was in part secured by a deed of trust on real estate. The borrower insisted that the taking of the deed of trust as security was in violation of the act of Congress. This court conceded that the statute by clear implication forbade a national bank from making a loan on real estate security, but held that the violation of the statute by the bank was a matter of which the borrower could not complain, saying: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defence whenever the offensive act shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the Government." The doctrine of the *Matthews* case has been often reaffirmed. *Whitney* v. *Wyman*, 101 U. S. 392, 397; *Jones* v. *Guaranty and Indemnity Co.*, 101 U. S. 622, 628; *Fritts* v. *Palmer*, 132 U. S. 282, 291; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 76; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 251.

By section 5201 of the Revised Statutes it is provided that "no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association." "While this section," this court said in *National*

*Bank of Xenia* v. *Stewart*, 107 U. S. 676, 677, "in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by any one except the Government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can, then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves."

These principles are in our judgment applicable to the case before us.

The defendant alleged that he subscribed for the fifty shares of the proposed increase of the bank's capital and deposited in the bank the amount necessary to pay for the stock, upon an understanding with the bank that the amount so deposited should be applied in payment of his subscription when all of the proposed increase of capital had been subscribed for and paid in, so that shares based upon such increase could be legally issued. But this does not present the whole case. The defendant, having paid in the amount subscribed, subsequently accepted a certificate for the shares subscribed for by him, knowing, as he must be conclusively presumed to have known, that the money paid in by him was the basis of such certificate. He assumed the position, and claimed and exercised the rights, of a shareholder. He drew money from the bank as dividends upon his stock. No understanding which the defendant may have had with the officers of the bank prior to his completed subscription of stock could, under the circumstances disclosed, relieve him from the liability attaching to him as a shareholder, after he had, in the most unequivocal manner, claimed and was accorded by the bank the rights of a shareholder. It may be—although upon this question we express no opinion—that the

defendant, by proper proceedings instituted in good faith and in due time before the suspension of the bank, could have had his subscription cancelled upon the ground that the whole amount of the proposed increase of capital had not in fact been paid in, although according to the pleadings the contrary was certified by the Comptroller. But immediately upon the failure of the bank the rights of creditors attached under section 5151, and a shareholder who was such when the failure occurred could not escape the individual liability prescribed by that section upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so. We concur with the Circuit Court of Appeals in holding that under section 5142, as modified by the act of May 1, 1886, each subscription for portions of increased capital "when paid up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions a condition that the subscriber paying such subscription in full cannot become a holder of valid stock unless the maximum amount of the proposed increase is subscribed and paid for." If this be a sound view, as we think it is, it follows that one holding stock in a national bank which is so far valid as to entitle him to enjoy, and who is accorded the right to enjoy, the privileges of a shareholder, as against the bank, is a shareholder upon whom assessments may be made in conformity with section 5151.

The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed not only for their protection but to give confidence to all dealing with national banks in respect of their contracts, debts and engagements, as well as to stockholders generally. If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position.

Although this question has not arisen in any former case in

the precise form in which it is here presented, the views we have expressed are in line with former adjudications.

In *Aspinwall* v. *Butler*, 133 U. S. 595, 607, 609, the principal question was as to the liability under section 5151 of one who had subscribed and paid for a part of an authorized increase of the stock of a national bank, the whole amount of such increase not having been taken up by subscriptions. Referring to a by-law of the association relating to the power of the directors when there was a deficiency in subscriptions arising from the failure of some to take stock who had the privilege of doing so, the court, speaking by Mr. Justice Bradley, said: "There was no express condition that the individual subscriptions should be void if the whole $500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares subscribed, and as to payment of instalments; and the unsubscribed stock is issued from time to time as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital. There may be cases in which equity would interfere to protect subscribers to stock where a large and material deficiency in the amount of capital contemplated has occurred. But such cases would stand on their own circumstances. It could hardly be contended that the present case, in which more than ninety-two per cent of the contemplated increase of capital was actually subscribed and paid in, would belong to that category. In *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46, only $320,000 out of $500,000 of capital authorized by the charter was subscribed in good faith, but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations. Some reliance is placed upon the words of the act of Congress which authorizes an increase of capital within

the maximum prescribed in the articles of association. They are found in section 5142 of the Revised Statutes, which declares that any banking association may, by its articles, provide for an increase of its capital from time to time, but adds, 'no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount,' etc. This clause would have been violated by an issue of $500,000 of new stock, when only $461,300 was paid in; but not by an issue of the exact amount that was paid in. The clause in question was intended to secure the actual payment of the stock subscribed, and so as to prevent what is called watering of stock. In the present case the statute was strictly and honestly complied with. The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?" Again: "The stock was lawfully created, the defendant subscribed for the shares in question and paid for them, and received his certificate; and nothing was afterwards done by the directors, the Comptroller of the Currency, or the stockholders in meeting assembled, which they had not a perfect right to do. The defendant became a stockholder; he held the shares in question when the bank finally went into liquidation; and, of course, became liable under section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held."

In *Pacific National Bank* v. *Eaton*, 141 U. S. 227, 233, 234, the court, again speaking by Mr. Justice Bradley, said: "The defendant in error was just as much bound by her subscription to the new stock as if the whole $500,000 had been subscribed and paid in. The only question to be considered, therefore, is whether the fact that the defendant in error did not call for and take her certificate of stock made any difference as to her status as a stockholder. We cannot see how it could make the

slightest difference. Her actually going or sending to the bank and electing to take her share of the new stock, and paying for it in cash, and receiving a receipt for the same in the form above set forth, are acts which are fully equivalent to a subscription to the stock in writing, and the payment of money therefor. She then became a stockholder. She was properly entered as such on the stock book of the company, and her certificate of stock was made out ready for her when she should call for it. It was her certificate. She could have compelled its delivery had it been refused. Whether she called for it or not was a matter of no consequence whatever in reference to her rights and duties. The case is not like that of a deed for lands, which has no force, and is not a deed, and passes no estate, until it is delivered. In that case everything depends on the delivery. But with capital stock it is different. Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself. An actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party." To the same effect was *Thayer* v. *Butler*, 141 U. S. 234.

It is supposed that *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372, is in opposition to the views herein expressed. We do not think so. In the case referred to it appeared that the bank, located at Concord, New Hampshire, purchased, for purposes of investment, one hundred shares of the stock of the Indianapolis National Bank, doing business at Indianapolis, Indiana, and after such purchase appeared upon the books of the latter bank as the owner and holder of the shares so purchased. The bank at Indianapolis suspended and was put into the hands of a receiver. The question presented was whether,

in respect of the stock standing in its name, the bank in New Hampshire could be held as a shareholder in the other bank under section 5151. This court, following the decisions in prior cases, including *California Bank* v. *Kennedy*, 167 U. S. 362, 367, held that a national bank had no power or authority to invest its surplus funds in the stock of another national bank. It was also adjudged that in the case of such a purchase the purchasing bank could plead its want of power, and thereby protect itself against the liability imposed upon shareholders by section 5151. The court said: "If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act. It is argued, on behalf of the receiver, that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the Comptroller were obliged to inquire into the validity of all the contracts by which the registered shareholders acquired their respective shares. The force of this objection is not apparent. It is doubtless within the scope of the Comptroller's duty, when informed by the reports of the bank that such an investment has been made, to direct that it be at once disposed of, but the Comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of the parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted."

The difference between that case and the present one is apparent. In the case before us there was no want of power in the defendant to subscribe for stock in the bank at Sedalia

and to assume the position of a shareholder. An individual may become a shareholder in a national bank by his own voluntary act. He can, if he choose, so act as to be estopped from saying that he is not a shareholder and liable as such for the contracts, debts and engagements of the bank. But a national bank is without authority to use its funds for the purchase of the stock of another national bank merely for purposes of investment, and therefore, as held in the *Hawkins* case, it could not under such circumstances become a shareholder within the meaning of section 5151. Of the powers of a national bank under the statutes providing for their creation every one must take notice. Whether a national bank may not be deemed a shareholder, within the meaning of section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided, and upon which, in this case, no opinion need be expressed.

The judgment is

*Affirmed.*

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## INTERNATIONAL NAVIGATION COMPANY *v.* FARR AND BAILEY MANUFACTURING COMPANY.

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

No. 193. Argued March 12, 13, 1901.—Decided April 22, 1901.

The Harter act, so-called, does not relieve the ship owner from liability for damages caused by the unseaworthy condition of his ship at the commencement of her voyage.

Nor is the ship owner exempted from liability under that act, "for damage or loss resulting from faults or errors of navigation, or in the management of said vessel," unless it appears that she was actually seaworthy when she started or that the owner had exercised due diligence to make her so in all respects.

The mere fact that the owner provides a vessel properly constructed and equipped is not conclusive that the owner has exercised due diligence within the meaning of the act, for the diligence required is diligence on

Statement of the Case.

the part of all the owner's servants in the use of the equipment before the commencement of the voyage and until it has actually commenced; and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

Whether a ship is reasonably fit to carry her cargo is a question to be determined on all the facts and circumstances, and the difference in the facts of this case from those in *The Silvia*, 171 U. S. 462, was such that the Court of Appeals was at liberty to reach a different result.

This was an action brought by the Farr and Bailey Manufacturing Company against the International Navigation Company, owner of the steamship Indiana, in the District Court of the United States for the Eastern District of Pennsylvania, in admiralty, to recover the sum of $2084.15, for damages to twenty bales of burlaps which were delivered to the Navigation Company at Liverpool, England, on board that steamship, in good order and condition, for carriage to the Manufacturing Company at Philadelphia. Upon the arrival of the steamship at Philadelphia the burlaps were found to have been damaged by sea water. The case was heard in the District Court and the libel sustained, and the cause referred to a commissioner to determine the extent of the loss. 94 Fed. Rep. 675. The Navigation Company applied for a reargument, which was had, and thereupon the libel was dismissed. 94 Fed. Rep. 678. From this decree the Manufacturing Company appealed to the Circuit Court of Appeals for the Third Circuit, and that court, one of its members dissenting, reversed the decree of the District Court, and held the Navigation Company liable. 98 Fed. Rep. 636. The case was then brought to this court on certiorari.

In the first opinion of the District Court it was stated that—

"In May, 1895, twenty bales of burlaps in good condition were received by the vessel at Liverpool, consigned to the libellant, in Philadelphia, and a bill of lading was given therefor. The bales were stowed with some other goods in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, two or three feet high, covering the floor, so that access to the ports was very easy and unobstructed. Four or five days after the vessel left Liverpool water was discovered in the compartment; and when the hatches were opened, a day or two later, it was found that the after

port on the starboard side was admitting water freely as the vessel rolled. Both covers of the port were unfastened and open, but there was no sign of injury to either, or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The ports in the compartment were inspected the day before the vessel sailed, and were believed to be closed; but several hours elapsed between the time of inspection and the time of sailing. The libellant's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability."

"We have little difficulty in coming to the conclusion that the vessel was a staunch boat, properly manned, equipped, and supplied, and that she was in all respects fit for the voyage, except in the one respect of which the libellant complains,—the condition of the after port on the starboard side in compartment No. 3."

And it was found "as a fact, that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool."

In the second opinion it was said:

"It seems to me that, although the owners of the vessel provided the proper equipment for the porthole under consideration, and although the failure to close it properly was due to negligence in the use of such equipment, nevertheless the result was unseaworthiness, because the vessel set sail with a hole in her side that was not only unknown to her officers, but was believed not to exist. She was, therefore, not in a condition to afford due protection to the cargo in this particular compartment. If the hole had been caused by collision while she lay at her berth, and she had been sent upon her voyage without repair, it could not be successfully asserted that she was seaworthy, although the proper tools and materials might have been among the ship's stores, and the failure to repair might be properly said to have been due to negligence in failing to use the equipment at hand."

The Circuit Court of Appeals said that—

"These goods were stowed in a compartment on the lower

steerage deck in such manner as to admit of free access being had to the port through which the water subsequently entered. This port, and others similarly situated, were inspected on the day before the vessel sailed, and they were believed to be closed and properly fastened; but, after the Indiana had proceeded for four or five days upon her voyage, water made its appearance in the compartment, and a day or two later investigation disclosed that both the glass cover and the iron dummy of the port in question were open, and that through this opening the water was admitted. There had been no severe weather, no accident was known to have happened, and the port, its covers, fastenings, and surroundings, did not appear to have been in any way broken or impaired."

And found as to the port:

"The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened; and we are of opinion that, by reason of this fact, the vessel was unseaworthy."

*Mr. J. Rodman Paul* for petitioner.

*Mr. John F. Lewis* for respondent. *Mr. Horace L. Cheyney* was on his brief.

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

Counsel for petitioner states that the question raised on this record is: "Was the Indiana unseaworthy at the time of beginning her voyage from Liverpool to Philadelphia, or was the failure to securely fasten the port covers and keep them fastened a fault or error in the management of the vessel under the exemption of the 'Harter act?'"[1]

[1] Act of February 13, 1893, 27 Stat. 445, c. 105, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property." The first, second and third sections read:

"Be it enacted by the Senate and House of Representatives of the United

The courts below concurred in the conclusion that the Indiana was unseaworthy when she sailed because of the condition of the port hole, but the District Judge on the reargument felt constrained to yield his individual convictions to the rule he understood to have been laid down in *The Silvia*, 171 U. S. 462.

*The Silvia* was decided, as all these cases must be, upon its particular facts and circumstances. The case is thus stated by Mr. Justice Gray, who delivered the opinion of the court:

"The Silvia, with the sugar in her lower hold, sailed from

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States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

"SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks next the forecastle had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five eighths of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage, was wholly a matter of conjecture—and the water came in through the port, and damaged the sugar."

And again:

"But the contention that the Silvia was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or dead lights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact

that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. *But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing.*"

In the present case the compartment in which the burlaps were stowed was used exclusively as a cargo hold; the glass and iron covers were intended to be securely closed before any cargo was received; the person whose duty it was to close them or see that they were closed, supposed that that had been properly done; and the hatches were battened down with no expectation that any more attention would be given to the port covers during the voyage; but in fact the port was not securely covered, and there was apparently nothing to prevent the influx of water, even under conditions not at all extraordinary, the port being only two or three feet above the water line.

We are of opinion that the difference in the facts between the two cases was such that the Court of Appeals was at liberty to reach a different result in this case from that arrived at in *The Silvia*. The latter decision simply demonstrated the justness of Lord Blackburn's observation in *Steele* v. *State Line S. S. Co.*, L. R. 3 App. Cases, 72, that the question whether a ship is reasonably fit to carry her cargo must be "determined upon the whole circumstances and the whole evidence."

On the question of fact in this case, we have the concurrent decisions of the two courts that the Indiana was unseaworthy at the commencement of the voyage, and as we find no adequate ground to conclude that the finding was erroneous, the settled doctrine that it should be accepted is applicable. *The Carib Prince*, 170 U. S. 655.

But it is contended that in spite of the fact that the condition of the port hole rendered the ship unseaworthy when she sailed, the omission to securely cover it was a fault or error in management and within the exemption of the third section of the Harter act. The proposition is that if the owner provides a vessel properly constructed and equipped, he is exempted from lia-

bility, no matter how unseaworthy the vessel may actually be, at the commencement of the voyage, through negligent omission or commission in the use of the equipment by the owner's servants. Or, to put it in another way. If the unseaworthiness is not the result of error or fault in management, the third section does not apply, and even if it were, the exemption still cannot obtain unless it appears that the owner used due diligence to make the vessel seaworthy. And it is said that the owner does exercise such diligence by providing a vessel properly constructed and equipped, and that while he is responsible for the misuse or nonuse of the structure or equipment by his "shore" agents, he exercises due diligence by the selection of competent "sea" agents, and that he is not responsible for the acts of the latter, although they produce unseaworthiness before the commencement of the voyage.

We cannot accede to a view which so completely destroys the general rule that seaworthiness at the commencement of the voyage is a condition precedent, and that fault in management is no defence when there is lack of due diligence before the vessel breaks ground.

We do not think that a ship owner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced.

The ruling in *Dobell & Co.* v. *Steamship Rossmore Co.*, (1895) 2 Q. B. 408, is in point. The Rossmore left Baltimore with a port improperly caulked, which rendered the vessel unseaworthy, through the negligence of the ship's carpenter, who was a competent person. Sea water entered through this port and damaged the cargo. The bill of lading incorporated the Harter act by reference, and it was held, as correctly stated in the syllabus, that "to exempt the ship owner from liability it was not sufficient merely to shew that he had personally exercised due diligence to make the vessel seaworthy, but that it must be shewn that those persons whom he employed to act for him in

this respect had exercised due diligence;" and that, therefore, the negligence of the ship's carpenter prevented the exemption from applying, and the ship owner was liable.

The obligation of the owner is, in the language of section two of the act, "to exercise due diligence, to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage;" and that obligation was not discharged when this vessel sailed with a hole in her side, under the circumstances disclosed, whether the duty of seeing that it was closed devolved on officers of the ship, or the foreman of the stevedores, or on all of them. The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word "management" is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing.

It is, of course, not to be understood as intimated that failure to close port holes necessarily creates unseaworthiness. That depends on circumstances, and we accept the finding of the District Court, and of the Court of Appeals, that it did so under the circumstances of this case.

Nor do we say that the liability rests alone on the ignorance of the officers that the port covers were not securely fastened. This is not a case where it appears that the port would ordinarily have been left open, to be closed as the exigency might require, and where failure to close it during the voyage might be an error or fault in management. The importance of this point is well illustrated by Dallas, J., in the Court of Appeals, thus: "But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not 'usually be left open for the

admission of light,' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived."

*Decree affirmed.*

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## BEDFORD *v.* EASTERN BUILDING AND LOAN ASSOCIATION.

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

No. 153. Argued January 30, 31, 1901. — Decided April 22, 1901.

The Building Association, a corporation organized under the laws of New York, was authorized by law to make advances to its members. The statutory provisions regarding such advances and the securing of the same are stated in the opinion of the court. Bedford, a resident in Tennessee, became a shareholder by subscription to the stock, and by payment therefor. The statutes of Tennessee authorized the corporation to do business in that State. Bedford, after subscribing to the stock, paid his subscription, and on his application secured a loan from the corporation and mortgaged his property to secure it. All this was authorized by the statutes of Tennessee at the time when it was done. Subsequently a new statute was enacted, the provisions in which are set forth in the opinion of the court, and an act was passed concerning building associations, the parts of which thereof, relating to foreign building associations, are also set forth in the opinion of the court. The Building Association subsequently filed its charter with the secretary of state of Tennessee, and an abstract of the same in the office of the Register of Shelby County, but it did not comply with the building association laws. Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the United States Circuit Court to foreclose the mortgage, and collect the amount due under his contract. Bedford answered that

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the notes and mortgage violated the laws of Tennessee, and were void. *Held:*

(1) That Bedford's subscription to the stock of the association, its issuance, and the application of a loan in pursuance of it, constituted a contract, which is inviolable by the state legislature.

(2) That by his subscription to the stock of the association, Bedford became a member of it, bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association.

This court recognizes the power of a State to impose conditions upon foreign corporations doing business within the State, but that cannot be exercised to discharge the citizens of the State from their contract obligations.

This suit was brought in the Circuit Court of the United States for the Western District of Tennessee by respondent to foreclose a mortgage executed by petitioners. A decree was entered in favor of the respondent. 88 Fed. Rep. 7. There was an appeal taken to the United States Circuit Court of Appeals for the Sixth Circuit. From that court the case came here on certificate. Subsequently a writ of certiorari was issued.

The following are some of the material facts contained in the statement of the Circuit Court of Appeals. Other facts will be stated in the opinion:

"The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the State of New York for the purpose and with the power of conducting a general building association business in New York and other States. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay $1 initiation fee for each share of $100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to $100, the holder is entitled to withdraw the same. Borrowing members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and interest by mortgage or otherwise. Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no au-

thority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of directors of the association. Three months after a person had subscribed for stock, and the stock had been issued to him, he was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares, or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse, together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called 'the local board' in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's place of residence who had been elected by all the resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer, through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts."

On the second day of January, 1891, H. L. Bedford, one of the petitioners, then being a resident of Shelby County, Tennessee, made application in due form, and under seal, to become a member of the association, and subscribed for forty-six shares of instalment stock. He delivered the application to the soliciting agent of the association at Memphis, to be forwarded to Syracuse. He agreed in the application "to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares," and to comply with the rules and regulations of the association; and he appointed the secretary of the association as proxy to appear and vote on his shares.

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On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis, who, a few days later, handed it to Bedford. The certificate was numbered 4773, and stated the number of shares to be forty-six, and the amount $4600; date of maturity, August 1, 1897. It certified that Bedford was thereby constituted a member of the association and holder of forty-six shares therein of $100 each. "The terms, conditions and by-laws printed on the front and back" of the certificate were made part of the contract, and it was stated "that this certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions."

These conditions were substantially as follows:

The payment of a monthly instalment of seventy-five cents on each share until it matures or is withdrawn; a fine of ten cents per share per month for each month if the payment of the instalment shall be in arrears; declaring the stock non-forfeitable; providing for its sale at auction if the monthly instalments due thereon be in arrears for six months or more, and providing for the application of the proceeds of the sale and the payment of such instalments and accrued fines; the balance remaining, if any, to be paid to the member in whose name the stock stands at the time of sale. "If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and cancelled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits."

Further conditions of the stock were "(4) that members could withdraw their monthly instalments at any time by giving thirty days' notice, and to receive six per cent annual interest on all shares of six months' standing and up to two years; the third year, seven per cent; any time after the third year and before maturity, eight per cent. (5) If a shareholder died, his personal representative could continue or withdraw his share. (6) At stated periods the profits arising from interest, premiums, fines and other sources shall be apportioned among the shares in good standing. (7) All payments were required to be paid to an authorized agent or sent to the secretary at the home of-

fice. (8) Reservation of a right in the association to make investigation prior to approval of claims. '(9) The by-laws of this association, which are attached to and endorsed hereon, are a part of this contract, and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.' (12) No shareholder to have an interest in the affairs, assets or funds of the association, except as above stated, or to assume liability except as hereafter described. (13) Upon the cessation or determination of the contract, all payments made thereon shall become forfeited to the association. (14) Actions to be brought within six months after filing proofs in the county of Onondaga, in the State of New York. (15) 'No agent has authority to change this contract, and the association assumes no liability for any statements not contained in its printed literature.'"

The certificate concluded as follows:

"Given under the seal of said association at Syracuse, New York, the second day of Feby., A. D. 1891.

"H. H. Loomis, *President.*

[L. s.] "Jno. W. Reynolds,

"*Secretary and Gen'l Manager.*"

On the 20th of March, 1891, Bedford made an application for a preference for an advance, which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at Syracuse. Bedford then applied on June 20 for the loan in the letter following:

"*Application for an Advance.*

"To the Board of Directors of the Eastern Building and Loan Association of Syracuse, N. Y.:

"Gentlemen: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent, I now respectfully request the advance be granted. I hereby agree to comply with the charter and

by-laws of your association and all requirements defined by your committee of the board of directors.

"H. L. BEDFORD, *Applicant.*

"Witness: J. H. T. MARTIN."

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby County, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby County.

The defeasance clause of the mortgage recited among other things that the "grant is intended as security for the payment of the sum of fifty-six hundred eighty-three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the interest, and each of said notes after maturity at the rate of six (6) per cent per annum, payable semi-annually, until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns, hereby covenants and agrees with the party of the second part, its successors and assigns, to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity, and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association. . . ."

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The seventy-eight notes were all of the same tenor, *mutatis mutandis*, as the following:

"On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86–100 dollars, ($72 86–100,) to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received.

"Bailey, Tenn., May 1, 1891. H. L. BEDFORD."

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act passed by the legislature of Tennessee went into effect:

"CHAPTER 122.

"An act to amend chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real and personal property in this State, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this State.

"SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, That chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever which may desire to do any kind of business in this State.

"SEC. 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own property or carry on business in this State of any kind or character, shall first file in the office of the secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

"SEC. 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or

to own or acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

"SEC. 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

"SEC. 5. Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

"SEC. 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

"SEC. 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

"Passed March 21, 1891."

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows (Chapter 2 of the Acts of 1891):

"SEC. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory or foreign government, shall do business in this State unless said association shall deposit and continually thereafter keep deposited in trust for all of its members and creditors, with some responsible trust company or with some state officer of

this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty-five thousand ($25,000) dollars nor more than fifty thousand ($50,000) dollars, at the discretion of the state treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein, may from time to time be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State—

"First. File with the treasurer of this State a duly authenticated copy of its charter or articles of corporation.

"Second. File with the treasurer of this State the certificate of the proper state officer of another State or the president and treasurer of some responsible trust company certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business as mentioned in this act, in trust for all the members and creditors of such building and loan association.

"Third. File with the state treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing, that if any legal process affecting such association be served on said state treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

"Fourth. Pay the state treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section.

"Sec. 7. Be it further enacted, No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as required by section 3 of this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer annually, on the first of January, and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars or more than fifty dollars."

The association filed its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby County on August 15, 1893. The association did not comply with the building association laws quoted above in any respect.

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for after that date.

The Supreme Court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made payable in Minnesota are Minnesota contracts, but that they are, nevertheless, void in Tennessee and cannot be enforced in the courts of Tennessee. *United States Saving & Loan Company* v. *Miller*, 47 Southwestern Rep. 17, affirmed on appeal by the Supreme Court of Tennessee, December 18, 1897, without written opinion.

Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the Circuit Court of the United States for the Western District of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant Bedford answered, averring that the notes and mort-

gage were in violation of the above quoted laws of Tennessee, and were void and could not be enforced.

*Mr. Robert M. Heath* for Bedford and wife. *Mr. Heber J. May* and *Mr. W. C. McLean* were on his brief.

*Mr. William Hepburn Russell* for appellee. *Mr. William Beverly Winslow*, *Mr. Joseph W. Buchanan* and *Mr. H. Dart Minor* were on his brief.

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

The assignments of error, except one, present the question of the enforceability of the notes and mortgage under the Tennessee law, or, as the question may be put, whether there was a contract between the parties—a right in one and an obligation in the other arising from a consideration given and received; mutual covenants by which each party acquired the right to that which the other promised or engaged to do, and whether the laws of Tennessee, as interpreted by its courts, impaired that right?

(1) A recapitulation of the facts in this connection will be useful. The Eastern Building and Loan Association was organized under the laws of New York, and one of its purposes was to make "advances" to members. It had a capital stock of $50,000, divided into shares of $100 each. The funds of the association were divided into two classes—a loan fund and an expense fund. The articles of incorporation provided that "the loan fund shall consist of all receipts which do not go into the expense fund, as hereinbefore provided, together with all interests and accumulations from whatever source. No money can be drawn from the loan fund for any other purpose than the making of loans on security, as provided by the by-laws, and to pay amounts due withdrawing shareholders. The funds of the association not required for advances on shares may be invested by the board of directors in such securities as the savings banks of the State of New York are permitted to take, or

deposited at interest in the savings banks, trust companies or duly incorporated banks of said State, and which are in good standing."

The articles of incorporation and the by-laws also provided the manner of becoming a member of the association, the rights of a member and the obligations of the association. The entrance fee of new members and new shares were to be one dollar per share, monthly dues seventy-five cents, fines for non-payment of dues on unpledged stock twenty cents. And it was provided by sections 1 and 2, article XIX, under the heading "Contract of members," as follows:

"SEC. 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

"SEC. 2. All persons desiring to become shareholders of this association must fill out, sign and deliver to the secretary an application according to the form adopted by the association, which said application shall be a part of said application with this association. Such applicant shall also pay a membership fee of one dollar per share for each and every share held by him.

* * * * * * * *

"SEC. 16. All remittances for advance, instalments, premiums, monthly instalments, fines and penalties, interest and premiums, and all other payments shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received."

The other sections of the article provide for the manner in which the loan shall be made, upon what security, interest and premium and covenants, the manner of payment and prepayment, and the enforcement of payment and when shares may be cancelled and forfeited. "Punctuality and strict performance on the part of all members, borrowers and shareholders, in payment of fines, dues, interest, loans and premiums, are made the essence of the contract."

The articles also provide with what the stock shall be charged

and to what it shall be subject, the amount of monthly instalments to be paid and when paid, and when and to what extent and upon what terms shares may be withdrawn and for the issue of paid up stock.

Article XV of the by-laws is as follows:

"Loans.

"SEC. 1. Each shareholder, for each share named in their certificate, shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such a loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it. All applications for loans shall be filed and numbered consecutively as received, and be examined and approved, or rejected, by the board in their regular order.

"SEC. 2. All shares must be in force three months before said shareholder shall be entitled to a loan. All applications for loans are part of the contract of the shareholders with this association. Nothing herein contained shall prevent the board of directors from loaning funds of the association to any member in greater sums than the above provided upon approved securities."

On the 2d of January, 1891, Bedford applied to become a shareholder of the association, and subscribed for forty-six shares of instalment stock. The application was accepted and a certificate of stock was issued to him on the 2d of February, 1891, and on the 20th of March, 1891, he presented a written application for a loan as follows: "——— ———do hereby make application for a loan of forty-six hundred ($4600.00) dollars, for six and a half years, to bear interest at the rate of five per cent per annum, and a premium of five per cent per annum, payable on or before the last Saturday of each month;" and to secure the sum agreed to give a mortgage on the real estate set forth in certain questions and answers which accompanied the application, which described with particularity the real estate and the improvements thereon, and stated that the loan was "for investment to relieve adjoining property." The property was stated to be of the value of $6000, and all of his prop-

erty easily to be worth $40,000. The application was sworn to and accompanied by the affidavit of three other persons that they regarded Bedford "as a prompt, upright, reliable person, pecuniarily responsible for his contracts."

The application and report of the local board of appraisers was received by the association on the 12th of May, 1891, by mail from H. B. Martin, the soliciting agent of the association. It was accepted and a loan granted on the 18th of May, and to secure the same the notes and mortgage in suit were subsequently executed.

The statutes of Tennessee relied on as a defence were passed March 26, 1891, and to repeat, the question is, did the subscription to the stock of the association, its issuance and the application for a loan in pursuance of it, constitute a contract which was inviolable by the state legislature? We think the answer should be in the affirmative. By his subscription to stock of the association Bedford became a member of the association—bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract. We are compelled, therefore, to disagree with the views expressed by the Supreme Court of Tennessee, in *New York &c. Building & Loan Association* v. *Cannon*, 99 Tennessee, 344, notwithstanding our high respect for that learned tribunal. It was there contended that "Cannon, having become a stockholder in the association before the acts were passed, with a view to becoming a borrower, and for that purpose, and having made his application for a loan likewise before the acts passed, acquired a vested right to the consummation of the loan, and the association became legally obligated to complete it, and it was also unfinished business, which the association had a right, and which was its duty, to finish, notwithstanding the acts of the legislature." To this contention the court replied: "If we were to grant that the borrower had a vested right to the loan, and the association had a legal obligation to consummate it, still, it must follow that the contract could be entered into, and the loan and mort-

gage made, only in compliance with the law. There was nothing to prevent the association from complying with the statutes and thus placing itself in the attitude where it could legally make the loan and take the mortgage if it were under obligation to do so, as it claims."

And the court observed that it could not be considered that the association and Cannon were winding up an old transaction and unfinished business, but were doing business in the sense of the statute and in defiance of its prohibition, and refused to enforce the mortgage of the association. We cannot assent to the view that there is nothing to prevent the association from complying with the statutes. The mere filing of its charter in a particular office—the secretary of state's or some other office—might be easily complied with, but the deposit with some responsible trust company or state officer of the State or some other State, of mortgages or securities of from $25,000 to $50,000 in amount, at the discretion of the state treasurer, might be impossible to comply with. At any rate, the requirement is so very onerous that the association could justly decline to do business in the State on that condition. It might indeed have the right to decline any condition and retire from the State, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The State could not affect that obligation nor impair it. "The obligation of a contract 'is the law which binds the parties to perform their agreement.'" 4 Wall. 452. The building association was incorporated under the laws of New York to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing—means in the treasury, a tender of good security—the contingent right became a vested one, a contract was formed, and, can there be a doubt, that it was enforceable against the association? If it could have been enforced by suit, it was properly yielded to without suit and possessed all legal sanctions.

We recognize the power of the State to impose conditions upon foreign corporations doing business in the State. We

have affirmed the existence of that power many times, but manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations.

It is claimed, however, that if the transactions between Bedford and the association were otherwise legal they were affected with usury, and to the extent that they were usurious they were unenforceable. The contention is that in making the loan of $4600 Bedford was required to pay a fixed premium of $460, and received only $4140, and that this constituted usury in Tennessee. This is made out because, it is said, Bedford was required to withdraw his stock and receipt in full, and could therefore get no benefit from future profits of the association; and, it is asserted, that thereby the loan became "fixed and certain and no element of contingency" remained, and the transactions are withdrawn from the principle expressed in *Spain* v. *Hamilton*, 1 Wall. 604, that "where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." But the fact was not as asserted.

The stock was pledged as security for the advance, and the pledge was no more a withdrawal of the stock, terminating Bedford's ownership of it, than his mortgage was an absolute conveyance of his land. It is provided in section 3, article 19, that in addition to real estate security for a loan a shareholder shall "transfer in pledge to the association one share of the stock held by said shareholder, as *collateral security*, on all loans made by the association" to him. Besides, the transactions were not usurious under the laws of New York, where the notes were payable. *Concordia Savings &c. Association* v. *Reed*, 93 N. Y. 474. Therefore, the principle expressed in *Miller* v. *Tiffany*, 1 Wall. 298, applies. It was said in that case: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also

well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." See also *Anderson* v. *Pond*, 13 Pet. 78; *Railroad Company* v. *Bank of Ashland*, 12 Wall. 226; *Scotland County* v. *Hill*, 132 U. S. 107; *Cromwell* v. *Sac County*, 96 U. S. 57; *Cockle* v. *Flack et al.*, 93 U. S. 344.

In *Pioneer etc. Loan Co.* v. *Cannon*, 96 Tennessee, 599, a note secured by mortgage was given to a building association and made payable at Minneapolis. It provided for the payment of five per cent interest per annum, a five per cent premium per annum, monthly, on or before the last Saturday of each month, and stipulated, further, that "any failure to pay interest or premium, when due, shall, at the election of the payee, make the principal, interest and premium at once due." Of the note and mortgage the court said: "The second assignment of error is that the note and mortgage were both usurious on their faces and nonenforceable. As already stated, the note stipulates on its face to pay five per cent interest per annum, at the office of the company at Minneapolis, Minn. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that State, which have been distinctly proved, and appear on the record." The assignment of error was held not well taken.

The Circuit Court adjudged Mrs. Bedford personally liable for the indebtedness to the association. This is conceded to be error, and it has been stipulated "that an order or decree may be entered in this cause releasing her from said liability upon such terms and conditions as to this court may seem just."

*The judgment of the Circuit Court will be modified in accordance with the stipulation, and, as modified, affirmed. Costs are awarded to Mrs. Bedford on her appeal to and in the Circuit Court of Appeals and in this court.*

# WALL *v.* COX.

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

No. 504. Submitted April 15, 1901.—Decided April 29, 1901.

Under the Bankrupt Act of 1898, the District Court of the United States in which proceedings in bankruptcy are pending has no jurisdiction, unless by consent of the defendants, of a bill in equity by the trustee in bankruptcy against persons to whom the bankrupt, before the proceedings in bankruptcy, made a sale and conveyance of property which the plaintiff seeks to set aside as fraudulent as against creditors, but which the defendants assert to have been made in good faith and to have vested title in them.

THE case is stated in the opinion of the court.

*Mr. Clement Manly* for appellants.

*Mr. Louis M. Swink* and *Mr. Lindsay Patterson* for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

On October 12, 1899, certain creditors of W. H. Gilbert filed against him a petition in bankruptcy in the District Court of the United States for the Western District of North Carolina, alleging that he was insolvent, and on October 10, 1899, transferred his stock of goods, with intent to hinder, delay and defraud his creditors, by a bill of sale to John D. Wall and Thomas W. Huske.

On October 14, 1899, the District Court issued an order of notice to Wall and Huske to show cause on October 24, 1899, why they should not be perpetually enjoined from disposing of the goods alleged to have been purchased by them from Gilbert, and meanwhile restraining them from disposing of it. At the time of the issue of that order, Wall and Huske had those goods in their possession.

The District Court, on October 27, 1899, adjudged Gilbert a bankrupt; and on November 6, 1899, "ordered that the restraining order heretofore issued be continued until the appointment and qualification of trustee of W. H. Gilbert, bankrupt. Upon the appointment and qualification of said trustee, in a proper case and upon a proper showing, an injunction or restraining order may be obtained upon application, in which Wall and Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and the matters at issue be determined, either by a suit in equity or action at law in the United States courts or the courts of the State, as petitioners may be advised."

Walter D. Cox, on November 23, 1899, was duly elected and qualified as trustee of Gilbert, bankrupt; and on December 6, 1899, filed a plenary bill in equity in the District Court of the United States for the Western District of North Carolina against Wall and Huske, to set aside as fraudulent the sale by Gilbert to them, alleging that Cox had requested them to deliver the property to him as trustee to be divided among Gilbert's creditors, but they had refused to do so and alleged that the sale to them was valid, and they thereby acquired title to the property, and were purchasers in good faith and for a present fair consideration. The bill prayed that the sale be set aside, and the property be decreed to belong to Cox as part of the bankrupt's estate, and for an injunction and a receiver.

On December 16, 1899, Cox filed a supplemental bill, setting forth the former bill, and its service upon Wall and Huske, alleging that the property was within the District and in the jurisdiction of this court, and was deteriorating in value by reason of being stored.

At the time of the filing of these bills, and of the service of the subpœna upon Wall and Huske, they were in possession of the stock of goods, holding it under the bill of sale from Gilbert.

On the filing of the bill, the District Judge issued an order to Wall and Huske to show cause why a receiver should not be appointed to take charge of the stock of goods, and issued an injunction restraining them from disposing of it until the

further order of the court. By consent, the hearing was postponed until January 9, 1900.

On January 6, 1900, Wall and Huske, "specially appearing under protest for the purpose of this plea, and for no other," filed a plea and demurrer, assigning as reasons, that the plaintiff had an adequate remedy at law; that the District Court had no jurisdiction to entertain this bill, or to determine the question arising between the plaintiff, as trustee in bankruptcy of Gilbert, and these defendants; that the defendants claimed title to the property described in the bill under a purchase from Gilbert prior to the institution of proceedings in bankruptcy against him; that both the plaintiff and the defendants were citizens of the State of North Carolina; and that the defendants do not consent to the jurisdiction of the court.

On January 9, 1900, a hearing was had on the motion for a receiver and an injunction, and the demurrer and plea, without objection to its form; and on January 15, 1900, the District Court overruled the demurrer and plea to the jurisdiction of the court, ordered the injunction to be continued until the final hearing of the cause, and appointed a temporary receiver to take into his possession the stock of goods. 99 Fed. Rep. 546.

On January 22, 1900, Wall and Huske filed in the Circuit Court of Appeals a petition asking the supervisory power of that court under the Bankrupt Act of 1898. Upon that petition the decision of the District Court was affirmed on May 1, 1900. 101 Fed. Rep. 403.

On June 2, 1900, Wall and Huske filed a motion for a rehearing, which was granted by the Circuit Court of Appeals; and that court certified the following questions on which it desired the instructions of this court:

"First. Under the facts and the pleadings above stated, had the District Court of the United States for the Western District of North Carolina jurisdiction over the controversy?

"Second. Said District Court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings, or in ancillary proceedings instituted either by the original petitioners, the receiver

of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property thus in the court's possession, and do full and complete justice in one litigation?"

In disposing of the questions certified, we are confined to the facts stated in the certificate, and cannot consider the allegations, made in the briefs, of other facts.

According to the statements of the certificate, the present case is a bill in equity, filed by a trustee in bankruptcy in the District Court of the United States in which bankruptcy proceedings are pending, against persons to whom the bankrupt, before the petition in bankruptcy, had made a sale and conveyance of property, which the plaintiff sought to set aside as fraudulent against creditors, but which the defendants asserted to have been made in good faith and to have vested title in them. This is a bill, of which, unless by consent of the defendants, the District Court of the United States, as was directly adjudged by this court at the last term, since the first hearing of this case in the Circuit Court of Appeals, has no jurisdiction under the Bankrupt Act of 1898. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Mitchell* v. *McClure*, 178 U. S. 539; *Hicks* v. *Knost*, 178 U. S. 541. The statement certified distinctly shows that the defendants, specially appearing for the purpose, protested that the District Court had no jurisdiction to entertain this bill, or to determine the question arising between the trustee and the defendants, and that the defendants did not consent to the jurisdiction of the court. The answer to the first question certified must therefore be that the District Court had no jurisdiction of the case.

The second question, if it does not depend on the first, is too comprehensive and indefinite to be answered at all. It speaks generally of the District Court having appointed a receiver; but does not state, nor does the certificate show, that the receiver was appointed before the election of the trustee in bankruptcy. Beyond this, the question comprehends what the District Court may do, not merely on this bill by the trustee, but on proceedings, original or ancillary, by the petitioning creditors, or by the receiver, or on the court's own motion.

*First question answered in the negative.*

Syllabus.

# SMITH *v.* ST. LOUIS AND SOUTHWESTERN RAILWAY COMPANY.

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

No. 155. Submitted January 31, 1901.—Decided April 22, 1901.

Article 5043c of the Revised Statutes of Texas, 1895, provides: "It shall be the duty of the commission provided for in article 5043a to protect the domestic animals of this State from all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere; and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to coöperate with live stock quarantine commissioners and officers of other States and Territories, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this State against Texas or splenetic fever. It shall be the duty of said commission, upon receipt by them of reliable information of the existence among the domestic animals of the State of any malignant disease, to go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the live stock reported to be affected, and whether the same is contagious or infectious, and if said disease is found to be of a malignant, contagious or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animals infected with disease or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commissioners. The said commission shall also, from time to time, give and enforce such directions and prescribe such rules and regulations as to separating, feeding and caring for such diseased and exposed animals as they shall deem necessary to prevent the animals so affected with such disease from coming in contact with other animals not so affected. And the said commissioners are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act." *Held*, that this statute, as construed and applied, in this case, is not in conflict with the Constitution of the United States.

The prevention of disease is the essence of a quarantine law. Such law is

Statement of the Case.

directed not only to the actually diseased, but to what has become exposed to disease.

THIS case involves the constitutionality of certain quarantine regulations of the State of Texas. The laws of Texas provide for the creation of a Live Stock Sanitary Commission, consisting of three members appointed by the Governor, and prescribe their duty. The particular provisions which are material to the case are inserted in the margin.[1]

The Governor of the State issued the following proclamation:

"Whereas, the Live Stock Sanitary Commission of Texas

[1] Article 5043*c* of the Revised Statutes, 1895, provides: "It shall be the duty of the commission provided for in article 5043*a* to protect the domestic animals of this State from all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere; and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to coöperate with live stock quarantine commissioners and officers of other States and Territories, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this State against Texas or splenetic fever. It shall be the duty of said commission, upon receipt by them of reliable information of the existence among the domestic animals of the State of any malignant disease, to go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the live stock reported to be affected, and whether the same is contagious or infectious, and if said disease is found to be of a malignant, contagious or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animals infected with disease or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commissioners. The said commission shall also, from time to time, give and enforce such directions and prescribe such rules and regulations as to separating, feeding and caring for such diseased and exposed animals as they shall deem necessary to prevent the animals so affected with such disease from coming in contact with other animals not so affected. And the said commissioners are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act."

has this day recommended the adoption of the following regulations:

"'The Live Stock Sanitary Commission of the State of Texas have been reliably informed that the cattle, mules and horses in the southern portion of Jefferson County, State of Texas, are affected with disease, known as charbon or anthrax, and are liable to impart such disease to cattle, mules and horses ranging in upper portion of Jefferson and other counties, from this time forth to the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven north or west of Taylor and Salt bayous, said bayous running across the southern portion of Jefferson County, State of Texas. This order is given for the purpose of quarantining all cattle, mules and horses south and east of said Taylor and Salt bayous. The Texas Live Stock Commission has reason to believe that charbon or anthrax has or is liable to break out in the State of Louisiana, from this time forth until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the State of Texas from the State of Louisiana. The Live Stock Sanitary Commission of the State of Texas hereby order that any violation of any of the aforesaid rules and regulations by moving of any cattle, mules or horses north of said bayous, or out of Louisiana into the State of Texas, is contrary to said rules and regulations, and shall be an offence and punishable as provided by the laws of the State of Texas:'

"Now, therefore, I, C. A. Culberson, Governor of Texas, in conformity with the provisions of chapter 7, title 102, of the Revised Statutes of Texas of 1895, do hereby declare that the quarantine lines, rules and regulations set forth in the above-recited order of the Live Stock Sanitary Commission of Texas shall be in full force and effect from and after this date.

"In witness whereof, I have hereunto set my hand, and caused the seal of the State to be affixed, at Austin, this 5th day of June, A. D. 1897.

"C. A. Culberson,
"*Governor of Texas.*"

In consequence of this proclamation the railway company

refused to deliver certain cattle to their owners, of whom the plaintiff in error was one, which it had received as freight from a connecting carrier, and which had been delivered to the latter in the State of Louisiana. The facts, or as many of them as is necessary to state, are as follows:

The shipment of cattle was made upon a through bill of lading issued by the St. Louis and Southwestern Railway Company, at Plain Dealing, La., for Fort Worth, Tarrant County, Texas, and was a through and continuous shipment. The cattle arrived at Fort Worth on the 28th of August, 1897. The owners were ready to receive them, and tendered the amount of freight due thereon. The tender was rejected, and the delivery of the cattle refused. The cattle remained in the pens of the plaintiff in error, the stockyards at Fort Worth refusing to receive them on account of the proclamation of the Governor, and permission, which was asked by the railway company of the Live Stock Sanitary Commission, to deliver them to their owners, was also refused on account of the Governor's proclamation. Thereafter the railway company shipped the cattle back to Texarkana, to the line of railway from which they were received, by which line they were returned to Plain Dealing, and there tendered to the shippers, who refused to receive them. Thereupon they were sold, after proper advertising, and the proceeds of the sale, less pasturage at Plain Dealing, were tendered to the owners, which was also refused. At the time of the shipment the Live Stock Sanitary Commission had recommended the adoption of the following regulation with reference to Louisiana cattle:

"The Texas Live Stock Commission has reason to believe that charbon or anthrax has or is liable to break out in the State of Louisiana, and from this time forth until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the State of Texas from the State of Louisiana."

The quarantine established (if valid) was in full force at the time of the shipment of the cattle. The bill of lading contained stipulations as to a measure of damages in case of a total loss of the cattle and other provisions, which, as they do not raise Federal questions, we are not concerned with on this record.

The trial court held that—

"1. The quarantine regulations above mentioned, established by the Governor of the State, is a regulation of or an interference with interstate commerce, in that its effect is to prohibit the importation of all cattle from the State of Louisiana into the State of Texas, whether affected with or capable of communicating the disease mentioned in said proclamation or not, and is therefore void as being in contravention of section 8 of article 1 of the Constitution of the United States.

"Had the Live Stock Sanitary Commission of the State found upon investigation that charbon or anthrax had broken out among the entire cattle of the State of Louisiana, and that all cattle of the State of Louisiana were liable to communicate either of said diseases to cattle of the State of Texas, and had said proclamation of the Governor been based upon said finding, then I think it would have been in law a police regulation of no greater scope than necessary to the protection of cattle in the State of Texas, and therefore valid, even though it did interfere with interstate commerce."

It also held that the stipulation in the contract of shipment limiting the damages at a fixed sum per head was void, and gave judgment for the actual cash value of the cattle, less freight charges. The judgment amounted to $578.10.

The judgment was reversed by the Court of Civil Appeals, and thereupon the Chief Justice of that court granted this writ of error. Before the commencement of the action the plaintiff in error became the vendee of the interests of the other owners.

*Mr. F. E. Albright* and *Mr. Wallace Hendricks* for plaintiff in error.

*Mr. Samuel H. West* for defendant in error.

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

There are other questions in the record besides the Federal

one, upon which the writ of error is based. They seem not to have been earnestly pressed either in the trial court or in the Court of Civil Appeals. They were not passed on by either court. The Court of Civil Appeals, however, said:

"It was shown that appellee's vendors had actual notice of the quarantine, and that appellant had not. It was also shown that after such notice was brought home to appellant it sought permission of the sanitary commission to deliver the cattle. The sanitary commission ruled and ordered otherwise. It has been given power to make rules. It has the power to call upon the sheriff and peace officers to enforce them. It was the duty of such officers to obey the orders of such commission. Our law also provides heavy penalties for a violation of the rules and regulations of the sanitary commission."

It is possible that the court may have concluded that the defence which those facts suggest could not be made by the railway company, and that, notwithstanding, the plaintiff in error could compel the company to receive his cattle and force it to contest the constitutionality of the Texas statute either by resisting the imposition of its penalties or in some other way. At any rate, the court rested its decision on the statute, holding it valid, and it is its judgment which we are called upon to review.

To what extent the police power of a State may be exerted on traffic and intercourse with the State without conflicting with the commerce clause of the Constitution of the United States has not been precisely defined. In the case of *Henderson* v. *Mayor of New York*, 92 U. S. 259, it was held that the statute of the State, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the State, required ship owners to pay a fixed sum for each passenger—that is, to pay for all passengers—not limiting the payment to those who might *actually* become such charge, was void. Whether the statute would have been valid if so limited was not decided.

In *Chy Lung* v. *Freeman et al.*, 92 U. S. 275, a statute declaring the same purpose as the New York statute, and apparently directed against persons mentally and physically infirm,

and against convicted criminals and immoral women, was also declared void, because it imposed conditions on all passengers and invested a discretion in officers which could be exercised against all passengers. The court, by Mr. Justice Miller, said:

"We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right if it exists. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question."

In *Railroad Company* v. *Husen*, 95 U. S. 465, a statute of Missouri which provided that "no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the first day of March and the first day of November in each year by any person whatever," was held to be in conflict with the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

The case was an action for damages against the railroad company for bringing cattle into the State in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the State. The former was confined to the prohibition of actually infected or diseased cattle and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid.

The relation of the police power of a State and the power of Congress to regulate commerce came up again in *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465. The principle which underlies both powers and the range and operation of those powers was considered. The action was against the railroad company for refusing to transport beer from Chicago to Marshalltown in Iowa. The refusal was attempted to be justified under a statute of Iowa against traffic in intoxicating liquors

and the conveyance of the same by an express or railway company into the State except under certain conditions. The statute was decided to be a regulation of commerce—to be not within the police power of the State, and therefore void. *Leisy* v. *Hardin*, 135 U. S. 100, is of the same general character, and need not be commented upon. See also *Scott* v. *Donald*, 165 U. S. 58.

In *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, some prior cases were reviewed, and the court, speaking by Mr. Justice Peckham, said:

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

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

The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle, and their principle does not depend upon the number of States which are embraced in the exclusion. It depends upon whether the police power of the State has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine.* The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed

not only to the actually diseased but to what has become exposed to disease. In *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers and inspection officers, and fees for them to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the State for the protection of health, though some of its rules amounted to regulations of commerce with foreign nations and among the States. In *Kimmish* v. *Ball*, 129 U. S. 217, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should bring into the State any Texas cattle unless they had been wintered at least one winter north of the southern boundary of the State of Missouri or Kansas; or should have in his possession any Texas cattle between the first day of November and the first day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, "and thereby spreading the disease among other cattle, known as the Texas fever," and there was besides criminal punishment. The court did not pass upon the first section. In commenting upon the second, some pertinent remarks were made on the facts which justified the statute, and the case of *Railroad Company* v. *Husen*, *supra*, was explained. It was said that the case "interpreted the law of Missouri as saying to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' p. 473. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering

within it. p. 472. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, the *Husen* case was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the State "any cattle liable or capable of communicating Texas, splenetic or Spanish fever to any domestic cattle of the State liable for damages," was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of Congress of March 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act.

What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. *Henderson* v. *Mayor of New York*, and *Chy Lung* v. *Freeman*, *supra*. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes —not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the Supreme Court of Tennessee said: "The necessities of such cases often require prompt action. If too long delayed the end to be attained by

the exercise of the power to declare a quarantine may be defeated and irreparable injury done."

It is urged that it does not appear that the action of the Live Stock Sanitary Commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in *Kimmish* v. *Ball*, *supra*. But the presumptions of the law are proof, and such presumptions exist in the pending case arising from the provisions of and the duties enjoined by the statute and sanction the action of the sanitary commission and the Governor of the State. If they could have been they should have been met and overcome, and the remarks of the Court of Civil Appeals become pertinent:

"The facts in this case are not disputed. The plaintiff sues as for a conversion, because of a refusal to deliver his cattle at Fort Worth. It is necessary to his recovery that he show that it was the legal duty of the defendant company to make such delivery. It is for the breach of this alleged duty he sues; yet it nowhere appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into. So far as the record shows, every animal of the kind prohibited in the State of Louisiana may have been actually affected with charbon or anthrax, and it is conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

*Judgment affirmed.*

Justices Harlan and White, dissenting.

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

I am unable to concur in the opinion and judgment of the court. The grounds of my dissent are these: (1) The railroad company was bound to discharge its duties as a carrier unless relieved therefrom by such quarantine regulations under the laws of Texas as were consistent with the Constitution of the United States. It could not plead in defence of its action the quarantine regulations adopted by the state sanitary commission and the proclamation of the Governor of that State, if such regulations and proclamation were void under the Constitution of the United States. (2) The authority of the State to establish quarantine regulations for the protection of the health of its people does not authorize it to create an embargo upon all commerce involved in the transportation of live stock from Louisiana to Texas. The regulations and the Governor's proclamation upon their face showed the existence of a certain cattle disease in one of the counties of Texas. If under any circumstances that fact could be the basis of an embargo upon the bringing into Texas from Louisiana of all live stock during a prescribed period, those circumstances should have appeared from the regulations and the proclamation referred to. On the contrary there does not appear on the face of the transaction any ground whatever for establishing a complete embargo for any given period upon all transportation of live stock from Louisiana to Texas.

I think therefore that the regulations and proclamation upon which the defendant relied were to be deemed void and therefore inapplicable to the particular transportation referred to in the complaint.

It seems to me that the present case comes within the principles announced in *Henderson* v. *Mayor of New York*, 92 U. S. 259. That case involved the validity of a statute of New York having for its object the protection of the people of that State against the immigration of foreign paupers. It was held by this court to be unconstitutional, because "its practical result was to impose a burden upon *all* passengers from foreign coun-

tries." In that case it was said that in whatever language a statute was framed, its purpose must be determined by its natural and reasonable effect. So also in *Railroad Co.* v. *Husen*, 95 U. S. 465, 473, we held that a statute of Missouri relating to the bringing into that State of any Texas, Mexican or Indian cattle between certain dates was a plain intrusion upon the exclusive domain of Congress. This court said: "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure." What was said of the Missouri statute may be repeated as to the regulations adopted by the Sanitary Commission and the proclamation of the Governor of Texas forbidding the bringing of cattle into that State from Louisiana. The result in my judgment is, in view of our former decisions, that the quarantine regulations and proclamation in question involved, by their natural and practical operation, an unauthorized obstruction to the freedom of interstate commerce. This must be so, even if the statute of Texas, reasonably interpreted, was itself not repugnant to the Constitution of the United States.

Mr. Justice White authorizes me to say that he concurs in these views.

Mr. Justice Brown, dissenting.

The law of Texas for the creation of a live stock sanitary commission, cited in the opinion of the court, provides that "it

shall be the duty of said commission, upon receipt by them of reliable information, . . . of any malignant disease, to go . . . and make a careful examination of the animals believed to be affected, . . . and if said disease is found to be of a malignant, contagious or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animals affected with disease, or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commissioners."

I had supposed the authority of the commissioners to be fixed by this act, and their right to quarantine or forbid the entry of animals was limited to such as were infected with disease or capable of communicating the same.

The proclamation of the Governor, based upon the report of the sanitary commission, covers two separate classes of cases. It finds that cattle in the southern portion of Jefferson County, Texas, are affected with disease and liable to impart such disease to cattle ranging in the upper portion of Jefferson and other counties, and therefore forbids such cattle from being transported north or west of certain bayous running across the southern portion of Jefferson County. So far the order is within the statute.

But it also finds that the commission "has reason to believe that charbon and anthrax has [broken out] or is liable to break out in the State of Louisiana," and hence that no cattle are to be transported into Texas from Louisiana. This portion of the order seems to me a plain departure from the terms of the statute. It does not find that there are cattle in Louisiana "infected with disease or capable of communicating the same," but simply that the disease is liable to break out in that State. It does not even find that it has broken out, or that there are any cattle in that State capable of communicating the disease. If the fact that a contagious disease is liable to break out in a certain locality be sufficient to justify a quarantine against such locality, then it is possible that every port of the United States may quarantine against Cuban or other West Indian ports,

since it is a well-known fact that yellow fever is liable to break out there at almost any time, and especially during the summer months.

The sweeping nature of this order is manifest by comparing it with the first order relating to the Jefferson County cattle. There is a finding there that the cattle in the southern portion of a particular county "are affected with disease, known as charbon or anthrax, and are liable to impart such disease to cattle" ranging in the upper portion of Jefferson County, and therefore no cattle shall be transported north or west of the infected district. In other words, it finds the actual existence of disease within a definite and circumscribed locality, and prohibits the transportation of cattle from such locality to non-infected districts.

On the other hand, the second order assumes to quarantine against cattle from the entire State of Louisiana, without any finding that the disease has broken out there, or that the cattle in such State are liable to communicate such disease to other cattle. The order is not limited to cattle coming from any particular portion of the State, but applies to the whole State, regardless of the actual existence of the disease or the liability to communicate contagion.

It seems to me that the proclamation goes far beyond the authority of the statute, beyond the necessities of the case, and is a wholly unjustifiable interference with interstate commerce. The statute thus construed puts a power into the hands of a sanitary commission which is liable to be greatly abused and to be put forward as an excuse for keeping out of Texas perfectly healthy animals from other States, and putting a complete stop to a large trade.

In the case of the *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, the statute of Kansas in question applied only to "cattle capable of communicating, or liable to impart what is known as Texas, splenetic or Spanish fever to any domestic cattle" of the State, and was a proper exercise of the power of quarantine, since healthy cattle were not interfered with. These were substantially the terms of the Texas statute, to which I see no objection; but the action of the commission

was a plain departure from the terms of the statute, and I think unauthorized by law. It was practically as sweeping as the statute of Missouri, condemned by this court in *Railroad Co.* v. *Husen*, 95 U. S. 465, which provided that "no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatever," regardless of the fact whether these cattle were diseased or were capable of communicating disease. This was held to be in conflict with the interstate commerce clause of the Constitution. As justly observed of the opinion in that case by the court in its opinion in this case, "a distinction was made between a proper and an improper exertion of the police power of the State. The former was confined to the prohibition of actually infected or diseased cattle, and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid." This is the precise objection I make to the finding of the commission, and to the proclamation of the Governor in this case.

It is sufficient to say of the finding of the Supreme Court of Texas that "so far as the record shows, every animal of the kind prohibited in the State of Louisiana may have been actually affected with charbon or anthrax," that there is no such finding in the report of the commission or in the Governor's proclamation, and that, under the statute, there must be a finding either of disease, or of a liability to communicate disease, to justify the action of the commission. It cannot of its own motion put in force the quarantine laws of the State without the finding of some facts that such enforcement is necessary to the protection of Texas cattle. I am therefore constrained to dissent from the opinion of the court.

## TREAT *v.* WHITE.

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

No. 227. Argued April 10, 1901.—Decided April 29, 1901.

What is denominated "a call," in the language of New York stock brokers, is an agreement to sell, and as the statutes of the United States in force in May, 1899, required stamps to be affixed on all sales or agreements to sell, the calls were within its provisions.

On September 18, 1899, S. V. White brought an action in the Supreme Court of the State of New York against Charles H. Treat, United States collector of internal revenue, to recover the sum of $604, alleged to have been unlawfully exacted by such collector. The action was removed to the United States Circuit Court for the Southern District of New York, and a judgment there rendered in favor of the plaintiff. 100 Fed. Rep. 290. The case was taken to the United States Court of Appeals for the Second Circuit, which, before any decision, certified a question to this court. The statement of facts and question are as follows:

"From the 1st day of July, 1898, until the date of the commencement of this action the defendant in error, Stephen V. White, was doing business as a stock broker on the New York Stock Exchange. In the course of his business White sold 'calls' upon 30,200 shares of stock, the said 'calls' being of the same effect and tenor as Exhibit A, hereinafter set forth, and only varying in the names of the stock, the date and the price at which they were offered.

"Exhibit A.

"New York, May 18th, 1899.

"For value received the bearer may call on me on one day's notice, except last day, when notice is not required. One hundred shares of the common stock of the American Sugar Refin-

ing Company at one hundred and seventy-five per cent at any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, at 3 P. M.

(Signed) "S. V. WHITE.

"These 30,200 shares of stock, for which 'calls' at various times had been in existence, were, as matter of fact, never actually 'called,' and no stamp was put upon the same. The plaintiff in error, Charles H. Treat, United States collector of internal revenue, demanded of the defendant in error, Stephen V. White, the sum of six hundred and four dollars, which sum was the value of 30,200 internal revenue stamps of the denomination of two cents each.

"This sum of six hundred and four dollars was paid by the defendant in error, Stephen V. White, under protest. Subsequently the defendant in error demanded the return of the said six hundred and four dollars, but the demand was refused.

"Upon the facts set forth the question of law, concerning which this court desires the instruction of the Supreme Court for its proper decision, is:

"Is the above memorandum in writing, designated as Exhibit A, an 'Agreement to sell' under the provisions of section 25, Schedule A, act of Congress approved June 13, 1898, and, as such, taxable?"

The collector acted under the provision of section 25 of Schedule "A" of the War Revenue act of June 13, 1898, 30 Stat. 448, which reads as follows:

"On all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or to secure the future payment of money or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents: *Provided*, That in

case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale and the matter or thing to which it refers."

*Mr. Assistant Attorney General Beck* for Treat.

*Mr. Stephen V. White* in person for the defendant in error.

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

The question before us is simply one of statutory construction. Is a "call" (a copy of which is incorporated in the statement of facts) an agreement to sell, within the meaning of Schedule "A"? In reference to this the learned Circuit Judge, in delivering his opinion, said:

"It is an agreement, and manifestly an 'agreement to sell.' It may be referred to as an 'offer,' or an 'option,' or a 'call,' or what not, but it is susceptible of no more exact definition than 'an agreement to sell.' Inasmuch, therefore, as the statute requires stamps to be affixed 'on all sales, or agreements to sell,' it would seem that these 'calls' are within its provisions."

We fully agree with this definition. "Calls" are not distributed as mere advertisements of what the owner of the property described therein is willing to do. They are sold, and in parting with them the vendor receives what to him is satisfactory consideration. Having parted for value received with that promise it is a contract binding on him, and such a contract is neither more nor less than an agreement to sell and deliver at the time named the property described in the instrument. It

may be a unilateral contract. So are many contracts. On the face of this instrument there is an absolute promise on the part of the promisor and a promise to sell. We cannot doubt the conclusion of the Circuit Judge that this is in its terms, its essence and its nature an agreement to sell. Therefore it comes within the letter of the statute.

The defendant in error, who has argued in his own behalf with ability the questions presented, has referred in his brief to this rule of construction: that the duty of the court "is to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity." Sedgwick, Construction of Statutory and Constitutional Law, 220. With that rule of construction we are in entire sympathy, and approve of it. In the ordinary reading of this instrument no one would doubt that there was an agreement on the part of the promisor to sell at the time named the property therein described. That being the ordinary, natural, grammatical interpretation of the language, it is, as the learned Circuit Judge declared, neither more nor less than an agreement to sell. Why should not the ordinary meaning of the language in the statute be enforced in respect to this particular instrument? Certainly there must be some satisfactory reason for departing from the general rule of construction. It is also true, as said by this court in *United States* v. *Isham*, 17 Wall. 496, 504, "if there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because in the language of Pollock, C. B., in *Girr* v. *Scudds*, 11 Exchequer, 191, 'a tax cannot be imposed without clear and express words for that purpose.'" With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer. But when the language is clear a different thought arises.

We do not question the fact that there are times when the mere letter of a statute does not control, and that a fair consideration of the surroundings may indicate that that which is within the letter is not within the spirit, and therefore must be

excluded from its scope. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457. But that proposition implies that there is something which makes clear an intent on the part of Congress against enforcement according to the letter. Nothing of that kind exists in this case. There is nothing to suggest that Congress did not mean that this provision should be enforced according to its letter and spirit everywhere. The defendant in error, in the course of his argument, says that Congress must be assumed to have been familiar with the ordinary modes of dealing on the Stock Exchange of New York, and that if it intended by its legislation to reach "calls," a term well understood in that exchange, it would have named them or used some word which necessarily includes them. But this takes for granted the question at issue and assumes that the words used do not include "calls." It is not to be assumed that Congress legislated with sole reference to transactions on stock exchanges, but its action is to be taken as having been exerted for the whole nation, and if it should so happen that dealings on any stock exchange come within the purview thereof, the parties so dealing are bound by it, and cannot claim an immunity from its burden. An isolated agreement to sell stock made by an individual in Austin, Texas, is an agreement to sell, subject to the stamp duty imposed. It is none the less an agreement to sell when made in the Stock Exchange of New York, as one of a multitude of similar transactions.

That there is a difference between an agreement to sell and an agreement of sale is clear. The latter may imply not merely an obligation to sell but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. That Congress recognized the difference between these two terms is evident, because in the very next paragraph of Schedule "A" it provides, in reference to merchandise, for a stamp "upon each sale, agreement of sale, or agreement to sell." That no stamp duty was imposed on agreements to buy (or, in the vernacular of the stock exchange, "puts") furnishes no ground for denying the validity of the stamp duty on agree-

ments to sell. The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In conclusion, we may say that the language of the statute seems to us clear. It imposes a stamp duty on agreements to sell. "Calls" are agreements to sell. We see nothing in the surroundings which justifies us in limiting the power of Congress or denying to its language its ordinary meaning.

*Therefore we answer the question submitted to us by the Circuit Court of Appeals in the affirmative, and hold that a "call" is an agreement to sell, and taxable as such.*

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## SPEED *v.* McCARTHY.

ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, SOUTH DAKOTA.

No. 230. Argued April 10, 11, 1901.—Decided April 29, 1901.

As against the purchaser of interests in mining claims after the location certificates were recorded, the original locators were held by the state court estopped to deny the validity of the locations. The question of estoppel is not a Federal question.

The state court further held that where the annual assessment work had not been done on certain mining claims, a co-tenant could not, on the general principles applicable to co-tenancy, obtain title against his co-tenants by relocating the claims.

This was also not a Federal question in itself, and the contention that the state court necessarily decided the original mining claims to be in existence at the time of the relocation, in contravention of provisions of the Revised Statutes properly interpreted, could not be availed of under section 709, as no right or title given or secured by the act of Congress in this regard was specially set up or claimed.

PATRICK B. McCARTHY commenced this action in the Circuit Court of Pennington County, South Dakota, against William

B. Franklin and others, to determine their adverse claims in and to certain mining property. Before the trial William B. Franklin died, and his heirs and his administrator, Edward W. Speed, were substituted.

The Circuit Court filed findings of fact and conclusions of law, and entered judgment for defendants on the facts so found.

The facts found by the trial court are thus stated in the opinion of the Supreme Court:

"On September 16, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed placer mining claim. From the date of location until 1892, Reed and Franklin were in actual, notorious and peaceable possession of the claim, were acknowledged and reputed to be its owners, and during each year performed the required development work. They applied for patent November 23, 1892. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at time of location. January 25, 1888, Reed, Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon, and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvement made upon the claim, except about four days' work in 1889 and about four days' work in 1891; such work not exceeding $14 in each of those years. There was no agreement on the part of defendants Blair or Franklin with plaintiff to perform labor or make improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror lode claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed, or improve-

ment made, upon Tin Bar No. 2, except about four days' work in 1891, of value not exceeding $14. There was no agreement on the part of defendants Franklin or Blair with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893 or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respectively, and the law has been complied with, so far as it relates to those claims, since the date of each. Defendants are the owners of the Holy Terror and Keystone No. 4, save for the rights of the plaintiff in this action. No adverse claim was filed by plaintiff or other owners of either Tin Bar No. 1 or 2 to the application for patent to the Reed placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein thereon within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence, or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by Tin Bar No. 1, and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to one George Williams, who, in the same year, conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 2 to defendant Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced, Franklin since deceased and defendants Blair, Fayel and Amsbury each owned an undivided one-fourth interest in the Holy Terror claim and an undivided seven-thirty-sixths interest in Keystone No. 4. Blair acquired his interest in the Holy Terror claim with full knowledge of whatever rights the plaintiff had, if any. During 1891, Blair and Franklin discovered a well defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discov-

ery being outside the limits of Reed placer claim. The location notice on Tin Bar No. 1 was posted upon a well defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposits therein until during the trial of this action in the court below."

Plaintiff appealed to the Supreme Court of South Dakota from the judgment and from an order denying a new trial, and the judgment was reversed and a new trial ordered. 11 S. D. 362. Subsequently a rehearing was had, and judgment was directed to be entered below for plaintiff on the findings of fact for one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Keystone No. 4 claim as was embraced by Tin Bar No. 1 and Tin Bar No. 2. 12 S. D. 7. This was accordingly done by the Circuit Court, and this writ of error was thereupon allowed.

*Mr. George Lines* for plaintiff in error. *Mr. James W. Fowler*, *Mr. Frederick H. Whitfield*, *Mr. Charles Quarles* and *Mr. Joseph V. Quarles* were on his brief.

*Mr. W. L. McLaughlin* for defendant in error. *Mr. Charles W. Brown* and *Mr. Daniel McLaughlin* were on his brief.

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

It is objected that jurisdiction of this writ of error cannot be maintained because no title or right was specially set up or claimed within section 709 of the Revised Statutes. But plaintiffs in error contend that, while they admit that they made no specific reference to the statutes of the United States, their pleading, nevertheless, showed that they asserted title through valid mining claims duly located, and denied the title of defendant in error on the ground that the locations under which he claimed had become forfeited and abandoned, and that that was a sufficient compliance with the requirements of section 709.

We cannot concede that this is so in view of the rule expounded in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, and

many other cases, and are the less disposed to that conclusion, as the case might well be held to have been decided on grounds independent of Federal questions.

Counsel for plaintiffs in error assert in their printed brief that the following questions were presented by the findings of fact:

"First. Whether Tin Bar No. 1 claim, in its entirety, was extinguished and lost to the owners thereof by the patenting of the Reed placer claim.

"Second. Whether the Tin Bar No. 2, claim, to the extent that it conflicted with the Reed placer, was extinguished and lost to the owners thereof by the patenting of the placer claim.

"Third. Whether, notwithstanding the failure of the owners of the Tin Bar claims to perform thereon the work required by section 2324, Rev. Stat., those claims continued to be valid and subsisting claims, and the locators thereof or their grantees cotenants in respect thereto; so that one of such locators or grantees could not make a new location, for his own benefit solely, and include therein a portion of the ground covered by said Tin Bar claims although, by reason of such failure to work, said claims had become 'open to relocation in the same manner as if no location of the same had ever been made.'"

And they insist that these questions could only have been determined by the application of the provisions of chapter six of Title XXXII of the Revised Statutes correctly interpreted, particularly of section 2324.[1]

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[1] "SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims

But the Supreme Court of South Dakota held that plaintiffs in error, defendants below, were not in a position to allege or prove against defendant in error, plaintiff below, that the declarations contained in the recorded location certificates were false.

In its first opinion, after saying that there was "certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim, or consent to such a location being made by others, within the boundaries of his placer claim;" and also that "if the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patents;" the court proceeded to hold that the conduct of the original locators was such as to induce "persons who might examine the records to believe that they were the owners of properly located mining claims," and that the rights of defendant in error in this action depended "upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their re-

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located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coöwners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coöwner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coöwners who have made the required expenditures."

corded representations were false. Neither of the defendants is in any better position than the original locators, and all are estopped from denying the validity of the Tin Bar locations."

In the opinion on rehearing the court said that the findings of the Circuit Court showed "that Reed, Franklin, Blair and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2, in the office of register of deeds in the proper county, before plaintiff purchased his interest in such claims; that neither defendant is in any better position than the original locators; and, whether or not plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations."

If, as thus held, defendants below could not deny the validity of these locations, the estoppel covered the objection to the right to locate a lode claim within a placer claim previously located, and the objection based on the supposed effect of the patenting of the placer claim, as raised on this record. And whether a party is estopped or not is not a Federal question. *Gillis* v. *Stinchfield*, 159 U. S. 658; *Pittsburgh Iron Co.* v. *Cleveland Iron Mining Co.*, 178 U. S. 270.

Having determined that for the purposes of this action the Tin Bar claims were to be regarded as valid in their inception, the Supreme Court considered the controversy as to the right of a co-tenant to relocate a mining claim when the annual assessment work has not been done, and obtain title as against his co-tenants.

The court held that the relation of co-tenant existed between McCarthy and Franklin when Franklin located the Holy Terror and Keystone claims; that original locators may resume work at any time before relocation; that Franklin's acts of relocation did not terminate the fiduciary relation between himself and McCarthy, and said: "We think the Circuit Court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the Federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements 'the claim or mine upon which such failure occurred shall be open to re-

location in the same manner as if no location of the same had ever been made.' Rev. Stat. U. S. § 2324. It is contended that, if Congress intended to have the relocator regarded as a trustee under any circumstances, such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute."

The state court thus disposed of this branch of the case upon general principles of law, and its decision did not rest on the disposition of a Federal question.

Counsel argue, however, that the court, before reaching the question of co-tenancy, was compelled to hold and did hold that the Tin Bar claims existed at the time of the location of the Holy Terror and Keystone claims, and that in so holding the court necessarily decided against the contention of plaintiffs in error that the Tin Bar claims had absolutely ceased to exist by virtue of the statute properly interpreted.

But was that contention so put forward as to constitute the special assertion of a right given or protected by the act of Congress? The only approach to such an assertion was the statement of plaintiffs in error in their amended answer, that defendant in error intended to set up certain rights under the Tin Bar claims, and that these claims were abandoned and forfeited before the Holy Terror and Keystone claims were located. We think these general allegations fall short of that definite claim of a right or title under a statute of the United States, which section 709 requires. And that, as the record stands, this court would not be justified in holding that the state court denied a right or title specially set up as secured by the statute, when it determined this particular question on the general principles of law recognized as prevailing in South Dakota.

*Writ of error dismissed.*

# AMERICAN SUGAR REFINING COMPANY *v.* NEW ORLEANS.

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

No. 535. Argued and submitted March 18, 1901.—Decided April 29, 1901.

The Circuit Courts of Appeals have power to review the judgments of the Circuit Courts in cases where the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, notwithstanding constitutional questions may have arisen after the jurisdiction of the Circuit Court attached.

But in any such case, where a constitutional question arises on which the judgment depends, a writ of error may be taken directly from this court to revise the judgment of the Circuit Court, although the case may nevertheless be carried to the Circuit Court of Appeals, but if so, and final judgment is there rendered, the jurisdiction of this court cannot thereafter be invoked directly on another writ of error to the Circuit Court.

When the plaintiff invokes the jurisdiction of the Circuit Court on the sole ground that the suit arises under the Constitution or laws or some treaty of the United States, as appears on the record from his own statement of his cause of action, in legal and logical form, and 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, is determined, then the appellate jurisdiction of this court is exclusive.

THIS was a petition for a writ of certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to this court for its review and determination the case of the *American Sugar Refining Company, Plaintiff in Error*, v. *The City of New Orleans, Defendant in Error, No.* 920, *November Term*, 1899; or in the alternative for a writ of mandamus to command the judges of said court to hear, try and adjudge said cause.

The petition alleged that on June 14, 1899, the city of New Orleans brought suit by rule in the civil district court for the parish of Orleans, Louisiana, against the American Sugar Refining Company for a city license tax for the year 1899 for the sum of $6250 with interest thereon claiming said license tax

solely by virtue of the laws of Louisiana and an ordinance of the city of New Orleans, as an occupation tax for carrying on the business of refining sugar and molasses in that city; that the American Sugar Refining Company petitioned the district court for an order removing the suit to the Circuit Court of the United States for the Eastern District of Louisiana, the petition for removal being based solely upon the ground that the defendant was a corporation of New Jersey, and the plaintiff, a corporation of Louisiana, which petition was granted, the bond required given, a certified copy of the record filed, and the suit docketed in the Circuit Court.

That thereafter, by order of the court, the city reformed its pleadings in some parts, "the only difference of substance between said reformed petition and the original rule being that said reformed petition omitted the formal prayer for a recognition of a lien and privilege on defendant's property, and for an injunction against defendant carrying on its business."

That the defendant answered:

"*First.* That it was a manufacturer, and as such exempt from license taxation under article 229 of the constitution of the State of Louisiana of 1898, which exempts all manufacturers from state and municipal license taxation, except those of distilled, alcoholic and malt liquors, tobacco, cigars and cottonseed oil; and

"*Second.* That the ordinance of the city of New Orleans under which said tax was claimed was based upon act No. 171 of the general assembly of Louisiana of 1898, and that the said act was in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it exempted from license taxation planters and farmers who refine their own sugar and molasses, and thereby sought to make an illegal discrimination against those sugar refiners who were not planters and farmers, and denied to defendant, as one of such sugar refiners, the equal protection of the laws of the State of Louisiana; and that the said act and city ordinance based thereon were therefore unconstitutional and void as to defendant."

That the suit was tried before the court and a jury, and evidence was adduced showing the nature and character of

defendant's business in support of its claim that it was a manufacturer, which evidence of the defendant was uncontradicted in every particular; and also showing that the gross receipts of defendant's business were of such amount that if liable at all for license tax, it was liable for the sum claimed; and defendant also filed an exception of no cause of action.

That at the close of the evidence defendant requested the court to direct the jury to render a verdict in its favor, which the court refused to do, and charged in plaintiff's favor, and plaintiff obtained a verdict and judgment. On defendant's application a bill of exceptions was duly settled and signed by the presiding judge; and the case carried on error to the United States Circuit Court of Appeals for the Fifth Circuit. The cause was there heard, and on May 29, 1900, judgment was rendered by the Circuit Court of Appeals dismissing the writ of error on the ground of want of jurisdiction. 104 Fed. Rep. 2. Petitioner thereupon applied for a rehearing, which was denied November 20, 1900.

Petitioner prayed for the writ of certiorari, or for the writ of mandamus as before stated. Leave was granted to file the petition, and a rule to show cause was thereupon entered, to which due return was made.

*Mr. Joseph W. Carroll* for petitioner. *Mr. Charles Carroll* was on his brief.

*Mr. Samuel L. Gilmore*, for respondent, submitted on his brief.

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

The jurisdiction of the Circuit Court rested on diverse citizenship, and not on any other ground, and had the Circuit Court of Appeals gone on and decided the case, its decision would have been final, and our interposition could only have been invoked by certiorari.

This was so notwithstanding one of the defences was the unconstitutionality of the ordinance. *Colorado Central Mining*

*Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691. These, and many other cases to the same effect, related to the appellate jurisdiction of this court over the Court of Appeals under the sixth section of the Judiciary Act of March 3, 1891, but they necessarily involved consideration of our jurisdiction under the fifth section, and that of the Court of Appeals under the sixth section. By the fifth section appeals or writs of error may be taken from the District or Circuit Courts direct to this court in any case that "involves the construction or application of the Constitution of the United States;" "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 which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Section six provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review the final decisions of the District and Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States." The jurisdiction referred to is the jurisdiction of the Circuit Court, and as the judgment of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, it follows that the Court of Appeals has power to review the judgment of the Circuit Court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the Circuit Court attached, by reason whereof the case became embraced by section five.

Thus it was held in *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, where the jurisdiction of the Circuit Court rested on diverse citizenship, but the state statute involved was claimed in defence to be in contravention of the Constitution of the United States, that a writ of error could be taken directly from

this court to revise the judgment of the Circuit Court, although it was also ruled that the plaintiff might have carried the case to the Circuit Court of Appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the Circuit Court.

The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the Courts of Appeals are not made final it is provided that "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy exceeds one thousand dollars besides costs."

And the right to two appeals would exist in every case (the litigated matter having the requisite value,) where the jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution, laws or treaties of the United States, if such cases could be carried to the Circuit Court of Appeals, for their decisions would not come within the category of those made final.

As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by 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 or application of the Constitution, or some law, or treaty of the United States, *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company*, 178 U. S. 239; and as those cases fall strictly within the terms of section five, the appellate jurisdiction of this court in respect of them is exclusive.

If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and also on grounds independent of that, a question expressly reserved in *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, and the case is taken to the Court of Appeals, propositions as to the latter grounds may

be certified, or, if that course is not pursued and the case goes to judgment, (and the power to certify assumes the power to decide,) an appeal or writ of error would lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. *Union Pacific Railway Company* v. *Harris*, 158 U. S. 326.

In *Carter* v. *Roberts*, 177 U. S. 496, we said: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." These observations perhaps need some qualification. Undoubtedly where the jurisdiction of the Circuit Court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the constitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the Circuit Court of Appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the Circuit Court of Appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in section five may have so arisen that a direct resort to this court might be had does not deprive the Court of Appeals of jurisdiction or justify it in declining to exercise it.

In the case at bar, the jurisdiction rested on diverse citizenship. Two defences were interposed, one of which asserted exemption from the license tax, and the other denied the constitutionality of the legislation under which the tax was imposed.

Both defences were overruled, and judgment rendered for the plaintiff. The case was then carried on error to the Circuit Court of Appeals, which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the court erred, and that a certiorari should issue that its judgment to that effect may be revised. As the record is before us on the return to the rule hereinbefore entered, and full argument has been had, it will be unnecessary for another return to be made to the writ, or further argument to be submitted.

*Writ of certiorari to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause.*

Mr. Justice Gray concurred in the result.

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## FAIRBANK v. UNITED STATES.

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

No. 226. Argued December 13, 1900. — Decided April 15, 1901.

A stamp tax on a foreign bill of lading is, in substance and effect, equivalent to a tax on the articles included in that bill of lading, and therefore is a tax or duty on exports, and therefore in conflict with article I, section 9 of the Constitution of the United States, that "No tax or duty shall be laid on articles exported from any State."

An act of Congress is to be accepted as constitutional, unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution.

If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety.

On March 7, 1900, plaintiff in error was convicted in the District Court of the United States for the District of Minnesota on the charge of issuing as agent of the Northern Pacific Rail-

way Company an export bill of lading upon certain wheat exported from Minnesota to Liverpool, England, without affixing thereto an internal revenue stamp, as required by the act of June 13, 1898, c. 448, 30 Stat. 448. Upon that conviction he was sentenced to pay a fine of $25. His contention on the trial was that that act, so far as it imposes a stamp tax on foreign bills of lading, is in conflict with article I, section 9, of the Constitution of the United States, which reads: "No tax or duty shall be laid on articles exported from any State." This contention was not sustained by the trial court, and this writ of error was sued out to review the judgment solely upon the foregoing constitutional question.

Section 6 of the act reads:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons, or party, who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule."

In Schedule "A" is this clause:

"Bills of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

Also the following:

"It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached

and canceled, as is in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

And this proviso at the end of the schedule:

"*Provided*, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America."

*Mr. C. W. Bunn* for plaintiff in error. *Mr. George A. King* and *Mr. William B. King* filed a brief on behalf of plaintiff in error.

*Mr. Solicitor General* for the United States.

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

The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written constitutions are to be regarded as of value, the duty of the court is plain to uphold the Constitution, although in so doing the legislative enactment falls. The reasoning in support of this was in the early history of this court forcibly declared by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch, 137, 177, and nothing can be said to add to the strength of his reasoning. His language is worthy of quotation:

"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."

This judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation. That in the enforcement of this rule the decisions, national and State, are not all in harmony is not strange. Conflicts

between constitutions and statutes have been easily found by some courts. It has been said, and not inappropriately, that in certain States the courts have been strenuous as to the letter of the state constitution and have enforced compliance with it under circumstances in which a full recognition of the spirit of the constitution and the general power of legislation would have justified a different conclusion. We do not care to enter into any discussion of these varied decisions. We proceed upon the rule often expressed in this court that an act of Congress is to be accepted as constitutional unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution.

In the light of this rule the inquiry naturally is upon what principles and in what spirit should the provisions of the Federal Constitution be construed? There are in that instrument grants of power, prohibitions and a general reservation of ungranted powers. That in the grant of powers there was no purpose to bind governmental action by the restrictive force of a code of criminal procedure has been again and again asserted. The words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named. Further, by the last clause of sec. 8, art. 1, Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." This construed on the same principles vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution. This matter was at an early day presented to this court, and it was affirmed that there could be no narrow and technical limitation or construction; that the instrument should be taken as a constitution. In the course of the opinion the Chief Justice said:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution.

This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 415.

And thereafter, in language which has become axiomatic in constitutional construction (p. 421)—

"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."

It is true that in that and other kindred cases the question was as to the scope and extent of the powers granted, and the language quoted must be taken as appropriate to that question and as stating the rule by which the grants of the Constitution should be construed.

We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by

the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

With this rule in mind we pass to a consideration of the precise question presented. The constitutional provision is "no tax or duty shall be laid on articles exported from any State." The statute challenged imposes on "bills of lading for any goods, merchandise, or effects, to be exported from any port or place in the United States to any foreign port or place, ten cents." The contention on the part of the Government is that no tax or duty is placed upon the article exported; that so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily though ordinarily used in connection with the exportation of goods; that it is a mere stamp imposition on an instrument, and, similar to many such taxes which are imposed by Congress by virtue of its general power of taxation, not upon this alone, but upon a great variety of instruments used in the ordinary transactions of business. On the other hand, it is insisted that though Congress by

virtue of its general taxing power may impose stamp duties on the great bulk of instruments used in commerce, yet it cannot in the exercise of such power interfere with that freedom from governmental burden in the matter of exports which it was the intention of the Constitution to protect and preserve. It must be noticed that by this act of 1898 while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading is charged one cent; an export bill of lading ten cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature but by virtue of the difference an attempt to burden exports with a discriminating and excessive tax.

The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of ten cents on bills of lading on goods to be exported it is because it has power to do so, and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the

articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

The power to tax is the power to destroy. And that power can be exercised not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export. To the suggestion that a stamp duty is necessarily small in amount, we reply that the fact is to the contrary. The act by which the stamp tax in question was imposed imposes a like tax on many other instruments, and in some instances graduating the amount thereof by the value of the property conveyed or affected by the instrument taxed. Thus, "each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place" is subject to a stamp tax in the sum of one cent for each hundred dollars of value of the property sold or agreed to be sold. Bills of exchange are likewise taxed by a graduated scale. Deeds or other instruments for the conveyance of land are charged with a stamp tax of fifty cents for each five hundred dollars of value of property conveyed. And so of others. It is a well-known fact that under this graduated system many instruments are subject to stamp duties of large amount. No question has ever been raised as to this power of graduating, and if valid in the cases of bills of exchange, agreements of sale, or conveyances of property, it is equally valid as to bills of lading. The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. By a graduated system, although the tax is called a tax on "the vellum, parchment or paper" upon which transactions are written, or by which they are evidenced, a burden may be cast upon exports sufficient to check or retard them, and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon. The question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is "no tax or duty." A ten cent tax or duty is in conflict with that provision as certainly as an hundred dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount but one of power. The

applicable maxim is "*obsta principiis*," not "*de minimis non curatur lex.*"

Counsel for the Government in his interpretation of the scope and meaning of this constitutional limitation says:

"To give Congress the power to lay a tax or duty 'on articles exported from any State,' meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others."

This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the

National Government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation, and, as we have shown, a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export.

In *Nicol* v. *Ames*, 173 U. S. 509, we had occasion to consider this very act in reference to another stamp duty required by the same schedule, "A," to wit, the clause:

"Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof in excess of one hundred dollars, one cent."

We sustained that tax as a tax upon the privilege or facilities obtained by dealings on exchange, saying (p. 521):

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

If it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported.

These considerations find ample support in prior adjudications of this court. Thus, in *Almy* v. *California*, 24 How. 169, 174, it appeared that the State of California had imposed a stamp tax on bills of lading for gold or silver shipped to any place outside of the State, and the contention was that such stamp tax was not a tax on the goods themselves, but the court said:

"But a tax or duty on a bill of lading, although differing in

form from a duty on the article shipped, is in substance the same thing; for a bill of lading or some written instrument of the same import is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco or bagging to cover cotton when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported."

It is true that thereafter, in *Woodruff* v. *Parham*, 8 Wall. 123, it was held, that the words "imports" and "exports" as used in the Constitution were used to define the shipment of articles between this and a foreign country and not that between the States, and while therefore that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected. In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon the case cited. It was recognized long anterior thereto in *Brown* v. *Maryland*, 12 Wheat. 419. In that case it appeared that the State of Maryland, in order to raise a revenue for state purposes, required all importers of certain foreign articles to take out a license before they were authorized to sell the goods so imported, and it was held that such license tax, although in form a tax upon the person importing for the privilege of sell-

ing the goods imported, was in fact a tax on imports, and that the mode of imposing it by giving it the form of a tax on the occupation of importer merely varied the form without changing the substance. The argument in the opinion in that case, announced by Chief Justice Marshall, remains unanswered. As the States cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. In like manner the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance. In the course of his argument Chief Justice Marshall used this illustration:

"All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic must either charge more on the article in which he deals or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution." p. 444.

The first clause of section 8 of Article 1 of the Constitution gives to Congress "power to lay and collect taxes, duties, imposts and excises." Were this the only constitutional provision in respect to the matter of taxation there would be no doubt that, tried by the settled rules of constitutional interpretation, Congress would have full power and full discretion as to both objects and modes of taxation. But there are also expressed in the same instrument three limitations. As said by Chief Justice Chase, in the *License Tax Cases*, 5 Wall. 462, 471:

"It is true that the power of Congress to tax is a very exten-

sive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

This proposition is restated by counsel for Government at the commencement of his argument, and is undoubtedly correct. We have hitherto had occasion to consider the two qualifications—the one that direct taxes must be imposed by the rule of apportionment and the other that indirect taxes shall be uniform throughout the United States. In the *Income Tax Cases*, *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S 429; 158 U. S. 601, the constitutional provision as to the apportionment of direct taxes was elaborately considered, and it was held that a tax on the income made up of the rents of real estate and one on the income from personal property were substantially direct taxes on the real estate and the personalty. In the first of these cases, on page 581, discussing the principles of constitutional construction, the Chief Justice said:

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the

securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins* v. *Commissioners*, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"*In Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and *Leloup* v. *Mobile*, 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself; and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698."

In *Knowlton* v. *Moore*, 178 U. S. 41, we considered the qualification in the matter of uniformity. The question presented was the validity of the inheritance tax imposed by the act of

June 13, 1898. 30 Stat. 448. After showing that the tax was not a direct tax within the constitutional meaning of the term, we examined the objection that it was not uniform throughout the United States, and, after full consideration, held that the uniformity required was a geographical and not an intrinsic uniformity, and was synonymous with the expression "to operate generally throughout the United States." While upon some of the questions in that case there was a difference of opinion, yet concerning the construction of the uniformity clause the Justices who took part in the decision were agreed. After discussing the construction of the uniformity clause, Mr. Justice White, speaking for the court, proceeded to show that the tax in question did not violate such uniformity. There was no suggestion that the qualification could be disregarded or limited in any legislation; the opinion proceeded upon the assumption that the uniformity provision was an absolute restriction on the power of Congress, and the argument was to demonstrate that the tax in question in no manner conflicted with either the letter or spirit of such restriction. If it had been in the mind of the court that such restriction as to uniformity could be evaded by a mere change in the form of legislation the opinion could have been less elaborate and the difficulties of the case largely avoided.

We have referred to these cases for the purpose of showing that the rule of construction of grants of powers has been also applied when the question was as to restrictions and limitations. Other cases may also well be referred to in this connection.

In *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, the question presented was whether an act of the State of Tennessee, requiring "all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby County, offering for sale, or selling goods, wares or merchandise therein by sample," to pay a certain tax to the county trustee, could be enforced as to those drummers who were engaged simply in soliciting business in the State of Tennessee in behalf of citizens of other States. It was held that it could not, that such act of solicitation, being a matter of interstate commerce, was, therefore, beyond the power of the State to

regulate. In the opinion, Mr. Justice Bradley, speaking for the court, said:

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States?

Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

"The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden on interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things." p. 494.

The scope of this argument is that inasmuch as interstate commerce can only be regulated by Congress, and is free from state interference, state legislation, although not directly prohibiting interstate commerce, if in substance and effect directly casting a burden thereon, cannot be sustained. Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, it appeared that Congress had passed an act authorizing the condemnation of a lock and dam known as the Upper Lock and Dam on the Monongahela River, belonging to the navigation company, with a proviso, "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated"—the idea being that simply the value of the tangible property was all that need be paid for; and it was held that such proviso could not be sustained; that while the right of condemnation was clear, it was limited by the clause in the Fifth Amendment, "nor shall private property be taken for public use without just compensation," and that that language required payment of the entire value of the property of which the owner was deprived, the court saying:

"Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it

necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon a price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation." p. 336.

In short, the court held in that case that Congress could not by any declaration in its statute avoid, qualify or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

In *Boyd* v. *United States*, 116 U. S. 616, the fifth section of

the act of June 22, 1874, 18 Stat. 186, which authorized a court of the United States in revenue cases, on motion of the District Attorney, to require the defendant or the claimant to produce in court his private books, invoices and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the Fourth and Fifth Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clauses of those amendments, and in respect to this the court said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." p. 635.

On the other hand, *Pace* v. *Burgess, Collector*, 92 U. S. 372, is cited as an authority against these conclusions; but an examination of the case shows that this is a mistake. The act of 1868, 15 Stat. 125, imposed certain taxes on the manufacture of tobacco for consumption or use, required as evidence of the payment of such taxes the affixing of revenue stamps to the packages, and forbade the removal of any tobacco from the factory without payment of the taxes and affixing of the stamps. It further provided that tobacco might be manufactured for export and exported without payment of any tax. Sections 73

and 74, page 157, are the sections making provision for such export, and authorized the removal of the tobacco from the manufactory to certain designated warehouses at ports of entry upon the giving of suitable bonds. The latter part of section 74 reads:

"All tobacco and snuff intended for export, before being removed from the manufactory shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation."

This act was amended in 1872, 17 Stat. 230, the amendments to sections 73 and 74 being found on page 254; but they have no significance in respect to the present question. Now, it was the cost of these removal stamps which was complained of as in conflict with the constitutional provision against a tax or duty upon exports, but the contention was overruled, the court saying (pp. 374, 375, 376):

"The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that 'no tax or duty shall be laid on articles exported from any State.' But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. . . . We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and pre-

cautions were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the Government from imposition and fraud likely to be committed under the pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is, the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the Government.

"One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us we think it is used for quite a different purpose from that of imposing a tax or duty; indeed, it is used for the very contrary purpose—that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold dust exported from California by a law of that State was clearly an export tax, as this court decided in the case of *Almy* v. *The State of California*, 24 How. 169. In all such cases no one could entertain a reasonable doubt on the subject."

Obviously, this opinion, taken as a whole, makes against rather than in favor of the contention of counsel for the Government. Its argument is to the effect that the stamp required was in no proper sense a tax for revenue; that there was no burden of any kind on the export; that it was something to facilitate rather than to hinder exports; that it was only a means of identification and to enable parties to remove their tobacco from the manufactory to the warehouse, and that the sum demanded was simply a matter of compensation for services rendered. The statute itself declared that the twenty-five cents was to be paid "for the expense attending the providing and affixing" of the stamps. This clearly excludes the idea that any tax or duty was intended to be imposed, and the opinion notes the fact that the difficulty arises because ordinarily stamps are used for the purpose of duty or tax, says that we must always regard things rather than names, and that this stamp was not used for the purpose of tax or duty but only for identification and to prevent frauds on the Government. If it had been supposed that a stamp tax could properly be charged, the line of argument would have been entirely different. In the case before us the stamp is distinctly for the purpose of revenue and not by way of compensation for services rendered, so that the question is whether revenue can be collected from exports by changing the form of the tax from a tax on the article exported to a tax on the bill of lading which evidences the export.

Again, it is said that if this stamp duty on foreign bills of lading cannot be sustained it will follow that tonnage taxes and stamp duties on manifests must also fall. The validity of such taxes is not before us for determination, and, therefore, we must decline to express any opinion thereon, and yet it may be not improper to say that even if the suggested result should follow it furnishes no reason for not recognizing that which in our judgment is the true construction of the constitutional limitation. Mingling in one statute two or three unconstitutional taxes cannot be held operative to validate either one, and if the reasoning we have stated and followed in reaching the conclusion in this case shall also lead to the result that such taxes are

invalid, it of itself does not weaken the force of the reasoning or justify us in departing from its conclusions. But we may be permitted to suggest, without deciding, that there may be a valid difference as indicated by the decisions of this court in respect to interstate commerce. It has been distinctly held that no State could by a license or otherwise impose a burden on the business of interstate commerce. *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, and cases cited in the opinion. And yet that decision was followed by decisions that it might tax the vehicles and property employed in interstate commerce so long and so far as they were a part of the property of the State. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, and cases cited in the opinion. This difference may have significance in respect to these other taxes. As heretofore said, we do not decide the question, but only make these suggestions to indicate that the matter has been considered.

Another matter pressed upon our attention, which deserves and has received careful consideration, is the practical construction of this constitutional provision by legislative action. On July 6, 1797, an act was passed entitled "An act laying duties on stamped vellum, parchment and paper," (1 Stat. 527,) which contained this clause:

"Any note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents," etc. p. 528.

This was changed by the act of February 28, 1799, 1 Stat. 622, but only as to the amount. On April 6, 1802, 2 Stat. 148, a repealing act was passed. Again, on July 1, 1862, 12 Stat. 432, a similar stamp duty was imposed on foreign bills of lading, which was continued by the act of June 30, 1864, 13 Stat. 223, 291, finally repealed by the act of June 6, 1872, 17 Stat. 230, 256; and then followed the act in question. In *Knowlton* v. *Moore*, *supra*, in which the inheritance tax was considered, the significance of this practical construction by legislative action was referred to, and on pages 56, 57, we said:

"The act of 1797, which ordained legacy taxes, was adopted

at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority. It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question."

And again, when the construction of the uniformity clause was being considered (p. 92):

"But one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced."

That was not the first case in which this matter has been considered by this court. On the contrary, it has been often presented. See in the margin a partial list of cases in which the subject has been discussed.[1] An examination of the opinions

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[1] *Stuart* v. *Laird*, 1 Cranch, 299; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Cohens* v. *Virginia*, 6 Wheat. 264, 418; *Edwards's Lessee* v. *Darby*,

in those cases will disclose that they may be grouped in three classes: First, those in which the court, after seeking to demonstrate the validity or the true construction of a statute, has added that if there were doubt in reference thereto the practical construction placed by Congress, or the department charged with the execution of the statute, was sufficient to remove the doubt; second, those in which the court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long continued construction by the officials charged with the execution of the statute; and, third, those in which the court, noticing the fact of a long continued construction, has distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute.

The first class is illustrated by *Cohens* v. *Virginia*, 6 Wheat. 264. There the question presented was the jurisdiction of this court over proceedings by indictment in a state court for a violation of a state statute. In an elaborate argument Chief Justice Marshall sustained the jurisdiction, and then added (p. 418):

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is

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12 Wheat. 206, 210; *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39; *United States* v. *Macdaniel*, 7 Pet. 1; *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet. 539; *Union Insurance Company* v. *Hoge*, 21 How. 35, 66; *United States* v. *Alexander*, 12 Wall. 177, 181; *Peabody* v. *Stark*, 16 Wall. 240, 243; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237; *Smythe* v. *Fiske*, 23 Wall. 374, 382; *United States* v. *Moore*, 95 U. S. 760, 763; *Swift Company* v. *United States*, 105 U. S. 691, 695; *Hahn* v. *United States*, 107 U. S. 402, 406; *United States* v. *Graham*, 110 U. S. 219, 221; *Lithographic Company* v. *Sarony*, 111 U. S. 53, 57; *Brown* v. *United States*, 113 U. S. 568, 571; *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727, 733; *The Laura*, 114 U. S. 411, 416; *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Hill*, 120 U. S. 169, 182; *United States* v. *Johnston*, 124 U. S. 236, 253; *Robertson* v. *Downing*, 127 U. S. 607, 613; *Merritt* v. *Cameron*, 137 U. S. 542, 552; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 570; *United States* v. *Alabama R. R. Co.*, 142 U. S. 615, 621; *McPherson* v. *Blacker*, 146 U. S. 1; *United States* v. *Tanner*, 147 U. S. 661, 663; *United States* v. *Union Pacific Ry. Co.*, 148 U. S. 562, 572; *United States* v. *Alger*, 152 U. S. 384, 397; *Webster* v. *Luther*, 163 U. S. 331, 342; *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190, 205; *Hewitt* v. *Schultz*, 180 U. S. 139–156.

believed, has arisen to which this principle applies more unequivocally than to that now under consideration."

And in support of that referred to the writings in The Federalist, which were presented before the adoption of the Constitution, and were generally recognized as powerful arguments in its favor; also to the Judiciary Act of 1789, 1 Stat. 73, the decisions of this court and the assent of the courts of several States thereto, saying (p. 421):

"This concurrence of statesmen, of legislators, and of judges in the same construction of the Constitution may justly inspire some confidence in that construction."

Again, in *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39, Mr. Justice Story, in like manner, said:

"It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

In the second class may be placed *Stuart* v. *Laird*, 1 Cranch, 299; *Burrow Lithographic Company* v. *Sarony*, 111 U. S. 53, in which last case Mr. Justice Miller, speaking for the court, used this language (p. 57):

"The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

See also *The Laura*, 114 U. S. 411; *United States* v. *Phil-*

*brick*, 120 U. S. 52, 59; *United States* v. *Hill*, 120 U. S. 169, 182; *Robertson* v. *Downing*, 127 U. S. 607, 613, and *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572, in which it was said:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The third class is the largest. While the language used by the several Justices announcing the opinions in these cases is not the same, the thought is alike. Thus, in *Swift Company* v. *United States*, 105 U. S. 691, 695, Mr. Justice Matthews said:

"The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt."

In *United States* v. *Graham*, 110 U. S. 219, 221, Chief Justice Waite thus stated the law:

"Such being the case it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous."

In *United States* v. *Tanner*, 147 U. S. 661, 663, it was said by Mr. Justice Brown:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States* v. *Graham*, 110 U. S. 219; *Swift Company* v. *United States*, 105 U. S. 691. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

In *United States* v. *Alger*, 152 U. S. 384, 397, Mr. Justice Gray used this language:

"If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In *Webster* v. *Luther*, 163 U. S. 331, 342, Mr. Justice Harlan stated the rule in these words:

"The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 34; *United States* v. *Healey*, 160 U. S. 136, 141. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

From this *résumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this mat-

ter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and, therefore, a tax or duty on exports, and in conflict with the constitutional prohibition. The judgment of the District Court will be reversed and the case remanded with instructions to grant a new trial.

Mr. Justice Harlan, (with whom concurred Mr. Justice Gray, Mr. Justice White and Mr. Justice McKenna,) dissenting.

By the act of June 13, 1898, c. 448, imposing certain stamp duties, it was declared that there should be levied, collected and paid the sum of *ten* cents "*for* and *in respect of* the *vellum, parchment or paper* upon which . . . shall be written or printed by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, . . . bills of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place. . . . *Provided*, That the stamp duties imposed by the foregoing Schedule on manifests, bills of lading and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America." 30 Stat. 448, 451, 458, 459, 462, §§ 6 and 24, Schedule A.

JUSTICES HARLAN, GRAY, WHITE and MCKENNA, dissenting.

It is contended that this stamp duty is forbidden by the clause of the Constitution declaring that "no tax or duty shall be laid on *articles* exported from any State," art. I, § 9; and that the stamp duty here in question was, within the meaning of that instrument, a tax or duty on the wheat received by the Northern Pacific Railway Company to be carried from Minnesota to Liverpool, and for which the company issued its bill of lading.

We are of opinion that this contention cannot be sustained without departing from a rule of constitutional construction by which this court has been guided since the foundation of the Government. Let us see to what extent Congress has exercised the power now held not to belong to it under the Constitution.

As early as July 6, 1797, Congress passed an act entitled "An act laying duties on stamped vellum, parchment and paper." By the first section of that act it was provided that from and after the 31st day of December thereafter there should be "levied, collected and paid throughout the United States the several stamp duties following, to wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to wit: . . . any note or bill of lading for any goods or merchandise . . . to be exported to any foreign port or place, twenty-five cents." 1 Stat. 527, 528, c. 11, § 1. The same act provided: "That if any person or persons shall write or print, or cause to be written or printed upon any unstamped vellum, parchment or paper, (with intent fraudulently to evade the duties imposed by this act), any of the matters and things for which the said vellum, parchment or paper is hereby charged to pay any duty, or shall write or print, or cause to be written or printed any matter or thing, upon any vellum, parchment or paper, that shall be marked or stamped for any lower duty than the duty by this act payable, such person so offending shall for every such offence forfeit the sum of one hundred dollars." 1 Stat. 527, 528, c. 11, § 13.

By an act approved December 15, 1797, c. 1, it was provided that the duties prescribed by the act of July 6, 1797, should be levied, collected and paid from and after June 30, 1798, and not before. 1 Stat. 536.

The above act of July 6, 1797, was amended in certain particulars by an act approved March 19, 1798, c. 20, by which certain provisions were made for furnishing the vellum, parchment or paper required by the former act to be stamped and marked. 1 Stat. 545.

It not having occurred to any of the great statesmen and jurists who were connected with the early history of the Government that enactments such as that of July 6, 1797, violated the Constitution, Congress passed another act on the 28th day of February, 1799, c. 17, imposing a duty of ten cents "on every skin or piece of vellum or parchment on which shall be written or printed any or either of the instruments following, to wit: . . . Any note or bill of lading, or writing or receipt in the nature thereof, for any goods or merchandise . . . to be exported to any foreign port or place." 1 Stat. 622.

Congress, still supposing that it was acting within the limits of its powers under the Constitution, again, by the act of April 23, 1800, c. 31, amended and extended that of July 6, 1797. By the latter act a general stamp office was established, and provision was made, among other things, for the punishment, by fine and imprisonment, of those who, with the intent to defraud the United States of any of the duties laid by the original act of 1797, counterfeited or caused to be forged or counterfeited any vellum, parchment or paper provided for by Congress under that act. 2 Stat. 40, 42. The act of April 23, 1800, was amended by an act passed March 3, 1801, c. 19, by which it was provided that deeds, instruments or writings, issued without being stamped, could be thereafter stamped and become valid and available as if they had been originally stamped as required by law. 2 Stat. 109.

By an act approved April 6, 1802, c. 17, internal duties on "stamped vellum, parchment and paper" were discontinued—for the reason, doubtless, that the further imposition of such duties was unnecessary. 2 Stat. 148.

As late as March 3, 1823, Congress passed a general statute in execution of the act of April 23, 1800, establishing a general stamp office. 3 Stat. 779.

By an act approved July 1, 1862, c. 119, Congress provided

that there should be levied, collected and paid a stamp duty of ten cents "for and in respect of the vellum, parchment or paper" upon which was written or printed any "bill of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place." 12 Stat. 432, 475, 479, 480, §§ 94, 110. By the act of June 30, 1864, c. 173, the stamp duties provided by the act of July 1, 1862, were continued in force until August 1, 1864, and it was provided that from and after the latter date there should be levied, collected and paid a stamp duty of ten cents "for and in respect of the vellum, parchment or paper upon which shall be written or printed" any "bill of lading or receipt (other than charter party) for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place." 13 Stat. 223, 291, 292, 298, §§ 151, 170, Schedule B. But by an act approved June 6, 1872, c. 315, all the taxes imposed under and by virtue of Schedule B of section 170 of the act of June 30, 1864, and the several acts amendatory thereof, were abrogated from and after October 1, 1872, excepting only the tax of two cents on bank checks, drafts or orders. 17 Stat. 230, 256.

We have referred somewhat in detail to the above enactments for the purpose of bringing out clearly the fact that stamp duties were imposed specifically for and in respect of the vellum, parchment or paper upon which was written or printed a bill of lading for goods or merchandise to be exported to foreign countries, and had no reference to the kind, quality or value of the property covered by such bill of lading. Congress *ex industria* declared in each act that the tax was for and in respect of the vellum, parchment or paper upon which the bills of lading were written or printed. This fact plainly distinguishes the present case from *Almy* v. *State of California*, 24 How. 169, which involved the validity, under the Constitution of the United States, of a statute of California, passed April 26, 1858, imposing a stamp tax on bills of lading for the transportation from that State, to any port or place without the State, of any quantity of gold or silver coin, in whole or in part, gold dust, or gold or silver in bars or other form. This court, after observing that

a tax laid on the gold or silver exported from California was forbidden by the clause declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," said: "In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only on bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax upon the gold and silver exported, while all the other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other. In the judgment of this court the state tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to." This interpretation was demanded by the words of the statute of California which provided: "The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment or other material, upon which may be written, printed, engraved, or lithographed, or other means of designation, of either of the following-described instruments, to wit: Any bill of lading, contract, agreement, or obligation for the transportation or conveyance from any point or place in this State, to any point or place without the limits of this State, of any sum, amount or quantity of gold or silver coin, in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney or consignee, or consignor, to wit: *for one hundred dollars, thirty cents; and all sums over one hundred dollars, a stamp tax or duty of one-fifth of one per cent upon the amount or value thereof*, the payment whereof to be included in the bill of lading, contract, or agreement, or, ob-

ligation for the transportation or conveyance thereof, as in this section provided, having attached thereto or stamped thereon a stamp or stamps expressing in value the amount of such tax duty," etc. Stat. Cal. 1858, p. 305; Stat. Cal. 1857, p. 304.

The difference between the California statute and the act of Congress is manifest. By the former the amount of the tax upon bills of lading depended upon the value of the gold or silver specified in them and exported, while the latter imposed a tax of only ten cents on the vellum, parchment or paper upon which was written or printed a bill of lading for property to be exported, without regard to its quantity or value. If Congress had graduated the stamp duty according to the quantity or value of the articles exported, there might have been ground for holding that the purpose and the necessary result was to tax the property and not the vellum, parchment or paper on which the bill of lading was written or printed.

This rule of interpretation was recognized in *Pace* v. *Burgess, Collector*, 92 U. S. 372, 375. That case arose under the act of July 20, 1868, c. 176, imposing duties on distilled spirits and tobacco, and for other purposes, and which provided that "all tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package to be stamped shall be paid to the collector on making the entry for such transportation." 15 Stat. 125, 158, § 74. The contention was that the statute imposed a tax or duty in violation of the constitutional prohibition of taxes or duties "on articles exported from any State." Art. 1, § 9. This court overruled that contention upon the ground that it was apparent from the statute that "the stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faith-

ful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo." The court added—and this is important in its bearing on the case before us: "It [the stamp] bore *no proportion whatever to the quantity or value of the package on which it was affixed.* These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business." As in *Pace* v. *Burgess, Collector*, so in the present case the stamp duty imposed was without any reference to the quantity or value of the property.

In our judgment, the small stamp duty imposed by the act of 1898 specifically upon the vellum, parchment or paper upon which was written or printed a bill of lading for property, of whatever value, intended for export, cannot be regarded as a duty on the property itself.

It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of ten cents upon the vellum, parchment or paper on which is written a bill of lading for articles to be exported from a State, it could as well impose a duty of five thousand dollars and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A *stamp* duty has now, and has had for centuries, a well-defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of the property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of five thousand dollars for and in respect of the vellum, parchment or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp tax laws, and that the purpose and necessary operation of such legislation was, in violation of the Constitution, to tax the articles specified in such bill and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity or value

of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported.

There is another view of this case which presents considerations of a serious character. In the opinion just rendered it is conceded that a stamp tax on vellum, parchment or paper on which is printed or written a bill of lading of goods to be shipped out of the United States, could be sustained, if regard be had to the practice of the Government since its organization. But that practice, covering more than a century, must, it seems, go for naught.

In *Stuart* v. *Laird*, 1 Cranch, 299, 309, (1803) the question arose whether the Justices of this court had the right, although authorized by an act of Congress, to sit as Circuit Judges, not having been appointed as such nor having any distinct commissions for that purpose. This court, speaking by Mr. Justice Patterson, said: "To this objection, which is of recent date, it is sufficient to observe, that *practice and acquiescence under it* for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed *fixed the construction*. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question *is at rest*, and ought not now to be disturbed."

In *Prigg* v. *Pennsylvania*, 16 Pet. 541, 608, 621, this court, speaking by Mr. Justice Story, after referring to the section of the act of February 12, 1793, requiring a certificate to be given, under certain circumstances, to the owner of a fugitive slave apprehended under that act, said: "So far as the judges of the courts of the United States have been called upon to enforce it and to grant the certificate required by it, it is believed that it has been uniformly recognized as a binding and valid law; and as imposing a constitutional duty. Under such circumstances, if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would, in our

judgment, entitle the question to be considered at rest; unless, indeed, the interpretation of the Constitution is to be delivered over to interminable doubt throughout the whole progress of legislation and of national operations. Congress, the executive and the judiciary have, upon various occasions, acted upon this as sound and reasonable doctrine"—citing among other cases that of *Stuart* v. *Laird*, 1 Cranch, 299.

In *The Laura*, 114 U. S. 411, 416, in which the question arose as to the validity of an act of Congress approved March 3, 1797, 1 Stat. 506, c. 13, authorizing the Secretary of the Treasury to remit a forfeiture of property after final sentence of condemnation, this court said: "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.' *Stuart* v. *Laird*, 1 Cranch, 308. The same principle was announced in *Burrow Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57, where a question arose as to the constitutionality of certain statutory provisions reproduced from some of the earliest statutes enacted by Congress. The court said: 'The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the Convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is [almost] *conclusive*.'" This quotation in *The Laura* from the opinion in *Sarony's* case was defective in that it omitted, by mistake in printing, the word "almost" before "conclusive." But the error does not affect the substance of the decision rendered, as the court, in the case of *The Laura*, approved and reaffirmed what was said in *Stuart* v. *Laird*.

In *Schell's Executors* v. *Fauché*, 138 U. S. 562, this court,

speaking by Mr. Justice Brown, cited with approval what is above quoted from *Stuart* v. *Laird*, adding: "In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officers whose duty it is to carry the law into effect, is universally held to be *controlling*."

In *McPherson* v. *Blacker*, 146 U. S. 1, 27, this court, speaking by the present Chief Justice, said: "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the *contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled. Stuart* v. *Laird*, 1 Cranch, 299, 309."

Cases almost without number could be referred to in which the same principles of constitutional construction are announced as in the cases above cited. In the latest case—*Knowlton* v. *Moore*, 178 U. S. 41, 56—this court had occasion in its review of taxing legislation by Congress, to refer to the act of July 6, 1797, the very act in which Congress first imposed a stamp duty on vellum, parchment or paper upon which was written a bill of lading for articles to be exported. Touching the objection that Congress could not constitutionally impose, as by that act was imposed, a tax on inheritances or legacies, this court, speaking by Mr. Justice White, said: "It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the Government. The act of 1797,

which ordained legacy taxes, was adopted at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the Convention which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority."

Many cases have been cited which hold that the uniform, contemporaneous construction by *executive* officers charged with the enforcement of a *doubtful* or *ambiguous* law is entitled to great weight and should not be overturned unless it be plainly or obviously erroneous. If such respect be accorded to the action of mere executive officers, how much greater respect is due to the legislative department when it has at different periods in the history of the country exercised a power as belonging to it under the Constitution, and no one in the course of a century questioned the existence of the power so exercised. Besides, we have here a question of the constitutional power of Congress under the Constitution, and not a question relating merely to the practice of executive officers acting under a law susceptible of different interpretations. No one of the acts of Congress imposing a stamp duty on the vellum, parchment or paper on which a bill of lading of articles to be exported was written, can be classed among laws that are doubtful or ambiguous in their meaning. No person, however skilful in the use of words, who attempts to frame a statute imposing a stamp duty, pure and simple, on such vellum, parchment or paper, could possibly employ language expressing that thought more distinctly than Congress has done in the several acts relating to stamp duties of that character. The words of those acts are clear, and are capable of but one construction; and the court determines the

case upon the ground alone of want of power in Congress to impose the stamp duty in question.

Without further discussion or citation of authorities, we submit that the denial, at this late day, of the power of Congress to impose what is strictly a stamp duty on the vellum, parchment or paper upon which is written or printed a bill of lading for goods to be exported to a foreign port or place, involves not only a departure from canons of constitutional construction by which it has been controlled for more than a century, but, in the words of *Prigg* v. *Commonwealth*, delivers the interpretation of the Constitution "over to interminable doubt throughout the whole progress of legislation and of national operations." Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the Government without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart* v. *Laird*, and in other cases, the question should be considered at rest.

In view of the importance of the case, we have deemed it appropriate to state the reasons of our dissent from the opinion and judgment just rendered.

Syllabus.

# FRENCH *v.* BARBER ASPHALT PAVING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 498. Argued February 25, 26, 27, 1901.—Decided April 29, 1901.

In this case the court proceeds on the assumption that the legal import of the phrase "due process of law" is the same both in the Fifth and in the Fourteenth Amendments to the Constitution of the United States; and that it cannot be supposed that it was intended by the Fourteenth Amendment to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government by the Fifth Amendment in a similar exercise of power.

It was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation: that Amendment legitimately operates to extend to the citizens and residents of the States, the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights.

The conclusions reached by this court in many cases cited and summarized by the court in its opinion are thus stated by two writers, (Cooley and Dillon) whose views this court adopts: "The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits. The whole cost in other cases is levied on lands in the immediate vicinity of the work. In a constitutional point of view, either of these methods is admissible, and one may sometimes be just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." "The courts are very generally agreed that the authority to require the property specially benefited, to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the gen-

Statement of the Case.

eral treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abuttors, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

*Norwood* v. *Baker*, 172 U. S. 269, considered, and held not to be inconsistent with these views.

THIS was a suit instituted in the circuit court of Jackson County, Missouri, by the Barber Asphalt Paving Company, a corporation whose business it was to construct pavements composed of asphalt, against Margaret French and others, owners of lots abutting on Forest avenue in Kansas City, for the purpose of enforcing the lien of a tax bill issued by that city in part payment of the cost of paving said avenue.

The work was done conformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of the city declaring the work of paving the street, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the owners of a *majority* of front feet on that part of the street to be improved had the right, under the charter, within thirty days after the first day of the publication of the resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby to divest the common council of the power to make the improvement, and such property owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this instance neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and the plaintiff company, being the lowest and best

bidder therefor, a contract was, on July 31, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement.

The contract expressly provided that the work should be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city should not in any event be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of land abutting on the improvement. The charge against each lot or tract of land was evidenced by a tax bill. The tax bill representing the assessment against each lot was, by the charter, made a lien upon the tract of land against which it was issued, and was *prima facie* evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction, against the owners of the land charged. No personal judgment was authorized to be rendered against the owner of the land. The right was expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner.

The defendants pleaded and contended that the contract offered in evidence was a contract to construct the pavement and maintain and keep the street in repair for five years, and was contrary to the charter of Kansas City, void and of no effect; and that the charter of Kansas City purports to authorize the paving of streets and to authorize special tax bills therefor, charging the cost thereof on the abutting property according to the frontage, without reference to any benefits to the property on which the charge was made and the special tax bills levied, and that such method of apportioning and charging the cost of the pavement was contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the circuit court of Jackson County was for the plaintiff company for the amount due on the tax bill and

for the enforcement of the lien. From this judgment an appeal was taken to the Supreme Court of Missouri, and, on November 13, 1900, the judgment of the circuit court was affirmed, and thereupon a writ of error from this court was allowed.

*Mr. Henry N. Ess* for plaintiffs in error.

*Mr. William C. Scarritt* for defendant in error. *Mr. Edward L. Scarritt*, *Mr. John K. Griffith* and *Mr. Elliott Hamilton Jones* were on his brief.

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

In its opinion in this case the Supreme Court of Missouri said that "the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. *St. Louis* v. *Allen*, 53 Mo. 44; *St. Joseph* v. *Anthony*, 30 Mo. 537; *Neenan* v. *Smith*, 50 Mo. 525; *Kiley* v. *Cranor*, 51 Mo. 541; *Rutherford* v. *Hamilton*, 97 Mo. 543; *Moberly* v. *Hogan*, 131 Mo. 19; *Farrar* v. *St. Louis*, 80 Mo. 379."

In the last-mentioned case Judge Norton for the court said:

"The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this State, and we are relieved from the necessity of examining authorities cited by the counsel for plaintiff in error condemning what is familiarly known as the front-foot rule.

"Learned counsel for defendant concede such was the decided law of this State, and that the portion of the Kansas City charter known as the ninth article of the charter, which authorizes the cost of a pavement to be assessed against the lots now fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed

similar laws and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court."

Accordingly the Supreme Court of Missouri held that the assessment in question was valid, and the tax imposed collectible. And, in so far as the constitution and laws of Missouri are concerned, this court is, of course, bound by that decision.

But that court also held, against the contention of the lot owners, that the provisions of the Fourteenth Amendment to the Constitution of the United States were not applicable in the case; and our jurisdiction enables us to inquire whether the Supreme Court of Missouri were in error in so holding.

The question thus raised has been so often and so carefully discussed, both in the decisions of this court and of the state courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing power, nor to attempt to discover and define the limitations upon that power that may be found in constitutional principles. It will be sufficient for our present purpose to collate our previous decisions and to apply the conclusions reached therein to the present case.

It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. While the language of those amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper. *Slaughter House Cases*, 16 Wall. 36, 77, 80.

Thus it was said, in *Davidson* v. *New Orleans*, 96 U. S. 97, 103:

"It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched

with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

However, we shall not attempt to define what it is for a State to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, but shall proceed, in the present case, on the assumption that the legal import of the phrase "due process of law" is the same in both Amendments. Certainly, it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government, in a similar exercise of power, by the Fifth Amendment.

Let us, then, inquire, as briefly as possible, what has been decided by this court as to the scope and effect of the phrase "due process of law," as applied to legislative power.

One of the earliest cases, in which was examined the historical and legal meaning of those words, is *Murray's Lessee* v. *Hoboken Land Company*, 18 How. 272. The question involved was the validity of a sale of real estate made under a distress warrant, authorized by a statute of the United States, 3 Stat. 592, c. 107, against a defaulting collector of customs. It was con-

tended that such a proceeding deprived the owner of property without due process of law, contrary to the Fifth Amendment, that by "process of law" was meant a charge, defence, judgment before and by a legally constituted court. The question was thus stated by Mr. Justice Curtis:

"That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Pursuing the lines of inquiry thus indicated, the court reached the conclusions that, in ascertaining and enforcing payment of taxes and of balances due from receivers of the revenue in England, the methods have varied widely from the usual course of the common law on other subjects, and that, as respects such debts, the "law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of examination bearing a very close resemblance to the warrant of distress in the act of Congress in question; that this diversity in the law of the land between revenue defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially

of the States, after the Declaration of Independence and before the formation of the Constitution of the United States; that not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it; and that, accordingly, the distress warrant in question was not inconsistent with that part of the Constitution which prohibits a citizen from being deprived of his property without due process of law.

In *Walker* v. *Sauvinet*, 92 U. S. 90, there was presented the question whether the Fourteenth Amendment availed to secure to a citizen of Louisiana a right of trial by jury as against an act of that State which provided that, in certain circumstances, a case enforcing penalties should be tried by the judge; and it was held that "the States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits of common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 280. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance thereof—or with any treaty made under the authority of the United States. Here the state court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

*McMillen* v. *Anderson*, 95 U. S. 37, 41, was a case wherein was involved the validity of a law of the State of Louisiana, whereby a tax collector was authorized to seize property and sell it in order to enforce payment of a license tax, and which was alleged to be opposed to the provision of the Fourteenth Amendment of the Constitution which declares that no State shall deprive any person of life, liberty or property without due process of law; but it was said by this court:

"Looking at the Louisiana statute here assailed, we feel bound to say that if it is void on the ground assumed the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States, by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall refuse or fail to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment, and the manner of giving this notice is fully prescribed. If at the expiration of this time the license be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent or so much as may be necessary to pay the tax and costs. . . . Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the

validity of a tax. And the fact that most of the States now have boards of revisors of tax assessments does not prove that taxes levied without them are void."

*Davidson* v. *New Orleans*, 96 U. S. 97, was a case wherein an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted in the state courts, and was by writ of error brought to this court on the ground that the proceeding deprived the owner of his property without due process of law. The origin and history of this provision of the Constitution, as found in Magna Charta, and in the Fifth and Fourteenth Amendments to the Constitution, were again considered; the cases of *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, and *McMillen* v. *Anderson*, 95 U. S. 37, were cited and approved; and it was held that "neither the corporate agency by which the work was done, the excessive price which the statute allowed therefore, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment was made before the work was done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution."

In *Springer* v. *United States*, 102 U. S. 586, was involved the validity of an act of Congress, June 30, 1864, c. 172, 13 Stat. 218, whereby lands of A were distrained and sold by reason of his refusal to pay a tax assessed against him, and it was contended that the sale of defendant's real estate, to satisfy the tax assessed upon him, in a summary manner, without first having obtained a judgment in a court of law, was a proceeding to deprive the defendant of his property without due process of law; that by "due process of law" is meant law in its regular course of administration by the courts of justice, and not the execution of a power vested in ministerial officers. But this court, after citing *Murray's Lessee* v. *Hoboken Land Co.*, as holding that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid, and that the proceeding was "due process of law," said:

"The prompt payment of taxes is always important to the

public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

In *Missouri* v. *Lewis*, 101 U. S. 22, the Fourteenth Amendment was invoked to invalidate legislation of the State of Missouri, regulating the right of appeal and of writs of error, and whereby suitors in the courts of St. Louis and certain other named counties were denied the right of appeal to the Supreme Court of Missouri in cases where it gave that right to suitors in the courts of the other counties of the State. Speaking for the court, Mr. Justice Bradley said:

"If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdiction of courts and that which the plaintiff in error complains of in the present case.

"If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges and immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do

not injuriously affect or discriminate between persons and classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several courts at its discretion. . . . Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line."

In *Mattingly* v. *District of Columbia*, 97 U. S. 687, 692, there was called in question the validity of the act of Congress of June 19, 1878, 20 Stat. 166, c. 309, entitled "An act to provide for the revision and correction of assessments for special improvements in the District of Columbia and for other purposes," and it was said by this court, through Mr. Justice Strong: "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question."

In *Kelly* v. *Pittsburgh*, 104 U. S. 78, it was urged that land which the owner had not laid off into town lots, but occupied for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city—the water tax, the gas tax, the street tax and others of similar character. The reason for this was said to be

that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. Cases were cited from the higher courts of Kentucky and Iowa where this principle was asserted, and where those courts have held that farm lands in the city are not subject to the ordinary city taxes. But this court said:

"It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States. . . . The main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

"It is not asserted that, in the methods by which the value of his land was ascertained for the purpose of this taxation, there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law. The tax in question was assessed and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is that as the land in question is, and always has been, used as farm land, for agricultural purposes only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we can-

not here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the state tribunals on that subject, that it is only necessary to refer to those decisions, without a restatement of the argument on which they rest. *State Railroad Tax Cases*, 92 U. S. 575; *Kennard* v. *Louisiana*, 92 U. S. 480; *Davidson* v. *New Orleans*, 96 U. S. 97; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Missouri* v. *Lewis*, 101 U. S. 22; *National Bank* v. *Kimball*, 103 U. S. 732."

In *Spencer* v. *Merchant*, 125 U. S. 345, a judgment of the Court of Appeals of the State of New York, upholding the validity of an assessment upon lands to cover the expense of a local improvement, was brought to this court for review upon the allegation that the state statute was unconstitutional. In the opinion of this court, delivered by Mr. Justice Gray, the following extract was given from the opinion of the Court of Appeals:

"The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property especially benefited by the expenditure of the amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakingly unjust, is not open

to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. . . . The precise wrong of which complaint is made appears to be that the land owners now assessed never had an opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action."

This definition of legislative power was approved by this court, and the judgment of the Court of Appeals was affirmed. The following extract is from the opinion of this court:

"In the absence of any more specific constitutional restric-

tion than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

In *Paulsen* v. *Portland*, 149 U. S. 30, 40, where the validity of a city ordinance, providing that the cost of a sewer should be distributed upon the property within the sewer district, and appointing viewers to estimate the proportionate share which each piece of property should bear, was questioned, because the ordinance contained no provision for notice, it was held by the Supreme Court of Oregon, and by this court on error, that notice by publication is a sufficient notice in proceedings of this nature, and that as the viewers, upon their appointment, gave notice by publication in the official paper of the city of the time

and place of their first meeting, such notice was sufficient to bring the proceedings within "due process of law."

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, was involved the validity of the irrigation act enacted by the legislature of the State of California. One of the objections urged against the act was that it permitted the whole cost to be levied by a board of directors of the district upon all of the real estate of the district according to value, with no reference to the degree of benefit conferred. As to this it was said by this court, through Mr. Justice Peckham:

"Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision." Citing *Spencer* v. *Merchant*, 125 U. S. 345.

Another objection to the validity of the act was the total want of an opportunity to be heard on the question of the expediency of forming the district, on the questions of cost and of benefits received. In respect to this it was said:

"The provision for a hearing in the irrigation act with a condition that lands which in the judgment of the board are not benefited shall not be included, renders the determination of the board, including them after a hearing, a judgment that such lands will be benefited by the proposed plan of irrigation.

"The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question and gives them an opportunity to be heard before the board. *Hager* v. *Reclamation District*, 111 U. S. 701; *Lent* v. *Tillson*, 140 U. S. 316; *Paulsen* v. *Portland*, 149 U. S. 30."

"It has been held in this court that the legislature has power

to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. *Paulsen* v. *Portland*, 149 U S. 30, 41. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal, (the board of supervisors in this case,) the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited.

"Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Merchant*, 125 U. S. 356, and *Walston* v. *Nevin*, 128 U. S. 578."

In *Bauman* v. *Ross*, 167 U. S. 548, on appeal from the Court of Appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted to commissioners

appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation, and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court—citing *Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Shoemaker* v. *United States*, 147 U. S. 282, 302. It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the dis-

cretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners.

This subject has been recently considered by this court in the case of *Parsons* v. *District of Columbia*, 170 U. S. 45, and it was there held, after a review of the authorities, that the enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot front against all lots or land abutting on the street, road or alley, in which a watermain shall be laid, was constitutional, and was conclusive alike of the necessity of the work and of its benefit as against abutting property.

We do not deem it necessary to extend this opinion by referring to the many cases in the state courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text-writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley on Taxation, 447.

"The courts are very generally agreed that the authority to

require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." Dillon's Municipal Corporations, vol. 2, § 752, 4th ed.

This array of authority was confronted, in the courts below, with the decision of this court in the case of *Norwood* v. *Baker*, 172 U. S. 269, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood* v. *Baker*. That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular

assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons* v. *District of Columbia*, 170 U. S. 45, 56, and in *Spencer* v. *Merchant*, 125 U. S. 345, 357.

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood* v. *Baker*.

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri:

"The work done consisted of paving with asphaltum the roadway of Forest avenue in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement."

JUSTICES HARLAN, WHITE and MCKENNA, dissenting.

What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

The judgment of the Supreme Court of Missouri is

*Affirmed.*

MR. JUSTICE HARLAN, (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA,) dissenting.

The special tax bills here in question purport to cover the cost of paving with asphalt a part of Forest avenue in Kansas City, Missouri. The work was done under the orders of the common council of that city, and the tax bills, it is alleged, were made out in conformity with the provisions of the city charter.

By section two of article nine of the city charter it was provided that "the city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, remacadamized, curbed, recurbed, guttered, reguttered, or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof, . . . and to pay therefor out of the general fund *or by issuing special tax bills* as herein mentioned. . . ."

The same section provides that no resolution for the paving, repaving, etc., of any street, alley, avenue, public highway or part thereof "shall be passed by the common council except upon recommendation of the board of public works indorsed thereon; and provided further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have such street, alley, avenue, public highway or part thereof paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized with a different kind of material or in a different manner from that specified in such resolution,

then the ordinance providing for the doing of such work or making such improvement shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax bills shall cease until a sufficient number of persons so remonstrating or their grantees shall, in writing, withdraw their names, or the property represented by them, from such remonstrance, so that said remonstrance shall cease to represent a majority of the resident property owners, as above provided, when the common council shall proceed in the manner above mentioned to cause the proposed improvement to be made." But by a subsequent section it was provided: "When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof *and pay therefor in special tax bills*, if the common council shall, by ordinance, find and declare that the resolution provided in section two of this article has been published as therein required and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public highway or part thereof to be improved have not filed with the city clerk a remonstrance against the doing of such work or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and *no special tax bill* shall be held *invalid or affected* for the reason *that such resolution was not published as therein required*, or *that a remonstrance or petition sufficiently signed was filed as therein required*, or *that such petition was not filed or was insufficiently signed.*" § 4.

By section three it was provided that "all ordinances and contracts for all work authorized to be done by section two of

this article shall specify how the same is to be paid for, and in case payment is to be made in special tax bills, the city shall in no event nor in any manner whatever be liable for or on account of the work."

The cost of work done on sidewalks, streets, avenues, alleys and public highways is provided for in the fifth and sixth sections of the same article, as follows: "The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys and public highways, or parts thereof, *shall* be charged as a *special tax* on the land *on both sides of and adjoining* the street, avenue, alley or public highway, or parts thereof improved, according to the *frontage* thereof. . . . When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax bills, the board of public works shall cause the city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the *frontage* of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax bills, except as hereinafter provided, make out and certify, in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax, according to such apportionment, against each lot or parcel of land to be charged."

By section eighteen of the same article every *special tax bill* issued under its provisions is made "a *lien* upon the land described therein, upon the date of the receipt to the board of public works therefor, and such lien shall continue for two years thereafter."

It thus appears that under the charter of Kansas City the cost of the paving or the repaving of any street, avenue, alley or public highway, is put upon the abutting property under a *rule* absolutely excluding any consideration whatever of the

question of special benefits accruing, by reason of the work done, to such property. It is true the abutting owner, in defence of a suit brought on a special tax bill, may show any mistake or error in the amount of such bill, or that the work was not done in a workmanlike manner; but the cost, set forth in the tax bill, or when ascertained in a suit on the tax bill, *must* be borne by the abutting property, according to its *frontage*, even if such cost be in substantial excess of the special benefits, if any, accruing to the property assessed. So the abutting property *must* bear the cost, according to frontage, even *if such cost equals the full or actual market value of the land.* Thus, the entire property abutting on the street improved, and subjected by the statute, that is, by the city charter, to a lien in favor of the contractor or his assignee, may be taken from the owner, for the benefit of the general public, to meet the cost of improving a public highway in which the entire community is interested. But that circumstance, it is contended, is not of the slightest consequence; for—so the argument in support of the statute runs—the legislature having determined that the land abutting on a public street shall, according to its frontage, meet the cost, whatever it may be, of improving that street, the courts cannot inquire whether the owner has received any such special benefit as justifies the putting upon him of a special burden not shared by the general public for whose use the improvement was made, nor inquire whether the cost of the work equals or exceeds the value of the property. I cannot assent to this principle. It recognizes, contrary to the principles announced in *Norwood* v. *Baker*, 172 U. S. 269, 277, 279, 293, 297, the existence in the legislative branch of government of powers which, I take leave to say, cannot be exercised without violating the Constitution of the United States. In that case, upon the fullest consideration, it was held, as had been held in previous cases, that the due process of law prescribed by the Fourteenth Amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. We also held that an assessment upon abutting property for the cost and expense incurred in opening a street was to be referred to the power of taxation, and that the

Constitution of the United States forbade an exercise of that power that would put upon private property the cost of a public work in substantial excess of the special benefits accruing to it from such work. Let us see if that was not the decision of the court.

In that case the attempt was made to put upon the abutting property the entire cost incurred in opening a public street through the owner's lands. No inquiry as to special benefits was made; indeed, no inquiry of that character was permissible under the ordinance in virtue of which the street was opened. It was not denied that the ordinance was consistent with the statutes of the State; and the question was distinctly presented whether a special assessment for the cost of opening a street through private property could be sustained under the Constitution of the United States if it was made under a *rule* excluding all inquiry as to special benefits accruing to the abutting property by reason of such improvement. In that case it was the public and not the owner of the property that wished the street to be opened. The judgment of the Circuit Court enjoining the assessment was affirmed upon the ground—so our mandate expressly stated—that the assessment was "under a *rule* which *excluded* any inquiry as to special benefits, and the necessary operation of which was, *to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom*, to take private property for public use without compensation." The mandate was in harmony with the opinion, for the court said: "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

JUSTICES HARLAN, WHITE and MCKENNA, dissenting.

As the court in the present case makes some observations as to the scope of the decision in *Norwood* v. *Baker*, it will be well to ascertain the precise grounds upon which our judgment in that case was based. Those grounds are indicated by the following extracts from the opinion:

"Undoubtedly abutting owners may be subjected to *special assessments to meet the expenses of opening public highways in front of their property*—such assessments, according to well-established principles, resting upon the ground *that special burdens may be imposed for special or peculiar benefits accruing from public improvements. Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 202; *Bauman* v. *Ross*, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvement. In *Williams* v. *Eggleston*, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns *which had been judicially determined to be towns benefited by such improvement*, it was said: 'Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking *generally*, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.' But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon partic-

ular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

Again: "It is one thing for the legislature to prescribe as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Further, in the same case: "The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion, namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such cost over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

Does the court intend in this case to overrule the principles

announced in *Norwood* v. *Baker?* Does it intend to reject as unsound the doctrine that "the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?" Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation being for an amount in substantial excess of the special benefits received—" will, *to the extent of such excess*, be a taking of private property for public use without compensation?" The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution are set forth in *Norwood* v. *Baker*, and need not be repeated. But I may add a reference to some recent adjudications.

In *Sears* v. *Boston*, 173 Mass. 71, 78, which was the case of a special assessment to meet the cost of watering streets, the court said: "It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of *Norwood* v. *Baker*, 172 U. S. 269, contains an elaborate discussion of the subject, with a citation of authorities from many of the States, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the Fourteenth Amendment of the Constitution of the United

States, inasmuch as it would deprive one of his property without compensation, and so without due process of law. The authority of this case is controlling in all state courts, and if it were not, *it is in accordance with sound principle*, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95, 101, and cases cited." In *Sears* v. *Street Commissioners*, 173 Mass. 350, 352, which was the case of charges upon land to meet the cost of certain sewerage work done under municipal authority, Mr. Justice Knowlton, delivering the unanimous judgment of the court, said: "If we treat the determination of these charges as a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible under the constitution of this Commonwealth and under the Constitution of the United States *only* when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then *only to an amount not exceeding such special and peculiar benefits.* . . . The fact that the charges to be determined are for the construction, maintenance and operation of the sewerage works of the whole city, gives some force to the possibility of a construction which includes all benefits; but whether this construction should be adopted or not, the charges may be determined on any grounds which the street commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed the benefits. This fact in itself is enough to bring the statute within the prohibition of the Constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law"—citing *Norwood* v. *Baker*, 172 U. S. 269; *New Brunswick Rubber Co.* v. *Street Com'rs*, 9 Vroom, 190; *Barnes* v. *Dyer*, 56 Vermont, 469, and *Thomas* v. *Gain*, 35 Mich. 155. In *Dexter* v. *Boston*, 176 Mass. 247, 251, 252, the court said: "It is now settled law in this court, as it is in the

Supreme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportioned to the benefits." To the same effect are *Hutchison* v. *Storrie*, 92 Texas, 688; *Adams* v. *City*, (Ind.) 57 N. E. Rep. 114; *McKee* v. *Town of Pendleton*, (Ind.) 57 N. E. Rep. 532; *Fay* v. *City of Springfield*, 94 Fed. Rep. 409; *Loeb* v. *Trustees*, 91 Fed. Rep. 37; *Charles* v. *Marion City*, 98 Fed. Rep. 166; *Cowley* v. *Spokane*, 99 Fed. Rep. 840.

The court, after referring to the declaration of the Supreme Court of Missouri to the effect that the Fourteenth Amendment was not applicable to this case, proceeds, in order to "prevent confusion and relieve from repetition," to refer to some of the cases arising under that and the Fifth Amendment. In the same connection the court, referring to the Fifth and Fourteenth Amendments, says that "while the language of those Amendments is the same [in respect of the deprivation of property without due process of law], yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper." As the court expressly declines to formulate any rule to determine for all cases "what it is for a State to deprive a person of life, liberty or property without due process of law," I will not enter upon a discussion of that question, but content myself with saying that the prohibition against the deprivation of property without due process of law cannot mean one thing under the Fifth Amendment and another thing under the Fourteenth Amendment, the words used being the same in each Amendment. If the court intends to intimate the contrary in its opinion, I submit that the intimation is not sustained by any former decision, and is not justified by sound principle.

The first case to which the court refers as arising under the Fourteenth Amendment is *Davidson* v. *New Orleans*, 96 U. S. 97, 103–105. From that case sentences are quoted which were

intended to remove the impression, then supposed to exist with some, that under that Amendment it was possible to bring "to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." But the court in the present case overlooks another part of the opinion in *Davidson* v. *New Orleans* which was pertinent to the issue in that case, and is pertinent to the present discussion. After speaking of the difficulty of an attempt to lay down any rule to determine the full scope of the Fourteenth Amendment, and suggesting that the wise course was to proceed by the gradual process of judicial inclusion and exclusion, the court said: "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a State, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." Here is a direct affirmation of the doctrine that a tax, assessment, servitude or other burden may be imposed by a State, or under its authority, consistently with the due process of law prescribed by the Fourteenth Amendment, *if* the person owning the property upon which such tax, assessment, servitude or burden is imposed is given an opportunity, in some appropriate way, to contest the matter. In the present case, no such opportunity was given to the plaintiffs in error, and the state court held that they had no right to show, in any tribunal, that their property was being taken for the cost of improving a public street in substantial excess of any special

benefits accruing to them beyond those accruing to the general public owning and using the street so improved.

Reference is made by the court to *McMillen* v. *Anderson*, 95 U. S. 38, 41, 42, in which will be found certain observations as to the words "due process of law." In that case the only question was whether a statute of Louisiana imposing a license tax, which did not give a person an opportunity to be present when the tax was assessed against him, or provide for its collection by suit, was in violation of the Fourteenth Amendment. The court, after referring to the provision requiring, in case the license tax was not paid, that the collector should give ten days' written or printed notice to the delinquent, and if at the expiration of that time the license was not fully paid, the tax collector might, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent, or so much as might be necessary to pay the taxes and costs, said: "Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection. Here is a notice that the party is assessed, by the proper officer, for a given sum, as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void. Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal. But however that may be, it is quite certain that he can, if he is wrongfully taxed, *stay the proceedings for its collection by process of injunction.* See Fouqua's Code of Practice of Louisiana, Arts. 296–309, inclusive. *The act of* 1874 *recognizes this right to an injunction, and regulates the proceed-*

*ings when issued to stay the collection of taxes.* It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction." Here we have, contrary to the intimation given in the opinion of the court in this case, a recognition of the principle that the Fourteenth Amendment does apply to cases of taxation under the laws of a State. And it is to be observed that the court in *McMillen* v. *Anderson* takes care to show that, under the laws of Louisiana, the taxpayer was given an opportunity to be heard in respect of the validity of the tax imposed upon him.

Among the cases cited in support of the conclusions announced by the majority are *Mattingly* v. *District of Columbia*, 97 U. S. 687, 692; *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Spencer* v. *Merchant*, 125 U. S. 345; *Paulsen* v. *Portland*, 149 U. S. 30, 40; *Bauman* v. *Ross*, 167 U. S. 548, and *Parsons* v. *District of Columbia*, 170 U. S. 45.

It seems to me quite clear that the particular question before us was not involved or determined in any of those cases.

In *Mattingly* v. *District of Columbia*, it was said that the legislature may direct special assessments for special road or street improvements "to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion." But that falls far short of deciding that an assessment in proportion to frontage could be sustained if it exceeded the value of the property or was for an amount in excess of the special benefits accruing to the property assessed. Besides, no question was made in that case as to the cost of the work exceeding special benefits.

In *Kelly* v. *Pittsburgh*, the only point involved or adjudged was that the Fourteenth Amendment did not stand in the way of the legislature of a State extending the limits of a city or township so as to include lands fit for agricultural use only, and make them subject to taxation for the local purposes of the extended city or town, although the owners did not enjoy the advantages of the municipal government to the same extent as those who resided in the thickly settled parts of the city or town. It was not a case in which the property of particular persons was specially assessed by a rule not applicable to all

other assessments. On the contrary it was admitted in that case that the methods adopted to ascertain the value for purposes of local taxation of the lands there in question were such as were usually employed, and that the manner of apportioning and collecting the tax was not unusual or materially different from that in force in all communities where land was subject to taxation. It was held that it was not the function of the court to correct mere errors in the valuation of lands for purposes of taxation.

In *Spencer* v. *Merchant* no question arose as to an excess of the cost of the improvement there in question over special benefits. The question before the court was as to the constitutionality of a statute validating what had been judicially determined to be a void assessment. This court so declared when it said that the plaintiff, who questioned the validity of the statute, contended "that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon *the whole amount of the assessment.*" The court held that the statute itself was, under the circumstances of that case, all the notice and hearing the owners of the lands required. There was no occasion for any general declaration as to the powers of the legislature which would cover cases of void assessments validated by legislative enactment where the amount assessed upon particular property was in substantial excess of special benefits accruing to it. Referring to *Spencer* v. *Merchant*, this court said in *Norwood* v. *Baker:* "The point raised in that case—*the only point in judgment*—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

In *Paulsen* v. *Portland* the only point adjudged was that notice by publication in a newspaper of the time and place of the meeting of viewers appointed to estimate the proportionate share which each piece should bear of the amount to be assessed upon the property in a sewer district for the cost of a

sewer, was sufficient "to bring the proceedings within due process of law." The court in that case took care to say that it did not question the proposition that "notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property." That case cannot be held to support the views of the Supreme Court of Missouri, for that court in this case held in substance that, under legislative authority, property fronting on a public street could all be taken to pay the cost of improving the street, leaving nothing whatever to the owner, and that too without any notice and without any right in the owner, in any form, to show that the amount required to be paid exceeded not only any special benefits accruing to the property but even the value of the property assessed.

In *Bauman* v. *Ross* we had a case in which a special assessment was made, under an act of Congress, imposing upon the lands benefited one half of the amount awarded by the court as damages for each highway or reservation, or part thereof, condemned and established under the act. The assessment was directed to be "charged upon the lands benefited by the laying out and opening of such highway or reservatien or part thereof," and the jury was directed "to ascertain and determine what property is thereby benefited." The same act directed the jury to assess against each parcel which it found to be so benefited its proportional part of the sum assessed, provided that as to any tract, part of which only had been taken, due allowance should be made for the amount, if any, "which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract." In such a case, the owner of the property being given full right to be heard before an authorized tribunal upon the question of special benefits, no question could arise such as is presented in the present one.

In *Parsons* v. *District of Columbia* the question was as to the validity of an act of Congress which provided for establishing, in this District, "a comprehensive system, regulating the supply of water and the erection and maintenance of reservoirs and water mains." It was provided that assessments

levied for water mains should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road or alley in which a water main is laid. This court, among other things, said: "Another complaint urged is that the assessment exceeded the actual cost of the work, and this is supposed to be shown by the fact that the expense of putting down this particular main was less than the amount raised by the assessment. But this objection overlooks the fact that the laying of this main was part of the *water system*, and that the assessment prescribed was not merely to put down the pipes, but to raise a fund to keep the system in efficient repair. The moneys raised beyond the expense of laying the pipes are not paid into the general treasury of the District, but are set aside *to maintain and repair the system*." But the court took care to add, "and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." The words thus added are significant, and if they had not been added the opinion would not have passed without dissent. The words referred to justify the conclusion that if there had been an abuse of legislative power; if the amount assessed had been substantially or materially in excess of the cost of the work or of the value of the property assessed, or of the special benefits received, the owners of the abutting property might justly have complained of a violation of their constitutional rights.

The court, in its opinion, quotes certain passages from Cooley's Treatise on Taxation, in which the author refers to the different modes in which the cost of local public work may be met, namely: (1) a general tax to cover the major part of the cost, the smaller portion to be levied upon the estates specially benefited; (2) a tax on the land specially benefited to meet the major part of the cost, the smaller part to be paid by the general public; and (3) a tax for the whole cost on the lands in the immediate vicinity of the work. In respect of each of these methods the court cites these words of Cooley: "In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general

charge, and levy no special assessment whatever. The question is legislative, and like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal, than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley on Taxation, 447, c. 20, § 5; Cooley on Taxation, 2d ed. 637, § 5.

But in the *same chapter* from which the above extract was made the author discusses fully the underlying principles of special assessments, saying: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community *is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure* of public funds; and, in addition to the general levy, they demand that special contributions, *in consideration of the special benefit,* shall be made by the person receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." Cooley on Taxation, 416, c. 20, § 1; Cooley on Taxation, 2d ed. 606, § 1. To this we may add the declaration of the author when, speaking for the Supreme Court of Michigan in *Thomas* v. *Gain*, 35 Mich. 155, 162, he said: "It is generally agreed that an assessment levied *without regard to actual or probable benefits* is *unlawful as constituting an attempt to appropriate private property to public use.*"

The court overruled other passages in the same chapter of

Cooley's Treatise on Taxation. Referring to the rule of assessment by the front foot upon property abutting on a local improvement, where no taxing district has been established over which the cost could be distributed by some standard of benefit, actual or presumptive, Cooley says: "But it has been denied, on what seems the most conclusive grounds, that this is permissible. It is not legitimate taxation because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that a town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army, or any portion of it, should be stationed for the time being should be charged with its support. If one is legitimate taxation the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the sense of those terms as applied to the exercise of powers by any enlightened or responsible government." Cooley on Taxation, 453 c. 20, § 53; Cooley on Taxation, 2d ed. 646, 647.

The author also says what I do not find in the opinion of the court in this case: "There can be no justification for any proceeding which charges the land *with an assessment greater than*

*the benefit; it is a plain case of appropriating private property to public use without compensation.*" Cooley on Taxation, 2d ed. 661.

The court also cites from Dillon's Treatise on Municipal Corporations certain passages to the effect that whether the expense of making local improvements "shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abuttees, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." 2 Dillon, Mun. Corp. 4th ed. p. 912, § 752. These views need not be controverted in this case, and of their soundness I have no doubt when we are ascertaining the general rule to be applied in the particular classes of cases referred to by the author. But the above quotation from Dillon by no means indicates his opinion as to the application of the general rule announced by him. In the same chapter from which the court quotes, I find the following principles announced by the author as deduced from an extended reference to numerous adjudged cases: "Special benefits to the property assessed, that is, benefits received by it *in addition to those received by the community at large*, is the true *and only just foundation upon which local assessments can rest;* and *to the extent of special benefits* it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again: "When not restrained by the constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York, *People* v. *Brooklyn*, 4 N. Y. 419, have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania,

is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." 2 Dillon, Mun. Corp. 4th ed. p. 934, § 761. Further, the author says: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvements, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, *was the only principle upon which such assessments can justly rest*, and that *any other rule is unequal, oppressive and arbitrary*, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just* and *reasonable doctrine*, that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.*" 2 Dillon, Mun. Corp. 4th ed. p. 935, § 761.

I agree with the court in saying that Cooley and Dillon are text-writers of high authority for learning and accuracy. But I cannot agree that the extracts from their treatises found in

its opinion correctly or fully state their views upon the particular question now before us.

The declaration by the court that the decision in *Norwood* v. *Baker* was placed upon the ground that the burdens imposed upon Mrs. Baker's property amounted to *confiscation* is, I submit, an inadequate view of our decision. The word "confiscation" is not to be found in the opinion in that case. The affirmance of the judgment in that case was upon the sole ground that the assessment was made under a *rule* that absolutely *excluded* any *inquiry as to special benefits.* Such a rule was held to be void because it rested upon the theory that to meet the cost of opening a street private property could be specially assessed for an amount in substantial excess of special benefits accruing to it from the improvement made in the interest of the general public.

If it may be inferred from what is said in the opinion of the court in this case that a special assessment resulting in the *confiscation* of the entire property assessed might not be sustained, I have to say that manifestly confiscation does occur when the property specially assessed is all taken to meet the cost of a public improvement supposed to be specially beneficial to the owner. So if the property is assessed beyond the special benefits accruing, there is confiscation *to the extent of such excess.* But if confiscation, in any form, will not be tolerated, what becomes of the broad declarations in the opinions in some of the cited cases to the effect that the legislature may prescribe the extent to which private property is specifically benefited by a local public improvement, and that its action in that respect cannot be questioned by the owner of the property assessed even if it appeared that the amount assessed exceeded the special benefits, or even if it appeared that the cost of the improvement exceeded the value of the property assessed? Are we to understand from the interpretation now placed upon the decision in *Norwood* v. *Baker* that the courts may, for the protection of the property owner, interfere when a legislative determination amounts to confiscation, pure and simple, but that they cannot interfere when the amount assessed is in substantial excess of the benefits received?

JUSTICES HARLAN, WHITE and MCKENNA, dissenting.

In my judgment, some of the cases referred to in the opinion of the court contain general declarations as to the powers of the legislature in the matter of special assessments which went far beyond what was necessary to be said in order to dispose of the respective cases. Those declarations, literally interpreted, seem to recognize the legislature in this country as possessing absolute, arbitrary power in the matter of special assessments imposed to meet the cost of a public improvement —indeed, all the power, in the matter of taxation, that belongs to the Parliament of Great Britain. The opinions in some of these cases recall the wise observations of Chief Justice Marshall, when, speaking for this court, he said: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case to be decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. 264, 399. We live under a Constitution which is the supreme law of the land. It enumerates the powers of government, and prescribes limitations and restrictions upon legislative authority as to the property of citizens. Some of these limitations and restrictions apply equally to the Congress of the United States and to the legislatures of the States. If it be true that the only ground upon which a special assessment can be legally imposed upon particular private property to meet the cost of a public improvement is that such property receives, or may reasonably be held to receive, special benefits not shared by the general public—and no one, I take it, will dispute the soundness of that principle—and if it be true that the property cannot be made to bear a proportion of such costs in substantial excess of special benefits, it necessarily follows that the owner of the property is entitled to protection against any legislative rule or requirement

that puts upon his property a burden greater than can be lawfully imposed upon it. How can he obtain such protection except through the courts? To say that he cannot do so is to say that the legislature possesses an absolute unlimited power over rights of property which is inconsistent with the supreme law of the land. Is it to become a canon of constitutional construction that the courts may interfere when the legislature authorizes a special assessment that will amount to the confiscation of the entire property assessed, but will not interfere when the confiscation is only to a limited, although a material, extent? In other words, is there to be a difference, so far as the powers of the courts are concerned, between confiscation, under the guise of taxation, of the entire property of the citizen and confiscation of only a part of it?

I have spoken of special assessments where the amount assessed was in substantial excess of special benefits. The words "substantial excess" have been used because, in the language of this court in *Norwood* v. *Baker*, already cited, exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a substantial character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. I do not doubt—indeed, the opinion in *Norwood* v. *Baker* concedes—that the legislature has a wide discretion in cases of special assessments to meet the cost of improving or opening public highways. But I deny that the owner of abutting property can be precluded from showing that the amount assessed upon him is in substantial excess of special benefits accruing to his property. To the extent of such excess the burden should be borne by the community for whose benefit the improvement is made. I entirely concur in the views of Church, C. J., as expressed in *Guest* v. *Brooklyn*, 69 N. Y. 506. He said: "The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners, or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property,

is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves." 2 Dillon's Mun. Corp. 934, 4th ed. note 1.

At the same time this case was determined the court announced its judgment in *Wight* v. *Davidson*, on appeal from the Court of Appeals of the District of Columbia. In its opinion in that case it makes some reference to *Norwood* v. *Baker* to which it is appropriate to refer in this opinion. The court, in *Wight* v. *Davidson*, says: "There [in *Norwood* v. *Baker*,] the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation, and accordingly affirmed the decree of the Circuit Court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found, upon due and proper inquiry, to be

equal to the special benefits accruing to the property." This language implies that the assessment in *Norwood* v. *Baker*, was without legislative sanction and hence the judgment rendered by this court; whereas, it distinctly and unmistakably appears from the opinion in that case that what the village of Norwood did was under a legislative enactment authorizing it to open the street there in question and assess the cost upon the abutting property, according to its frontage, without regard to special benefits, and without any inquiry upon that subject. And it was because and only because of this *rule* established by the legislature that the court held the assessment invalid. I submit that this case cannot be distinguished from *Norwood* v. *Baker* upon the ground that the village of Norwood proceeded without legislative sanction.

In my opinion the judgment in the present case should be reversed upon the ground that the assessment in question was made under a statutory *rule* excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation.

# WIGHT *v.* DAVIDSON.

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

No. 283. Argued October 26, 29, 1900.—Decided April 29, 1901.

A constitutional right against unjust taxation is given for the protection of private property, but it may be waived by those affected, who consent to such action to their property as would otherwise be invalid.

It was within the power of Congress, by the act of March 3, 1899, c. 431, 30 Stat. 1344, to extend S Street in the District of Columbia, to order the opening and extension of the streets in question, and to direct the Commissioners of the District to institute and conduct proceedings in the Supreme Court of the District to condemn the necessary land; and it was also competent for Congress, in said act, to provide that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one half thereof should be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as provided for in said act; and that the sums to be assessed against each lot or piece or parcel of ground should be determined and designated by the jury, and that, in determining what amount should be assessed against any particular piece or parcel of ground, the jury should take into consideration the situation of said lots, and the benefits that they might severally receive from the opening of said streets.

The order of publication gave due notice of the filing of the petition in this case, and an opportunity to all persons interested to show cause why the prayer of the petition should not be granted; and operated as a notice to all concerned of the pending appointment of a jury, and that proceedings would be had under the act of Congress.

The act of March 3, 1899, was a valid act, and the proceedings thereunder were regular and constituted due process of law.

The Court of Appeals, in regarding the decision in *Norwood* v. *Baker*, 172 U. S. 269, as overruling previous decisions of this court in respect to Congressional legislation as to public local improvements in the District of Columbia is overruled.

Congress, by an act approved March 3, 1899, entitled "An act to extend S street in the District of Columbia, and for other purposes," 30 Stat. 1344, c. 431, enacted as follows:

"Section 1. That within thirty days from the passage of this

act the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary to open and extend S, Twenty-second and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: *Provided*, That the owners of the 'Kall' tract dedicate the land in said tract contained within the lines of said street: *And provided further*, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

* * * * * * * *

"SEC. 5. That the proceedings for the condemnation of said lands shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of land in said District for public highways."

"SEC. 7. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets."

On March 31, 1899, the Commissioners filed a petition in the Supreme Court of the District, alleging that the owners of the Kall tract had dedicated to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second and Decatur streets; that a map of the proposed extension of said streets, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, had been prepared and a copy thereof annexed to the petition; and praying the

court to direct the marshal of the District to summon a jury to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which said streets were proposed to be extended, might sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by the said act of Congress and by chapter 11 of the Revised Statutes of the United States, relating to the District of Columbia, to the end that a permanent right of way for the public over said lands might be obtained and secured for the extension of said streets.

On April 3, 1899, an order of publication was made by the court directing all persons interested in the proceedings to appear in the court on or before the 22d day of April, 1899, and show cause, if any they have, why the prayer of said petition should not be granted, and that a copy of the order should be published in the Washington Post and the Washington Times newspapers at least six times and in the Washington Law Reporter once before the said 22d day of April, 1899.

On July 21, 1899, it was ordered by the court that, whereas notice by advertisement had been duly published, a jury should be summoned to be and appear upon the premises to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend said streets, as prayed in said petition, and directing that of the amount due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less than one half thereof should be assessed by said jury against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which would be benefited by the opening of said streets; and to further proceed in accordance with the act of Congress approved March 3, 1899.

On August 30, 1899, there was filed in the Supreme Court of the District a return or report by the marshal, setting forth the appointment and qualification of the jurors, and a statement of the proceedings of said jury in taking testimony and hearing arguments of counsel. With the report of the marshal there was also filed a verdict in writing by the jury in the following terms:

"In the Supreme Court of the District of Columbia, holding a District Court for said District.

"*In re* extension of S, Twenty-second and Decatur streets. —No. 549.

"We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary to open and extend S, Twenty-second and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on the plat or map filed with the petition in this cause, as set forth in schedule 1, hereto annexed as part hereof; and we, the jury aforesaid, in accordance with the act of Congress, approved March 3, 1899, for the extension of said streets, do hereby assess the sum of $26,000, being not less than one half of the damages so, as aforesaid, awarded in schedule 1 against the pieces and parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which we find will be benefited by the extension of said streets, as set forth in schedule 2, hereto annexed as part hereof."

By schedule 1, annexed to the award, it appears that the jury awarded to the owners of parts of lots 41 and 42 of Phelps and Tuttle's subdivision of Widow's Mite, as damages for land within the lines of S and Twenty-second streets extended, the sum of $36,000, and to the owners of part of lot 41, included in the lines of Decatur place extended, the sum of $16,000.

By schedule 2 it is shown that the jury apportioned one half of said damages among the owners of pieces or parcels of land benefited, and that among those found to be benefited were the owners of the Kall tract, and against whose lands there were assessed various sums amounting, in the aggregate, to $14,000.

On September 19, 1899, the Supreme Court of the District entered an order confirming the award and assessment, unless cause to the contrary should be shown on or before the 4th day of October, 1899, and directing that a copy of said order should be published once in the Washington Law Reporter and twice in the Evening Star before that date; and further ordering that the marshal should serve a copy of the order per-

sonally on all the owners of land condemned and all the owners of land assessed in said verdict, with one half of the damages awarded therein, who might be found within the District of Columbia, and if not found therein, then by mailing a copy thereof to the place of abode or last known place of residence of each owner or owners.

On September 29, 1899, the marshal returned that he had served a copy of the order personally on, among others, the appellees, and had mailed copies to such parties as resided without the District.

On October 4, 1899, the appellees filed exceptions to the confirmation of the award and finding of the jury, as to the owners of the tract of land known in the proceedings as the Kall tract. The exceptions were as follows:

"First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings are had and taken, and by a proper construction thereof no damage can be assessed against said tract of land, or any part thereof, or these respondents as owners of said land.

"Second. Because said act is unconstitutional and void, in that it contains no provision for notifying the owners of property to be assessed in advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such assessment might be made effective, and for other vices and defects apparent on the face of the statute.

"Third. Because the statute under which said assessment is made is a statute relating to a condemnation of land solely, and contains no provision touching the assessment of benefits, and was not intended to provide for such assessment.

"Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land therefor, and the assessment of benefits, is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement as to the

assessment of benefits against property forming no part of that sought to be condemned.

"Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient and defective.

"Sixth. Because said award of damages and finding of the jury in that behalf are excessive, unjust and unreasonable.

"These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be impanelled in accordance with the provisions of the statute in such case made and provided."

On November 18, 1899, after argument, the exceptions were overruled, and the verdict, award and assessment were in all respects confirmed. Thereupon the cause was taken on appeal to the Court of Appeals of the District of Columbia. On April 25, 1900, the order and decree of the Supreme Court of the District were reversed by the said Court of Appeals, and the cause was remanded to the Supreme Court of the District, with directions to vacate such order or decree and for such other proceedings therein, if any, as might be proper and not inconsistent with the opinion of the Court of Appeals. 16 D. C. App. 371. An appeal was thereupon allowed to this court.

*Mr. Clarence A. Brandenburg* and *Mr. Andrew B. Duvall* for appellants.

*Mr. B. F. Leighton* for appellees.

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

This is an appeal from a decree of the Court of Appeals of the District of Columbia reversing an order or decree of the Supreme Court of the District confirming an assessment upon lands of the appellees for alleged benefits accruing from the opening of certain streets adjoining such lands, and presents for determination the constitutionality of an act of Congress, approved March 3, 1899, under which the assessment complained of was made.

Opinion of the Court.

It may well be doubted whether the appellees are in a position to question the validity of the statute. They are the owners of the "Kall" tract mentioned in the first section of the act, and with respect to which it was made a condition that the owners should dedicate the land in said tract contained within the lines of the streets to be extended; and, it appears by the record, that, in order to procure the desired action of the Commissioners, they did dedicate to the District of Columbia for highway purposes the land in said tract contained within the lines of S, Twenty-second and Decatur streets.

Prior to the filing of the petition of the Commissioners, the authorities of the District had taken no steps towards the contemplated extension of these streets. In fact, under the act they had no power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

"Under some circumstances, a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect." Cooley on Taxation, 573; *Tagh* v. *Adams*, 10 Cush. 252; *Bidwell* v. *City of Pittsburgh*, 85 Penn. St. 412; *Lafayette* v. *Fowler*, 34 Ind. 140; *Shutte* v. *Thompson*, 15 Wall. 151, 159.

However, as we learn from this record that there are others than the appellees concerned in the question of the validity of the act of Congress, and as the decision of the Court of Appeals,

by declaring the act void as to the appellees, operates to defeat or suspend proceedings under it, and under other existing acts of Congress in similar terms, respecting public improvements in the District, we prefer to pass by the question whether the appellees are estopped by having made the dedication imposed as a condition precedent to the opening of the streets, and to place our decision upon the question discussed by the Court of Appeals and which controlled its decision, namely, that of the constitutionality of the act of Congress under which the proceedings were had.

The principal objections urged against the validity of the act are, first, because, as is alleged, it arbitrarily fixes the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed, by the opening of the streets; and, second, because it contains no provision for notifying the owners of the property to be assessed, in advance of such assessment, or at any time pending the consideration of the cause by the jury.

In *Bauman* v. *Ross*, 167 U. S. 548, on appeal from the Court of Appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon

the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation, and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court—citing *Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Shoemaker* v. *United States*, 147 U. S. 282, 302. It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners—citing the cases hereinbefore mentioned.

By the act of June 17, 1890, c. 428, 26 Stat. 159, Congress enacted that the Commissioners of the District of Columbia

shall have the power to lay water mains and water pipes and erect fire plugs and hydrants, whenever the same shall be, in their judgment, necessary for the public safety, comfort or health. By the act of August 11, 1894, c. 253, 28 Stat. 275, it was provided "that hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per linear front foot against all lots or lands abutting upon the street, road or alley in which a water main shall be laid."

On October 5, 1895, Homer B. Parsons filed in the Supreme Court of the District of Columbia a petition against the District of Columbia and the Commissioners thereof, complaining, as illegal, of a certain charge or special assessment against land of the petitioner, as a water main tax or assessment for laying a water main in the street on which said land abuts. After a hearing upon the petition and return, the petition was dismissed. An appeal was taken to the Court of Appeals of the District of Columbia, where the judgment of the Supreme Court of the District was affirmed. The cause was then brought to this court, and by it the judgment of the Court of Appeals was affirmed. *Parsons* v. *District of Columbia*, 170 U. S. 45. The principal grounds of complaint were that the lot owner was given no opportunity to be heard upon the question of cost, or utility, or benefit of the work, or of the apportionment of the tax; that the assessment was made without any estimate of the cost of the work to be done, and without regard to the cost of the work or the value of the improvement, and not upon the basis or benefits to the property assessed.

This court held that the legislation in question was that of the United States, and must be considered in the light of the conclusions, so often announced, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia—citing *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Gibbons* v. *District of Columbia*, 116 U. S. 404; *Shoemaker* v. *United States*, 147 U. S. 282; *Bauman* v. *Ross*, 167 U. S. 548; that when, by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the

rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property; that to open such questions for review by the courts, on the petition of any and every property holder, would create endless confusion; that where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard; that the function of the Commissioners, under the act, was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and pipes, and of erecting fire plugs and hydrants, and that their *bona fide* exercise of such a power cannot be reviewed by the courts.

If, then, the reasoning and conclusions of these cases are to be respected as establishing the law of the present case, it is plain that it was within the power of Congress, by the act of March 3, 1899, to order the opening and extension of the streets in question, and to direct the Commissioners of the District to institute and conduct proceedings in the Supreme Court of the District to condemn the necessary land; and it was also competent for Congress, in said act, to provide that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one half thereof should be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as provided for in the said act, and that the sums to be assessed against each lot or piece or parcel of ground should be determined and designated by the jury, and that, in determining what amount should be assessed against any particular piece or parcel of ground, the jury should

take into consideration the situation of said lots and the benefits that they might severally receive from the opening of said streets.

It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the Supreme Court of the District gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of Congress would subsequently be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsel. The return of the marshal shows that some, at least, of the property owners appeared before the jury, produced witnesses, and were heard by counsel. If the appellees did not avail themselves of these opportunities, the court and jury, proceeding according to law, were not to blame.

The record shows that, on September 19, 1899, the court passed an order *nisi* confirming the verdict, award and assessment of benefits, unless cause to the contrary should be shown on or before the 4th day of the following month, and directing service of a copy of the order *nisi* on the owners of the land condemned and on the owners of the land assessed in said verdict. It also appears that the appellees were served with this copy, and that they accordingly filed exceptions to the finding of the jury and to the confirmation of the award, on October 4, 1899.

On the 18th of November, 1899, after hearing, the Supreme Court of the District passed a decree overruling the exceptions, and confirming the verdict of award and assessments made by the jury.

Upon the authorities heretofore cited it would therefore appear that the act of Congress of March 3, 1899, was a valid enactment, and that the proceedings thereunder were regular and constituted due process of law, unless reasons for a different

conclusion can be found in the opinion of the Court of Appeals, which reversed the decree of the Supreme Court of the District, and ordered the dismissal of the petition.

What, then, was the reasoning upon which the Court of Appeals proceeded? It was thus stated in the opinion:

"The principal questions raised by the assignments of error are two, 1, that of the constitutionality of the act of Congress under which the proceedings have been had; and, 2, that of the sufficiency of the notice given to the appellants in respect of the assessments upon their property.

"1. With respect to the first of these questions, we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States, in the case of *Norwood* v. *Baker*, 172 U. S. 269.

"As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of the special benefit which has accrued to him from the public improvement adjacent to his property."

But we think that the Court of Appeals has not correctly apprised the decision in *Norwood* v. *Baker*, and that, on examination, that decision and the reasoning on which it is founded will not be found to be applicable to the case now before us.

That case came to this court on an appeal from the Circuit Court of the United States for the Southern District of Ohio, wherein it had been held that for a municipality of a State to condemn land for a street through the property of a single owner, and then assess back upon his abutting property the entire damages awarded, together with the costs and expenses of the condemnation proceedings, is to take private property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. *Baker* v. *Norwood*, 74 Fed. Rep. 997. In the opinion of this court it was said:

"The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law, nor deny to

any person within its jurisdiction the equal protection of the laws, as well as of the bill of rights of the constitution of Ohio." *Norwood* v. *Baker*, 172 U. S. 269, 277.

It will, therefore, be perceived that there the court below and this court were dealing with a question arising under the Fourteenth Amendment of the Constitution of the United States, which, in terms, operates only to control action of the States, and does not purport to extend to authority exercised by the Government of the United States.

In the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation.

However, we need not pursue this suggestion, because we think the Court of Appeals, in regarding the decision in *Norwood* v. *Baker* as overruling our previous decisions in respect to Congressional legislation in respect to public local improvements in the District of Columbia, misconceived the meaning and effect of that decision. There the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits.

There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation, and accordingly affirmed the decree of the Circuit Court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found, upon due and proper inquiry, to be equal to the special benefits accruing to the property.

That it was not intended by this decision to overrule *Bauman* v. *Ross*, and *Parsons* v. *The District of Columbia* is seen in the opinion, where both those cases are cited, and declared not to be inconsistent with the conclusion reached. *Norwood* v. *Baker*, 172 U. S. 269, 294. Special facts, showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity; and this was thought by a majority of this court to have been the case in *Norwood* v. *Baker*. But no such facts are disclosed in this record.

The second proposition upon which the Circuit Court proceeded was that sufficient notice had not been given in respect of the assessments upon the property. This question, we think, has been disposed of by previous decisions, and has been sufficiently discussed in a previous part of this opinion.

*The decree of the Court of Appeals of the District of Columbia is reversed and the cause remanded to that court with directions to affirm the decree of the Supreme Court of the District of Columbia.*

Mr. Justice Harlan, (with whom concurred Mr. Justice White and Mr. Justice McKenna,) dissenting.

JUSTICES HARLAN, WHITE and MCKENNA, dissenting.

I am of opinion that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

Under the act of March 3, 1899, it was competent for the jury, *without regard to special benefits*, to put upon the lands abutting upon each side of the streets authorized to be opened and extended *not less* than one half of the entire damages found due and awarded in respect of the property taken under the first section of that act. It could only consider the question of benefits in respect to "adjacent" pieces or parcels of land. For the reasons stated in my dissenting opinion in *French* v. *Barber Asphalt Paving Company*, I cannot agree that such a statutory regulation or rule is consistent with the Constitution of the United States. My views upon the general subjects of special assessments are expressed in that opinion and need not be repeated here.

The court in the present case says that Congress has exclusive jurisdiction, municipal and political, in the District of Columbia, and is not controlled by the Fourteenth Amendment, although it is controlled by the Fifth Amendment providing, among other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. "But," the court proceeds, "it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment and maintaining the validity of acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling legislation." These observations were made to sustain the proposition that the principles announced in *Norwood* v. *Baker*, 172 U. S. 269, in reference to the validity of state enactments relating to local public improvements, have no necessary application to a case of a like kind arising under a similar act of Congress relating to local public improvements in the District of Columbia. As the court does not pursue this subject, nor express any final view upon the question referred to, I refer to this part of its opinion only for the purpose of recording my dissent from the intimation that what a State might

not do in respect of the deprivation of property without due process of law, Congress under the Constitution of the United States could, perhaps, do in respect of property in this District. The Fifth Amendment declares that no person shall be deprived of property "without due process of law." The Fourteenth Amendment declares that no State shall deprive any person of property "without due process of law." It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the Fourteenth Amendment but not applicable under the Fifth Amendment, or upon principles applicable under the Fifth and not applicable under the Fourteenth Amendment. It seems to me that the words "due process of law" mean the same in both Amendments. The intimation to the contrary in the opinion of the court is, I take leave to say, without any foundation upon which to rest, and is most mischievous in its tendency.

The court withdraws this case from the rule established in *Norwood* v. *Baker* upon the ground that the legislature of Ohio "had not defined or designated the abutting property as benefited by the improvement." But this is a mistake; for, as plainly stated in the opinion in that case, the State, by statute, had authorized villages to establish streets and highways and to meet the cost of such improvements by special assessments on the abutting property, according to *frontage, without regard to special benefits accruing to the property so assessed.* And, to repeat what I have said in *French* v. *Barber Asphalt Paving Company*, just decided, it was because and only because of this *rule*, prescribed *by the legislature*, that the state enactment was condemned as unconstitutional. The enactment, under which the council of Norwood proceeded, put upon the abutting property, when the municipality proceeded under the front-foot rule, the *entire* cost of opening a street; precluding, by a *rule* established for such cases, the owner of the property from showing that the cost was in excess of special benefits and was confiscatory to the extent of such excess. *Norwood* v. *Baker* expressly rejected the theory that the entire cost of a public highway, in which the whole community was interested, could be put, under

legislative sanction, on the abutting property, where such cost was in substantial excess of the special benefits accruing to the property assessed.

The court, in this case, says that "special facts showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity." What this means, when taken in connection with what has been said and intimated by the court in *French* v. *Barber Asphalt Paving Co.*—especially when considered in the light of the broad declarations in other cited cases as to legislative power—I confess I am unable to say. What "special facts," in the case of special assessments to meet the cost of a public improvement, would show an abuse of the law? What is meant by the words "an actual deprivation of property?" If private property abutting on a street be assessed for the cost of improving the street in excess of special benefits accruing to such property, is the assessment to the *extent of the excess* such an abuse of the law or such an actual deprivation of property as would justify the interference of a court of equity? In *Norwood* v. *Baker* this question was answered in the affirmative. Whether that doctrine is to remain the court does not distinctly say either in the present case or in any of the cases relating to special assessments just determined.

I submit that if the present case is to be distinguished from *Norwood* v. *Baker*, it should be done upon grounds that do not involve a misapprehension of the scope and effect of the decision in that case. If Congress can, by direct enactment, put a special assessment upon private property to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended.

# TONAWANDA *v.* LYON.

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

No. 214. Argued February 26, 1901.—Decided April 29, 1901.

It was not the intention of the court in *Norwood* v. *Baker*, 172 U. S. 269, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment to the Constitution of the United States; but the purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress.

This was the case of a bill in equity filed in the Circuit Court of the United States for the Northern District of New York on September 9, 1899, by James B. Lyon, a citizen of the State of New York, against the town of Tonawanda, a municipal corporation of that State, and John K. Patton, supervisor of said town. The object of the bill was to restrain the defendants from enforcing payment of a certain assessment against tracts or parcels of land belonging to the complainant, situated in the town of Tonawanda, and abutting on Delaware street in said town. The assessment was levied against said tracts of land to meet the expense of grading and paving said street, in pursuance of the provisions of statutes of the State of New York and of an order of the town board of Tonawanda. The principal matter complained of was that the method of meeting the expense of grading and paving the said street was by assessing the same against the lots abutting on the street according to frontage thereon, and that the statutes and proceedings thereunder, which provided for that method, were contrary to the provisions of the Constitution of the United States, in that thereby the land of the complainant would be taken for public use without just compensation and he would be deprived of his property without due process of law.

Counsel for Parties.

The case came on for final hearing on bill, answer and a stipulation of facts, and on January 17, 1900, the Circuit Court decreed, among other things, as follows:

"That those parts of the acts of the legislature of the State of New York mentioned and set forth in plaintiff's bill of complaint, to wit, of chapter 550 of the laws of the State of New York for the year 1893, and of chapter 816 of the laws of the State of New York for the year 1895, which authorized and required the town board of said town to levy the assessment for the entire expense of paving said Delaware street, set forth in the bill of complaint, upon the complainant's said parcels of land described in said bill of complaint and the other lands fronting on said Delaware street, and the acts of the said defendant, the town of Tonawanda, by its town board, mentioned in said bill of complaint, in levying said assessments upon said lands according to the rule prescribed in said acts of said legislature, to wit, in the proportion which the number of front feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment, bear and are to the aggregate number of feet of frontage of all the lots of land so bounding on the portion of said street in front of which said improvement was made, was and were, and each and every of said provisions of said acts of the legislature of the State of New York and all acts of said defendant, the town of Tonawanda, in levying said assessment in the manner and form aforesaid, are wholly unconstitutional and void as being contrary to the provisions of the Constitution of the United States."

And thereupon the town of Tonawanda and John K. Patton as supervisor of said town were forever enjoined and restrained "from in any manner collecting or enforcing payment of such assessments against said complainant or his land or property." 98 Fed. Rep. 361.

On January 17, 1900, an appeal from said decree to this court was prayed for and allowed.

*Mr. John Cunneed* for Tonawanda.

*Mr. Tracy C. Becker* for Lyon.

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

The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the State of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power. *The People* v. *Mayor &c.*, 4 N. Y. 419; *Spencer* v. *Merchant*, 100 N. Y. 585.

What was claimed was that a state statute, which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the State may have held otherwise, it was its duty to follow the decision of this court in the case of *Norwood* v. *Baker*, 172 U. S. 269, which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in *Norwood* v. *Baker*, the learned judge extended the doctrine of that case beyond its necessary meaning.

It was not the intention of the court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the States the same

protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress. The case of *Norwood* v. *Baker* presented, as the judge in the court in the present case well said, "considerations of peculiar and extraordinary hardships," amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment.

The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the *Norwood* case.

It is unnecessary to enter into an examination of the authorities on this subject, as that has recently been done in *French* v. *Barber Asphalt Paving Co.*, in error to the Supreme Court of the State of Missouri, and in *Wight* v. *Davidson*, on appeal from the Court of Appeals of the District of Columbia, in the former of which the effect of the Fourteenth, and, in the latter, that of the Fifth Amendment, was considered. 181 U. S. 324, 371.

There were other questions passed upon in the trial court and discussed in the briefs, but the conclusion we now reach renders it unnecessary for us to consider them.

*The decree of the Circuit Court is reversed and the cause is remanded to that court with directions to dismiss the bill of complaint.*

Mr. Justice Harlan, (with whom concurred Mr. Justice White and Mr. Justice McKenna,) dissenting.

My views touching the general questions arising in this case have been expressed in *French* v. *Barber Asphalt Paving Company* and in *Wight* v. *Davidson*, just determined. I adhere to those views, and therefore dissent from the judgment in this case. As stated by the Circuit Court, the special assessment in question was "in the proportion which the number of front feet

of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment, bear and are to the aggregate number of feet of frontage of all the lots so bounding on the portion of said street in front of which said improvement was made." The case, therefore, is one in which, beyond question, private property is specially assessed by the front foot, in the interest of the whole public, for the entire cost of paving a highway, without reference to any special benefits accruing to it, and without the owner of the property being permitted to show that such cost amounts to the confiscation of his property to the extent that it substantially exceeds special benefits, or that it exceeds the value of the property assessed.

The court says that it was not the intention of this court in *Norwood* v. *Baker*, to hold "that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States." The contrary was not asserted by the learned judge of the Circuit Court, nor has any one in this case contended that the Fourteenth Amendment subverted the taxing systems of the States. But it was contended, and such is my position, that nothing can be done by or under the authority of a State in violation of that Amendment. After that Amendment became part of the Constitution, the only provisions in the state taxing laws or systems that ceased to have operation were those that were inconsistent with the Amendment. No one, I assume, will dispute that proposition.

The court also says that the purpose of the Fourteenth Amendment "is to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress." I assent most cordially to this view, and therefore, in another case, felt obliged to express my objection to the intimation that possibly that might be done by Congress under the due process clause of the Fifth Amendment which could not be done by a State under the same clause of the Fourteenth Amendment.

# WEBSTER *v.* FARGO.

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

No. 378. Argued and submitted February 27, 1901.—Decided April 29, 1901.

It is within the power of the legislature of a State to create special taxing districts, and to charge the cost of local improvement, in whole or in part, upon the property in said districts, either according to valuation, or superficial area, or frontage; and it was not the intention of this court, in *Norwood* v. *Baker*, 172 U. S. 269, to hold otherwise.

This was an action brought by Mortimer Webster in the district court in and for the county of Cass and State of North Dakota, against the city of Fargo; James M. Fargo, as auditor of said city; D. C. Ross, as treasurer, and G. J. Olson, as auditor, of Cass County, in which the plaintiff sought to enjoin the defendant from enforcing an assessment for grading and paving against certain lots or pieces of land belonging to the plaintiff, and abutting on the streets of the city of Fargo.

It was admitted, and, indeed, alleged, in the complaint, that "each and every of the acts and proceedings required to be done and taken by the statutes of said State of North Dakota in making and return of said assessment, as aforesaid, were duly taken and done," but it was alleged that the state statutes, under which the work was done and the assessment made, were in violation of the Fourteenth Amendment of the Constitution of the United States, in that they prescribed for paying for grading and paving the streets, by an assessment upon abutting lots by the foot-front rule.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and, as the plaintiff declined to amend, entered a judgment dismissing the complaint. From this judgment an appeal was taken to the Supreme Court of the State of North Dakota, which court affirmed the judgment of the district court dismissing the complaint. A writ

of error from this court was thereupon allowed by the Chief Justice of the Supreme Court of the State of North Dakota.

*Mr. Seth Newman* for plaintiff in error. *Mr. Burleigh F. Spalding* was on his brief.

*Mr. S. B. Pinney*, *Mr. John E. Greene* and *Mr. H. F. Miller* submitted on their brief.

MR. JUSTICE SHIRAS delivered the opinion of the court.

It is conceded, in this record, that the plaintiff in error has no ground to complain of any discrimination attempted against him, either in the statutes of the State or in the proceedings thereunder, whereby the tax in question was assessed against his property. The sole contention on his behalf is that, under the decision of this court in the case of *Norwood* v. *Baker*, 172 U. S. 269, all special assessments upon the basis of frontage are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they may result in the taking of property without due process of law.

But we agree with the Supreme Court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said districts, either according to valuation, or superficial area, or frontage, and that it was not the intention of this court, in *Norwood* v. *Baker*, to hold otherwise.

It is unnecessary to enter upon an examination of the authorities, as that has recently been done in the case of *French* v. *Barber Asphalt Company*, *ante*, 324; and, upon the authority of that case, the judgment of the Supreme Court of North Dakota is

*Affirmed.*

MR. JUSTICE HARLAN, (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA,) dissenting.

The controlling question in this case is the same as is presented

in *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, *Wight* v. *Davidson*, *ante*, 371, and *Tonawanda* v. *Lyon*, *ante*, 389, all just decided. For the reasons stated in my opinions in those cases, I dissent from the opinion and judgment of the court in this case.

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## CASS FARM COMPANY *v.* DETROIT.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 508. Argued February 25, 26, 27, 1901. — Decided April 29, 1901.

The court holds and adheres to its decisions in *French* v. *Asphalt Paving Co.*, *Tonawanda* v. *Lyon*, *ante*, 371, and *Wight* v. *Davidson*, *ante*, 389, and finds nothing in the record to show that the complainants have entitled themselves to its interference.

THE case is stated in the opinion of the court.

*Mr. Henry M. Campbell* for plaintiff in error.

*Mr. Timothy E. Tarsney* and *Mr. C. D. Joslyn* for Detroit.

MR. JUSTICE SHIRAS delivered the opinion of the court.

A bill in equity was filed in September, 1898, in the circuit court for the county of Wayne, State of Michigan, by the Cass Farm Company, Limited, and others, owners of lands lying and abutting upon Second avenue in the city of Detroit, against said city, the board of public works, and the Alcatraz Asphalt Paving Company, whereby it was sought to enjoin the city of Detroit from paving a portion of Second avenue, and to have the proceedings taken with reference to said paving declared void.

There was a decree in the circuit court in favor of complainants, and thereupon the case was taken to the Supreme Court of the State of Michigan, where the decree of the trial court

was reversed, and a decree was entered dismissing the complainant's bill with costs of both courts.

We learn from a statement in the opinion of the Supreme Court that among other grounds of relief stated in the bill was the following:

"That the provisions of the charter and of the paving ordinances of the city, in so far as the same provide for an assessment of the cost of paving upon the abutting property in proportion to the frontage of such property, were in violation of the Constitution of the United States and the amendments thereof, and therefore null and void."

The state Supreme Court disposed of this contention in the following language:

"In paving cases the rule has been settled in this State by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage.

"It was said by Mr. Justice Cooley in *Sheley* v. *Detroit*, 45 Michigan, 431:

"'We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to question. Writers on constitutional law, on municipal law and on the law of taxation have collected the cases and have recognized the principle as settled; and if the question were new in this State we might think it important to refer to what they say; but the question is not new. It was settled for us thirty years ago.'

"We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood* v. *Baker*, inasmuch as it was based on the Fourteenth Amendment of the Constitution of the United States, if that were a paving case; but that was a street opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall

feel bound to follow our own decisions." *The Cass Farm Improvement Co.* v. *Detroit*, 83 N. E. Rep. 108.

We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*. *French* v. *Asphalt Paving Co.*, *Tonawanda* v. *Lyon*, *Wight* v. *Davidson*, *ante*, 324, 389, 371.

We are not convinced, by anything appearing in this record, that the complainants have entitled themselves to the interference of this court. As held by the Supreme Court of their own State, the proceedings to enforce the payment of their proportion of a common burden have been conducted in due regard to the forms and provisions of the statutes and ordinances applicable to the facts of the case, and disclose no departure, actual or intended, from constitutional principles.

The judgment of the Supreme Court of the State of Michigan is

*Affirmed.*

Mr. Justice Harlan, (with whom concurred Mr. Justice White and Mr. Justice McKenna,) dissenting.

The controlling question in the above case is the same as is presented in *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, *Wight* v. *Davidson*, *ante*, 371, and *Tonawanda* v. *Lyon*, *ante*, 389, just decided. For the reasons stated in my opinions in those cases, I dissent from the opinion and judgment of the court in this case.

# DETROIT *v.* PARKER.

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

No. 411. Argued February 26, 1901.—Decided April 29, 1901.

*Cass Farm Company* v. *Detroit*, *ante*, 396, followed in holding that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress; and Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*, 172 U. S. 269.

The case is stated in the opinion of the court.

*Mr. Timothy E. Tarsney* for appellants.

*Mr. Elbridge F. Bacon* for appellee.

Mr. Justice Shiras delivered the opinion of the court.

This was the case of a bill in equity filed in the Circuit Court of the United States for the Eastern District of Michigan by Ralzemond A. Parker, a citizen of the State of Michigan, against the city of Detroit and certain officers of said city, seeking to set aside certain assessments and tax sales of complainant's land for the paving of Woodward and Blaine avenues in the city of Detroit. The paving in question was done in pursuance of certain statutes of the State of Michigan, constituting the charter of the city of Detroit, and of ordinances of the common council of said city.

There was no allegation or proof that, in the proceedings

which resulted in the making of the improvements and in assessing complainant's lots for a portion of the costs thereof, there had been any disregard of the provisions of the statutes and ordinances, or that complainant's property had been charged differently from that of the other lot owners. Nor was it alleged that the portion or share of the cost of making the improvements assessed against complainant's property in point of fact exceeded the benefits accruing to each property by reason of such paving.

The only foundation of the bill was the allegation that "the said statutes and ordinances providing for the paving and grading of streets are in violation of the rights of the complainant under the Fourteenth Amendment of the Constitution of the United States, in that they do not provide for any hearing or review of assessments at which the property owner can show that his property was not benefited to the amount of such assessments, but that the same shall be made arbitrarily according to the foot front."

The case was thus disposed of by the learned judge in the Circuit Court:

"It is the claim of complainant that the charter, in the provisions mentioned, that the entire cost of the street improvements, except for street and alley crossings, etc., shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property or their relation to the cost of the improvement, is in conflict with the Fourteenth Amendment of the Constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The case of the village of *Norwood* v. *Baker*, 172 U. S. 269, is the foundation for this position, and seems fully to sanction it. . . . The Supreme Court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in *Baker* v. *Norwood* must be confined to the facts of that case and has no application to an assessment for paving. With all respect for that learned tribunal, I am constrained under the

cases cited, to a different opinion of the decision, and to follow the Supreme Court of the United States upon the construction of the Fourteenth Amendment of the Federal Constitution."

Accordingly a decree was entered in accordance with the prayer of the bill, and a perpetual injunction was issued. *Parker* v. *City of Detroit*, 103 Fed. Rep. 357.

This court has just decided, in the case of *Cass Farm Company* v. *Detroit*, affirming a judgment of the Supreme Court of Michigan, that "it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*," *ante*, 396.

Like conclusions were reached, after a full consideration of the authorities, in *French* v. *Barber Asphalt Paving Company* and in *Wight* v. *Davidson*, *ante*, 324, 371.

*The decree of the Circuit Court is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.*

MR. JUSTICE HARLAN, (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA,) dissenting.

The controlling question in the above case is the same as is presented in *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, *Wight* v. *Davidson*, *ante*, 371, and *Tonawanda* v. *Lyon*, *ante*, 389, just decided. For reasons stated in my opinions in those cases, I dissent from the opinion and judgment of the court in this case.

Counsel for Parties.

## WORMLEY *v.* DISTRICT OF COLUMBIA.

## ALLEN *v.* DISTRICT OF COLUMBIA.

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

Nos. 101, 102. Submitted November 12, 1900.—Decided April 29, 1901.

*Parsons* v. *District of Columbia*, 170 U. S. 45, and *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, followed.

*Mr. D. W. Baker*, *Mr. John C. Gittings* and *Mr. Malcom Hufty* for plaintiff in error.

*Mr. Andrew B. Duvall* and *Mr. Clarence A. Brandenburg* for defendant in error.

PER CURIAM. And now, April 29, 1901, the judgments in the foregoing cases are affirmed, with costs, on the authority of *Parsons* v. *District of Columbia*, 170 U. S. 45, and *French* v. *Barber Asphalt Paving Co.*, *ante*, 324.

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## SHUMATE *v.* HEMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 550. Argued February 27, 1901.—Decided April 29, 1901.

*French* v. *Barber Asphalt Paving Co.*, again followed in holding that the contract in question in this case made for the construction of a sewer and the assessment against the property of the plaintiff in error for the cost of making it were not null and void.

THE case is stated in the opinion of the court.

*Mr. G. B. Webster* for Shumate. *Mr. Hiram J. Grover* and *Mr. Hamilton Grover* were on his brief.

JUSTICES HARLAN, WHITE and MCKENNA, dissenting.

*Mr. David Goldsmith* for Heman. *Mr. Robert E. Collins* and *Mr. H. P. Rodgers* were on his brief.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was a suit brought in the Circuit Court of the city of St. Louis by August Heman to enforce payment of a special tax bill issued in his favor by that city for the construction of a sewer in what is called Euclid avenue sewer district. The plaintiff recovered a judgment, and the defendants, who were owners of property assessed for the cost of making said sewer, appealed to the Supreme Court of Missouri, where the judgment of the trial court was affirmed, the case being reported as *Heman* v. *Allen*, 156 Mo. 534; and after such affirmance the defendant brought the case to this court by writ of error.

The only question which is open to our consideration upon this record is the contention of the plaintiff in error, that the provisions of the charter of the city of St. Louis, the ordinances of the municipal assembly, the contract with the defendant in error made thereunder, and the assessment against the property of the plaintiff in error for the cost of the construction of said sewer, were null, void and of no effect, for the reason that they were repugnant to the Fourteenth Amendment of the Constitution of the United States, as construed and applied in the case of *Norwood* v. *Baker*, 172 U. S. 269.

This contention has been considered and determined, under a similar state of facts, by this court, in the recent case of *French* v. *The Barber Asphalt Paving Company*, *ante*, 324, in error to the Supreme Court of the State of Missouri, and upon the authority of that case the judgment of the Supreme Court of Missouri is

*Affirmed.*

MR. JUSTICE HARLAN, (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA) dissenting.

The controlling question in this case is the same as is presented in *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, *Wight* v. *Davidson*, *ante*, 371, and *Tonawanda* v. *Lyon*, *ante*, 389, just decided. For the reasons stated in my opinions in those cases, I dissent from the opinion and judgment of the court in this case.

## FARRELL *v.* WEST CHICAGO PARK COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 201. Argued March 18, 19, 1901.—Decided April 29, 1901.

*French* v. *Barber Asphalt Co. ante*, 324, and *Wight* v. *Davidson ante*, 371, followed.

The case is stated in the opinion of the court.

*Mr. George W. Wilbur* for plaintiffs in error.

*Mr. Robert A. Childs* for defendants in error. *Mr. Charles Hudson* was on his brief.

Mr. Justice Shiras delivered the opinion of the court.

This case originated in proceedings to create and improve an avenue or thoroughfare known as Douglas boulevard, in the town of West Chicago.

The full history of those proceedings, contained in the statement of facts made by this court in the case of *Lombard and others* v. *The West Chicago Park Commissioners*, recently decided, renders it unnecessary to repeat them here. And the legal questions involved were so fully discussed in that case, and in *French* v. *Barber Asphalt Co.* and *Wight* v. *Davidson*, cognate cases decided at the present term of this court, that we are relieved from their further consideration.

The judgment of the Supreme Court of the State of Illinois is

*Affirmed.*

Mr. Justice Harlan, (with whom concurred Mr. Justice White and Mr. Justice McKenna) dissenting.

The controlling question in this case is the same as is presented in *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, *Wight* v. *Davidson*, *ante*, 371, and *Tonawanda* v. *Lyon*, *ante*, 389. For the reasons stated in my opinions in those cases, I dissent from the opinion and judgment of the court in this case.

# GERMAN NATIONAL BANK *v.* SPECKERT.

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

No. 192. Argued March 12, 1901.—Decided May 13, 1901.

No appeal lies to this court, under the act of March 3, 1891, c. 517, § 6, from a judgment of the Circuit Court of Appeals directing the Circuit Court of the United States to remand a case to the state court.

THE case is stated in the opinion.

*Mr. Alexander Pope Humphrey* for appellants. *Mr. John G. Carlisle* and *Mr. William M. Smith* were on his brief.

*Mr. John L. Dodd* for appellees. *Mr. Aaron Kohn*, *Mr. David W. Baird*, *Mr. T. W. Spindle* and *Mr. J. C. Dodd* were on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, commenced in a court of the State of Kentucky, and removed, on petition of the defendant, into the Circuit Court of the United States for the District of Kentucky. The Circuit Court of the United States denied a motion to remand the case to the state court, 85 Fed. Rep. 12, and afterwards dismissed the bill upon its merits. The plaintiff appealed to the Circuit Court of Appeals, which reversed the decree and ordered the Circuit Court to remand the case to the state court. 98 Fed. Rep. 151; 38 C. C. A. 682. From the order of the Circuit Court of Appeals the plaintiffs appealed to this court.

In *Railroad Co* v. *Wiswall*, (1874) 23 Wall. 507, a case was removed from a state court into a Circuit Court of the United States; the Circuit Court, being satisfied that it had no jurisdiction, ordered the case to be remanded to the state court; and

a writ of error to review the order remanding it was dismissed by this court, upon the ground that "the order of the Circuit Court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

By the act of March 3, 1875, c. 137, § 5, it was provided that an order of the Circuit Court, dismissing or remanding a cause to the state court, should be reviewable by this court on writ of error or appeal. 18 Stat. 472. Under that statute, many cases were brought to this court by appeal or writ of error for the review of such orders.

But by section 6 of the act of March 3, 1887, c. 373, as reenacted by the act of August 13, 1888, c. 866, that provision was expressly repealed; and by section 2 it was enacted that whenever the Circuit Court of the United States should decide that a cause had been improperly removed, and order it to be remanded to the state court from which it came, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed." 24 Stat. 553, 555; 25 Stat. 435, 436.

Under that statute, it has been constantly held that this court has no power to review by appeal or writ of error an order of a Circuit Court of the United States remanding a case to a state court.

In the first case Chief Justice Waite said: "It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed." *Morey* v. *Lockhart*, (1887) 123 U. S. 56. And it was held that the act prohibited a writ of error after that statute took effect to review an order of remand made while the act of 1875 was in force. *Sherman* v. *Grinnell*, (1887) 123 U. S. 679.

By the act of February 25, 1889, c. 236, it is provided that

"in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States, in which there shall have been a question involving the jurisdiction of the court," the losing party should be entitled to an appeal or writ of error to this court, without reference to the amount of the judgment, but limited, when that amount did not exceed $5000, to the question of jurisdiction. 25 Stat. 693. It was held that this act did not authorize an appeal from an order of the Circuit Court of the United States remanding a case to the state court for want of jurisdiction, because " the words ' a final judgment or decree,' in this act, are manifestly used in the same sense as in the prior statutes which have received interpretation, and these orders to remand were not final judgments or decrees, whatever the ground upon which the Circuit Court proceeded." *Richmond & Danville Railroad* v. *Thouron* (1890) 134 U. S. 45. A similar decision was made in *Gurnee* v. *Patrick County*, (1890) 137 U. S. 141.

In the case of *In re Pennsylvania Co.*, (1890) 137 U. S. 451, it was held that the acts of 1887 and 1888 took away the remedy by mandamus, as well as that by writ of error or appeal, in the case of an order of remand; and Mr. Justice Bradley, in delivering judgment, after quoting section 2 of those acts, said: "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately

carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." 137 U. S. 454.

In *Chicago Railway* v. *Roberts*, (1891) 141 U. S. 690, the cases of *Morey* v. *Lockhart* and *Richmond & Danville Railroad* v. *Thouron* were followed; and it was held that section 5 of the Judiciary Act of March 3, 1891, c. 517, giving a writ of error from this court "in any case in which the jurisdiction of the court is in issue," does not authorize a writ of error to review an order of the Circuit Court, remanding a case for want of jurisdiction, because such order is not a final judgment.

In *Missouri Pacific Railway* v. *Fitzgerald*, (1896) 160 U. S. 556, 580–583, in a careful opinion of the Chief Justice, reviewing the statutes and decisions, it was again stated, as well settled, that an order of the Circuit Court of the United States ordering a suit to be remanded to the state court was not a final judgment or decree; and that such an order could not be reviewed in this court by any direct proceeding for that purpose; and it was also held that "as under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of the Circuit Court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under section 709, in respect of such an order, where the state court has rendered no decision against a Federal right, but simply accepted the conclusion of the Circuit Court."

In the present case, the remand to the state court was denied by the Circuit Court of the United States, but, on appeal from its decree dismissing the bill, was ordered by the Circuit Court of Appeals.

If the Circuit Court had ordered the case to be remanded, its order could not, according to the decisions above cited, have

been reviewed by this court, in any manner, either by appeal from that court, or by mandamus to that court, or by writ of error to the state court.

It would be an extraordinary result if, while an order of remand by the Circuit Court, of its own motion, is not subject to review in any form, an order of remand by that court, by direction of the Circuit Court of Appeals, were subject to a further appeal to this court.

The appeal in this case is taken under the last paragraph of section 6 of the act of March 3, 1891, c. 517, by which "in all cases not hereinbefore in this section made final," and when the matter in controversy exceeds $1000, there is of right a review of the judgment of the Circuit Court of Appeals by this court on appeal or writ of error.

Such appeal or writ of error, of course, can only be taken from a final judgment. But an order of remand is not a final judgment, according to the cases above cited, especially *Railroad Co.* v. *Wiswall*, *Richmond & Danville Railroad* v. *Thouron*, *Chicago Railway* v. *Roberts*, and *Missouri Pacific Railway* v. *Fitzgerald*. Therefore no appeal lies from the order of remand.

*Appeal dismissed for want of jurisdiction.*

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## PUT-IN-BAY WATERWORKS &c. COMPANY *v.* RYAN.

APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 332. Submitted February 25, 1901.—Decided May 13, 1901.

The property and franchises, which are the subject matter of this suit, were not in the possession of the state court, when the Federal court appointed its receiver.

Within the letter of the statute there was a controversy between citizens of different States, in which the matter in dispute was over the sum of or value of two thousand dollars.

Statement of the Case.

Jurisdiction having attached under the allegations of the original bill, that jurisdiction did not fail by reason of anything that appeared in *ex parte* affidavits, denying the truth of the allegations contained in the original bill in respect to the amount in dispute.

In September, 1892, the Electric Supply Company, a corporation and citizen of the State of Connecticut, filed in the Circuit Court of the United States for the Northern District of Ohio a bill of complaint against the Put-in-Bay Waterworks, Light and Railway Company, a corporation and citizen of the State of Ohio. It was alleged in the bill that the plaintiff company had, in June, 1872, sold and delivered to the defendant company certain materials and supplies to be used in the erection of the lighting apparatus, powerhouse, station and railway of the defendant, of the value of $2787.04, and that said supplies and material were used in the construction of the lighting apparatus and railway of said defendant, situated in Put-in-Bay Island, in Ottawa County, Ohio, and that the entire amount of said claim was due and unpaid.

The bill further alleged that, on September 7, 1892, the plaintiff company had filed with the recorder of Ottawa County an affidavit containing an itemized statement of the amount and value of the materials and supplies furnished under said contract of sale, with a statement of the account and terms of payment to be made thereunder and a description of the premises upon which said lighting apparatus and railway were located, which said statement and all connected therewith were duly recorded by said recorder in a book kept for that purpose; that the plaintiff has a lien on the premises and all the property of defendant company from the 7th day of June, 1892, for the amount due with interest; and that, in the premises, the plaintiff was entirely without remedy according to the strict rules of the common law, and could only have relief in a court of equity where matters of such a nature were properly cognizable and reviewable.

The bill further alleged that the Railway Equipment Company, a corporation and citizen of the State of Illinois; John Arbuckle, Charles Ryan and W. J. Ryan, citizens of the State of Ohio; James K. Tillotson, a citizen of the State of Ohio;

the Cleveland Electrical Manufacturing Company, a corporation and citizen of the State of Ohio; the Industrial and Mining Guaranty Company, a corporation and citizen of the State of New York; John P. Carrothers, a citizen of the State of New York; and H. H. Warner, a citizen of the State of New York, claimed to have some interest in the premises upon which the plaintiff claimed the aforesaid lien; and the bill prayed that each of said parties should be required to appear and set up their respective claims, or be forever barred from setting up the same against the plaintiff. The bill prayed for an account with the defendant company, and for a decree of sale of said premises, etc.

On September 10, 1892, an answer and cross bill were filed by J. K. Tillotson. In this cross bill it was alleged that said Tillotson had built and equipped the railroad of the defendant company, and had received in payment therefor the stock of said company and mortgage bonds to the amount of $125,000; that he had contracted with John P. Carrothers and H. H. Warner, as owners and controllers of the Industrial and Mining Guaranty Company of New York, (named as defendants in the bill of complaint,) to sell and dispose of said stock and bonds, but that said Carrothers and Warner had not sold or accounted for the said stock or bonds, but that said Carrothers, claiming to be the owner of the capital stock of said defendant company, had elected himself president thereof, and had taken possession of said railroad, etc. It was thereupon prayed, in said cross bill, that a restraining order should be issued against said Carrothers and Warner and the said Industrial and Mining Guaranty Company, forbidding them, during the pendency of this suit, from selling or disposing of said stock and bonds, and that the court should appoint a receiver to take charge and custody of the railway and property in plaintiff's bill of complaint described, with instructions to care for and operate the same under the order of the court, and as, in the judgment of the court, might be for the interest of all parties concerned.

Thereupon, on September 10, 1892, a subpœna was issued summoning said Carrothers, Warner and the Industrial and Mining Guaranty Company to appear and answer said cross

bill. On the same day a temporary restraining order was issued against said Carrothers and Warner as prayed for in the cross bill, and one L. S. Baumgardner was appointed receiver, who gave a bond as such receiver in form and amount approved by the United States District Judge.

The United States marshal made return that he had served the restraining order and subpœna on said John P. Carrothers, and that said H. H. Warner and the Industrial and Mining Guaranty Company were not found.

Subsequently, on September 26, 1892, the Put-in-Bay Waterworks, Light and Railway Company filed an answer to the bill of complaint, admitting that on June 7, 1892, the defendant had entered into a contract with the complainant company, whereby the latter company was to sell and deliver certain materials to be used in the construction of defendant's railway in Ottawa County, Ohio. The said answer contained the following allegations:

"This defendant says that it is not true that Exhibit 'A' attached to complainant's bill contains a true and correct statement of the material so sold by the complainant to this defendant as aforesaid. And it is not true that all of said supplies and materials contained in said Exhibit 'A' were used in the construction of the said railway. But, on the contrary, this defendant says that a large part of said materials were sold and delivered to said J. K. Tillotson, defendant, for the purpose of being used, and which were used, in the construction of certain property known as Hotel Victory on South Bass Island. This defendant says that it is not true that the material sold to this defendant by said complainant as aforesaid were of the value of $2787.04, as set forth in said Exhibit 'A,' but on the contrary this defendant is informed and believes, and so states the fact to be, that the materials so sold by said complainant to this defendant, through its vice president, the defendant Tillotson, for the purpose of being used in the construction of said railway, and which were so used, amounted in value to about the sum of $700, and no more. . . . This defendant further says that the said complainant, when it sold the said Tillotson the material set forth in Exhibit 'A' of said complaint, well knew that a

large part of said material was so sold and delivered for the purpose of being used, and was used, in the construction of Hotel Victory, of which the said Tillotson was president, and which had no connection whatever with this defendant's railroad. And this defendant alleges that said complainant, at the request of said Tillotson, procured a lien to be filed with the recorder of Ottawa County against this defendant's property, on the day previous to the filing of the complainant's complaint herein, and for the entire amount of the material sold this defendant and also sold to said Tillotson for the use of said Hotel Victory. And said lien was so filed by said complainant at the request of said Tillotson, for said amount, and for the express purpose of instituting this action in this court.

"And this defendant prays that this honorable court may take an account of material sold by complainant to and for the use of the defendant, to be used in the construction of said railway, and the amount of said material so sold, which has been actually used in the construction thereof. And that the court may determine the value of said material so sold to and used by this defendant, and the actual amount of the lien which said complainant has on account thereof against the property of this defendant."

On September 26, 1892, the Put-in-Bay Waterworks, Light and Railway Company filed an answer to the cross bill of Tillotson, admitting some and denying many of the allegations thereof, and containing the following allegation:

"This answering defendant further says that on or about the 3d day of September, 1892, the said defendant Tillotson, attempting to interfere with the said company in the operation of its said railway, and to prevent the said company from the peaceable enjoyment of its said property, the common pleas court of Ottawa County, Ohio, on the petition of said Put-in-Bay Waterworks, Light and Railway Company, issued a restraining order enjoining the said defendant James K. Tillotson from interfering or attempting to interfere in any manner with the said company in the operation of its railway, and which said restraining order is still in full force and effect."

It also appears that the defendant company sued out of the

court of common pleas a writ of replevin against Tillotson, but it is not shown what the property levied on was.

Afterwards, on September 30, 1892, the answer and cross bill of Arbuckle, Ryan & Company, who had been named as defendants in said suit, was filed, in which it was, among other things, alleged that said firm had furnished a large amount of machinery and of labor for the said Put-in-Bay Waterworks, Light and Railway Company, which went into the construction of said railroad and powerhouse of said company, on which there was unpaid and due to the said Arbuckle, Ryan & Company a balance of $11,153.60, and for which they had filed, on August 17, 1892, with the recorder of Ottawa County, Ohio, an affidavit and itemized account, by virtue of which proceeding they had obtained a lien upon the property and railroad of the defendant, the said railroad company. They therefore prayed for an account, and for an order directing the sale of the said property and railroad, and for the payment of their claim out of the proceeds of such sale.

On October 15, 1892, L. S. Baumgardner, theretofore appointed receiver, filed a petition showing cause why certain expenditures incident to the care and preservation of the railroad and its property since they had come into his hands, and other expenditures necessary to be made, required him to raise a sum of not less than $5000, and prayed for leave to issue receiver's certificates for that purpose. This was followed by an order of the court authorizing the receiver to issue certificates to the amount of $5000, and declaring said certificates to be a first lien upon all the property of said railway company in the hands of said receiver.

Afterwards, on October 29, 1892, a motion to discharge the receiver was made on behalf of the defendant railway company, which was accompanied by an affidavit of J. P. Carrothers, as president of said company, in which, among other things, it was stated that on September 3, 1892, the affiant, as president of said company, was compelled to and did institute replevin proceedings to obtain possession of the personal property of said company, and that by virtue of said action the property of said company was turned over to affiant as president thereof, excepting

the books, papers, muniments of title and certain other of the personal property belonging to said company which were taken away and secreted by said Tillotson; and that said railway company obtained from the court of common pleas of Ottawa County a restraining order enjoining Tillotson from interfering with the company's peaceable enjoyment of the possession and control of said Put-in-Bay Waterworks, Light and Railway Company, its property and business, such order to take effect upon the plaintiff giving an undertaking, as provided by law, in the sum of $5000, to the satisfaction of the clerk of said court.

Afterwards, on November 12, 1892, an affidavit of one F. S. Terry, as manager and attorney of complainant company, was filed in the present case, in which, among other things, it was stated that the Electric Supply Company was induced to include all sums due for material furnished for use of the Hotel Victory Company in its account against said railroad; that the amount actually used in the construction of the Put-in-Bay Waterworks, Light and Railway Company amounted to $861.23; that the balance of said material, to the amount of $1925.81, was used inside of said Hotel Victory; that all of said material was ordered by said defendant Tillotson, as vice president of said defendant corporation, and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Waterworks, Light and Railway Company.

On December 22, 1892, the court overruled the motion to dismiss the receiver and to modify the order to said receiver to issue certificates; and an order was made, on the further petition of the receiver, allowing him to issue additional certificates to the amount of $5000.

On January 20, 1893, an appeal from the decree of the Circuit Court overruling the motion to discharge the injunction and to modify the order authorizing the receiver to issue certificates, and retaining jurisdiction, was taken by the Industrial and Mining Guaranty Company, a corporation of New Jersey, and one of the defendants in the cause, to the Circuit Court of Appeals for the Sixth Circuit; and, on June 22, 1893, that court reversed the decree of the Circuit Court, the injunction was dis-

solved and the cause was remanded to the Circuit Court with directions for further proceedings in conformity with the opinion of the Circuit Court of Appeals. 58 Fed. Rep. 732, 746.

On December 14, 1893, the Circuit Court, in pursuance of the mandate from the Circuit Court of Appeals, dissolved the injunction theretofore granted on the cross bill of Tillotson, and, on December 28, 1893, appointed Irvin Belford a special master commissioner for the purpose of examining the accounts of the receiver, with particular reference to the disposition made by him of the proceeds of the certificates, and also to report the expenses found by the master to have accrued to the defendants, or any of them, and the reasonable compensation to which the receiver was entitled, etc.

On March 31, 1894, Irvin Belford, the special master, filed his report in the Circuit Court, in which he found that the receipts of the receiver from all sources amounted to the sum of $12,230.90, whereof $8776.10 were from proceeds of receiver's certificates, and his expenditures amounted to the sum of $11,969.58, leaving a balance of cash on hand of $261.32. The master further found that the reasonable compensation to which the receiver was entitled was $2200; of which $1200 were for his personal services, and $1000 for his attorney's fees. He also found that the expenses and costs incurred by the defendant, the Industrial and Mining Guaranty Company, consisting principally of attorney's fees, amounted to the sum of $8795.25.

Subsequently, on June 12, 1894, the Circuit Court made the following order:

"This day this cause came on for further hearing upon the motion of the Industrial and Mining Guaranty Company, the Put-in-Bay Waterworks, Light and Railway Company and John P. Carrothers, to dismiss this cause for want of jurisdiction. And the court, having heard the evidence and the arguments of counsel, and being now fully advised in the premises, does grant said motion conditionally.

"It is therefore ordered, adjudged and decreed that, upon the payment into court of the amount due on the certificates issued by L. S. Baumgardner, heretofore appointed receiver herein, or the filing herein of said certificates, duly paid and

cancelled on or before the 30th day of June, 1894, and the payment to the clerk of this court of the costs in this case, including the compensation of the receiver, which is now taxed at the sum of $1200.00, and the compensation of receiver's counsel, which is now taxed at the sum of $1000, said cause be, and the same is, hereby dismissed."

On December 5, 1894, Arbuckle, Ryan & Company moved the court to dismiss the cause in compliance with the order previously made that said cause be dismissed when the receiver's certificates were paid, because, as alleged, that said certificates have been paid in full, but that Walker P. Hall and James E. Hutton, the holders of said certificates, have failed and refused to bring the same into court to have them cancelled, etc.

On March 1, 1895, the following order was entered:

"This cause came on to be heard on the motion of Arbuckle, Ryan & Company to compel the holders of the receiver's certificates heretofore issued under the orders of this court herein to deliver them up to be cancelled and to dismiss said cause; the order to Walker P. Hall and James E. Hutton to show cause why said receiver's certificates should not be cancelled; the answer of Walker P. Hall to said citation to show cause, and the evidence was argued by counsel; and the court, being fully advised in the premises, finds that the said Walker P. Hall purchased said certificates for full value and in good faith, relying upon the orders of this court and is the present owner and holder thereof; that the same have not been paid, nor has anything been paid to the said Walker P. Hall on account thereof, and that they are still a first lien upon all of the property and franchises of the defendant company, the Put-in-Bay Waterworks, Light and Railway Company, and that said cross petitioners are not entitled to have said cause dismissed until said receiver's certificates and expenses and the costs of this cause are paid in full."

On October 5, 1895, a motion was made by the Put-in-Bay Waterworks, Light and Railway Company to dismiss said action and to direct the receiver theretofore appointed to forthwith deliver the property of the company in his possession and under his control, etc.

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On May 6, 1896, Judge H. F. Severens entered an order fixing May 14 for the hearing of said motion, and further ordering that any other party or parties who might be interested in the action of the court to be taken upon said motion should have leave to intervene and be heard at said hearing.

On June 4, 1896, Judge Severens entered an order containing, among other things, the following:

"I am further of the opinion that the motion heretofore made upon the petition of the Put-in-Bay Waterworks, Light and Railway Company, directing the receiver to surrender the property in his hands and dismissing the suit, should be denied, my opinion being that there are certain charges incurred in the receivership, the extent of which is not now determined, which must be ascertained and satisfied before the property can be released and the case dismissed, even if the case be dismissed and the property surrendered, this order, however, to be without prejudice to a renewal of a like application and motion when the situation of the case shall be ripe for a dismissal."

On June 25, 1896, the defendant company filed another petition, renewing its motion that the receiver should be directed to surrender to the company the property in his possession, which petition contained, after certain recitals, the following paragraphs:

"Your petitioner further represents that it is ready and willing and hereby tenders to the court a good and sufficient bond for the payment of all charges incurred in said receivership that may be finally determined a first and prior lien upon the property of your petitioner.

"Wherefore your petitioner prays that an order may be entered in this cause directing the receiver to forthwith deliver to your petitioner all of the property of your petitioner of every kind and description now in his custody or under his control by virtue of his appointment as receiver aforesaid, upon the filing by your petitioner of the bond hereinbefore tendered and the approval thereof by the court. . . . Your petitioner further prays that a reference be had for the purpose of ascertaining the amount of the charges incurred by the receiver herein with particular reference as to the disposition made by the receiver

of the proceeds of the receiver's certificates heretofore issued in this action, the purposes for which, the persons to whom and the dates the same were made; that said reference shall include the ascertainment of any other charges made in said receivership and the purposes for which the same were created."

Whereupon, on July 15, 1896, Judge Severens entered an order granting the railway's petition for restoration of property upon giving a bond of $20,000, to be approved by the clerk of the court, for the use and benefit of the parties who might hereafter be entitled thereto, and providing that the obligors of said bond should bind themselves to secure the payment of all charges incurred in the receivership in this action, including his certificates aforesaid, which might finally be determined to be a lien upon the property of said railway company, and should, in giving this bond, submit themselves to the jurisdiction of the court to the end that the court might make such bond effectual for the collection of said charges by order or decree in this cause, etc.

On April 17, 1897, the following order was entered:

"It appearing under the decree ordered herein on July 15, 1896, providing for a restoration of the property in the hands of the receiver, L. S. Baumgardner, heretofore appointed in this cause, to the defendant, the Put-in-Bay Waterworks, Light and Railway Company, upon the said company filing a bond as provided in said decree, and further under the decree of January 6, 1897, extending the time for the filing of said bond to March 1, 1897, that said defendant, the Put-in-Bay Waterworks, Light and Railway Company, has not filed said bond: Now, therefore, it is hereby ordered and decreed that the said decree of July 15, 1896, be and it is hereby set aside and held for naught."

Several further motions were made not necessary now to mention, and finally on January 31, 1898, the court filed an opinion finding that there was not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and other necessary charges, and that it was necessary to sell the railroad and other real estate and fixtures belonging to the works of the Put-in-Bay Waterworks, Light and Railway Company, in order to raise a fund necessary to com-

pletely satisfy the charges, and accordingly directed notice to be given to the several intervening parties.

Pending these proceedings, the Atlantic Trust Company, a corporation and citizen of the State of New York, on March 7, 1898, asked and obtained leave to file an intervening petition or complaint against the defendant railway company, wherein it was alleged that said intervening company was the holder as trustee of certain bonds of said railway company aggregating $125,000, secured by a deed of trust or mortgage, bearing date June 16, 1892, on all the property, railroad and franchises of said railway company; that said bonds were in default and unpaid; and thereupon prayed that said mortgage be declared a lien on said property and be foreclosed.

On November 21, 1898, the Put-in-Bay Waterworks, Light and Railway Company filed a demurrer to the intervening petition of the Atlantic Trust Company, which demurrer was on January 31, 1899, overruled.

On December 12, 1899, the Circuit Court, Hon. Horace H. Lurton, Circuit Judge, and Hon. Henry F. Severens, present, entered an order containing, among other things, the following:

"It appearing to the court that there has been filed in this cause no plea or answer to the intervening petition of the defendant Atlantic Trust Company, or to its amendment thereto, and that each and every of the defendants and the complainant are in default thereof: Now, therefore, on this 12th day of December, 1899, came the said Atlantic Trust Company, by its solicitors, H. Van Campen, Jr., and Swayne, Hayes and Tyler, and on its motion, it is ordered that the said intervening petition and amendment thereto be taken *pro confesso* as to all parties to this action—reserving, however, to the defendant, the Bodefield Belting Company, without further pleading herein, the right to present for the further consideration of the court and its orders thereon all or any question as to the priority of the lien claimed by said the Bodefield Belting Company over the said lien of said Atlantic Trust Company."

And thereupon, on the same day, Irvin Belford was appointed as special master to ascertain and report the number and owner-

ship of bonds secured by said mortgage, and the amount of principal and interest due thereon.

On December 15, 1899, the Circuit Court, present Hon. Horace H. Lurton, Circuit Judge, and Hon. Henry F. Severens, District Judge, entered the following decree or order of sale:

"It being made to appear to the court that there is now past due and unpaid on the receiver's certificates heretofore issued under the order and direction of the court in this case the sum of $7996.10, which amount represents the balance due on all of said certificates now outstanding up to this date and shall bear interest hereafter at seven per cent, all of which certificates have been deposited with the clerk of this court, and which amount and the costs of this case taxed and taxable against the defendant the Put-in-Bay Waterworks, Light and Railway Company, to wit, the sum of $——, the court finds are the first and best lien on all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, and there being no income or moneys available in the hands of the receiver sufficient to provide for the payment of said certificates and costs, it is accordingly ordered, adjudged and decreed that unless said defendant or some party in interest pay or cause to be paid to the clerk of this court the amounts so as aforesaid found due for receiver's certificates and the costs, as aforesaid, together with the sum of $15,033.44, being the amount due as found by this court in a prior order in this case on the amended intervening petition of Arbuckle, Ryan & Company, with interest computed to the date of this decree, and the sum of $784.85, being the amount found due in a prior order of this court on the intervening petition of Barbour & Starr, with interest computed to the date of this decree, and the sum of $486.88, being the amount found due in a prior order of this court on the intervening petition of the Bodefield Belting Company, with interest computed to the date of this decree, within thirty days from the date of this decree, all of the property of the defendant, the Put-in-Bay Waterworks, Light and Railway Company, hereinafter more specifically described, and all of the right, title, and interest and equity of redemption of said defendant, the Put-in-Bay Waterworks, Light and Railway Company, and each and every party to

this action in and to the said property and in and to all property which has since the date of the filing of the petition herein been acquired by said the Put-in-Bay Waterworks, Light and Railway Company or by the receiver appointed by this court or which may hereafter be acquired prior to the sale hereinafter provided for, shall be offered for sale and sold by and under the direction of Mathias A. Smalley, who is hereby appointed special master for the purpose, in the manner hereinafter directed, to satisfy the amounts due, as aforesaid, for said receiver's certificates, and costs, and also to satisfy the amounts found due as aforesaid, on the amended intervening petition of Arbuckle, Ryan & Company and the intervening petitions of Barbour & Starr and the Bodefield Belting Company, and that the property ordered to be sold under this decree shall be sold in accordance with the course and practice of this court at public sale to the highest bidder for cash, at the courthouse of Ottawa County, Ohio, at Port Clinton, in said county, being the county in which said property is situate, and that notice of the time and place of such sale shall be given by said Mathias A. Smalley, special master, as aforesaid, by advertisement thereof published once a week for at least four weeks prior to said sale in at least one newspaper printed, regularly issued, and having a general circulation in said Ottawa County, which said notice shall describe the property to be sold.

"It is further ordered, adjudged, and decreed that the said special master in making such sale shall first offer for sale all the right, title, and interest of the defendant the Put-in-Bay Waterworks, Light and Railway Company in and to the railroad, so called, of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, including therein the line of railway cars, motors, apparatus, tracks, side tracks, switches, turnouts, poles, wires, and other apparatus, together with the franchises, easement, and rights of way connected therewith or appurtenant thereto, not part of, however, or belonging to the powerhouse property, so called, hereinafter described, provided that no bids for said above-described property, when thus offered separately, shall be received for less than a sum equal to the amounts found due, as aforesaid, upon receiver's certificates and the costs hereinbefore provided; and provided fur-

ther, however, and it is hereby ordered, that if within thirty days from the date of this decree the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, or any party in interest herein, pay or cause to be paid to the clerk of this court the amount so, as aforesaid, found due on said receiver's certificates, together with the costs of this action, as hereinbefore adjudged, then said marshal shall not expose or offer for sale under this decree the railroad property as above described. In case said railroad property, so called and above described, shall be separately offered for sale under the above terms of this decree and the amount bid therefor shall equal the amount of said receiver's certificates and costs aforesaid, then said special master shall sell the aforesaid property to the highest and best bidder therefor, and thereupon shall next offer for sale and sell to the highest and best bidder for cash all the right, title, and interest of the defendant the Put-in-Bay Waterworks, Light and Railway Company in and to the remainder of the property of the said the Put-in-Bay Waterworks, Light and Railway Company, to wit, the powerhouse property, so called, being lots numbers four hundred and seventy-one (471), four hundred and seventy-two (472), four hundred and seventy-three (473), four hundred and seventy-four (474), and four hundred and seventy-five (475) of Victory Park addition, in Put-in-Bay or South Bass Island, Ottawa County and State of Ohio, together with all the buildings and appurtenances thereon, including the plant, machinery, apparatus, and fixtures attached to or contained in said buildings or either of them, provided that no bid for said powerhouse property as above described shall be received for less than $10,000.

"It is further ordered that if in accordance with the terms of this decree, as hereinabove set forth, separate offer of the aforesaid railroad company, so called and as hereinabove described, shall be made, and the sum bid therefor shall not, however, be equal to the amount found due, as aforesaid, upon said receiver's certificates and the costs aforesaid, then separate sale thereof shall not be made, but in lieu of said offer of the remainder of the property of said defendant, the Put-in-Bay Waterworks, Light and Railway Company, as provided by the terms of this

decree hereinabove set forth, said special master shall forthwith offer for sale and sell for cash to the highest and best bidder therefor all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company above described, including both the railroad property, so called, and the power-house property so called, as hereinabove described, as a unit, but no bid therefore as a unit shall be received for less than $16,500.

"It is further ordered, adjudged, and decreed that the said special master return the proceeds of said or any of said sales into the registry of this court, to be there held subject to the further order of this court.

"It is further ordered and directed that the said special master make report of his acts and doings under this decree with all convenient speed after said sale or sales shall have taken place.

"The court hereby reserves for further consideration as between Atlantic Trust Company and the Bodefield Belting Company any and all questions arising between them as to the priority of their respective liens, and the court further expressly reserves for its further consideration all matters not herein expressly provided for."

On March 2, 1900, the report of M. A. Smalley, special master in chancery, was filed, showing that on February 24, 1900, he had sold to J. W. and C. W. Ryan, at public auction, for the sum of $16,501, all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company; and on March 8, 1900, the court approved the said report and sale *nisi;* and on March 26, 1900, no exceptions or objections to the sale having been filed by any of said parties, it was ordered that the said order confirming said sale was made absolute, and the special master directed to immediately execute a deed for the property so sold by him to the purchasers.

On June 8, 1900, an order or decree of distribution was made, containing, among other things, the following:

"This day came Arbuckle, Ryan & Company, the Bodefield Belting Company, Barbour & Starr, the Put-in-Bay Waterworks, Light and Railway Company, Walker P. Hall, L. S.

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Baumgardner, receiver, and Atlantic Trust Company, by their respective counsel, and thereupon this cause was heard upon the motion of Walker P. Hall for an order releasing the bond by him heretofore given conditioned for the repayment of any moneys by him received from the receiver herein should he be ultimately found not entitled thereto.

"In consideration whereof the court, being duly advised in the premises, doth find that the condition of said bond has been fully satisfied, and that the same should be cancelled and discharged, but retained in the custody of the court.

"It is therefore ordered and adjudged by the court that said bond be, and the same hereby is, cancelled and discharged, and the said Walker P. Hall and his surety are hereby released from any and all liability thereon.

"And thereupon this cause was further heard upon the motion of the said Walker P. Hall for an order of the court directing the clerk to pay the said Walker P. Hall out of the moneys in the registry of the court and arising from the sale of the property of said defendant, the Put-in-Bay Waterworks, Light and Railway Company, the sum of $2400, claimed to have been paid by him on the 28th day of July, 1894, to said L. S. Baumgardner, as receiver, in liquidation of the allowances theretofore made said receiver and his counsel, together with certain expenditures by said receiver made, and was argued by counsel.

"In consideration whereof the court, being duly advised in the premises doth find that said motion is not well taken and should be denied.

"It is therefore ordered and adjudged by the court that said motion be, and the same hereby is, overruled at the costs of said Walker P. Hall.

"Thereupon this cause was further heard upon the fifth and final report of said receiver, L. S. Baumgardner, heretofore appointed herein, and was submitted to the court.

"In consideration whereof and upon examination thereof the court finds the same to be, in all respects, true and correct, and it is therefore ordered and adjudged by the court that the same be, and it is hereby, approved and confirmed.

"And the court doth further find that all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, has been sold and delivered to the purchaser thereof, and that there is no further deed for a receiver herein.

"The court does further find that said receiver and his counsel, Doyle & Lewis, have performed valuable services in the care and preservation of the property of said defendant since the last allowance made them herein. It is therefore ordered and adjudged by the court that out of the funds in his hands said receiver be allowed, and he is hereby authorized to pay unto himself, in full of his compensation for such services, the sum of $200; to Doyle & Lewis, his said counsel, the sum of $300, in full payment for the services rendered him as such receiver, and to the clerk of this court the balance remaining in his hands, to wit, the sum of $269.18, to be applied by said clerk in part payment of the costs herein incurred.

"It is further ordered and adjudged by the court that upon making said payment of said sum to said clerk, and upon filing with the clerk of this court proper receipts, evidencing the disbursements by him made, as set forth in his said final account, said receiver shall stand discharged from all further duties and obligations as such receiver, and that the condition of said bond by him heretofore filed herein as such receiver be satisfied and said receiver and his surety be relieved from all liability thereon.

"And thereupon this cause was further heard upon the petition of Arbuckle, Ryan & Company, one of the intervenors herein, for an order of the court distributing the proceeds arising from the sales of the property of the Put-in-Bay Water works, Light and Railway Company, heretofore made in accordance with the former order of this court, and was argued by counsel.

"In consideration whereof the court, being duly advised in the premises, doth find that the prayer of said petition should be granted.

"It is therefore ordered and adjudged by the court that the clerk of this court be, and he hereby is, ordered and directed to forthwith distribute the moneys in the registry of the court and arising from said sales aforesaid in the following manner, to wit:

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"I. To the clerk of this court the costs of this suit and remaining unpaid, including the sum of $175 to the special master commissioner hereby allowed as his compensation for his services by him rendered in selling said property, and the further sum of $54.30, hereby allowed him for the expenses and expenditures by him incurred in connection therewith, which said amounts shall be paid said master commissioner.

"II. To the owner or owners of receiver's certificates, heretofore issued herein, upon the surrender and cancellation thereof, the amount heretofore found to be due thereon, to wit, $7966.10, together with interest thereon, at the rate of 7% per annum, from the 13th day of December, 1899, to the date when this order shall finally take effect.

"III. To the county treasurer of the county of Ottawa and State of Ohio the sum of $591.66, being the taxes and assessments levied and assessed against the property of said the Put-in-Bay Waterworks, Light and Railway Company for the year 1899.

"IV. The one hundred one hundred sixty-fifth part of the balance remaining to Arbuckle, Ryan & Company, the Bodefield Belting Company and Barbour & Starr, pro rata, in proportion to the amounts heretofore found due them respectively.

"The balance, after the payments aforesaid, to wit, the sum of $——, shall be retained in the registry of the court to await its further and final order.

"And thereupon this cause was further heard, upon the motion of the Atlantic Trust Company, trustee, for leave to withdraw its petition filed herein for allowance of compensation; which leave is given, and the same is accordingly done, without prejudice, however, to the rights of said trustee to hereafter file its petition therefor.

"To all the foregoing order and decree the said the Put-in-Bay Waterworks, Light and Railway Company, by its counsel, excepts on the ground that the court is without jurisdiction in the premises, for the reason that it appears by the record herein that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and the parties to said suit were improperly and collusively

joined for the purpose of creating a case cognizable by said Circuit Court under the act of Congress of March 3, 1875, as to which question of jurisdiction an appeal has been taken by the said the Put-in-Bay Waterworks, Light and Railway Company to the Supreme Court of the United States, at Washington."

On June 2, 1900, an appeal was allowed in the following terms:

"The former appeal prayed by the above-named appellant, the Put-in-Bay Waterworks, Light and Railway Company, and allowed by me on the 23d day of February, 1900, having been discontinued, and the said appellant having now presented a new petition praying for the allowance of an appeal from the decrees of this court made on the 12th, 13th and 15th days of December, 1899, said petition is now granted and the appeal is allowed.

"And thereupon, on the request of Walter L. Granger, of counsel for the appellant, I do hereby certify to the Supreme Court of the United States that upon the hearing of the said cause, wherein the said decrees so appealed from were entered, as well as upon various interlocutory hearings during the progress of the cause, the said appellant denied the jurisdiction of the court over said cause and contended that the court was without jurisdiction upon the grounds that the amount in controversy was in truth and in fact much less than the sum of two thousand dollars ($2000), exclusive of interest and costs, and that the case had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing; which contention, so far as related to the receiver's certificates and the intervening petitions, was overruled.

"And it is accordingly certified that the appeal herein allowed is granted for the single purpose of presenting to the said Supreme Court the question whether the Circuit Court had jurisdiction to entertain the said cause and render the decrees so appealed from.

"The clerk is therefore directed to certify to the United States Supreme Court, at Washington, the portions of the record in said cause appertaining to said jurisdictional question

upon the appellant executing a bond for costs in the sum of five hundred dollars ($500).

"H. F. SEVERENS, *Circuit Judge.*"

*Mr. Joseph B. Foraker* and *Mr. Walter L. Granger* for appellant.

*Mr. J. K. Hamilton* and *Mr. William C. Cochran* for appellees.

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

The contention in the brief on behalf of the appellant, that "by the service of the writ of replevin issued from the state court the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises, the state court having placed the property in the possession of the officers of the railway company as against the claim of Tillotson, by a writ of replevin, the United States Circuit Court in this case had no jurisdiction to issue an injunction or to appoint a receiver, by means of which the company and its officers were prevented from using and operating the railway property, which the state court had directed its officers to place in their hands," seems to answer itself.

By the operation of the writ of the state court certain personal property of the Put-in-Bay Waterworks, Light and Railway Company was taken from the possession of one Tillotson and restored to that of the company, and by a restraining order Tillotson was prohibited from interfering with the use and operation by the company of its railway property. Whatever, then, may have been the nature or merits of the questions between the railway company and Tillotson, it is conceded that the actual possession of the property, whether real or personal, was in the railway company at the time when, in the suit of the Electrical Supply Company, the receiver was appointed by the

Circuit Court of the United States. It is too plain for argument that the replevin suit, affecting only certain articles of personal property, and arising out of a controversy between the railway company and Tillotson, its vice president, could not draw into the jurisdiction and control of the state court the railroad and franchises of the railway company, so as to preclude creditors of the company from instituting proceedings in the Federal court. As respects the restraining order, if such were ever issued, it does not appear that Tillotson ever disobeyed it, and, if he did, he personally would be answerable to the state court. It may be further observed that it is not made to appear that the restraining order ever became operative as an injunction by the filing of a bond in $5000, which was imposed as a condition for its issuance. At all events, and conclusively as to the merits of this contention, the property and franchises which are the subject-matter of the present suit were not, either actually or constructively, in the possession of the state court when the Federal court appointed its receiver.

Our inspection of this record has not constrained us to hold that the Circuit Court lost its apparent jurisdiction of the case by reason of disclosures made subsequently in the progress of the case. The mere denial that the materials sold by the complainant to the railway company were of the value alleged in the bill did not, of itself, deprive the court of jurisdiction. Thereby was presented a question of fact into which the court had jurisdiction to inquire. Within the letter of the statute there was a controversy between citizens of different States, in which the matter in dispute was over the sum or value of two thousand dollars.

The fifth section of the act of March 3, 1875, 18 Stat. 470, provided that if in "any suit commenced in a Circuit Court, . . . it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, the said Circuit Court shall proceed no further therein, but shall dismiss the suit."

And it has been several times decided by this court that a

suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Barry* v. *Edwards*, 116 U. S. 550; *Wetmore* v. *Rymer*, 169 U. S. 115.

It is not clearly shown in this record that, at any time after the suit was brought, it was made to appear, *to the satisfaction of the Circuit Court*, that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court. On the contrary, it appears that the Circuit Court was not so satisfied, but overruled complainant's motion to dissolve the preliminary injunction and to discharge the receiver. Thereupon the cause was taken on appeal to the Circuit Court of Appeals, and that court directed that the preliminary injunction granted by the Circuit Court should be dissolved, but held that, on that appeal, the Circuit Court of Appeals had no jurisdiction to proceed further, and was without power to direct a dismissal of the bill or to vacate the order appointing a receiver.

It is true that observations were made by the judges of that court, based on affidavits made in the court below, that jurisdiction had been collusively obtained by reason of false statements of the amount of materials sold by the complainant to the defendant company, and they seem to have thought that by such affidavits the Circuit Court had been made to know that its equitable jurisdiction had been improperly invoked. *Industrial, etc., Co.* v. *Electrical Supply Co.*, 58 Fed. Rep. 733, 744.

But such observations of the learned judges did not have the force of a decision, nor did they undertake to direct the Circuit Court to dismiss the bill for want of jurisdiction.

It further appears that, upon the filing of the mandate of the Court of Appeals in the Circuit Court, the counsel of complainant filed a motion to dismiss the bill, and claimed that the Court of Appeals had decided that the Circuit Court had no jurisdiction. This and subsequent motions to the same effect were overruled by the Circuit Court, and the Circuit Court of Appeals denied an application for a writ of mandamus. 90 Fed. Rep. 831.

Pending these proceedings and before the final decree of sale, the Atlantic Trust Company filed an intervening petition, alleging its ownership as trustee of one hundred and twenty-five mortgage bonds of the defendant company; that there was the sum of $40,250 due and unpaid on account of said indebtedness, and praying for an account and for a decree of foreclosure and that the lien of said trust company should be decreed to be a lien prior to those of the other creditors. As already stated, the Circuit Court overruled the defendant's demurrer to this intervening petition, and on December 12, 1899, the court entered an order that said intervening petition should be taken *pro confesso*, and appointing a master to ascertain and report the amount and ownership of the outstanding mortgage bonds. And subsequently, on December 15, 1899, the final decree or order of sale was entered, in which the court reserved for further consideration, as between the Atlantic Trust Company and the Bodefield Belting Company, any and all questions arising between them as to the priority of their respective liens. A sale of all the property of the defendant railway company, in pursuance of said decree, was made on February 24, 1900; and, no objections or exceptions to the sale having been filed by any of the parties, on March 26, 1900, the sale was confirmed absolutely, and the master directed to execute a deed for the property so sold by him to the purchasers.

It appears that, under the intervening petitions of other creditors than the complainant, there were involved, before and at the time of the decree of sale, liens and claims against the defendant's property largely in excess of the amount necessary to confer plenary jurisdiction on the Circuit Court. Jurisdiction having attached under the allegations of the original bill, and the court having proceeded, in a proper exercise of its discretionary power, to appoint a receiver and to authorize a large expenditure of money raised by certificates, in order to protect and preserve the property in its custody, and the court having also, in the exercise of its power as a court of equity, allowed the intervention of other creditors, as between some of whom and the defendant company there was jurisdiction in the court, both as respects diversity of citizenship and amount of claims,

we think its jurisdiction did not fail by reason of anything that appeared in *ex parte* affidavits filed on behalf of the defendant company, denying the truth of the allegations contained in the original bill in respect to the amount in dispute.

In *Krippendorf* v. *Hyde*, 110 U. S. 283, it was said: "The equitable powers of courts of law over their own process, to prevent abuses, oppression and injustice, are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in custody of the law. *Buck* v. *Colbath*, 3 Wall. 334; *Hagan* v. *Lucas*, 10 Pet. 400. And when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several States, the very circumstance appears which gives the party a right to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what Mr. Justice Story calls, in *Clarke* v. *Matthewson*, 12 Pet. 172, a dependent bill."

Circuit Judge Severens, in his opinion in the present case, aptly referred to the case of *Gumbel* v. *Pitkin*, 124 U. S. 132, as containing an elaborate exposition of the principles upon which a court of equity may proceed when the rights of intervening creditors are to be dealt with, and upon which principles the Circuit Court proceeded in this case.

We fail to perceive any equities in the position of the appellant company. All its creditors, as well the original complainant as the several intervening creditors, have acquiesced in the action of the Circuit Court and have availed themselves of the remedy afforded by the sale of the defendant's property. Having failed and declined to accept the opportunity afforded by an interlocutory order to regain possession of its property, by giving a bond to pay such charges as the court should de-

termine to be just and proper, and not having offered, at last, to pay the claims and liens adjudged to be just and proper, the defendant company seems to us to have suffered no injustice. However this may be, the case is before us only on the question whether the Circuit Court had jurisdiction to entertain the said cause and render the decrees so appealed from, and this we answer in the affirmative, and direct the appeal to be dismissed with costs.

*Let it be so certified.*

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## UNITED STATES RUBBER COMPANY *v.* AMERICAN OAK LEATHER COMPANY.

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

No. 150. Argued January 25, 28, 1901. — Decided May 13, 1901.

The right of an insolvent debtor to prefer one creditor to another, exists in the State of Illinois to its fullest extent, and the giving of judgment notes is recognized as a legitimate method of preference.

In the absence of national bankrupt laws, if a remedy is sought in a court of equity against fraudulent preferences, it must be on allegation and proof of a design to defraud and to delay the complaining creditor.

While the policy of the law permits preferences, and such preferences as are necessarily unknown to others than those concerned, it does not permit any device which prevents the debtor from giving a like advantage to his other creditors, if he so wishes, unless such device is put in the form of a mortgage, or other instrument, perpetually open to public inspection upon the public record.

The present case is one in which the fundamental rule that equality is equity, may properly be applied.

On September 11, 1896, the American Oak Leather Company, a corporation of the State of Ohio, filed, in the Circuit Court of the United States for the Northern District of Illinois a bill of complaint against C. H. Fargo & Company, a corporation of the State of Illinois; the United States Rubber Company, a corporation of the State of New Jersey; L. Candee & Company,

a corporation of the State of Connecticut; John W. Arnold, United States Marshal for the Northern District of Illinois, and the Metropolitan National Bank, a national banking association.

The bill alleged that the complainant was a judgment creditor of C. H. Fargo & Company, an insolvent corporation; that judgments by confession against said C. H. Fargo & Company had been entered in the Circuit Court of the United States on August 6, 1896, for large amounts in favor of the United States Rubber Company and L. Candee & Company; that, on the same day, an assignment was made by C. H. Fargo & Company of all its book accounts to said rubber companies; that a judgment by confession had been entered on August 6, 1896, for a large amount, in favor of the Metropolitan National Bank, and on the same day deeds to said bank had been executed by Fargo & Company, conveying its factory at Dixon, Illinois; that executions had been issued on said judgments and levied upon all the tangible assets of C. H. Fargo & Company; that said judgments were illegal because given and taken with intent to defraud the complainant and other creditors of C. H. Fargo & Company. The bill prayed that the said judgments, executions, assignment and deeds should be set aside, and that the assets of C. H. Fargo & Company should be applied, through a receiver, to the payment of its *bona fide* creditors.

Subsequently other creditors to a large amount filed intervening petitions, and joined in the complainant's prayer for relief. Answers were filed by the several defendants, denying the allegations of fraud; and thereupon the court referred the case to Henry W. Bishop as a master in chancery, "to take proofs herein and report the same, together with his conclusions thereon, as to the facts only." An order was also entered appointing a receiver, and upon appeal to the Circuit Court of Appeals for the Seventh Circuit this order was affirmed. 82 Fed. Rep. 348.

On April 17, 1899, after taking a large amount of testimony, and a protracted hearing, the master filed a report, of which the important portions were as follows:

"There was due January 6, 1896, to Candee & Company, upon the notes of C. H. Fargo & Company, (given in settlement in November, 1895,) the sum of $44,900, and on the same

date there was due from the Fargo Company to the United States Rubber Company on open account for proceeds of sale of consigned goods the sum of $141,537.13.

"It is shown by the testimony, and I so find, that about January 2, 1896, the C. H. Fargo Company, anticipating difficulty in meeting its regular obligations maturing during that month, applied to one Charles L. Johnson, who represented both the Candee Company and the United States Rubber Company, for a loan of $50,000, representing that the Fargo Company was perfectly solvent, and that this accommodation would relieve it from its temporary embarrassments and enable it to go on with its business.

"This application was granted, and on January 6, 1896, Johnson agreed, acting for L. Candee Company, to lend the Fargo Company the sum of $50,000 for six months, upon the understanding that this loan and the indebtedness of $44,900 upon the notes previously given as aforesaid and the balance due the United States Rubber Company, and which might become due it, should be secured in such a way as might be satisfactory to their counsel, Mr. Beale, of the law firm of Isham, Lincoln & Beale.

"The proposition was accepted on the 6th day of January, 1896, and it was agreed and arranged between the parties as follows:

"First. That the $50,000 should be advanced to the Fargo Company by L. Candee & Company, partly on that date and during the succeeding two weeks.

"Second. That the Fargo Company should that day execute and deliver its three judgment notes, one for $45,000, payable on demand to the order of L. Candee & Company, to secure that company with respect to its liability as endorser or guarantor upon the notes for $44,900 given previous to January, 1896; one for $51,500, payable on demand to L. Candee & Company, as collateral security to plain notes of the Fargo Company, which were given as evidence of the advance of $50,000 then to be made, and one for $140,000, payable on demand to the order of the United States Rubber Company, as collateral security to the then existing and to any future in-

debtedness of the Fargo Company to the United States Rubber Company as aforesaid.

"Third. That in case the Fargo Company should at any time find it necessary to suspend business, it would assign as additional security all its accounts and bills receivable; that it should not give any judgment notes to other creditors which would impair the security to the rubber companies, and that the $50,000 advance should be used by the Fargo Company in reduction of its general indebtedness as it matured; and

"Fourth. That the four employés of the Fargo Company who were on the board of directors, and also E. A. Fargo, should retire from the board and there should be elected in their places by the stockholders of the company five persons, to be nominated by said Beale, in whom he had confidence, one of whom should become secretary and treasurer, and that the directors so to be elected at Beale's nomination should not hamper or interfere with the proper carrying on of the ordinary business of the company.

* * * * * * * *

"I find that the attention of the general creditors was never called to this arrangement and they had no knowledge of it. The Metropolitan National Bank first learned of it at or about the time a judgment note was given it to secure the payment of its claim of $50,000 as hereinafter stated.

"I find that in pursuance of this arrangement, and on January 6, 1896, a meeting of the board of directors of the C. H. Fargo & Company was had before any change in said board, when a resolution was passed authorizing the borrowing of the $50,000, the giving of judgment notes, as in said agreement provided for, and assignment of the accounts, bills and choses in action upon the contingencies agreed upon; and upon the same day the three judgment notes referred to were executed and delivered by Charles E. Fargo, president of the company; Frank M. Fargo, vice president and treasurer, and E. A. Fargo, secretary, and the loan of $50,000 was perfected, $10,000 being advanced at the time and the balance of $40,000 during the succeeding two weeks.

"This action was ratified on the 8th day of January, 1896,

by the unanimous vote of the stockholders of C. H. Fargo & Company, all the shares being represented.

"I find that in pursuance also of said arrangement, and as a part of it, at a meeting of the stockholders of C. H. Fargo & Company, held January 9, 1896, George C. Madison, Tiffany Blake, Buell McKeever, Frederick B. Fuller, Gilbert E. Porter, Charles E. Fargo and F. M. Fargo were duly elected directors for the ensuing year.

"The first five, except Blake, were employés in the office of William G. Beale, and said Blake was assistant corporation counsel of the city of Chicago, of which William G. Beale was then corporation counsel, and all five were elected by the stockholders at the suggestion of said Beale. Subsequently, at a meeting of the newly constituted board, at which Charles E. Fargo was reëlected president of the company, Frank M. Fargo was reëlected vice president of the company and Buell McKeever was elected secretary and treasurer of the company, the by-laws of the company were amended providing against the giving of judgment notes or preferential security without special authorization of the board of directors.

"I also find that the change of the board of directors and officers, and the changes of the by-laws of said company and the resolution thereof authorizing judgment notes and assignments of accounts if necessary, were all for the purpose of giving preferential security to the rubber companies, and the matter was kept secret in order to allow the Fargo Company an opportunity of getting through embarrassments apparently temporary but not with a fraudulent intent as to the other creditors of the company. The only purpose and object of changing the board of directors as aforesaid and of amending the by-laws was to protect the rubber companies against the giving by the Fargo Company of preferential security or judgment notes to other of its creditors which should be superior to the security of the rubber companies.

"I further find that the arrangement as made was carried out in good faith by the parties, and that the directors elected at the suggestion of said Beale took no part in the active management of the Fargo Company after their election, and that

no stockholders' or directors' meetings of the Fargo Company were held after January 9, 1896, until August 5, 1896.

"I find that on January 9, 1896, which was the date of the meeting of the new directors, the authorized capital stock of the said corporation of C. H. Fargo & Company, was $400,000, and the debts of the corporation on January 6, 1896, as follows:

| | |
|---|---|
| Amount owing United States Rubber Company | $141,537 13 |
| Amount owing Candee & Company | 44,900 00 |
| Amount owing Metropolitan National Bank | 50,000 00 |
| Amount owing other creditors | 210,216 20 |
| Total | $446,653 33 |

"I find that the value of the assets of C. H. Fargo & Company at that time had not been definitely ascertained, but I find, as a matter of fact, as the results of efforts since made in collecting the same in liquidation and from other sources of information disclosed by the testimony, that on the 6th day of January, 1896, the assets of said company were not sufficient to discharge its indebtedness, of which fact the defendants, the rubber companies, are shown to have been ignorant, relying upon the representation of the Fargos that there was a large excess of assets over liabilities. The fact that Johnson, representing the rubber companies, made no detailed examination of the assets of the company, but consented to advance the money which was applied for, is evidence to my mind that he believed in the assurances which were given him by the Fargos of the condition of their company.

"I further find that between January 6, 1896, and August 6, 1896, the new liabilities incurred by said corporation to creditors other than the rubber companies and the bank were $246,660.54, (of which there was due and unpaid on August 6, 1896, $142,690.95,) and that during the same period the Fargo Company paid out more than $300,000 to its general creditors in the regular course of business, paying substantially all of the indebtedness of January 6, 1896, which was largely to the same persons who are now creditors.

"I further find that between January 6 and August 6, 1896, the Fargo Company continued its business as before, reducing its general indebtedness to a considerable extent with its general creditors; that during said time it paid Candee & Company $44,900, the amount of its indebtedness prior to January 6, 1896, and $13,470 on account of the advance of $50,000 as aforesaid; that during said time it paid to the United States Rubber Company $15,000 on account of the indebtedness to that company existing January 6, but it also sold consigned goods of that company to the amount of $24,534.04, of which it remitted only $5495.40; and that on August 6, 1896, there was due to the United States Rubber Company the sum of $142,424.81, and to L. Candee & Company the sum of $36,530.

"I further find from the testimony that the indebtedness of the Fargo Company, which was incurred after January 9, 1896, up to the time of the entry of judgment upon the judgment notes referred to, was incurred in ignorance of the giving of the judgment notes and the change of directors, and of the change of officers, and of the arrangement existing between the rubber companies and the Fargo Company, and that the amount of the claims that were thus contracted and is still unpaid exceeded $110,000.

"I find that while Johnson and Sadler, representing the rubber companies, were here from January 2 to January 6, 1896, that it was then agreed that separate books showing sales of consigned goods should be kept, and the proceeds of the sales thereof should be kept in a separate bank account, which was done.

"I find that the advance of $50,000 on January 6, 1896, and the giving of the judgment notes and security referred to, was the result of an evident feeling upon the part of all the parties to the transaction, and was in the belief and expectation on their part, that through the assistance which was in this way afforded the Fargo Company it would be enabled to continue its business successfully and become ultimately relieved of its financial embarrassment, and that said arrangement was entered into in good faith and without any fraudulent intent.

"I find that the testimony does not show that the parties

were influenced in making the arrangement aforesaid upon a belief of the insolvency of the Fargo Company at that time, and the conduct of the corporation afterwards and until about the time of the entering up of the judgment notes, in my judgment, clearly indicated the hope and expectation that the Fargo Company would be finally relieved of its troubles.

"In support of this conclusion I find that in the meantime and between January 6, 1896, and August, 1896, in the regular course of its business the Fargo Company reduced, to a large extent, the indebtedness which existed on January 1, 1896, increasing the capacity of their manufacturing business, reducing its stock and discharging, to a large extent, its general liabilities, except with the United States Rubber Company and the Metropolitan National Bank, with an evident purpose and expectation of continuing its business; during which time nothing is shown to have occurred with these parties inconsistent with this theory.

"I find that during this period the general creditors were substantially the same as before, with the exception of the Eagle Tanning Works of Chicago, whose claim of $2500.24 has been established, for the goods purchased on credit between April 1, 1896, and July 15, 1896, and Wilder & Company, and the Pfister & Vogel Leather Company, hereafter mentioned.

* * * * * * * *

"And I also find that during this time upon the letterheads of the C. H. Fargo Company the printed names of the Fargos, treasurer and secretary, appeared as before, without anything to show any change in the construction or management of said corporation, nor were such changes in any way mentioned, or their real condition disclosed.

* * * * * * * *

"I further find that during many years prior to January 6, 1896, the C. H. Fargo Company had been doing business with the Metropolitan National Bank of this city, its bankers, resulting in the creation from time to time of a large indebtedness to said bank, which was finally reduced, in the usual course of business, so that on the fifth day of August, 1896, said indebtedness amounted to the sum of $40,000.

"That the Metropolitan National Bank, during the summer of 1896, applied to C. H. Fargo & Company to reduce its indebtedness to it and to finally discharge it by the month of November following.

"I further find that at the same time said bank gave the C. H. Fargo Company said notice, and down to about the 3d or 4th day of August, A. D. 1896, it had no knowledge of any transactions which occurred between it and the rubber companies in the previous month of January, and that it did not know of the change in the board of directors of said C. H. Fargo & Company, or that it had given the rubber companies judgment notes for an indebtedness owing by it to said rubber companies, or of the agreement which had been entered into in respect to the same between it and the rubber companies, or of the action which had been taken by the newly constituted board in pursuance of this agreement.

"I further find that on or about Monday, the 3d day of August, A. D. 1896, Charles E. Fargo, president of the said C. H. Fargo & Company, called at the Metropolitan National Bank, and while there applied to the bank for an additional loan of $10,000.

"I find that during this interview, or shortly thereafter, the said Charles E. Fargo informed the president of said bank that the said C. H. Fargo & Company had given the rubber companies judgment notes for the amount of its indebtedness to them, and while said C. E. Fargo insisted that the assets of his company were at that time largely in excess of its indebtedness and ample to meet the entire amount thereof, that, owing to the difficulty in making its collections as rapidly as its outstanding paper matured, his company would be obliged to fail unless it received some assistance.

"I find that at the time of said interviews the said C. E. Fargo represented to the president of said bank that the said C. H. Fargo & Company was indebted to him and his brothers for money exceeding $10,000 which they had borrowed upon their notes for the benefit of the company, and which they had paid over to the company for use in its business, and that said Fargo brothers had put up some bank stock that they owned as col-

lateral to said notes, and C. E. Fargo thereupon proposed to said bank that if it would loan said C. H. Fargo & Company $10,000 in addition to its then existing loan, so that said company could reimburse him and his brothers and enable them to take up said notes, he would procure from the said C. H. Fargo & Company judgment notes for said bank, both for said sum so advanced as aforesaid, and also for notes then remaining due said bank to the amount of $40,000.

"I further find that said bank acceded to said proposition, and loaned said C. H. Fargo & Company said additional sum of $10,000, receiving two judgment notes of the Fargo Company for the sum of $25,000 each, crediting to the account of said C. H. Fargo & Company in said bank said sum of $10,000.

"I further find that at the time of the completion of this arrangement with said bank neither the bank nor its officers nor attorneys had any knowledge of the change of the board of directors of the said C. H. Fargo & Company, or of its by-laws, but the bank did know that the rubber companies, as a part of the final arrangements made, were entitled equally with themselves to enter judgment upon the judgment notes which had been given.

"I further find that neither the complainants herein nor any of the other creditors of the said C. H. Fargo & Company were led to give credit to said company by reason of the transactions had between it and the bank, nor did any of the said parties sell any goods to said C. H. Fargo & Company subsequent to the time when said bank made said $10,000 loan aforesaid to C. H. Fargo & Company, nor did the said bank in any way participate in or have any knowledge of the change in the by-laws of said C. H. Fargo & Company as aforesaid.

"I further find that from about the time when the said judgment notes were given to said bank, as aforesaid, the said bank entered into a stipulation with the rubber companies by which it was agreed that they should unite their efforts to collect their respective claims against the said C. H. Fargo & Company and should share *pro rata* in whatever proceeds should be derived therefrom.

* * * * * * * *

"I further find upon the testimony submitted to and taken before me in connection with this branch of the case that the defendant, the Metropolitan National Bank, is not shown to have been guilty of any actual fraud as against the complainants or the other creditors of C. H. Fargo & Company by reason of any of its transactions with the said defendants, C. H. Fargo & Company or the said rubber companies.

"I further find that August 6, 1896, before entry of the judgments in favor of the rubber companies as set forth in the pleadings, C. H. Fargo & Company, by its president, C. E. Fargo, duly assigned to the United States Rubber Company all the accounts and bills receivable of the Fargo Company as further security for the indebtedness to the rubber companies, pursuant to and in accordance with the agreement made in January, 1896.

"I find nothing in the testimony which has been taken before me upon this reference which so changes the record which was before the court upon the hearing of the application for the appointment of a receiver as to lead me to a conclusion different from that announced by the court at that time; indeed, the effect of the testimony, in my judgment, is to explain and strengthen the conclusion then expressed by the court, that there was no fraud in fact or want of good faith shown in the conduct of any of the defendants in respect to the transactions complained of; and upon a careful examination of the whole record and testimony I so find and report."

Exceptions filed by the respondents were overruled, and the report was in all respects confirmed.

On May 4, 1899, the Circuit Court, per Circuit Judge Grosscup, entered a decree setting aside the preferences complained of in the bill, as "fraudulent in law, (although not at the time believed by the parties to be such, but, on the contrary, believed to have been within their rights,) as against the other creditors of C. H. Fargo & Company;" and directing the assets in the hands of the receiver, amounting to about $111,000, to be distributed *pro rata* among the creditors, including the defendants. An appeal and a cross appeal were taken to the Circuit Court of Appeals, and that court, on October 3, 1899, reversed the decree of the Circuit Court in so far as it permitted

the rubber companies and bank, defendants, to share equally with other creditors in the fund to be distributed.

Thereupon this court, upon the petition of the rubber companies and the Metropolitan National Bank and the cross petition of the complaining creditors, allowed a writ of certiorari to the Circuit Court of Appeals of the Seventh Circuit.

*Mr. Henry S. Robbins* for petitioners. *Mr. George A. Follansbee* and *Mr. Edward S. Isham* were on his brief.

*Mr. Frederick A. Smith* and *Mr. Jacob Newman* for respondents. *Mr. William J. Manning* and *Mr. Horace Kent Tenney* were on Mr. Smith's brief. *Mr. George W. Northrup*, *Mr. S. O. Levinson* and *Mr. Benjamin V. Becker* were on Mr. Newman's brief.

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

This was a case in which the Circuit Court of the United States for the Northern District of Illinois, sitting in chancery, was called upon to administer and distribute the assets of an insolvent corporation. The jurisdiction of the court was invoked by a bill of complaint filed on behalf of unsecured creditors seeking to set aside as fraudulent certain preferences held by the defendants. Pending that controversy, a receiver was appointed, and ultimately a fund was realized for distribution amounting to about $111,000.

The contested questions raised by the bill, intervening petitions, and answers were referred to a master to take proofs and report the same "together with his conclusions thereon as to the facts only."

After stating his findings of facts, the master thus stated his conclusions thereon:

"I find nothing in the testimony which has been taken before me upon this reference which so changes the record which was before the court upon the hearing of the application for the appointment of a receiver as to lead me to a conclusion different

from that announced by the court at that time; indeed, the effect of the testimony, in my judgment, is to explain and strengthen the conclusion then expressed by the court, that there was no fraud in fact or want of good faith shown in the conduct of any of the defendants in respect to the transactions complained of; and upon a careful examination of the whole record and testimony I so find and report."

The Circuit Court overruled exceptions taken to the findings and conclusion of the master, and confirmed his report.

The conclusions of the Circuit Court were thus expressed in the opinion of Circuit Judge Grosscup:

"After as careful an examination of the evidence as I have been able to give to it, I have come to the following conclusions:

"First. That the intervening creditors have not clearly proven that the rubber company and the Candee Company had any intention to commit a fraud upon the other creditors at the time of the arrangement of January, 1896; on the contrary, I think the weight of proof shows that both these companies believed that, with the help they were about to give Fargo & Company, that company would be able to weather the storm. I am, therefore, of the conclusion that there was no intentional fraud committed.

"Second. The proof on the part of the intervenors has not clearly shown that the ten thousand dollars borrowed from the Metropolitan National Bank upon which the Fargos were personally liable as indorsers did not go into the business of and to the benefit of the Fargo Company; on the contrary, the proof clearly shows that, so far as the Metropolitan National Bank knew, the money had gone to the company. Under these circumstances I see no reason why the Metropolitan National Bank had not a right to advance the ten thousand dollars additional money. . . .

"Fourth. . . . Candee & Company, the rubber company and the bank would, undoubtedly, in January or in August, have had the rightful power to have obtained the judgment notes actually taken. Had they taken judgment thereon, there can be no doubt but that their preference would have been sustained. The vice in the conduct of the rubber company

and the Candee Company consisted in their attempting to tie up the corporation against the power to give like preferences in favor of others. It was, in a certain sense, a new attempt; it was in the line of efforts of creditors to secure themselves; it was, on the whole, not ungenerous to Fargo & Company; and did not, considering their rights to have taken judgment notes, and the fact that none of the other creditors attempted to obtain such notes, or any other preference, before the general crash, do any actual injury to the other creditors.

"On the whole, I think the interests of justice will be best subserved by placing them in the class with the other creditors, and compelling them to pay the general costs of this litigation."

In the opinion of the Circuit Court of Appeals there does not appear to have been made any serious attempt to overrule or substantially modify the master's findings of facts; but the conclusion of the Circuit Court permitting the defendants to participate in a *pro rata* distribution of the fund was not approved, and the decree in that particular was reversed by a majority of the court.

In his dissenting opinion Mr. Justice Brown thus expressed his views on the questions of fact:

"I find no testimony to satisfy me that an actual fraud upon the general creditors was intended. . . . The evidence satisfies me that there was a *bona fide* effort to assist the Fargo Company in continuing its business, with the hope of ultimately pulling it through, and that if this attempt had been successful, it would have redounded greatly to the interest of the general creditors. It was natural, at least, that in making this attempt the rubber companies should have endeavored to secure themselves, not only for their immediate outlay of $50,000, but for their prior debts. In palliation of the secrecy which was held to make this constructively fraudulent, it may be said that publicity doubtless would have destroyed the entire scheme of raising money to carry on the business."

Nor has our own examination of the evidence led us to disapprove of the findings of facts by the master, confirmed and adopted by the Circuit Court.

What judgment, then, ought a court of equity to render upon such an ascertained state of facts?

The view of the majority of the Court of Appeals was that the defendants in the court below should not be allowed to participate in the fund until all the other creditors had been paid in full. The result in the present case and in most similar cases would be that the defendants would get nothing, as the fund would not reach them. This would be a striking exercise of power by a court of equity. Thereby the advantages obtained by remedies on the law side of the court would be transferred to the complainants on its equity side; the preferred would become the unpreferred creditors, and the unpreferred become the preferred creditors.

The common law recognizes in every man the right to dispose of his property as he pleases. If he becomes insolvent, he may pay one creditor, and leave another unpaid. He may secure one and not another by a transfer of assets. Such a condition of things, when left uncontrolled, naturally resulted in great abuses. Under cover or pretence of paying or securing one set of creditors, property actually procured from another would be withdrawn from the reach of the latter. Yet the only remedy afforded by the common law was in the principles of the statute of 13 Elizabeth, c. 5, which have been substantially reënacted in the various states of the Union. Under those principles a collusive transfer, placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, would be invalid. But an insolvent debtor may prefer a creditor, even though the latter has knowledge of such insolvency and the effect of the preference be to delay or disappoint his other creditors. *Crawford* v. *Neal*, 144 U. S. 585; *Davis* v. *Schwartz*, 155 U. S. 631.

The right of an insolvent debtor to prefer one creditor to another exists in the State of Illinois to its fullest extent, and the giving of judgment notes is recognized as a legitimate method of preference. *Tomlinson* v. *Matthews*, 98 Illinois, 178; *Field* v. *Ridgely*, 116 Illinois, 424.

The abuses which are possible in such a state of affairs were among the causes that led to the enactment of bankrupt laws

forbidding preferences by insolvent debtors. But, in the absence of such laws, as in the present case, if a remedy is sought in a court of equity against fraudulent preferences, it must be on allegation and proof of a design to defraud and delay the complaining creditor. It does not suffice to show a mere case of a preference intended by an insolvent debtor in paying or securing a *bona fide* creditor, even though the latter was well aware that the natural effect of the preference could work a detriment to other creditors. This was well known to the learned counsel who drew the bill of complaint in the present case, and accordingly we find therein charges that C. H. Fargo & Company, the United States Rubber Company and L. Candee & Company entered into a fraudulent agreement, in and by which it was provided that said foreign corporations should be immediately placed in control of said C. H. Fargo & Company, and have sole and exclusive power and authority to manage, control and direct the business and affairs of C. H. Fargo & Company; that said transfer of control should be effectuated secretly, and to be kept secret, so as to enable C. H. Fargo & Company to continue apparently doing business for a limited time, and that said C. H. Fargo & Company should continue during said period to purchase merchandise on credit, and should turn the same or the proceeds thereof over to the said foreign corporations, and should secure and prefer said foreign corporations out of the assets and property then owned by C. H. Fargo & Company, and out of the property and merchandise which should be thereafter purchased by C. H. Fargo & Company, to the exclusion of the other creditors, and to defraud, hinder and delay the other creditors; and that it was not intended that C. H. Fargo & Company should *bona fide* continue business, but, on the contrary, it was intended that they should continue in business for a limited time only, and only for the purpose of consummating said fraudulent agreement. The bill further alleges that said agreement was carried out; that a large amount of merchandise was purchased on credit from other creditors, and that, finally, by means of judgment notes and transfers of accounts, the entire assets of C. H. Fargo & Company were levied on for the benefit of the secured cred-

itors; that the claims of the said rubber companies and of the Metropolitan National Bank were considerably less than the amount for which judgments were severally confessed in their favor, and that therefore said judgments so confessed were absolutely null and void, etc.

Without pursuing in further detail the allegations of the bill, it may be conceded that, if satisfactorily sustained by evidence, they would have justified the conclusion that the transactions between C. H. Fargo & Company and the defendants constituted, not an agreement for the purpose of securing *bona fide* creditors, but a conspiracy to hinder, delay and defraud the unsecured creditors of C. H. Fargo & Company. But, as already stated, and as found by the master and the Circuit Court, these incriminating allegations were not sustained, and the conclusion of the master, of the Circuit Court and of the dissenting justice of the Circuit Court of Appeals was that no fraud upon the general creditors was intended or actually carried into effect.

The theory of the Court of Appeals, as forcibly expressed in the opinion of Circuit Judge Woods, would seem to be an application to the facts of the case of the principles of the bankrupt law, with its feature of forbidding preferences. It overlooks, as we think, the legal right of creditors to secure themselves by legal remedies, even though they may result in hardship and loss to others. In stating that the rubber companies were guilty of fraud in fact, we think the Circuit Court of Appeals was not borne out by the findings of the master and of the Circuit Court, nor by the facts as they appear to us; and in holding that, as against other creditors, they and the Metropolitan National Bank should not be allowed to share in the fund for distribution, there was error.

If, in the agreement between C. H. Fargo & Company and the preferred creditors, and the giving and taking of the preferences, there was no actual fraud upon the other creditors intended, it may not be easy to clearly state the grounds on which a court of equity may deprive the defendants in the bill of the legal advantages thus obtained.

Still, it has often been held that permitting personal property,

like a stock of goods, to remain in the possession of an insolvent merchant as a basis for credit, however rightfully intended, is forbidden by the policy of the law. And we adopt the view of the Circuit Court, that "while the policy of the law permits preferences and such preferences as are necessarily unknown to others than those concerned, it does not permit any device which prevents the debtor from giving a like advantage to his other creditors, if he so wishes, unless such device is put in the form of a mortgage or other instrument perpetually open to public inspection upon the public record. . . . The device resorted to accomplished for the Fargos and the favored creditors all that a secret chattel mortgage, with possession and power of sale remaining in the mortgagee, could have accomplished, and must therefore be treated in equity, upon all considerations of justice and reason, as such a mortgage would be treated. . . . The judgment notes themselves would not have been a fraud in law; the assignment of the accounts or of the plant at Dixon would not themselves have been a fraud in law; but connected, as they were, with the other advantages obtained—namely, deprivation of the Fargos of all further power and permission to retain possession of the goods and reap the profits of their trade, a scheme on the whole under which a dishonest trader could effectually shelter himself—they are, in my judgment, within the plain prohibitions of the law," citing *Robinson* v. *Elliott*, 22 Wall. 513.

The decree of the Circuit Court, while depriving the rubber companies and the Metropolitan National Bank of the prior liens created by the confessed judgments and assignments, placed them in the class with the other creditors, and entitled to share ratably in the distribution of the fund in court.

Mr. Justice Brown, in his dissenting opinion in the Circuit Court of Appeals, thus expressed the same view:

"Upon the whole it does not seem to me that such a case of fraud is made out as authorizes the court to postpone the claims of the preferred creditors to those of the general creditors, and thereby practically to confiscate them; and there is no sound reason for departing from the general rule laid down in the Supreme Court in *White* v. *Cotzhausen*, 129 U. S. 329, and in

*Streeter* v. *Jefferson County Bank*, 147 U. S. 36, wherein the preferred creditors were permitted, after their security had been set aside, to stand upon an equality with the general creditors."

The case of *White* v. *Cotzhausen* arose under the voluntary assignment act of the State of Illinois, and it was held that creditors who had attempted to secure an illegal preference of their debts by means of a conveyance to them of the property of their debtor when insolvent, to the exclusion of other creditors, were not thereby debarred, under the operation of the statute, from participating in a distribution, under that act, of all the debtor's property, including that illegally conveyed to them. The Circuit Court held that such illegally preferred creditors should be postponed in the distribution, but this court said, *per* Mr. Justice Harlan:

"We are not able to assent to this determination of the rights of the parties; for the mother, sisters and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over the other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended by the statute to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors."

A similar view prevailed in *Streeter* v. *Jefferson County Bank*, and it was held that where a creditor of a bankrupt caused execution to be levied, before the bankruptcy, on goods of the bankrupt to satisfy the debt, and the levy was afterwards set aside as an illegal preference within the purview of the bankrupt act, in consequence of knowledge of the debtor's condition by the plaintiff's attorney, that the creditor was not thereby precluded from proving his debt against the bankrupt.

There is a wide difference between the case of a fraud *ab initio*, such, for instance, as a scheme to enforce a false or pretended indebtedness, so as to remove the assets of an alleged

debtor from the reach of his *bona fide* creditors, and the case of an attempt by *bona fide* creditors to secure preferences for themselves, but using methods forbidden by statute or by the policy of law. In the former case, undoubtedly, a court of equity will refuse to permit the guilty parties to derive any profit or advantage from the fraudulent arrangement. In the latter case a court of equity will not declare a forfeiture of just debts, or, by postponing them till all other creditors are satisfied, practically confiscate them, but will, while defeating the attempt to obtain a forbidden preference, leave such creditors to use and enjoy the same rights and remedies possessed by other creditors.

We think the present case is one in which the fundamental rule, that equality is equity, may properly be applied, and that will result in avoiding the attempted preferences and in permitting all the creditors to share ratably in the distribution of the fund in the hands of the receiver.

*The decree of the Circuit Court of Appeals is reversed with costs, and that of the Circuit Court is affirmed.*

Mr. Justice Brown did not take part in the decision of the case.

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## DISTRICT OF COLUMBIA *v.* CAMDEN IRON WORKS.

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

No. 172. Submitted March 7, 1901.—Decided May 13, 1901.

Any seal may be used and adopted by a corporation as well as an individual, and the same general principles respecting seals apply to municipal as well as private corporations.

It was for the Commissioners of the District of Columbia to determine whether the interests of the District required the contract in this case to be sealed. And the contract having been executed as and for the District, the seals of the Commissioners are to be assumed to have been affixed as the seal of the corporation.

Where work is to be completed within a specified number of days from the date of the execution of a contract, parol evidence that the contract was executed and delivered subsequent to its date, is admissible.

Statement of the Case.

Covenant will lie on a contract under seal, though not fully performed, where absolute performance has been dispensed with.

Where strict performance by plaintiff is prevented or waived by defendant, a claim by defendant of fines and penalties for delay or failure cannot be sustained.

The matter of interest was properly left to the jury.

This was an action of covenant brought in the Supreme Court of the District of Columbia by the Camden Iron Works, a corporation created under the laws of the State of New Jersey, against the District of Columbia, to recover the price of certain iron pipe manufactured for and delivered to defendant by plaintiff in pursuance of a contract under seal. Several pleas were interposed, and among them the plea of *non est factum*, and the plea of the statute of limitations of three years. To the latter plea a demurrer was sustained, and issue was joined on the others. The case went to trial and resulted in a verdict in favor of the plaintiff below for $11,044.16, with interest from February 27, 1888. A motion for a new trial having been overruled, judgment was entered on the verdict, whereupon defendant carried the case to the Court of Appeals of the District, where the judgment below was affirmed. 15 App. D. C. 98. This writ of error was then sued out.

The contract bore date June 29, 1887, and, by its terms, purported to be made by the District of Columbia of the first part, and the Camden Iron Works by Walter Wood, president, of the second part. It concluded as follows:

"In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) "William B. Webb, [L. S.]
(Signed) "S. E. Wheatley, [L. S.]
(Signed) "William Ludlow, [L. S.]
"*Commissioners of the District of Columbia.*

"(Corporate seal Camden Iron Works.)
(Signed) "Walter Wood, *Pres't Camden Iron Works.*"

Statement of the Case.

The contract was proved and offered in evidence, but its admission was objected to by defendant on the ground that it was not under the corporate seal of the District of Columbia. The objection was overruled, and defendant excepted. The evidence showed that no action was taken by the temporary board of Commissioners appointed under the act of Congress approved June 20, 1874, looking to the adoption of a corporate seal for the District, and none by the permanent board appointed under the act of Congress of June 11, 1878, until September 23, 1887, when the board passed an order that the seal of the District of Columbia, as adopted by an act of the legislative assembly of August 3, 1871, be placed in the official charge and custody of the secretary of the board; and it further appeared that this seal was not generally used until after the contract had been entered into, but was affixed to deeds conveying real estate, to bonds and securities, and, in some cases, to tax deeds. Plaintiff further proved that the contract was not in fact executed and delivered by the Commissioners before August 4, 1887. The evidence to this effect was objected to by defendant, the objection overruled and exception taken.

The opinion of the Court of Appeals further states the facts as follows:

"The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its complete delivery to the defendant, 'within 136 days *after the date of the execution* of the contract; one half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887.' For failure to deliver the pipes within the time thus fixed, the contract provided that there should 'be deducted from the contract price, as in said contract specified, one per cent of the contract price for all delinquent articles for each and every week day that they remained delinquent.' There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract 'the sum of ten dollars *per diem* for the same period estimated as liquidated and fixed damages to the District.'

"In the contract there was a provision made for inspecting

the iron pipes and 'to determine whether there was any reason for rejection, prior to delivery.' Payments were to be made after August 1, 1887, for all pipe 'received and accepted in proper order and condition, less twenty per cent of the amount found due, to be reserved until the satisfactory completion of the contract.'

"There appears to have been a suspension in the execution of the contract, owing to misunderstandings as to the qualities of the work, and the inspection thereof; and consequently, but a small proportion of the pipe was delivered prior to November 30, 1887. But after that date, pipe worth $11,404.09, at contract rates, according to estimate made, was delivered to and accepted by the District of Columbia, and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District of Columbia was $16,335.87, on which there was paid in cash $5291.71, by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract; and the balance, $11,044.16, was more than counterbalanced by the fines and penalties charged up by the defendant for non-delivery of the pipe within the time specified in the contract. It was for this balance of $11,044.16 with interest thereon from the 27th of February, 1888, that this action was brought. There is no pretence that there was any demand made by the defendant for any more or other quantity of pipe than that delivered under the contract and which was refused to be delivered by the plaintiff. On the contrary, on November 30, 1887, when Captain Symons, the Assistant Engineer Commissioner of the District, requested that no more pipe should be cast for delivery under the contract, there remained to be cast about 340,000 pounds, on which the profits to the plaintiff, at contract prices, would have been about $1300. After the plaintiff's letter of November 30, 1887, assenting to the cancellation of the contract, *as to all pipe not then manufactured*, provided all pipe then manufactured should be taken and paid for at contract rates, without deductions, and Captain Symons' reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe, at contract rates, actually shipped to the defendant, was $11,404.16

It was for this amount that the verdict was rendered, with interest, and without any allowance or deductions for forfeitures or penalties for non-delivery of pipe within the time prescribed by the terms of the contract."

Certain instructions to the jury were requested and given by the court on plaintiff's behalf. Instructions were also asked on behalf of defendant, and refused. To the rulings of the court in granting the instructions given for plaintiff, and in refusing the instructions asked for defendant, defendant duly excepted. The court also charged the jury generally, to which charge or any part thereof no exceptions were taken.

The errors assigned were to the effect that an action of covenant would not lie on the contract because it was not under the seal of the District of Columbia; that it was not competent for plaintiff below to show by parol evidence that the contract was finally executed and delivered by defendant at a date subsequent to that mentioned in the contract itself, from which latter date the time allowed for the manufacture and delivery of the pipe should be computed; that the manufacture and delivery of the pipe within the time mentioned constituted a condition precedent, and that no recovery could be had on the contract for any pipe delivered to and accepted by defendant after the time specified for delivery; that if plaintiff was entitled to recover for pipe delivered after the times mentioned, defendant was entitled to offset the penalties against the contract price as liquidated damages; and that no interest ought to have been allowed in the recovery.

*Mr. Andrew B. Duvall* and *Mr. Clarence A. Brandenburg* for plaintiff in error.

*Mr. Samuel Maddox* for defendant in error.

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

The first section of the act "to provide a government for the District of Columbia," approved February 21, 1871, 16 Stat.

419, c. 62, provided: "That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

A governor and legislature were created; also a board of public works, to which was given the control and repair of the streets, avenues, alleys and sewers of the city of Washington, and all other works which might be intrusted to their charge by either the legislative assembly or Congress. They were empowered to disburse the moneys received for the improvement of streets, avenues, alleys, sewers, roads and bridges, and to assess upon adjoining property specially benefited thereby a reasonable proportion of the cost, not exceeding one third.

June 20, 1874, an act was passed entitled "An act for the government of the District of Columbia, and for other purposes." 18 Stat. 116, c. 337. By this act the government established by the act of 1871 was abolished, and the President by and with the advice and consent of the Senate was authorized to appoint a commission, consisting of three persons, to exercise the power and authority vested in the governor and the board of public works, except as afterwards limited by the act.

By a subsequent act approved June 11, 1878, 20 Stat. 102, c. 180, it was enacted that the District of Columbia should "remain and continue a municipal corporation," as provided in section two of the Revised Statutes relating to said District, (brought forward from the act of 1871,) and the appointment of Commissioners was provided for, to have and to exercise similar powers given to the Commissioners appointed under the act of 1874.

This legislation is considered and set forth in *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 6.

By section thirty-seven of the act of February 21, 1871, which is applicable to the present Commissioners, *District of Colum-*

*bia* v. *Bailey*, 171 U. S. 161, 175, it was provided that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

Section five of the act of June 11, 1878, provided: "All contracts for the construction, improvement, alteration, or repair of the streets, avenues, highways, alleys, gutters, sewers, and all work of like nature, shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied in a book kept for that purpose and be signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

On March 3, 1887, an act of Congress was approved, by which the sum of $100,000 was appropriated for "repairing and laying new mains," and "lowering mains," and for engineers and others under the water department of the district government. 24 Stat. 580, c. 389.

The contract in this case was signed by all of the Commissioners and recorded in a book kept for that purpose as required by the act of Congress. Unquestionably the Commissioners when they executed the contract were authorized to purchase iron pipe for the extension of the water service, and as the municipal corporation had the right to have a seal, which could be changed from time to time, it had the right to execute contracts under seal. The principal objection here is, however, that this was not the sealed obligation of the District. It is conceded that the Commissioners, who signed the contract officially, were not personally liable thereon, and that the contract bound the District, but it is insisted that the contract was not a specialty. The opinion of the Court of Appeals by Chief Justice Alvey satisfactorily disposes of this objection, and we concur with the views therein expressed.

The board of Commissioners was constituted by statute to carry the powers of the municipal corporation called the District of Columbia into effect. The Commissioners could adopt for the corporation any seal they chose, whether intended to be permanently used, or adopted for the time being. When, acting officially, as in this instance, they signed and sealed the instrument as for the corporation, their signatures and seals bound the corporation as by a specialty. As Judge Putman said in *Mill Dam Foundry* v. *Hovey*, 21 Pick. 417, 428: "A corporation as well as an individual person may use and adopt any seal. They need not say that it is their common seal. The law is as old as the books. Twenty may seal at one time with the same seal."

The general rule is "that when a deed is executed, or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties, and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract, and can alone claim its benefits." *Sheets* v. *Selden's Lessee*, 2 Wall. 177, 187; *Hodgson* v. *Dexter*, 1 Cranch, 345.

As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is atttached with intent to seal on behalf of the corporation, is enough though some other seal than the ordinary common seal of the company should be used. *Jacksonville Railroad Co.* v. *Hooper*, 160 U. S. 514; *Stebbins* v. *Merritt*, 10 Cushing, 27, 34; *Bank* v. *Railroad Company*, 30 Vt. 159; *Tenney* v. *East Warren Lumber Company*, 43 N. H. 343; *Porter* v. *Railroad Company*, 47 Maine, 349; *Phillips* v. *Coffee*, 17 Illinois, 154. Many of these cases are cited by Judge Dillon in his work on Municipal Corporations, (4th ed.) § 190, where he says: "Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been authoritatively affixed to an instrument requiring it, though it be not the seal regularly adopted."

Opinion of the Court.

Under the former corporate organization of the District a seal had been adopted, but it was not until after this contract was entered into that the board took official action in respect of it. It is to be assumed on this record that the Commissioners affixed their seals as the seal of the corporation. It was for them to determine whether the interests of the District required the contract to be sealed.

We agree with the Court of Appeals that this contract was not only the contract of the District, as is conceded, but that it was its deed, upon which an action of covenant could be maintained. It was therefore properly admitted in evidence, and recovery could be had thereon, if otherwise justified. As such an action is not barred in three years the demurrer to the plea of the three years' statute of limitations was necessarily sustained.

The next proposition of the District, that it was not competent for plaintiff below to show by parol that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit. The contract did not provide that the work was to be completed within one hundred and thirty-six days from its date, but "after the date of the execution of the contract." It is well settled that, in such circumstances, it may be averred and shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face.

In *United States* v. *Le Baron*, 19 How. 73, it was ruled that a deed speaks from the time of its delivery, not from its date; and Mr. Justice Curtis, who gave the opinion, cited *Clayton's case*, 5 Coke, 1; *Oshey* v. *Hicks*, Cro. Jac. 263, and *Steele* v. *Mart*, 4 B. & C. 272. To which the Court of Appeals added *Hall* v. *Cazenove*, 4 East, 477. These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed, from which time it takes effect.

In *Williams* v. *Bank*, 2 Pet. 96, 102, it was laid down as a general principle of law that "If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act

of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it; the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract has imposed upon him."

In this case the further performance of the contract was determined by the consent of the parties, but the contract was not rescinded except as to the future manufacture of pipe for delivery.

The third objection of the District is that an action of covenant on the contract would not lie to recover the price of the pipe that was delivered, because there had not been full performance; yet the pipe, to recover the price for which this action was brought, was, as the Court of Appeals said, manufactured, delivered, and accepted under the contract, in part performance thereof, and with reference to the specifications and price agreed upon as set forth in the contract. The dispensation of complete performance did not make a new contract, nor alter the terms of the existing agreement. It was a mere waiver of further performance.

It is said that the demurrer to the plea of limitations, the ninth plea, ought to have been carried back to the declaration. The hearing of that demurrer was reserved by stipulation to the trial of the cause, no suggestion of this kind was then made, and the declaration was good as against a general demurrer. The company averred full performance, "except in so far as it was prevented or discharged from so doing by the defendant." That was not setting up a modified or substituted contract, but a waiver of a condition precedent to be performed by plaintiff.

In *McCombs* v. *McKennan*, 2 W. & S. 216, it was held that covenant may be sustained upon a contract under seal, notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was changed.

In *Construction Company* v. *Seymour*, 91 U. S. 646, it was held that defendant was liable on his covenant for the contract

price of the work when completed, where absolute performance had been waived. And in many cases of prevention by the defendant or of tender and refusal, the plaintiff has been held to have the right of action on a special contract, prevention or refusal being equivalent for that purpose to performance.

Assuming that full performance was dispensed with the court did not err in ruling that the right to sue upon the contract remained.

The court gave to the jury, on behalf of plaintiff, the following instructions:

"If the jury believe from the evidence that the plaintiff corporation was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered under the contract offered in evidence within the time or times therein limited by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission.

"If the jury believe from the evidence that the defendant, by its silence or conduct, caused the plaintiff corporation to believe, on or about the 1st day of December, A. D. 1887, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief and thereafter deliver pipe to the defendant, which the plaintiff would not have otherwise done, and the defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract."

Defendant asked the following instruction, which the court refused to give:

"If the jury believe from the evidence that the failure of plaintiff to deliver the iron pipes mentioned in the contract given in evidence at the times and in the quantities specified, hindered and delayed the defendant in extending the water service in 1887, then the defendant had a right to charge against the price it agreed to pay the plaintiff for the pipe it undertook to deliver as liquidated damages the penalties provided in the contract."

The fourth question is whether the court erred in these rulings. Defendant's instruction was clearly wrong, and it seems to us that plaintiff's instructions fairly submitted the contention as to penalties and forfeitures to the jury. If strict performance by plaintiff was prevented or waived by defendant as contended on the facts, then the claim for fines or penalties for delay or failure to deliver the pipe could not be sustained.

The court left the matter of interest to the jury, and refused to give at defendant's request an instruction that no interest should be allowed except from the time of the institution of the suit. Exception was taken to this refusal, but, in view of the evidence, the trial court committed no error in that regard. Rev. Stat. D. C. § 829; *Washington & Georgetown Railroad* v. *Harmon's Admr.*, 147 U. S. 571, 585. To the general charge of the court in respect of interest no exceptions were preserved.

*Judgment affirmed.*

MR. JUSTICE BROWN and MR. JUSTICE MCKENNA dissented.

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## THE BARNSTABLE.

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

No. 178. Argued March 8, 1901.—Decided May 13, 1901.

In a suit for a collision against a vessel navigated by charterers, it is competent for the court to entertain a petition by the general owners that the charterers be required to appear and show cause why they should not be held primarily liable for the damages occasioned by the collision.

A ship is liable *in rem* for damages occasioned by a collision through the negligence of the charterers having her in possession and navigating her.

If a stipulation in the charter party that "the owners shall pay for the insurance on the vessel" imposes any other duty on the owner than that of paying the premiums, it goes no farther than to render them liable for losses covered by an ordinary policy of insurance against perils of the

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sea; and as such policy would not cover damage done to another vessel by a collision with the vessel insured, the primary liability for such damage rests upon the charterers, who undertook to navigate the vessel with their own officers and crew, and not upon the owners.

This case originated in a libel by the owners of the schooner Fortuna against the British steamship Barnstable, for a collision which took place off Cape Cod on January 13, 1896, and resulted in a total loss of the schooner, and the personal effects of her master and crew. Nine of the crew were drowned.

A claim was interposed by the master of the Barnstable on behalf of the Turret Steamshipping Company, a British corporation, and the owner of the steamship; and an order was subsequently entered substituting that corporation as claimant.

Before the time to answer expired, the Turret Company presented a petition, setting forth that at the time of the collision the Barnstable was chartered to the Boston Fruit Company, a Massachusetts corporation; that the charterer supplied its own officers and crew, who were navigating the vessel at the time of the collision, and that, if there were any faults on the part of the Barnstable, they were the faults of the charterer and not those of the owner. In compliance with the prayer, a summons was issued to the Boston Fruit Company to appear before the District Court to answer the petition. The company appeared and answered, admitting the charter, (copy of which was annexed to the petition,) but denying liability for the negligence of the officers and crew of the steamship, or that it had assumed liability therefor under its charter.

Subsequently, however, but after certain testimony had been taken, counsel for the owners and also for the charterer became satisfied that the Barnstable was in fault, and assented to a decree against her, leaving the question of liability as between the owner and charterer to be passed upon by the court.

The material provisions of the charter party, which was for thirty-six months from March, 1894, were that the charterer should "provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen and crew, who, except the guarantee

engineer, shall be appointed by them;" that the owners should "maintain the vessel in a thoroughly efficient state" for the service, but the charterer should "provide and pay for all the coals, fuel, port charges, pilotage, agencies, commissions and *all other charges whatsoever*, excepting for painting and repairs to hull and machinery and everything appertaining to keeping the ship in proper working order;" to pay for her use £550 per month, and that "in the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to assume her service." There was a final and most important provision, upon the construction of which the case turned, "that the owners shall pay for the insurance on the vessel."

The case, as thus presented between the owner and the charterer, was submitted to the District Court, which dismissed the owner's petition, holding it to be liable under the charter for the consequences of the collision. 84 Fed. Rep. 895. This decree was affirmed by the Circuit Court of Appeals. 94 Fed. Rep. 213.

*Mr. J. Parker Kirlin* for petitioner.

*Mr. Arthur H. Russell* opposing. *Mr. Charles Theodore Russell* was on his brief.

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

The question involved in this case is, whether the owners of a vessel, who have let it out upon charter party and agreed to pay "for the insurance on the vessel," are liable, as between themselves and the charterers, for damage done to another vessel by a collision resulting from the negligence of the officers and crew, who are appointed and paid by the charterers.

1. It was within the power of the court, under general Ad-

miralty Rule 59, to entertain the petition of the Turret Steamshipping Company, owner and claimant of the Barnstable, and to call in the charterer to show cause why it should not be condemned for the damage resulting from this collision. *The Alert*, 40 Fed. Rep. 836. Such proceeding, though not within the words, is clearly within the spirit of the rule; and the case, as between the Turret Company and the Fruit Company, thereafter proceeded substantially as an independent cause, in which the original libellants had no substantial interest, their claim being adequately protected by the decree against the Barnstable. The position of the Turret Company was in no manner affected by the failure of the libellants to appeal from their own decree.

2. Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, *The Ticonderoga*, Swabey, 215; *The Lemington*, 2 Asp. Mar. Law Ca. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, 13 P. D. 110; *The Parlement Belge*, 5 P. D. 197; *The Castlegate*, (1893) App. Ca. 38, 52; *The Utopia*, (1893) App. Cas. 492, the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer. *The Little Charles*, 1 Brock. 347, 354. It was said by this court in the case of *The Palmyra*, 12 Wheat. 1, 14, referring to a seizure in a revenue case: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizure in the admiralty." So in *United States* v. *Brig Malek Adhel*, 2 How. 210, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): "That the act makes no exception whatsoever, whether the aggression be with or without the coöperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . .

It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof." This was the principle upon which this court held, in the case of *The China*, 7 Wall. 53, that a vessel was liable for a collision occasioned by the fault of a compulsory pilot—a marked distinction from the English rule, which, by statute, exempts the vessel from such consequences.

Indeed, the liability of the vessel for the negligence of the charterers is now fixed by statute in this country. Rev. Stat. sec. 4286. "The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

As the charterers hired the Barnstable for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes—the owners only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in an efficient state during the existence of the charter party, there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault. *Thorp* v. *Hammond*, 12 Wall. 408; *Williams* v. *Hays*, 143 N. Y. 442; *Scott* v. *Scott*, 2 Starkie, 386; *Webster* v. *Disharoon*, 64 Fed. Rep. 143; *Galzoni* v. *Tyler*, 64 Cal. 334, 386.

This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received, less the ordinary results of wear and tear, and such in-

juries as are caused by a peril of the sea, or inevitable accident. *Coupé Co.* v. *Maddick*, (1891) 2 Q. B. 413; *Sturm* v. *Boker*, 150 U. S. 312; Story on Bailments, secs. 25 to 32.

If, then, the owners be liable for the negligence of the charterers, such liability must arise from the particular stipulation in the charter party that "the owners shall pay for the insurance on the vessel." The language of the clause is peculiar and significant. It is not an agreement to *insure*, or to procure or provide insurance, but to *pay for* such insurance as the owner should see fit to take out—and perhaps inferentially to apply such insurance toward the extinguishment of any liability of the charterers for losses covered by the policy. It is entirely clear that, under this stipulation, the owners could not charge the charterers with the expense of insurance, that is, the premiums, whatever form of policy the owner might select, though insurance be in fact a part of the running expenses of the vessel, and perhaps, in the absence of a special clause, covered by the stipulation that "the charterers shall provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, *and all other charges whatsoever*, except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order."

It may be conceded, however, that for any damage to the vessel coverable by an ordinary policy of insurance "on the vessel" the owners must look to the companies, at least for the insured proportion of such damage, and not to the charterers. It may also be conceded that the owner might have selected a form of policy containing a special running-down clause that would have covered damages done to another vessel, though the rule in this court is, following the English case of *De Vaux* v. *Salvador*, 4 Ad. & El. 420, that an ordinary policy against perils of the sea does not cover damage done to another vessel by collision. *Gen. Mutual Ins. Co.* v. *Sherwood*, 14 How. 351. Mr. Justice Curtis remarked in this case (p. 363): "We believe that, if skillful merchants, or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel, not insured by the policy, by a col-

lision occasioned by the negligence of those on board the vessel injured, they would, down to a very recent period, have answered unhesitatingly in the negative." This case was decided in 1853, although shortly before that the Supreme Court of Massachusetts had held in *Nelson* v. *Suffolk Ins. Co.*, 8 Cush. 477, that a policy on the vessel covered damages which the vessel insured might do to another vessel. The same view had already been taken by Mr. Justice Story in *Hale* v. *Washington Ins. Co.*, 2 Story, 176. In speaking of these cases Mr. Justice Curtis observed (p. 367): "But with great respect for that eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants, and that it is the safer and more expedient rule. We cannot doubt that the knowledge by owners, masters and seamen that underwriters were responsible for all the damage done by collision with other vessels through their negligence would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case [cause]." As the construction of a policy of insurance is one of general rather than one of local law, (*Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 443; *Gloucester Ins. Co.* v. *Younger*, 2 Curt. 322,) we are constrained to adopt our own views as to such construction, though the courts of the State in which the cause of action arose have adopted a different view.

But, whatever be the obligation as between the insured and his underwriters, this clause in the charter party should be construed in consonance with its other provisions, and with the obvious intention of the parties that the duty of the owner is discharged by keeping the vessel in good order and condition, and that the charterers assumed and agreed to pay all her running expenses. Conceding that damages done to another vessel are neither the one nor the other, they are incident rather to the navigation than to the preservation of the vessel, although the cost of the premiums may be referable to the preservation of the ship, inasmuch as the owner obtains the benefit of them in case of damages or loss, for which, as between him and the char-

terer, he is chargeable. If the responsibility for an extraordinary class of damages that is done to another vessel be thus shifted from the charterer, by whose agents the damage is done, and to whom its reimbursement properly belongs, to the owners, it should be evidenced by some definite undertaking to that effect, and not be inferred from an obscure provision of the charter party, which seems to have been designed for a different purpose. It is scarcely credible that the owners could have intended to assume a liability for the acts of men not chosen by themselves and entirely beyond their control, which in this case equalled the hire of the ship for eight months, and might, had the Fortuna been of greater value, have exceeded the whole amount of rent payable by the charterers.

There is undoubtedly weight to be given to the proposition that, unless we hold the owners liable for everything a policy of insurance could have covered, the clause is of little value, since the charterers would not in any event be liable for damages resulting from the perils of the sea or other risks ordinarily covered by insurance upon the vessel. But this argument loses much of its force in view of the ruling of this court that an ordinary policy of insurance on a vessel does not cover damages done to another vessel; and as there seems to be a difference in practice, some charters providing that the insurance shall be paid by the charterer, *Latson* v. *Sturm*, 2 Ben. 327, and others providing that it shall be paid by the owner, we think the probable object of the clause was to fix beyond cavil the responsibility for premiums. It was probably inserted in this charter to negative the inference derivable from that provision of the charter, imposing upon the charterers the obligation to pay the running expenses of the vessel, and *all other charges whatsoever*. But, however this may be, we find ourselves unable to give it the broad construction that it was intended to fix upon the owners a new and extraordinary liability, which we think could not have been within the contemplation of the parties.

The evidence of a parol understanding as to the meaning of the insurance clause in this connection, is entitled to no weight whatever. In answer to a question put to the broker who negotiated the charter, upon cross examination, he testified as follows:

"Q. You have had no experience, I understand you, of the actual working out of this clause in any particular cases?

"A. I have had considerable experience in various insurance claims—so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape or manner against stranding, collision and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure.

"Q. Tell us what experience you have actually had of these insurance clauses, or the working out of them.

"A. I have never known an owner to insure a charter for damage by collision before. He has always taken that risk."

Several answers may be made as to any inference derivable from this testimony. In the first place, the answer to the first question was not responsive to the question at all. In the second place, it was not the testimony of an expert as to the meaning of this clause among underwriters, and their customers, in which case it might properly have been admissible, but an attempt in respect to the particular charter, to introduce the antecedent understanding of the parties, and thereby to explain, control and qualify the language of the charter. This was obviously impossible. *Seitz* v. *Brewers' Refrigerating Machine Co.*, 141 U. S. 510. Finally, giving to the answer its full effect, his statement of the owner's liability does not include damage which might be done to other vessels.

The statement of the witness, too, differs from his testimony upon direct examination, which was as follows:

"Q. Did you have any conversation with Mr. Craggs (the then owner of the vessel) with regard to that clause?

"A. I did; several.

"Q. Please state the substance of that conversation.

"A. I told him that he would have to insure for his vessel the same as the charter party stated.

"Q. Did he make any reply?

"A. Of course, I told him if he did not want to insure, he could take that risk. But his intention was to insure."

In addition to this, however, the testimony was quite inadmissible as against the Turret Steamshipping Company, the

purchaser of the vessel and the assignee of the charter party, since it was not shown to have had any notice of the conversation, and therefore, in taking over the charter, was only bound by the obligations imported by the words of the insurance clause in their ordinary commercial sense. *Paige* v. *Cagwin*, 7 Hill, 361; *Bristol* v. *Dann*, 12 Wend. 142; *Clews* v. *Kehr*, 90 N. Y. 633; *Truax* v. *Slater*, 86 N. Y. 630; *Tabor* v. *Van Tassell*, 86 N. Y. 642.

In conclusion, we are of opinion that, if anything more were intended by the insurance clause than to impose on the owners the duty of paying the premiums, it was fully satisfied by an ordinary policy of insurance against perils of the sea; that such policy would not cover damage done to another vessel by a collision with the vessel insured, and that the primary liability for such damage rested upon the charterers and not upon the owners. We express no opinion as to the effect of any payment that may have been actually made by the underwriters upon this loss.

*The decrees of both courts must therefore be reversed, and the case remanded to the District Court for the District of Massachusetts, for further proceedings not inconsistent with this opinion.*

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## HALE *v.* LEWIS.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 151. Argued January 28, 29, 1901. — Decided May 13, 1901.

A statute of Wisconsin required building and loan associations to deposit with the state treasurer securities to a certain amount, to be held in trust for the benefit of local creditors. The receiver of a Minnesota building and loan association, which had made the deposit required by the Wisconsin statute, prayed that such securities might be turned over to him, and the proceeds distributed among all the shareholders of the association, wherever they might reside, upon the ground that the association

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had no authority to pledge such securities; that such pledge operated to prefer the Wisconsin shareholders over the other shareholders of the association, and was a violation of the contract clause of the Constitution. The Supreme Court held that the contract clause of the Constitution could not be invoked to release these securities from the operation of the statute, as the stockholders had waived their right to insist upon the constitutional objection by the voluntary act of the board of directors, which was binding upon them, in making the deposit with the state treasurer under the statute. *Held:* That this was a non-Federal ground broad enough to support the judgment, and the writ of error must be dismissed.

This was a petition filed by Lewis, as subscriber for five shares of stock in the American Building and Loan Association, in the circuit court for Dane County, against the American Savings and Loan Association, the treasurer of the State of Wisconsin, and William D. Hale, receiver of the association, (subsequently admitted as defendant,) to compel the securities of this association, held in trust by the state treasurer, to be sequestrated and distributed among the members and stockholders who are residents of the State of Wisconsin, and for an injunction and receiver as adjuncts to such relief.

The facts of the case as disclosed by the complaint, answer and counterclaim are substantially as follows:

The American Building and Loan Association was originally incorporated under the laws of Minnesota, April 15, 1887, with its principal office at Minneapolis, where it continued to transact its corporate business until June 26, 1892, when its name was changed to the American Savings and Loan Association, without in any way affecting or altering its corporate rights. The general nature of its business was declared to be "to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes, by loaning or advancing under the mutual building society plan, to such of them as might desire to anticipate the ultimate value of their shares, funds accumulated from the monthly contributions of its stockholders, and also such other funds as may from time to time come into its hands." The management of its affairs was vested in a board of seven directors, elected by the stockholders. Membership was acquired by taking stock

in the company and paying an admission fee. On July 31, 1888, the association amended its articles by adding thereto that "the board of directors may sell and dispose of the mortgages held by the corporation whenever they may deem best and as provided by the by-laws." But no by-laws were ever passed upon this subject; and on July 11, 1889, the articles of incorporation were again amended by declaring that "the board of directors shall not sell or dispose of any of the mortgages held or owned by this corporation."

On April 19, 1889, the legislature of Wisconsin enacted a law which provided that—

"No foreign building and loan association . . . shall issue its shares, receive moneys or transact any business in this State unless such association shall have and keep on deposit with the state treasurer of Wisconsin, in trust for the benefit and security of all its members in this State, the securities of the actual cash value of $100,000 of the kind mentioned in section 2 of this act, to be approved and accepted by said state treasurer, and held in trust as aforesaid, until all shares of such association held by residents of this State shall have been fully redeemed and paid off by such association, and until its contracts and obligations to persons and members residing in this State shall have been fully performed and discharged." Sanford & Berryman's Stats. sec. 2014*a*.

At the time the complaint was filed the association had 246 shareholders in Wisconsin, of whom 162 had become such prior to the enactment of this law; and thereafter, and prior to the appointment of plaintiff in error as receiver, 84 additional residents of the State became shareholders, all under a contract identical with that by which all the shareholders in thirty-four other States became shareholders in the association, and the rights, privileges, immunities and liabilities of every shareholder, whether residing in Wisconsin or elsewhere, were the same.

A few days after the enactment of the above law, and on May 1, 1889, the board of directors adopted the following resolution: "*Resolved*, That the state treasurer of Wisconsin be made a depository of the association for temporary convenience in complying with the law of Wisconsin in regard to the de-

posit of securities, $100,000. *Also resolved*, That the association comply with the Wisconsin law as soon as possible." Thereafter, from time to time, without other or additional authority, mortgages taken by the association from its members were delivered to the state treasurer in the aggregate face value of $145,234. The shareholders had no knowledge whatever of the delivery of these mortgages to the state treasurer, nor did they consent or acquiesce in that disposition of them.

On January 14, 1896, the association having become insolvent, the plaintiff in error, William B. Hale, was duly appointed receiver by the district court of Hennepin County, Minnesota, under the laws of that State.

Subsequent to the appointment of Hale as receiver, and on February 5, 1896, one Melville C. Clarke, was appointed receiver for such association for the State of Wisconsin, by the circuit court of Dane County, and the state treasurer, who was a party to the proceeding, was ordered by the court to turn over all the mortgages in his possession as treasurer, to Clarke as receiver. This was done, and Clarke was proceeding to collect the same for the purpose of distributing the proceeds to the shareholders residing in Wisconsin.

Prior to the appointment of either of these receivers, however, Lewis filed this petition, to which Hale, the Minnesota receiver, was subsequently made a party defendant. He also filed an answer, praying that the Wisconsin receiver, Clarke, turn over to him the mortgages held by him, to be by him, Hale, collected, and the proceeds equitably distributed to all the shareholders of the association, wheresoever they may reside.

Clarke, the Wisconsin receiver, demurred to the counterclaim set up in the answer of Hale, which was sustained, and an appeal was taken from the order sustaining such demurrer to the Supreme Court, which affirmed the order of the lower court, and remanded the case for further proceedings. Hale, refusing to amend his answer and counterclaim, and electing to stand upon the record, judgment was rendered against him for costs, and from this judgment an appeal was taken to the

Supreme Court, which again affirmed the judgment of the circuit court. Whereupon plaintiff in error sued out this writ.

*Mr. Eugene G. Hay* for plaintiff in error. *Mr. Charles H. Van Campen* was on his brief.

*Mr. John L. Erdal* for defendant in error.

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

While no motion was made to dismiss this case, the question of jurisdiction arising from the alleged want of a Federal question is elaborately discussed by counsel in their briefs, and has received our attentive consideration.

The original complaint by Lewis against the Building and Loan Association and the state treasurer makes no reference to such question, and merely prays for relief under the state statute, and for a distribution of the local assets among the local stockholders. The answer of the state treasurer admits the main allegations of the bill, and apparently accedes to the position of the plaintiff. The answer and counterclaim of Hale, the Minnesota receiver, who was subsequently admitted as defendant, sets up no conflict between the Wisconsin statute and the Federal Constitution, but denies the authority of the association to pledge, transfer or dispose of any of its mortgages, which were delivered to the state treasurer without authority; asserts that the assets of the association, including the mortgages in the possession of Clarke, are not sufficient to pay all the shareholders in full, and that if Clarke, the Wisconsin receiver, shall collect the mortgages in his possession, and distribute the same to the Wisconsin shareholders, they will receive their pay in full, and thereby be constituted a preferred class against equity and good conscience, and contrary to the purposes of the association as defined by its articles; and finally, "that the law under which it is alleged said mortgages were deposited was intended to protect said Wisconsin shareholders in all their rights growing out of their membership in said association, and not for the purpose of extending, altering or

changing said rights; that the purpose for which any deposit made by said association with said state treasurer under said law was made terminated and was at an end when said association became insolvent and incapable of carrying out its contracts and effectuating the purpose of its being."

To this answer and counterclaim Clarke, the Wisconsin receiver, as well as Lewis, the plaintiff, demurred for insufficiency. The demurrer was sustained, and the defendant Hale given leave to amend. Instead of amending, Hale took an appeal to the Supreme Court from the orders sustaining the demurrer.

Upon this appeal the Supreme Court held that the principal question presented was as to the construction, validity and effect of the law of Wisconsin requiring such associations to make a deposit of securities as a condition to doing business, and decided, *first*, that the mortgages in dispute were deposited with the state treasurer by the corporation in a *bona fide* attempt to comply with the Wisconsin law; that it was its duty and within the power of its directors to make such deposits, as a condition precedent to the right to do business in Wisconsin; that the recognition of the existence of a corporation by any other than the State of its creation depends purely upon the comity of such other State or States; that the power to exclude such corporations embraces the power to regulate them, and that this doctrine was conclusive as to the validity of the pledge of the securities in question under the Wisconsin statute, and was also within the power of the corporation, and not in violation of the trust reposed in the board of directors. And, *second*, that whatever the view taken of the rights and relations of the entire body of stockholders as between themselves and the corporation, the contract clause of the Constitution could not be invoked to release these securities from the operation of the statute, as the stockholders had waived their right to insist upon the constitutional objection by the voluntary act of the board of directors in making the deposit with the state treasurer under the statute. Said the court: "Whatever the practical result of the enforcement of the trust in favor of Wisconsin shareholders, creditors and others sustaining contractual relations with the corporation defendant may be, it rests, as we think and as we

hold, upon the consent of the corporation and of its shareholders lawfully given, as it well might be in the present case, by and through its board of directors, for a valid consideration received by the corporation to the benefit and advantage of those now denying its validity."

The orders appealed from were affirmed, and the case sent back to the circuit court. Hale refusing to amend and electing to stand on the record, judgment went against him for costs. He appears to have carried the case again to the Supreme Court, and for the first time assigned as error the repugnancy of the statute to the Constitution of the United States. Judgment was again affirmed.

Passing the question whether a party who failed to set up a Federal question in his original pleadings, or upon his first appeal to the Supreme Court, and subsequently declines to amend, and only sets such question up in an assignment of errors on a second appeal, after the question had been practically disposed of by the Supreme Court, does not lay himself open to the objection so often sustained by us that a party cannot raise a Federal question for the first time on a motion for a rehearing, *Union Mutual Life Ins. Co.* v. *Kirchoff*, 169 U. S. 103, 113; *Yazoo & Mississippi Valley Railway Co.* v. *Adams*, 180 U. S. 1, it is clear that the Supreme Court disposed of the case upon a non-Federal ground broad enough to support the judgment. It held, in substance, that, conceding the law to be unconstitutional, the corporation is estopped to set up its invalidity, by the action of the board of directors in depositing securities with the state treasurer under the Wisconsin statute; that such action was within the power of the board; was binding upon the stockholders, and that such deposit, having been made subject to the condition that the securities shall be held "in trust for the benefit and security of its members in this State, . . . and held in trust as aforesaid, until all shares of this association shall have been fully redeemed and paid off by such association, and until its contracts and the obligations to persons residing in this State shall have been fully performed and discharged," the stockholders as well as the corporation were estopped to claim that such condition was invalid.

The case is completely covered by that of *Eustis* v. *Bolles*, 150 U. S. 361. This was an action to recover the residue of a note, the holder having received one half of the amount under certain insolvency proceedings in Massachusetts. Defendants pleaded the proceedings in insolvency, an offer of composition, its acceptance by plaintiff and the receipt of the amount coming to him under the composition. Plaintiff demurred, and insisted that the statute, which had been enacted after the note had been executed, impaired the obligation of his contract. The Supreme Court held that the action of plaintiff in accepting his dividend under the insolvency proceedings was a waiver of his right to object to the validity of the statute. Upon writ of error from this court, we held that, in deciding that it was competent for plaintiff to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court did not decide a Federal question, and the writ of error was dismissed, citing *Beaupré* v. *Noyes*, 138 U. S. 397. See also *Electric Co.* v. *Dow*, 166 U. S. 489; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Seneca Nation* v. *Christy*, 162 U. S. 283.

The case differs from the one under consideration only in the fact that in this case there was a further question whether the waiver was binding not only upon the corporation but upon its stockholders. That question involved the construction of the Wisconsin statute, but no Federal right. See also *Moran* v. *Horsky*, 178 U. S. 205, in which a defence under the laws of the United States was held by the Supreme Court of Montana to have been waived by the laches of the plaintiff. This was also held to be a non-Federal ground sufficient to support the judgment, and the writ of error was dismissed.

The same result must follow in this case, and the writ of error is, therefore,

*Dismissed.*

# BARKER *v.* HARVEY.

# QUEVAS *v.* HARVEY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Nos. 209, 210. Argued March 20, 21, 1901.—Decided May 13, 1901.

The facts in these two cases are so nearly alike that the court thinks it sufficient to consider only the first. The land there in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo. The plaintiffs claim title by virtue of a patent issued in confirmation of two grants made by the Mexican government. The defendants, without claiming the fee, claim a right of permanent occupancy, as Mission Indians, who had been in occupation of the premises long before the Mexican grants. *Held:*

(1) That the United States were bound to respect the rights of private property in the ceded territory, but that it had the right to require reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented, shall be considered abandoned:

(2) That so far as the Indians are concerned, the land was rightfully to be regarded as part of the public domain, and subject to sale and disposition by the government:

(3) That if the Indians had any claims founded on the action of the Mexican government, they abandoned them by not presenting them to the commission for consideration:

(4) That lands which were burdened with a right of permanent occupancy were not a part of the public domain, subject to the full disposal by the United States.

Some discussion appears in the briefs as to the meaning of the word "servidumbres," (translated "usages"). The court declines to define its meaning when standing by itself, but holds that in these grants it does not mean that the general occupation and control of the property was limited by them, but only that such full control should not be taken as allowing any interference with established roads or cross roads, or other things of like nature.

THESE cases were brought by defendants in error in the superior court of the county of San Diego, California, to quiet their title to certain premises in that county. Decrees rendered in their favor were carried to the Supreme Court of the

State, and by that court affirmed. 126 California, 262. To such affirmance these writs of error have been sued out.

The facts in the cases are so nearly alike that it is sufficient to consider only the first. The land in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848. 9 Stat. 922. Generally speaking, the plaintiffs claim title by virtue of a patent issued to John J. Warner on January 16, 1880, in confirmation of two grants made by the Mexican government. On the other hand, the defendants do not claim a fee in the premises but only a right of permanent occupancy by virtue of the alleged fact that they are Mission Indians, so called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory; insisting, further, that the government of Mexico had always recognized the lawfulness and permanence of their occupancy, and that such right of occupancy was protected by the terms of the treaty and the rules of international law.

The treaty of Guadalupe Hidalgo provided in article 8 as follows:

"Article VIII.

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.

"Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the

character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, the property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

Article 10, as originally prepared, was stricken out by the Senate, but in the protocol signed by the representatives of the two nations, at the time of the ratification, on May 26, 1848, it was stated:

"2d. The American government by suppressing the tenth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territory, are those which were legitimate titles under the Mexican law in California and New Mexico, up to the 13th of May, 1846, and in Texas up to the 2d March, 1836." Ex. Doc. No. 50 H. R. 30th Cong. 2d Sess. p. 77.

After the acquisition of this territory Congress, on March 3, 1851, c. 41, 9 Stat. 631, passed an act entitled "An act to ascertain and settle the private land claims in the State of California," which created a commission to receive and act upon all petitions for confirmation of such claims. Its decision was subject to appeal to the District Court of the United States, and thence to this court. As originally organized the commission was to continue for three years, but that time was extended by subsequent legislation. Sections 8, 13, 15 and 16 are as follows:

"SEC. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government shall present the same to the said commissioners when sitting as a board, together with such docu-

mentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the District Attorney of the United States in and for the district in which such decision shall be rendered."

"SEC. 13. That all lands, the claims to which have been finally rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act 'to create the office of surveyor of the public lands for the State of Louisiana,' approved third March, one thousand eight hundred and thirty-one: Provided, always, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the District Judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said Judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time ap-

pointed for hearing the same: And provided, further, That it shall and may be lawful for the District Judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the Commissioner of the General Land Office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said Judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved."

"SEC. 15. That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

"SEC. 16. That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

On the trial before the court, without a jury, the findings of fact were in substance that the plaintiffs had the ownership in fee simple of the premises described; that the defendants had no rights or interest therein, and the decree was in accordance therewith. The statement on appeal prepared by the trial court disclosed that the plaintiffs introduced in evidence the patent to John J. Warner, which patent recited the filing of a petition by Warner with the land commission praying for confirmation of his title, a title based on two Mexican grants—one June 8, 1840, to José Antonio Pico by Juan B. Alvarado, then constitutional governor of the Californias, and the second, November 28, 1844, to petitioner by Manual Micheltorena, governor general commandant and inspector general of the Californias; recited also a decree of confirmation of such title, an appeal to the District Court of the United States and an affirmance of the decision of

the commission, the return of the surveyor general of the State showing a survey; and conveyed the premises to Warner, "but with the stipulation that in virtue of the fifteenth section of the said act neither the confirmation of this claim nor this patent shall affect the interests of third persons." It was admitted that Warner's title had passed to plaintiffs, and that the taxes had all been paid by them. On the other hand, the appeal statement showed that the defendants offered copies of the expedientes of both of the grants referred to in the patent, and also oral testimony of occupation by the defendants and their ancestors. Some witnesses were introduced by the plaintiffs to contradict this matter of occupancy, but on final consideration the court struck out all the testimony in reference to occupancy and of the Mexican grants upon which the patent was issued. Upon the evidence, therefore, that was received by the trial court there could be no doubt of the rightfulness of the decree, and the question presented by the record to the Supreme Court of the State was whether there was error in striking out the testimony offered on behalf of the defence.

*Mr. Shirley C. Ward* and *Mr. Assistant Attorney General Hoyt* for plaintiffs in error.

*Mr. David L. Withington* for defendants in error. *Mr. Stephen M. White*, *Mr. Charles Monroe* and *Mr. Cassius Carter* were on his brief.

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

Undoubtedly by the rules of international law, and in accordance with the provisions of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this Government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition,

and to decree that all claims which are not thus presented shall be considered abandoned. "Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the Government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the Government; and Congress might either itself discharge that duty or delegate it to the judicial department. *De la Croix* v. *Chamberlain*, 12 Wheat. 599, 601, 602; *Chouteau* v. *Eckhart*, 2 How. 344, 374; *Tameling* v. *United States Freehold Co.*, 93 U. S. 644, 661; *Botiller* v. *Dominguez*, 130 U. S. 238." *Astiazaran* v. *Santa Rita Land & Mining Co.*, 148 U. S. 80, 81.

*Botiller* v. *Dominguez*, 130 U. S. 238, the last case cited in the foregoing quotation, deserves special notice. The Supreme Court of California had held in several cases that a perfect title need not be presented to the land commission; that it was recognized by the treaty of cession, and required no further confirmation; that the act to ascertain and settle private land claims applied only to those titles which were imperfect and needed the action of some tribunal to ascertain and establish their validity. But in this case, which came from the Supreme Court of California, we held the contrary. We quote at some length from the opinion. Thus, on page 246, it was said:

"Two propositions under this statute are presented by counsel in support of the decision of the Supreme Court of California. The first of these is, that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; and also in conflict with the rights of property under the Constitution and laws of the United States, so far as it may affect titles perfected under Mexico. The second proposition is, that the statute was not intended to apply to claims which were supported by a complete and perfect title from the Mexican

government, but, on the contrary, only to such as were imperfect, inchoate and equitable in their character, without being a strict legal title.

"With regard to the first of these propositions it may be said, that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own Government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616; *Taylor* v. *Morton*, 2 Curtis, 454; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195."

In reference to the second proposition, after noticing several provisions of the statute, it was declared (p. 248):

"It is not possible, therefore, from the language of this statute, to infer that there was in the minds of its framers any distinction as to the jurisdiction they were conferring upon this board, between claims derived from the Spanish or Mexican government, which were perfect under the laws of those governments, and those which were incipient, imperfect or inchoate. . . . 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 demands 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 whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them."

The views thus expressed have been several times reaffirmed by this court, the latest case being *Florida* v. *Furman*, 180 U. S. 402, in which, after quoting the passage last above quoted, we said, in reference to statutes of the United States respecting claims in Florida (p. 438):

"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."

See also *Thompson* v. *Los Angeles Farming &c. Co.*, 180 U. S. 72, 77, in which it was said in reference to the statute before us:

"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."

These rulings go far toward sustaining the decision of the Supreme Court of California in the present cases. As between the United States and Warner, the patent is as conclusive of the title of the latter as any other patent from the United States is of the title of the grantee named therein. As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land within the language of the statute "part of the public domain of the United States." "Public domain" is equivalent to "public lands," and these words have acquired a settled meaning in the legislation of this country. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger*, 92 U. S. 761, 763. "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws." *Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S. 535, 538. See also *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284. So far, therefore, as these Indians are concerned the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the Government, and the Government has conveyed to Warner. It is true that the patent,

following the fifteenth section of the act, in terms provides that the patent shall not "affect the interests of third persons," but who may take advantage of this stipulation? This question was presented and determined in *Beard* v. *Federy*, 3 Wall. 478, and the court, referring to the effect of a patent, said (pp. 492, 493):

"When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. 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. . . . 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."

If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, "resist successfully any action of the government in disposing of the property." If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government," it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has

given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (sec. 16) "to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians." It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress

considered that they had no claims which called for special action.

But we are not compelled to rest upon any presumptions from the inaction of Congress. Turning to the testimony offered in respect to the matter of occupation, it may be stated that there was sufficient to call for a finding thereon if the fact of occupation was controlling. But in the Mexican grants upon which Warner based his application to the commission for a confirmation of his title we notice these things: The first grant was in 1840, to José Antonio Pico. The application was for "the place 'Agua Caliente,' belonging to the mission of San Luis Rey, since it is not needed by the said mission, having a house on it, and an orchard of little utility." The report of the justice of the peace was "that the land 'Agua Caliente' is the property of the San Luis Rey Mission, which has improvements, buildings and an orchard, from which derive their subsistence the Indians who live thereon, which is bounded by the property of Joaquin Ortega, and I believe it can be awarded to the interested party for being worthy, but without prejudice to the Indians, who from it derive their support."

The last paper in the expediente was the following:

"*Juan B. Alvarado, Constitutional Governor of the Department of both Californias:*

"Whereas José Antonio Pico has petitioned for his own personal benefit and that of his family the land known by the name of 'Agua Caliente,' bounded by the ranch of 'San José Valley,' with the boundary of the canyon of 'Buena Vista,' and by the mountains of 'Palomar,' having previously complied with the writs and investigations corresponding, as required by the laws and regulations, exercising the powers which are conferred on me in the name of the Mexican nation, I have resolved to grant to him the said place, subjecting himself to pay for the place of worship and other improvements that be there, belonging to the San Luis Rey Mission, and not molest (prejudicar) the Indians that thereon may be established, and to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

"First. He is allowed to fence it in, without interfering with the roads, cross roads and other usages (servidumbres); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit, but within a year he shall construct a house thereon and live in it.

"Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof, by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

"Third. The land of which donation is hereby made is of the extent mentioned in the plan, which goes with the 'expediente.' The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for other purposes.

"Fourth. If he should fail to comply with these conditions, he shall forfeit his title to the land, and it will be denounceable by another.

"Therefore, I command that this present order be to him the title, and holding it for good and valid, a copy thereof be entered into the proper book, and given to the party interested for his protection and other purposes."

No approval of this grant by the departmental assembly appears of record, but the finding of the commission was that whatever of right passed to Pico was transferred by conveyances to Warner. The second grant, that in 1845, was made directly to Warner, upon his personal application, which application was thus endorsed.

"Office of the First Justice of the Peace.

"*San Diego.*

"In view of the petition which the party interested remits to this office, I beg to state that the said 'Valle San José' is, and has for the past two years been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this in San Diego.

"August 6, 1844. Juan Ma Marron.

"*To the Most R. P. Vincent Olivas:*

"With the object of soliciting in property the place known by the name 'Valle de San José,' formerly occupied by the mission under your charge, I beg of you to be so kind as to inform me if, at the present day, the Mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

"San Diego, August 5, 1844. JUAN J. WARNER.

"The 'Valley of San José' can be granted to the party who petitions for it, inasmuch as the Mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission.

"FR. VINCENT P. OLIVAS.

"Mission of San Diego, August 5, 1884."

The grant was in these words:

"The citizen, Manuel Micheltorena, general of brigade of the Mexican army, adjutant general of the same, governor general, commander and inspector of both Californias:

"Whereas Juan José Warner, Mexican by naturalization, has petitioned for his own personal benefit, and that of his family, the land known by the name 'Valle de San José,' bounded on the east by the entrance into San Felipe and the mountain, on the west by the mountain and canyon of Aguanga; and on the north bounded by the mountain, and the boundaries on the south being the 'Carrizo' and the mountain; having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

"First. He will not be allowed to sell it, to alienate it, nor to mortgage it, to place it under bond, or to place it under any obligation, nor give it away.

"Second. He will be allowed to fence it in, without interference with the roads, and other usages (servidumbres). He will hold it freely and exclusively, turning it to agriculture, or any

other use he may please, and he shall build a house on it within one year, and live in it.

"Third. He shall apply to the respective judge to give him judicial possession thereof, by virtue of this order, by which he shall mark out the boundaries whereon he shall place the stakes, some fruit and wild trees of some use or other.

"Fourth. The land which is being granted consists of six leagues, more or less (seis sitios de ganado mayor) according to the respective map or plan. The judge who may give possession thereof shall have it surveyed according to law, leaving the residue (sobrante) to the nation for its use.

"Fifth. Should he fail to comply with these conditions, he shall forfeit his right to the land, and it will be denounceable by another. Therefore I order that this present decree be to him his title, and holding it for good and valid notice thereof be entered into the respective books and be given to the interested party for his protection and other purposes."

The grant was subsequently approved by the departmental assembly on May 21, 1845. On the application to the Private Land Commission the matter was investigated, and a report made by Commissioner Felch, in these words:

"*J. J. Warner* v. *The United States*, for the place called Agua Caliente y Valle de San José, in San Diego County, containing six square leagues of land.

"Two grants are presented and proved in this case: The first made by Governor Juan B. Alvarado to José Antonio Pico, on the 8th day of June, 1840; the other by Governor Manuel Micheltorena, on the 28th day of November, 1844, to the present claimant. The land embraced in the grant to Pico is designated by the name Agua Caliente, and that described in the grant to Warner is called the Valle de San José. On comparing the descriptions of the two parcels of lands and maps which constitute portions of the two expedientes, it is manifest that the grant to Warner embraces the premises described in the previous grant to Pico. The place known by the name of Agua Caliente constitutes the northern portion of the valley known by the name of San José, while the grant to Warner describes the entire valley, and the witnesses testify that the rancho claimed

by Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant, but in 1842 he left the place, probably on account of the danger from the Indians, and does not appear to have done anything more in connection with it.

"The proof is scarcely sufficient to establish the performance of the conditions of the grant by him, while his absence from the place, and the want of any evidence of an attempt to return to it after 1842, indicates an abandonment of it. It was so treated by Warner in petitioning for a grant of the same in 1844, and by the governor in making the concession to him. If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the thirteenth day of January, 1852. This conveyance is given in evidence.

"I think, however, that the right of the present claimant must be determined entirely by the merits of the case based on Micheltorena's grant to him.

"This grant was approved by the departmental assembly May 21, 1845.

"The testimony of Andres Pico shows that Warner was living with his family on the place in the fall of 1844 and cultivating portions of the land.

"His residence on the place appears to have been continued until 1851, when the Indians burnt his buildings and destroyed his stock. Since that time his occupation has been continued by his servants.

"In the grant, the description of the land petitioned for is such as to embrace the entire valley called San José, as laid down on the map constituting a part of the expediente, giving well-defined landmarks and boundaries, which the witnesses testify are well-known objects.

"The valley is very irregular in shape and is surrounded by high hills.

"Juridical measurement was required and the quantity of six

square leagues was granted, but as the measurement was never obtained, it is important to determine whether the grantee is entitled to hold the entire premises described in the grant; using the scale given on the desino referred to in the grant, the quantity included in the premises cannot exceed six square leagues of land.

"The testimony of the witnesses who were interrogated on the subject estimate it variously; some more and some less than the quantity conceded. On an examination of the whole case, however, we are inclined to the opinion that the petitioner should have a confirmation of the premises according to the description contained in the grant to him, and a decree will be entered accordingly."

Upon that report the title was confirmed, which, as heretofore stated, was approved by the District Court, and thereupon a patent was issued.

From these papers the following appears: The grant to Pico was made subject to the condition that he should "not molest the Indians that thereon may be established." No such condition was attached to the subsequent grant to Warner. On the contrary, the report of the justice of the peace was that the land had been for two years vacant and abandoned; that there were some property rights vested, not in the Indians, but in the Mission of San Diego, and the official of that mission consented to the grant, inasmuch as the mission had no means to cultivate and occupy the land, and it was no longer necessary for its purposes.

Some discussion appears in the briefs as to the meaning of the word translated "usages" (servidumbres) which appears in both grants, and it is contended by the plaintiffs in error that it is equivalent to the English word "servitudes," and is broad enough to include every right which any one may have in respect to the premises, subordinate to the fee. We shall not attempt to define the meaning of the word standing by itself. It may be conceded that it was sometimes used to express all kinds of servitudes, including therein a paramount right of occupation, but the context seems to place a narrower meaning upon its use here. Thus, in the first grant not only is there

the distinct provision that the Indians established on the land shall not be molested, but the grantee "is allowed to fence it in without interfering with the roads, cross roads, and other usages" (servidumbres). In the second the grantee is "allowed to fence it in without interference with the roads and other usages" (servidumbres). Obviously, it is in these two clauses contemplated that the fencing is to be without interference with roads and other usages or burdens. It does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or other things of like nature.

It thus appears that prior to the cession the Mexican authorities, upon examination, found that the Indians had abandoned the land; that the only adverse claim was vested in the Mission of San Diego, and made an absolute grant, subject only to the condition of satisfying whatever claims the mission might have. How can it be said therefore that when the cession was made by Mexico to the United States there was a present recognition by the Mexican government of the occupancy of these Indians? On the contrary, so far as any official action is disclosed, it was distinctly to the contrary, and carried with it an affirmation that they had abandoned their occupancy, and that whatever of title there was outside of the Mexican nation was in the mission, and an absolute grant was made subject only to the rights of such mission.

For these reasons we are of opinion that there was no error in the rulings of the Supreme Court of California, and its judgments in the two cases are

*Affirmed.*

MR. JUSTICE WHITE did not hear the argument of these cases or take part in their decision.

# UNITED STATES *v.* EDMONDSTON.

APPEAL FROM THE COURT OF CLAIMS.

No. 353. Submitted April 8, 1901.—Decided May 13, 1901.

One who pays to government officers, entitled to receive money for public lands, more than the law required him to pay for it cannot recover that excess in an action against the government in the Court of Claims.

THIS was an appeal from a judgment of the Court of Claims in favor of the appellee and against the United States for $200, being the amount he was overcharged in the purchase of a quarter section of land. The evidence disclosed the following facts: The claimant on March 11, 1891, filed in the local land office at Ashland, Wis., a statement, under the preëmption laws, of his intention to preëmpt a tract of 160 acres. On September 16, 1891, he gave public notice, as required by law, of his purpose to make final proof, and, in pursuance of such notice, on November 9, 1891, proved up before the register and receiver of the land office the necessary settlement and improvement.

Findings 2, 3, 4 and 5 are as follows:

"II. The claimant having established his right to the said land, on November 11, 1891, was required to pay for the same to the United States the sum of $400, being at the rate of $2.50 per acre for 160 acres, and he did pay the United States that amount for the land.

"III. The land inhabited and improved by the claimant, and paid for by him on the 11th of November, 1891, had been raised in price to $2.50 per acre, and put in the market prior to January, 1861, by reason of the grant of alternate sections to aid in the construction of railroads, and was of an alternate section reserved to the United States along the line of a railroad within the limits granted to the State of Wisconsin by the act approved June 3, 1856, 11 Stat. 20, to aid in the construction of railroads in that State, now known as the grant to the Chicago,

St. Paul, Minneapolis and Omaho Railway Company, and it was never alternate reserved land to the United States along the line of railroads within the limits granted by any other act of Congress to any other railway company.

"IV. At the time said cash entry was made and said money paid to the receiver at the local land office at Ashland, Wisconsin, it does not appear that the claimant made any protest or objection to said payment, nor asserted any right to purchase the land at a less price than that which he was called upon to pay for said land.

"V. Said land had been raised to $2.50 per acre and put on the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, said land having been thus offered on June 14, 1856."

It also appeared that the claimant applied to the land office for the repayment of half of the purchase money, which was refused.

*Mr. George Hines Gorman* and *Mr. Assistant Attorney General Pradt* for the United States.

*Mr. Harvey Spalding* and *Mr. E. W. Spalding* for Edmondston.

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

On June 16, 1880, an act was passed, 21 Stat. 287, c. 244, in section 2 of which is the following clause:

"And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall, in like manner, be repaid to the purchaser thereof, or to his heirs or assigns."

Another act passed the day before, June 15, 1880, 21 Stat. 237, c. 227, contained this provision:

"The price of lands now subject to entry which were raised to two dollars and fifty cents per acre and put in market prior

to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre."

*Medbury* v. *United States*, 173 U. S. 492, arose under the clause first quoted, and it was held that it did not apply to lands which were in fact within the limits of a land grant, but which had been forfeited on account of the failure of the railroad company to build its road, but only to cases in which there had been a mistake in the first instance as to the location of the land, the court saying (p. 500):

"That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

"Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress."

The act of June 16, 1880, may, therefore, be put out of consideration. By the act of June 15, however, the price of this tract was reduced from $2.50 to $1.25 per acre. The claimant paid the $2.50 without protest or question. He paid more than the law required him to pay. Can he recover the excess in this action in the Court of Claims?

The question thus presented is one of difficulty. If the parties to the transaction were both private individuals, it would clearly be a case of voluntary payment, and the amount overpaid would not be recoverable. If, for instance, the owner of a large body of land placed certain prices on different tracts thereof, and his agent, dealing with a purchaser of one of those tracts, charged him more than the price fixed by the principal, the purchaser paying the extra price without protest, and the principal accepting such payment, the transaction would not thereafter be open to inquiry in the courts, and the purchaser

could not recover the extra sum which he had paid to the agent. But it is insisted that the relations between the government and its purchaser are not like those between two individuals—that there is a constraining power in the government, a species of force or compulsion in its action, which makes the payment of money by one purchasing land from it through its officers a payment not voluntary but an exaction, and therefore enables the purchaser to recover any excess in the price.

We may not enter into any discussion of the mere equities of this transaction or the extent of the moral obligation resting on the government to repay a purchaser an excess in the price charged to and received from him. Our inquiry is limited to the question whether, in the statutes conferring jurisdiction on the Court of Claims, Congress has intended to acknowledge the liability of the government to every individual who has paid to any one of its officers a sum in excess of the legal charge for property or services and given to that court the power to render judgment against it for such excess.

The consequences of such a conclusion are far-reaching. The administrative affairs of the government are carried on by many thousands of officers. The fees for their services are generally prescribed. The sums which are to be paid for property obtained from the government are in like manner fixed by statute. Can it be that every individual who pays for services rendered by any of the administrative officers of the government, or for property which he obtains through the action of such officers, may come into the Court of Claims, and have an inquiry whether he has paid more than the statutory fee or price, and if he has, obtain judgment for the excess? Suppose, for instance, the statutory fee for a certificate from a certain official is twenty-five cents, and a party applying for such certificate is charged and pays fifty cents, has Congress by its legislation in respect to the Court of Claims provided that he can go into that court and recover from the government the extra twenty-five cents? It may be said that this is an extreme case, and that the fee is for the personal services of the officer; but under the present provisions of the statutes, generally speaking, all fees for the services of officers belong to the government, and are available

only in payment so far as they go of their salaries. It may also be said that no one would go to the trouble of suing for such a trifle as twenty-five cents, but if there are 10,000 cases of that kind the aggregate is no inconsiderable sum. But whether the aggregate of these claims be large or small, the inquiry is fairly presented whether Congress by its legislation intended to commit to the courts a supervision of all the charges for services and all the prices for property which administrative officers collect and receive, and empowered them to render judgment against the government in every case of excess therein. Of course, if such was its purpose the courts cannot decline jurisdiction, and must act in compliance therewith. But before so holding it seems to us that that purpose should be clearly manifested, and that a doubt in respect thereto should be resolved in favor of the government.

By 24 Stat. 505, c. 359, § 1, jurisdiction is given to the Court of Claims over actions against the United States for—

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort."

One contention is that there is an implied contract by the government to return to the payor any sum in excess of that which is legally due as the price of property, although the payment was made without any question, protest or notice.

No one can read the findings without recognizing that the transaction between the officials of the land office and the claimant was at the time acceptable to both and without any complaint on the part of the petitioner. Some stress is placed by counsel on the word "required" in the second finding, but we think that it means simply that the government officials charged him four hundred dollars. To that charge he made no objection. Take any case in which application is made to an official for services or for the purchase of property; when he names the fee or the price the applicant ordinarily without question pays it. In a certain sense the applicant is required to pay;

that is, the sum which he pays is the sum demanded of him. It may be a rightful or a wrongful demand. When it is demanded it is required. If he pays without objection, notice or protest it is simply in response to the call upon him for the particular sum, and, as we have heretofore said, between individuals it would be regarded as a voluntary payment.

Our attention has been called by counsel to certain opinions of this court, and some expressions therein, disconnected from the facts, doubtless lend countenance to their contention. Those cases may be placed in two classes: First, those in which something was purchased from the government which the purchaser wanted or must have; and, second, those in which some official of the government was called upon to return moneys he had received by virtue of his office. *Swift Company* v. *United States*, 111 U. S. 22, is an illustration of the first class. In that case the Swift Company sued to recover certain commissions alleged to be due on the purchase of proprietary stamps under the internal revenue law. It appeared that the company had settled with the internal revenue department from time to time, and it was held that such settlements did not bar it from its right to recover, although in making the settlements in controversy there was at the times thereof no distinct objection, notice or protest. It was contended by the government that the matter was closed by the voluntary action of the parties, but this court decided otherwise, predicating its decision upon the fact that there had been long-continued rulings of the department in respect to the basis of settlement, and that among those who had theretofore made frequent protests was William H. Swift, who upon the organization of the claimant company became one of its large stockholders and treasurer. It was held that the company was not compelled—in view of these repeated rulings, and after protests made by others engaged in the same business, including among the number one who was largely identified in interest with itself—to continue those protests at each settlement. In other words, the thought was that there was no magic in the mere formality of an objection at the time of each settlement; that when it appeared that parties engaged in like business had presented the question to the department and frequently pro-

tested against its rulings, and that among them was one who was largely instrumental in the organization of the company, one of its large stockholders and its treasurer, it was a work of supererogation to every time repeat the formal protest. But the very line of argument pursued by the court implied the fact that there must have been some action by the party paying, or those connected with it in business; that the attention of the department had been called to the matter again and again, its action protested against, and still it insisted upon the ruling which it had made. The claimant in the case was held to be so far identified with the parties who had made protests as to be entitled to avail itself of the benefit of such protests. The language found in the opinion as to the difference in the position occupied by the government and a party dealing with it must be understood in connection with those facts. If taken otherwise, and in the broad sense which counsel desire, and as carrying with it the suggestion that there can be no voluntary payment in a dealing between the government and an individual in respect to the purchase of property from the government, we must decline to accede to it.

We quote from the opinion in that case, pages 27 and following, that which shows the facts as understood by the court, and the language upon which the contention is here made:

"It appears that prior to June 30, 1866, the leading manufacturers of matches, among whom was William A. Swift, who, upon the organization of the claimant corporation in 1870, became one of its largest stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against its method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs; although it did not appear that any one in behalf of the claimant corporation ever, after its organization, made any such protest or objection, or any claim on account thereof, until January 8, 1879. On that date the appellant caused a letter to be written to the commissioner, asserting its claim for the amount, afterwards sued for, as due on account of commissions on stamps purchased. To this, on January 16, 1879, the commissioner replied, saying that the appellant had received all

commissions upon stamps to which it was entitled, 'provided the method of computing commissions, which was inaugurated with the first issue of private die proprietary stamps and has been continued by each of my predecessors, is correct. I have heretofore decided to adhere to the long established practice of the office in this regard until there shall be some legislation or a judicial decision to change it.' And the claim was, therefore, rejected.

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law, upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money; that it regulated all its forms, modes of business, receipts, accounts and returns upon that interpretation of the law; that it refused on application, prior to 1866 and subsequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to appellant that unless it complied with the exaction it should not continue its business; for it could not continue its business without stamps and it could not purchase stamps except upon the terms prescribed by the Commissioner of Internal Revenue. The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.*"

*United States* v. *Lee*, 106 U. S. 196, is not in point. The question there was as to the necessity of a tender on the day of sale in order to prevent the issue of a valid tax deed. The property was the Arlington estate, title to which was at the time in Mrs. Lee, and in respect thereto it was said (p. 204):

"It is proper to observe that there was evidence, uncontradicted, to show that Fendall appeared before the commissioners in due time and on the part of Mrs. Lee, in whom the title then was, offered to pay the taxes, interest and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person."

It also appeared that the commissioners had laid down a rule to the same effect, and the court held, under those circumstances, that no further tender was necessary, quoting the general rule laid down in *Hills* v. *Exchange Bank*, 105 U. S. 319, as follows (p. 202):

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

Of course, this decision bears only remotely on what is or what is not a voluntary payment, and not at all upon the question whether there be any right of recovery in case of a voluntary payment.

The *Bank of the United States* v. *The Bank of Washington*, 6 Pet. 8, is even less in point. There it appeared that a judgment had been rendered against the Bank of Washington; that it sued out a writ of error, and ultimately obtained a reversal of the judgment; but that before it sued out such writ of error, and while the judgment was in full force, it paid the amount thereof to one having in his possession an execution, notifying him at the same time that it intended to take proceedings to reverse the judgment. It was held that notwithstanding such notice no recovery could be had by the Bank of Washington from the party who had the execution, he holding not as owner of the judgment but simply as agent to collect; that while upon reversal a recovery might be had from the judgment creditor, a

payment to this third party created no cause of action against the party so receiving.

On the other hand, in *Lamborn* v. *County Commissioners*, 97 U. S. 181, Lamborn, trustee for a land company, whose lands had been sold for taxes to the county of Dickinson, paid the amount of taxes to the county and took an assignment of the tax sale certificates. It was subsequently decided that the taxes were illegal, and thereupon he brought this action to recover the amount he had paid. When he made the payment and took the assignment he made no protest, and it was held that he could not recover, the payment having been voluntary, and made simply under a mistake of law. Many cases are cited in the opinion sustaining that proposition. To the same effect is *Railroad Company* v. *Commissioners*, 98 U. S. 541.

The other class of cases is illustrated by *United States* v. *Lawson*, 101 U. S. 164, and *United States* v. *Ellsworth*, 101 U. S. 170. In each of those cases it appeared that a collector had received certain fees, some of which he was entitled to retain, but all of which he paid into the United States Treasury upon the peremptory order of the Commissioner of Customs. This was held not to be a voluntary payment or sufficient to prevent a recovery of the moneys actually due him, the court saying, in the second of these cases (p. 173):

"You will bear in mind, said the commissioner, that all moneys of every description, not received by warrant on the Treasury, must be actually deposited. Had he added, if you fail to comply, the law will be enforced, his meaning could not be misunderstood, as the act of Congress provides that the gross amount of all moneys received from whatever source for the use of the United States, with an exception immaterial in this case, shall be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable, without any abatement, etc. Rev. Stat. sec. 3617.

"Penalties are prescribed for noncompliance with that requirement, as follows: Every officer or agent who neglects or refuses to comply with that provision shall be subject to be removed from office and to forfeit any part or share of the moneys

withheld, to which he might otherwise be entitled. 14 Stat. 187; Rev. Stat. sec. 3619.

"Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain."

On the other hand, in *United States* v. *Wilson*, 168 U. S. 273, it appeared that a consul for the United States, in his regular accounts and settlements with the Secretary of the Treasury, charged himself with certain fees, received by him as consul, which he was not obliged to account for, and paid the same into the Treasury, retiring from office upon a final settlement without making any claim or protest concerning them, and it was held that he could not recover them, as they were voluntarily paid into the Treasury, the court saying (p. 276):

"There is no pretence that he paid the fees into the Treasury to avoid a controversy with any department of the government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so finds in substance. If a voluntary payment can be made to the government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the government, we think the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as a disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government without claim of any right to retain one penny of it."

It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered,

and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered.

We now proceed to notice some special objections of counsel for the appellee. One is that the defence of voluntary payment made in this case is exceptional and opposed to the entire policy of the government. Yet confessedly in all customs cases protest is necessary—made so by express statute. Counsel refer to *Elliott* v. *Swartwout*, 10 Pet. 137, 153, in which a reason for the necessity of protest was given as follows:

"To make the collector answerable, after he had paid over the money without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and there is no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against the suit."

And upon that say:

"It is evident that customs cases are a class by themselves, and that the reasons which make a protest absolutely necessary in such cases have no application to other cases. The questions arising in the administration of the customs laws are so delicate, with such subtle shades of difference, that it is absolutely necessary that the Treasury have notice when one of its rulings is to be disputed, in order that the evidence may be preserved. This necessity has crystallized into positive law, regulating the form and time for filing protests, and creating a separate jurisdiction for the trial of such causes apart from other claims against the government."

But *Elliott* v. *Swartwout* was decided before there was a Court of Claims, and the specific reason stated in the quotation would not apply to an action brought directly against the gov-

ernment in such court, and yet the necessity of protest is still affirmed by statute. So it cannot be said that the defence of voluntary payment is opposed to the entire policy of the government.

Passing from customs cases counsel refer to several instances in which the Interior Department has repaid money received under a mistake. Thus, in *M. F. Soto*, 6 Pub. Land Dec. 383, Secretary Lamar ordered, in respect to a series of cases, a return of the excess of moneys charged and received by the local land officers and paid into the Treasury of the United States. An examination of that decision shows that it was made under the act of June 16, 1880, heretofore referred to, which, in section 2, directed the repayment, and, in section 3, provided that—

"The Secretary of the Interior is authorized to make the payments herein provided for, out of any money in the Treasury not otherwise appropriated."

So, Congress having directed a repayment under conditions named in the statute, and authorized the Secretary of the Interior to make that repayment, the Secretary simply enforced the mandate of Congress.

*In re Thomas Kearney*, 7 Pub. Land Dec. 29, is to the same effect. It may be that the Secretary of the Interior misconstrued the law of June 16, 1880, as seems probable from our decision in *Medbury* v. *United States*, *supra*, but whether he did or no, his action was based upon that law. The same may be said of the case of *Jacob A. Gilford*, 8 Pub. Land Dec. 583.

*In re Frank A. White*, 17 Pub. Land Dec. 339, a case of desert land entry, is a decision that no repayment can be ordered in the absence of an express direction by Congress.

The case of *Albert Nelson*, 28 Pub. Land Dec. 248, referred to by counsel, is significant. In that case it was held that the repayment provisions of the act of June 16, 1880, did not authorize the Secretary of the Interior to draw his warrant upon the Treasury for double minimum excess erroneously charged for lands reduced in price by section 3 of the act of June 15, 1880, but that where the consideration received for the lands was in the form of scrip, still in the custody of the Land Depart-

ment, the error might be corrected by that department by a return of scrip equal in amount to the excess. That means simply that when a sale has not been closed by the payment of the consideration into the Treasury of the United States, and while the transaction is in process of administration and the consideration is still in the hands of the department charged with the duty of making the sale, it can correct a mistake in the amount of the consideration received, and that it is not necessary to turn the entire amount into the Treasury and leave the party to some other remedy directly against the government. But it does not follow therefrom that when the consideration has been paid into the Treasury and the power of the Secretary of the Interior to make any correction has ceased, a claimant may ignore the question of a voluntary payment, and maintain an action to recover the excess.

The conclusion we draw from these cases (and no others in respect to the ruling of the land department are referred to) is different from that drawn by counsel. That Congress has power in all cases to waive the question of voluntary payment and provide that any mistake shall be corrected and any excess of payment refunded by the officer receiving it, or recovered by an action in the Court of Claims, is undoubted; that, as shown by these references, it has made provision in certain cases for a refunding by the department which has received the money is obvious; and provided for such refunding irrespective of the question of voluntary payment. Now, counsel would draw the inference that the question of voluntary payment has been waived by Congress in all cases of transactions between the government through its administrative officers and private individuals except in customs cases, and that if there be no specific provision for refunding by the department in which the mistake has occurred, the party may come into the Court of Claims and enforce his right to recover. Our conclusion is directly to the contrary, and that Congress, recognizing the rule of voluntary payment, believed that in certain instances it ought not to be enforced, and that the department which received money in excess of the legal charge or price should refund, and so legislated, intending to leave all other cases subject to express statutory

requirement of protest or to the ordinary and well-established rule as to the effect of voluntary payment.

While the consequences of a construction are not conclusive, yet sometimes they are worthy of notice. If the jurisdiction of the Court of Claims is limited to cases in which the several departments have failed to recognize the direct mandates of Congress in respect to refunding, comparatively few cases will be brought into that court. It is to be assumed that the departmental officers will recognize all legislation of Congress, and carry it into effect in accordance with its terms, and, therefore, the only matters for judicial cognizance will be questions arising as to alleged misconstruction by such officers of its command, and the only judgments rendered against the government will be those in affirmance thereof; whereas, if the other construction is accepted, then, irrespective of any ruling by the department, without any mandate from Congress to refund, upon the mere fact of a supposed mistake in the fees charged or the price collected, although such fees or price were paid without question, the court will have jurisdiction of all actions to recover any alleged excess, and will be flooded with a multitude thereof. We know that even now that court is loaded with a volume of cases, prophetic of long delay, and if the door is to be opened so that all charges made by the government, through its officers, for fees or prices, irrespective of the question of voluntary payment, may be litigated therein, it is obvious that its docket will be so burdened that determination within ordinary limits of time cannot be expected.

Finally, we pass to a consideration of the question whether there is anything in the record to show that which is tantamount to objection and protest. We have not pursued the order of argument followed by counsel in their brief, but that which seems to us most natural to develop the questions involved herein. As indicated in the opinion in *Swift Co.* v. *United States*, *supra*, there are cases in which the formality of a protest or objection is unnecessary; some things may be taken as equivalent thereto or as sufficient in lieu thereof.

But we fail to see anything in the record which brings this case within the scope of that decision. It does not appear that

there was any continued or even a single ruling of the land department to the effect that land situated as was this was subject to the price of $2.50 per acre, and, of course, if there had been no ruling to that effect there had been no objection or protest by any one. Nor is there anything to show that the $2.50 was paid on any supposition that it was an excessive charge, or paid simply for the purpose of protecting a property right which he had acquired. It is said that as he had already gone upon the land and made improvements, that he paid $400 to protect his right to his settlement and improvements, and that he paid it because such price was exacted from him; but there is nothing in the record to indicate that he did not go upon the land in the first instance supposing that the price was $400, or that he did not file his declaratory statement, make his settlement and improvements—all with the expectation of paying the sum which he did thereafter pay. Under those circumstances it cannot be said that he paid a sum which was exacted from him—not because he believed it was the proper charge, but because he felt that it was necessary to protect his rights. In short, and to sum it up in a word, so far as we can see from this record the transaction was purely voluntary on his part, and that while there was a mistake it was mutual and one of law—a mistake on his part not induced by any attempt to deceive or misrepresentation by the government officials. It is a case of a voluntary payment, and as such the claimant's remedy is by appeal to the discretion of Congress and not by an action in the Court of Claims.

*The judgment is reversed, and the case remanded with instructions to enter judgment for the Government.*

# LOCKHART *v.* JOHNSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 147. Argued March 22, 1901.—Decided May 13, 1901.

Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority, or by an executive withdrawal under such authority, either express or implied.

Under the act establishing the Court of Private Land Claims, public lands belonging to the United States, though within the claimed limits of a Mexican grant, became open to entry and sale.

If the provisions of the laws of New Mexico, in force when this location was made, were not complied with, and another location is made before such work was done, the new location is a valid location.

In the courts of the United States in action of ejectment the strict legal title must prevail; and if the plaintiff have only equities, they must be presented on the equity side of the court.

Although the plaintiff has no right to maintain this action, he ought not to be embarrassed by a judgment here from pursuing any other remedy against the defendants, or either of them that he may be advised.

This was an action of ejectment brought by plaintiff in error to recover certain mining property in the Territory of New Mexico. The declaration alleges that the plaintiff, on July 10, 1893, was entitled to the possession of a certain mine, or deposit of mineral-bearing rock in place, situated in the Cochiti mining district, in the county of Bernalillo and Territory of New Mexico, and that while so in possession the defendants, on October 1, 1893, entered into and upon the premises and have ever since withheld the possession of the same from the plaintiff to his damage. All the defendants pleaded not guilty, while Pilkey added a further plea that he was not at the time of the commencement of the action in the possession of the premises or any part thereof. The plaintiff demurred to this second plea, and after argument the demurrer was overruled. The parties went to trial upon these pleadings, and after the

testimony had been taken the jury, under the instructions of the court, found a verdict for the defendants. The plaintiff appealed from the judgment entered upon the verdict to the Supreme Court of the Territory, where it was affirmed, and he thereupon sued out a writ of error from this court.

For the purpose of the trial the parties entered into the following stipulation:

"It is stipulated and agreed by and between the plaintiff and defendants in the above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor general of the Territory of New Mexico, known as the Canada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29, A. D. 1885.

"It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same were filed in the Court of Private Land Claims, one by Joel Parker Whitney, José Juan Lucero, Laurino Lucero, Juan Cristoval Lucero, José de Jesus Lucero, Juan Toedora Lucero, José Telesforo Lucero, Bernard S. Rodey, and Hannah Harris, being numbered 205 of the docket of the Court of Private Land Claims at Santa Fé, and filed March 2, 1893; and the other petition being filed by Manuel Hurtado and José Antonio Gallego on the 3d day of March, 1893, and that said petitions were consolidated in said cases heard, and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894, a compared copy of which decree is attached to this stipulation.

"It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed by said decree.

"It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895.

"It is further stipulated and agreed that the official printed

copies of the reports of the surveyor-general to Congress upon said private land claim and all documents attached thereto may be used upon the trial of this cause to the same effect as if they were the original documents and archives on file in the surveyor general's office, subject, however, to such objection as the parties may make upon other grounds."

The plaintiff also showed upon the trial that he and one Benjamin Johnson and the defendant Charles Pilkey on or about May 7, 1893, entered into an agreement at Albuquerque, New Mexico, by which they agreed to form a partnership for the purpose of discovering, locating and operating mining claims, Pilkey agreeing to prospect and locate such veins and lodes and places as he might discover, containing valuable ores or minerals, in the name and for the joint benefit of all the parties to the agreement, in the proportion of one third interest to himself and an undivided two thirds interest to the others. They were to furnish him with tools, etc., and to pay him for some portion of his labor upon the mines which he might discover. In pursuance of this agreement Pilkey started out and among others discovered, took possession of and assumed to locate the mine in question. It is claimed on the part of the plaintiff that Pilkey, after taking possession of and locating the mine, remained there from July 10, 1893, until some time in October of that year, when in connection with several other persons he entered into a conspiracy against his partners and pursuant thereto ceased to do any work on the mine and permitted other persons (defendants herein) to take possession of it and make a relocation thereof, and that they have retained possession ever since.

Evidence was offered at the trial for the purpose of showing these last stated facts, which, under the objection of the defendants, was ruled out and exceptions duly taken.

The defendants contended that the land in controversy was at all times subject to the mining laws of the United States, and that plaintiff did not comply with the provisions thereof or of the laws of New Mexico applicable thereto, and that whatever right or title he ever had in the lands had expired and be-

come forfeited before the defendants took possession of the land and long before the commencement of this action.

*Mr. J. H. McGowan* for plaintiff in error.

*Mr. William B. Childers* for defendants in error.

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

The first question to be determined in this case is one which arises out of the facts set forth in the stipulation between the parties, and that is, Did the lands which the plaintiff claims to recover belong at the time of the location in 1893 to the United States within the meaning of section 2319, Revised Statutes, which provides that "all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States," etc.?

At the time of the location the record shows the parties believed the land was government land and not within the limits of any Mexican grant. The stipulation shows, however, that the lands were in fact within the limits of the private land claim known as the Canada de Cochiti grant; that the grant was never confirmed by Congress upon the report of the surveyor general, and that two different sets of claimants under the grant had filed their petitions in the Court of Private Land Claims at Santa Fé, one on the 2d and the other on the 3d day of March, 1893; that there was a decree of confirmation rendered by the court on September 29, 1894, and in that decree of confirmation the lands were not included within the boundaries of the grant as confirmed by that decree. An appeal was taken therefrom by all the parties to the Supreme Court of the United States, where it was pending at the time the stipulation was entered into, the appeal being dated March 11, 1895.

It therefore appears that at the time of the discovery and location of the lode in July, 1893, the Cochiti grant was before the

Court of Private Land Claims for adjudication, and the question is whether by reason of that fact these lands were reserved from entry and were not subject to the mineral laws of the United States at that time. It will be noticed that before the trial of this case the validity and extent of the Cochiti grant had been decided by the Court of Private Land Claims, and this land was thereby excluded from the limits of that grant. We know by our own records that the decree of the Court of Private Land Claims was affirmed in this court, in substance, in *Whitney* v. *United States*, decided in May, 1897. 167 U. S. 529. The contention on the part of the plaintiff in error is that while the Cochiti claim was before the Court of Private Land Claims, and thereafter until its final determination by this court, no land within its claimed limits could be entered upon under the mining laws of the United States, and if any such entry were in fact made it was illegal and void, and gave no rights under the mining laws to the parties so entering, and consequently plaintiff's possession was not subject to forfeiture under those laws. In other words, that while the claim was *sub judice* all lands within its limits as claimed were withdrawn and reserved from entry under any of the laws pertaining to the sale or other disposition of the public lands of the United States, and that the plaintiff, being in possession, had the right to retain it as against defendants who entered without right or title, and were therefore mere trespassers.

Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied. *Wolsey* v. *Chapman*, 101 U. S. 755, 769; *Hewitt* v. *Schultz*, 180 U. S. 139. We must, therefore, refer to the action of Congress to discover whether lands which in fact were public lands of the United States were reserved from sale or other disposition under its public laws because they were included within the claimed limits but in fact were not within the actual limits of a grant by the Spanish or Mexican authorities before the cession of the

territory by Mexico to the United States by the treaty of Guadalupe Hidalgo of February 2, 1848. 9 Stat. 922. The eighth and ninth articles of that treaty provide that the property of every kind belonging to Mexicans in the ceded territory should be respected by the government of the United States and their title recognized.

By the act of July 22, 1854, c. 103, 10 Stat. 308, Congress established the office of surveyor general of the Territory of New Mexico, and in the eighth section of that statute it was made the duty of that officer, under instructions from the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico. He was to make a full report of all such claims as originated before the cession of the territory to the United States by the treaty above mentioned, with his decision as to the validity or invalidity of each. This report was to be laid before Congress for such action thereon as it might deem just and proper, "and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

The Cochiti grant came before the surveyor general pursuant to the provisions of the act of 1854, and therefore by the terms of that portion of section eight, just quoted, the lands were reserved from sale or other disposal by the government until final action by Congress thereon. Up to March 3, 1891, Congress had taken no action in regard to this grant and on that day it passed the act establishing the Court of Private Land Claims, 26 Stat. 854, c. 539; and by its fifteenth section Congress in terms repealed the eighth section of the act of 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act." By this repeal, lands which were in fact public lands belonging to the United States, although within the claimed limits of a Mexican grant, became open to entry and sale under the laws of the United States, unless, as is the contention of plaintiff, such lands were reserved from

entry and sale or other disposition by the United States, by reason of the provisions of the treaty with Mexico. We see nothing in the terms of that treaty, either in the eighth or ninth article, that could be construed as a withdrawal of lands which in fact were the public lands of the United States, although contained within the claimed limits of some Mexican grant made prior to the cession to the United States. The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale.

We are aware that the land department has in some cases taken a different view of this subject. In the *Tumacacori* and *Calabazas grant*, 16 L. D. 408, 423, the Secretary held that the act of 1891, creating the court of Private Land Claims, did not by its fifteenth section, "either by expression or necessary implication, revoke or annul the statutory reservations in force at the time of its passage."

And in the *Joseph Farr claim*, 24 L. D. 1, the Secretary held that by the terms of the treaties between the United States and the Republic of Mexico all lands embraced within the Mexican and Spanish grants were placed in a state of reservation for the ascertainment of the rights claimed under said grants, and that the act of March 3, 1891, continued that reservation in force, and that it would remain so until final action is taken on the respective claims or grants affected thereby.

We cannot agree with these decisions. In the last case the Secretary held, in opposition to the views expressed by his predecessor in the earlier case, that the lands were not reserved by virtue of the statutory reservation under the act of 1854, because that section was repealed by the fifteenth section of the act of 1891 without any qualification, and the repeal went to the entire section; but he held that, "Whatever may have been the purpose of Congress in making said reservation, it is clear that all lands embraced within the claimed limits of grants made by Mexico or Spain prior to said treaty were in a state of reservation under the terms of the treaty itself, independent of any reservation that might be made after such treaty was duly rati-

fied. It follows that the repeal of the section of the statute containing the reservation would not have the effect of releasing lands reserved under treaty obligations from such reservation."

As we have already stated, there are no words in the treaty with Mexico expressly withdrawing from sale all lands within the claimed limits of a Mexican grant, and we do not think there is any language in the treaty which implies a reservation of that kind. Whatever reservation there is must be looked for in the statutes of the United States, and we are of opinion that there is no such reservation and has been none since the repeal of the eighth section of the act of 1854.

In *Stoddard* v. *Chambers*, 2 How. 284, the action was ejectment for lands in Missouri, the defendant claimed title under a New Madrid certificate permitting location upon the public lands which had been authorized to be sold under an act of Congress, approved February 15, 1811, by which the President was authorized to sell public lands in the Territory of Louisiana, with a proviso that "till after the decision of Congress thereon no tract shall be offered for sale the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana."

From the time of the passage of that act up to May 26, 1829, it was not questioned that all lands claimed under French or Spanish title were reserved from sale by acts of Congress. On May 26, 1829, this reservation ceased until it was revived by the act of July 9, 1832, and was continued from that time until the act of 1836. The defendant's patent was issued on July 16, 1832—after the time when the reservation was revived by the act of July 9, 1832. In speaking of the location under his New Madrid certificate by the defendant, the court said (at p. 318): "His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title

of the defendant could not be contested. But at no other interval of time, from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate."

So in that case it appears that unless there were a reservation of the land by Congressional action, it was not reserved in any other way, and that during the interval of three years, when the reservation by the act of Congress was not in operation, an entry made during that time would have been valid, and the title of the defendant thereunder could not have been contested.

Mineral lands are not supposed to have been granted under ordinary Mexican grants of lands, and the act of 1891 provides that minerals do not pass by such grants, unless the grant claimed to effect the donation or sale of such mines or minerals to the grantee, or unless such grantee became otherwise entitled thereto in law or in equity; the mines and minerals remaining the property of the United States, with the right of working the same, but no mine was to be worked or any property confirmed under the act of 1891 without the consent of the owner of such property, until specially authorized thereto by an act of Congress thereafter to be passed. (Section 13, subdivision third, act of 1891.) This provision makes it still plainer that, so far as regards mineral lands, there was no intention after the passage of the act of 1891 that they should be reserved by a mere claim in a Mexican grant of ordinary land.

Nor does the claim that the Cochiti grant was *sub judice* at the time of the location of these lands affect their status as public lands belonging to the United States. They were not, in fact, within the limits of the grant.

The case of *Astiazaran* v. *Santa Rita Land & Mining Company*, 148 U. S. 80, is not in point. In that case it was held that a private claim to land in Arizona, under a Mexican grant which had been reported to Congress by the surveyor general of the territory, could not, before Congress had acted on the report, be contested in the courts of justices. It was stated (p. 83) that, "The case is one of those, jurisdiction of which has been committed to a particular tribunal, and which cannot, therefore—at least, while proceedings are pending before that tribunal—be

taken up and decided by any other." The court further said that Congress having constituted itself the tribunal to finally determine upon the report and recommendation of the surveyor general whether the claim was valid or invalid, the proceedings were pending until Congress acted, and while they were pending the question of the title of the petitioner could not be contested in the ordinary courts of justice. This is no such case. There was no contest in any other court by which the validity or extent of the grant pending for decision in the Court of Private Land Claims could in any way be affected. No court of justice had been appealed to for any such purpose. The question was simply whether the land was public land open to entry under the laws of the United States, and this was a question which parties might decide at the peril of having their acts rendered of no avail if the decision of the Court of Private Land Claims included those lands in the grant then before it.

Nor does the case of *Newhall* v. *Sanger*, 92 U. S. 761, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interier ordered a withdrawal of lands along the route of the railroad, were not embraced in the Congressional grant to the company. The decision went upon the ground that the legislation of Congress had been so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. The act of March 3, 1851, 9 Stat. 631, 633, sec. 13, which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of its provisions the lands were not public lands under the laws of the United States until the claims thereto had been either barred by lapse of time or rejected. The sixth section of the act of 1853, March 3, 10 Stat. 244, 246, was also referred to as expressly excepting all lands claimed under any foreign grant or title. There was no such legislation existing in regard to New Mexico at the time of the location of this mining claim, July, 1893. The lands were in fact and have been since their cession to this country public lands of the

United States, although during the period between the passage of the act of 1854 and that of 1891 they were not open for sale or other disposition while the claims to such lands were undetermined.

Being public land and since 1891 open to location under the mining laws of the United States, it is further contended on the part of defendants that the location of the claim made by Pilkey on July 10, 1893, in behalf of himself and his two partners, Lockhart the plaintiff herein and Johnson, became forfeited by reason of noncompliance with the mining statutes of the United States and also the Territory of New Mexico, and that while such failure to comply with the statutes continued, peaceable possession of the land was taken and a relocation made by the defendants, and whatever rights the plaintiff ever had under the first location were thereby cut off.

The laws of New Mexico in force at the time when this location was made provide that a person desiring to locate a mining claim must distinctly mark the location on the ground so that its boundaries may be readily traced, and must post in some conspicuous place on the ground a notice in writing stating the names of the locators, their intention to locate the claim, giving a description thereof by reference to some natural object or permanent monument so as to identify it, and must also within three months after such posting cause a copy of the notice to be recorded in the office of the recorder of the county in which the notice is posted. The locator must also within ninety days from the date of taking possession of the claim sink a discovery shaft upon the claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or he shall drive a tunnel, adit or open cut upon such claim at least ten feet below the surface exposing mineral in place. By the provisions of the act of 1889 the surface boundaries of all mining claims located must also be marked by four substantial posts, or four substantial monuments of stone set at each corner of the claim, and which posts or monuments must be plainly marked so as to indicate the direction of the claim from each monument or post. Sec. 2286, Compiled Laws of N. M. 1897; secs. 1 and 2, chap. 25, Laws N. M. 1889.

Opinion of the Court.

There is no pretence in the evidence that these things were done other than the posting of a notice upon a pile of rocks at some point within the claim. No work was done, no monuments or posts set, no discovery shaft sunk, nor any tunnel, adit or open cut driven, as provided by law. It also appears that some time about the last of September or the early part of October, 1893, Pilkey, who was the only one of the partners who went to the land and stayed near it at any time, left the neighborhood with his wife and came to Albuquerque and remained there until November, 1893, and that while he was absent and no one in possession of the land, and on or about October 23, 1893, four of the original defendants, Fagaly, Walker, Leeds and Johnson, located this claim and peaceably entered upon and took possession of it.

If the statutes are not complied with by doing the work as therein provided, and another locates before such work is done, it is a valid location. *Faxon* v. *Barnard*, 4 Fed. Rep. 702; *Belk* v. *Meagher*, 104 U. S. 279, 282.

It is undisputed that the requisite amount of work was not done by the first locator, nor is there any dispute that he left the mine, certainly early in October, 1893, and that there was no one in possession of the land on the 23d of October, 1893, when the above-named defendants entered upon the land, peaceably took possession thereof and made their location, and that in such location Pilkey did not join, and his name was absent from the notice, and he was not present when possession was taken by the other defendants.

These undisputed facts are shown by the record, and upon such evidence the court directed a verdict for the defendants. The Supreme Court of the Territory has affirmed the judgment entered upon this verdict, on the ground that the land was public land of the United States and open to location under the mineral laws thereof; that the failure of the original locator to comply with the terms of the statutes of the United States and of New Mexico by doing the work therein prescribed forfeited all his rights under such location, and the peaceable location and possession by others while such failure continued were valid, and the plaintiff therefore showed no legal title to the mine, and con-

sequently could not recover in this action. Upon the facts thus stated we think the Supreme Court was right.

In the course of the trial, however, while the cause was with the plaintiff, he offered to show certain other and further facts which he claimed entitled him to recover the lands as against all the defendants. The defendants objected to the evidence so offered on the ground that it was inadmissible and immaterial in this action, and the objection was sustained and the plaintiff duly excepted.

The facts which the plaintiff sought to prove are briefly these: After Pilkey and the plaintiff and Johnson had entered into their agreement, and while Pilkey was, pursuant to its provisions, engaged in prospecting, he discovered the mine in question and located it in the name of himself and his partners, and thereafter and before the expiration of the ninety days in which to do the necessary work on the claim he and the other defendants conspired together, and agreed that he should do no work on the mine within the statutory time, and after the expiration of that time and a forfeiture had been incurred by a failure to comply with the statutes the other parties defendant should relocate the mine, comply with the laws in regard to doing the work upon it and thereby obtain the ownership thereof, and that pursuant to such conspiracy he did neglect to do the necessary work within the statutory time, the defendants relocated the mine, entered into the possession thereof and did the necessary work thereon and have remained in possession ever since. The plaintiff, therefore, claims that Pilkey, being one of the conspirators with the other defendants and also a copartner of plaintiff, could not be a party to a hostile relocation of the mine, and that any such relocation by others, under an agreement with him, was illegal, and gave no right or title to defendants, and that the prior possession of plaintiff, through his copartner, continued in law, and, as against the defendants, such possession gave plaintiff a good title, they being on account of their fraud mere trespassers upon the land.

Much of the testimony thus given is denied on the part of Pilkey, but as all of it was rejected by the court we must assume its truth for the purpose of determining the case.

It is clear that the statutes providing for a location of mining lands were not complied with by Lockhart or his partners. There is no dispute on that subject. When peaceable possession of the mine which Pilkey had abandoned was taken and the relocation was made by the defendants Fagaly, Walker, Leeds and Johnson, and in their own names, whatever legal title to the mine the plaintiff Lockhart had by virtue of the prior location by defendant Pilkey was cut off. The plaintiff has now brought this purely legal action of ejectment, and must recover upon the strength of his legal title, or not at all. It is undisputed that whatever possession Pilkey had ever taken of the land in question had been in fact abandoned by him as early as the first of October, 1893. Lockhart had never had any other than constructive possession of the land based upon the alleged actual possession of his copartner, and when the latter abandoned such actual possession, left the mine and came to Albuquerque, the constructive possession of plaintiff ceased at the same moment. When the four defendants who took possession of and relocated the mine went on the land on October 23, 1893, they found it vacant, and when they took peaceable possession of the vacant land before any resumption of work upon the claim by plaintiff or in his behalf, the latter's legal title, whatever it had been, ceased. It is not a case, therefore, of a prior possession under color of law or title being sufficient as against an ouster by a mere trespasser. There has been no ouster, but on the contrary a complete abandonment of possession. Whatever may be the equities of the plaintiff, in regard to this land as against the defendants, he has certainly no legal title to the mine or any part thereof, and in this purely legal action he must fail.

In the courts of the United States in an action of ejectment the strict legal title must prevail, and if the plaintiff have only equities they must be presented and considered on the equity side of the court. *Foster* v. *Mora*, 98 U. S. 425, 428; *Johnson* v. *Christian*, 128 U. S. 374, 382. The law of New Mexico is to the same effect. Compiled Laws of N. M. sec. 3160, and following sections.

Whatever the rights of the plaintiff may be, (and as to what

they are we express no opinion,) it is clear that on this record he cannot maintain an action of ejectment. If he have rights as a copartner or cotenant with Pilkey, and he claims that the acts of the latter inure to his benefit in any way, his rights under such circumstances can be enforced in equity. *Turner* v. *Sawyer*, 150 U. S. 578, 586.

In relation to mining, it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up, is against the copartner or cotenant, by an action for a breach of his contract or to establish and enforce a trust in the claim as relocated against the parties relocating. *Saunders* v. *Mackay*, 5 Montana, 523; *Doherty* v. *Morris*, 11 Colorado, 12.

In this case it will be seen that the relocation on behalf of some of the defendants did not contain Pilkey's name, and hence he never had any legal title under that location. He denies that he had any interest in the mine under the relocation, and asserts that it was not made in his interest or for his benefit. Although the plaintiff has no right to maintain this action, yet he ought not to be embarrassed by a judgment here from pursuing any other remedy against the defendants or either of them that he may be advised; and in order to avoid any complication of that nature which possibly might result from an absolute affirmance of the judgment of the Supreme Court of the Territory, we modify the terms of that judgment by providing that it is entered without prejudice to the enforcement by other remedies, of the rights, if any, which the plaintiff may have against the parties defendant or either of them, and, as so modified, such judgment is

*Affirmed.*

# WELLS *v.* SAVANNAH.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 222. Argued April 9, 1901.—Decided May 13, 1901.

Payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment.

The validity of such a contract presupposes a good consideration therefor.

In this case the ordinances exempting from taxation were only exemptions for the year in which the ordinance was passed; and the same rule applies to all the exempting ordinances.

The views of the Supreme Court of Georgia in this case are sustained by this court.

THE plaintiffs in error commenced this proceeding in the superior court of the State of Georgia, Chatham County, against the mayor, etc., of the city of Savannah and its city marshal, to enjoin the collection of taxes upon certain real estate in that city, of which they claim to be lessees from the city, and they allege that the taxes assessed upon such real estate are illegal; they also seek to recover from the city the amount of taxes theretofore paid by them on such real estate, under protest. The trial of the case resulted in a judgment for the city, which was, on appeal to the Supreme Court of the State, affirmed, and the plaintiffs have brought the case here on writ of error.

They claim that the levying and collection of the taxes referred to, under an ordinance of the city providing therefor, passed in 1878, constitute an impairment of the obligations of a contract between the city and the predecessors in title of the plaintiffs in error, made at the time the real estate was purchased, by which contract it was agreed that on the payment of a certain annual sum, called "ground rent," to the city by the holders of the real estate, it was to be forever exempt from all city taxation.

Upon the trial of the action these facts appeared: Prior to

1790 the city of Savannah owned certain lots which were called "common lots," and on September 28 of that year the common council passed an ordinance for disposing of a portion of them. Each lot, by the provisions of the ordinance, was to be valued by the city, and then put up for sale at public outcry, and the highest bidder, over and including the original valuation, was to have the lot, and if he chose to pay the whole amount of his bid in cash he was to have a deed conveying it to him in fee simple, or he might, instead of making the whole cash payment, agree with the city to pay in cash the balance of his bid over the valuation, called the increase money, and also to pay a ground rent of five per centum upon the amount of the valuation, payable quarterly, and in that event the lot might be retained in his hands or in the hands of his heirs and assigns forever on payment of such ground rent. The ordinance further provided that at any time thereafter the purchaser or his heirs or assigns should have the power to pay the original valuation money, with what rent might be due up to that time, in full discharge and extinguishment of the ground rent, and he or they should thereupon be entitled to the land in fee simple. The city was also to give a deed by way of bargain and sale to each purchaser of lots which should vest an absolute or conditional estate in the purchaser, according to the circumstances; that is to say, an absolute one if the valuation and increase money should be paid down, or a conditional one if the valuation money should not be paid down, but which should become absolute if and when the valuation money should at any future time be paid into the treasury, which payment should be acknowledged by the mayor and a majority of the aldermen, under the seal of the city and attested by the city treasurer, to be endorsed on the deed. The ordinance continued:

"And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on failure therein for the space of fifteen days after the same shall become due the said premises are to revert to the corporation, who shall immediately thereafter possess the power of reëntry, and having by means of

Statement of the Case.

their proper officers exercised such power and given a notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes, as fully as if the same had not been bargained for or purchased, any sale or incumbrance or other act, made or suffered by the purchaser or purchasers or others under him, her or them, to the contrary thereof in anywise notwithstanding."

Pursuant to such ordinance the lands were sold and the purchasers of many of the lots elected to hold their purchases on ground rent payable quarterly, as stated in the ordinance. Deeds were thereupon executed on the part of the city and also were signed by the respective purchasers. Lands have been sold from time to time under ordinances of substantially the same character and containing language in substance the same up to 1872, since which time conditional sales have been abandoned.

The deeds contained a provision that "In consideration of the rent to be paid, and of the several covenants and agreements to be performed, (mayor and aldermen,) have bargained and sold, and by these presents do bargain and sell, unto the said ——— ——— all that lot of land (describing it) . . . unto the said ——— ——— executors, administrators and assigns, forever, on this express condition. Nevertheless, that ——— ——— the said ——— ——— executors, and administrators and assigns," shall pay rent as covenanted; and "in case of failure herein for the space of twenty days after any of the said quarterly payments shall become due, that then the said lot and premises shall revert to the corporation of the said city, who shall immediately thereafter possess the power of reentry; and having, by means of their proper officers, exercised such power, and given a notice thereof in writing, posted on the premises, the said lot, with all improvements thereon, shall be considered, at the expiration of ten days thereafter, as absolutely revested in the corporation, and the estate by these presents created determined to all intents and purposes as fully

as if the same had not been bargained for or purchased; any sale or incumbrance, or other act made or suffered by the said ——— ——— executors, administrators or assigns, or others under him or them, to the contrary thereof in anywise notwithstanding."

The purchaser also covenanted to pay the annual rent, and that in case of failure the city should have the lawful right of reëntry as already provided for.

The deed also contained the following provision:

"And it is hereby declared to be the true intent and meaning of these presents, and all parties to the same, that, on payment of the said ground rent, at the times and after the manner hereinbefore directed, the said ——— ——— heirs, executors, administrators and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said lot and premises, and receive and take the rents, issues and profits thereof, and of every part thereof, to ——— and ——— own use, absolutely, without the let, suit, trouble, eviction or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority, subject only to such assessments and burthens as shall be in common with other lotholders in the said city."

It was also provided in the deed that the purchaser, his heirs, executors or administrators or assigns, might at any time pay into the city treasury the valuation money and the rent then due, in full discharge and extinguishment of such rent, and in that case there should be an acknowledgment of such payment under the seal of the city, signed by the mayor and a majority of the aldermen and attested by the city clerk, and indorsed on the deed, "which shall then and from thenceforth vest an absolute estate, in fee simple, of and in the said lot and premises, in the said ——— ——— heirs and assigns to ——— and their only proper use and behoof forever." It is admitted that the same character of deed has been executed for lots sold under other sales since 1790.

Extracts from the minutes of the proceedings of the common council of the city, in regard to meetings of that body in 1790

and thereafter, were put in evidence, from which it appeared that the ordinance for the sale of these lots was induced by the fact that the expenses of the city government were more than its revenues, and these sales were provided for in the hope that the condition of the city's finances might thereby be improved. There was also put in evidence a notice of sale of lots, advertised in The Georgia Gazette of June 13, 1799, in which were specified the terms contained in the ordinance for the sale of the lots, and the advertisement contained the statement that the "purchasers are at liberty to take a lease to him or her or his heirs and assigns forever of the lots so purchased, at a ground rent of five per cent on the valuation," etc.

An ordinance for laying off into city lots what was called the "Springfield Plantation," and providing for the sale of the same, passed in the year 1851, was also put in evidence, which contained substantially the same plan as that provided for in the ordinance of September 28, 1790, except that the conditional sale was to be for twenty-four years only. Although the lots mentioned in the petition of the plaintiffs in error in this case are not situated within the Springfield Plantation, the ordinance and the deed thereunder regarding those lots were put in evidence for the purpose of comparison with the ordinance of 1790, and the deeds executed thereunder, in order to show that the same language, except as to the term, was used in the instrument which granted a lease for but twenty-four years as was used in the other granting a perpetual term. There were also ordinances of February 27 and July 31, 1851, put in evidence, the former of which permitted one of two or more tenants in common or joint tenants to pay his proportion of the purchase money, and, upon such payment, he should receive a deed in fee, and any lessee of a city lot might, on application, have it divided into two or more parts and receive a lease for the same; and the other ordinance provided for increasing the depth of certain lots, at an increased rent therefor, payable at the same time that the regular ground rents on these lots fell due.

A report of the mayor in 1854, to the common council, was put in evidence, in which was a statement of the resources of

the city of Savannah, among which were designated 643 lots in 22 wards "under lease;" also two reports of the mayor, the one on October 31, 1855, and the other a year later, both containing similar statements as to the number of lots belonging to the city, which were "under lease," and similar reports from and including 1857, up to and including 1877, with the exception of the years 1864 and 1865, when no report was made by the mayors of the city. This class of evidence was offered for the purpose of showing that the title conveyed to the purchasers was under a lease, and that it was not a conditional estate subject to be terminated by a breach of a condition subsequent, and that the city recognized the conveyance as a lease and not in truth as a conditional estate.

On April 7, 1806, an ordinance was passed by the city council for raising a fund for the support of a "watch" in the city, which provided that a tax should be levied on property therein, "including all lots held by lease from the corporation," but on November 24, 1806, an ordinance was passed providing "that so much of the first section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation . . . be and the same is hereby repealed."

It was admitted that every annual tax ordinance to raise revenue for the city passed by the mayor and aldermen from the above date, November 24, 1806, up to and including the ordinance of January 22, 1857, used the words "excepting lots held by lease from the corporation." On December 11, 1857, the tax ordinance provided as follows:

"SEC. 4. The following real property shall be exempt from taxation, to wit: each lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen, of the class commonly called city lots."

The annual report of the mayor for the year 1871 was also put in evidence, in which the following language occurs: "It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and are, therefore, not the subject of taxation, and are not included in the assessments."

It was also admitted that lots known as "ground rent lots"

were never in fact assessed for taxation from 1790 until some time after the passage of the ordinance of May 29, 1878, and that those lots were omitted from the assessment books made in 1807 and every year thereafter down to the assessment book made out in the year 1878, and that in fact no city taxes were ever levied on them until after the resolution of the common council of November 17, 1889, under which they have been for the first time assessed for city taxation for the year 1890.

It was also admitted that no taxes were in fact assessed or levied under the ordinance of April 7, 1806, above mentioned. The holders of these city lots have always paid state and county taxes and street improvements and assessments for sidewalks and all other assessments and burdens common to lot owners in the said city, except city taxes. A report of the finance committee made in 1872, and signed by the chairman, was also put in evidence, in which it was stated as follows:

"The reason why city lots are not taxed beyond the ground rent is that the city is understood to have bound itself not to tax them.

"The ordinance of 1790, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such a lot, and all claiming under him, shall have the use, etc., upon paying the ground rent. This ordinance has been followed either in terms or substance by all succeeding ordinances providing for such sale.

"It is of no moment that the stipulation does not appear in the deeds; the ordinances contain the real terms of the contracts and control the deeds whenever the latter depart from them or conflict with them. And as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

The ordinance of May 29, 1878, provided that—

"Every person and corporation owning real property in said city, including improvements, shall pay a tax upon said property of two and one half per centum of the value thereof, including ground-rent lots, except on such property as may be exempt from taxation under the laws of this State."

Counsel for Parties.

The city is given full power of taxation by state legislation. Code of 1863, sec. 4756; Code of 1882, sec. 4847.

Oral evidence was also given from which it appeared that on sales of the property under various ordinances of the same nature as that of 1790 the city marshal by whom the sales were made "would announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under authority of the committee. And often when the bidding would lag the marshal would remind the bystanders that there was only a twenty per cent cash payment required, and that there was no city taxes, but only an annual ground rent."

One of the witnesses, who was himself at the time of some of the sales an alderman between 1858 and 1869, stated:

"I, as a city official, in good faith, have made the statement and directed the marshal so to announce when making sales of city lots under my supervision as chairman of the committee on public sales and city lots, and under the common and universal construction of the city deeds, the absence of any reservation of a right to tax the lots sold under ground rent has always been construed as an agreement not to tax."

Another witness said that he would not say that the city of Savannah ever at any time formally agreed not to tax ground-rent lots; he did not know of any official action taken thereon by the city.

The above are substantially the facts upon which the contention of the plaintiffs in error that their lots are exempt from city taxation is founded. There is no evidence that any of them bought their lots at a sale where an announcement of exemption was made, or that they purchased them under the belief that they were forever legally exempt from all city taxation.

They also claimed that the deed itself, irrespective of the above testimony, necessarily and by its terms implies a perpetual exemption from all city taxation upon the lots so long as the ground rent is paid.

*Mr. Pope Barrow* and *Mr. Joachin R. Saussy* for plaintiffs in error.

Opinion of the Court.

*Mr. Samuel B. Adams* for defendants in error.

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

The contention on the part of the plaintiffs in error is that, in the exercise of the taxing power granted it by the legislature, the common council of the city adopted the ordinance of May, 1878, and in providing therein for the taxation of the leased lots it thereby impaired the obligation of the contract existing between the city and the holders of that class of property, among whom are the plaintiffs in error, and the ordinance is therefore to that extent void. This contract they say is evidenced, first, by the ordinance of 1790 and the deeds executed in pursuance of its provisions; also by the minutes of the common council of the city and by subsequent proceedings of the common council; by the statements of the city officials at the time when some of the sales of the property were made; by the reports of the officials, mayors of the city and committees of the common council; by the actual omission for a hundred years—from 1790 to 1890—to tax these lots; also by ordinances similar to that of 1790 for the sale of lots, passed subsequently to that year, and by the deeds executed pursuant to such ordinances, which, it is admitted, were in substance similar to those executed under the ordinance of 1790.

Taking all the foregoing evidence into consideration, including the ordinance of 1790 and the deeds executed under it, we are unable to see that any contract of exemption has been proved. The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt

that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist. This has been many times decided by this court. *Tucker* v. *Ferguson*, 22 Wall. 527, 573; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146, and cases cited.

The different annual ordinances for taxation passed by the common council, exempting from taxation thereunder the leased lots, were but exemptions for the year in which the ordinance was passed, and there can be no plausible claim urged that they, one or all, constituted any contract for exemption beyond the time of each specific ordinance. The statements of officials when lots were sold, that they were not taxable, did not constitute a contract. The lots had not in fact been taxed at the time of these statements and had been annually exempted from taxation, and the statements amounted to no more than opinions of officials as to what would be done in the future. There is no evidence that they had the least power to speak for or to bind the corporation in this behalf. The reports of committees that the lots were not taxable are of the same character—merely the opinions of officials upon a question of law, and not in the nature of a contract.

Upon this question of proof of a contract we quote what was said by the Supreme Court of Georgia in this case upon the last review, through Mr. Justice Lewis (107 Ga. 1):

"Was such a contract shown in the present case? With the view of determining whether or not there was, we have naturally looked to the official action taken by the governing body of the city, either in its ordinances or resolutions providing for the plan upon which the sales were to be made and the consequences and effect thereof, or in its deed of conveyance to the purchaser. Upon examining the various ordinances set out in the record we fail to find any reference whatever to the matter of exempting this property from taxation, and instead of finding any stipulation to that effect in the form of deed invariably made by the city to the various purchasers there appears a clause directly negativing the idea that the city ever intended to grant a perpetual exemption of this property

from the burden of taxation. In each instance it was recited in the deed given to the purchaser that the conveyance of the city was made and the rights of the purchaser thereunder were conferred 'subject only to such assessments and burthens as shall be in common with other lotholders in the said city.' The term 'assessment' is often used as a synonym of 'taxes.' Indeed, one of the definitions of this term given by Webster is 'a tax.' But even if this word, as used in the deed, does not necessarily refer to taxation, the word 'burthen,' which is also therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other landowners in the city. The deed was signed by both parties. Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and, of course, by his assigns) subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.

"Plaintiffs in error contend, however, that the contract they insist upon is evidenced sufficiently by the conduct of the municipal officers at the time the sales by the city took place. It was shown that when lots were put up for sale the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large, and that for nearly a hundred years after these sales first began the municipal authorities failed to tax the lands, and in various ordinances afterwards passed these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere nonuser by a government of its power to levy a tax, it matters not for how long it continued, can never be construed into a forfeiture of the power. This question was directly passed upon by this court when the case was here before. As to this point, Chief Justice Bleckley said: 'Whatever the expectation of purchasers or the unbroken practice of

the city hitherto may have been, the mandate of the constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now.'

"There is an absolute want of any testimony in the record showing that the mayor and aldermen of the city of Savannah, by ordinance, resolution or official action of any sort, ever authorized the marshal to make the public announcement above referred to in offering for sale the city's property. . . . Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs or any of their predecessors in title bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them."

We think the opinion correctly states the facts and the law relating to them.

Looking specially at the contents of the deeds executed under the ordinance of 1790, which were signed by both parties, the city and the purchasers, we find that the provision under which the purchasers took the title and by which they were thereafter peaceably and quietly to have possession of the lots was by positive agreement, "subject to all such assessments and burthens as might be in common with other lotholders in the city."

Plaintiffs in error endeavor to give to the word "assessments," contained in the deeds from the city, its more modern meaning of a peculiar kind of tax levied upon lands specially benefited by improvements which are to be paid for by such assessments.

Opinion of the Court.

The fact is notorious that a century ago special assessments of that kind upon the lands benefited were not usual in this country, and at that time the word was used as synonymous with "rates or taxes," generally. Thus, in a statute passed by the legislature of Georgia in the year 1787, to be found in Watkins' Digest of the Laws of Georgia, 1755–1790, at page 354, it was provided in the fourth section, in speaking of the city of Savannah and the hamlets thereof, "that it shall and may be lawful for the said wardens, or a majority of them, yearly and every year, or oftener, if occasion may require, to make, lay and assess one or more rate or rates, assessment or assessments, upon all or every person or persons who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, house or place, . . . within the limits of the town of Savannah or hamlets as aforesaid, for raising such sum or sums of money as the said wardens, or a majority of them, shall in their discretion judge necessary for and towards carrying this act into execution; and in case of refusal or neglect to pay such rate and assessment, the same shall be levied and recovered in manner as hereinafter directed."

Here is an instance of the use of the word "assessment" at that time in relation to this very city as descriptive of a general tax upon the owners of property within the limits of the city, and to be expended for the general purposes of the corporation. We agree with Mr. Justice Lewis in his construction of this language contained in the deed.

It is further objected in behalf of the plaintiffs in error that the condition that the land was to be subject to assessments, etc., was inserted in the deeds without the authority of the common council, and that the ordinance of 1790 providing for the sale of lots contained no such provision. We think the deeds are substantially in accord with that ordinance, and there is nothing therein inconsistent or at war with the insertion of such provision in the deed; it was but providing for one of the details connected with the sale, and there was an implied power under the ordinance to do so. In addition to that the purchasers took their deeds with such language contained in them, and having themselves signed the deeds they personally agreed to

the condition, and took their titles subject thereto. We do not by this mean to intimate that the title would not have been equally subject to the condition contained in the deed by accepting the deed while not signing it ; but in addition to the acceptance there is the affirmative act of signing the instrument, and we think the language subjecting the lots to the same assessments and burthens as were laid in common with other lotholders created a valid agreement, and made the lands subject to the same kind of taxation as is levied upon other lots in the city.

The covenant on the part of the city that the purchasers should have peaceable and quiet possession, use, occupation and enjoyment of the lots upon payment of the rent as it became due is in nowise violated by the taxation of the lots in the hands of the purchasers or their assigns. A covenant for quiet enjoyment would not under these circumstances include an exemption from taxation. The purchasers of these lots became to all intents and purposes their owners, as they had the right to their possession, use and occupation forever upon payment of the rent, and they could assign or devise the same, and their assignees or devisees would take good title, and their heirs would also take in case there was no assignment or devise. They could also, at their discretion and on the payment of the money agreed upon, become owners in fee.

Although the city retained the right of reëntry for nonpayment of rent, the character of the title conveyed to the purchasers and their heirs and assigns was not thereby so changed from an absolute fee that the property actually conveyed could not be assessed for the payment of city taxes. The interest of the purchasers was capable of assessment for taxation, and their right was in substance that of ownership. It bears no resemblance to the case of an ordinary lease for years between landlord and tenant.

In reference to this subject, Mr. Chief Justice Bleckley, in his opinion in this case on its first appearance in the Supreme Court of Georgia, (87 Georgia, 397,) at page 399 *et seq.*, said:

"The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true

owner of the property for the time being. This holds equally of a city lot or of all land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demised forever subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent. The corporeal property in such case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby. It is to be assumed that the whole contract between the parties will be observed, not broken, and their true relation to the property is to be determined on that assumption. Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere lessee but a purchaser admitted into possession on the faith of his contract of purchase. Such were the contracts involved in the present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and is the equivalent of interest at a moderate rate *per annum* on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held. *Bank* v. *Danforth*, 80 Ga.

55. Not an iota of beneficial ownership in the city lots now in question abides in the municipality. The city but retained a qualified and wholly unproductive title as security for the purchase money and, until that shall be paid, as security also for the annually accruing compensation under the name of ground rents in lieu of interest on that money. If the municipal government held all the values in the city as trustee for the owners, or as security for purchase money, these values would be none the less taxable for that reason. The constitution of the State requires that taxes on property shall be ad valorem, and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception. It prevails in Savannah. *Mayor & Aldermen of Savannah* v. *Weed*, 84 Ga. 683. The property in question is situate in that city, and, as already said, its beneficial ownership is not in the municipality, but in those who long ago purchased it from the city or who hold under such purchasers by succession to their title. Relatively to the question of taxation, it makes no substantial difference whether the estate or property or beneficial owners be classed as realty or personalty, whatever property of either kind belongs to them is taxable ad valorem. That the so-called ground-rent lots, as long as the conditions of sale are unbroken, are the property of the purchasers follows from what was decided by this court in *Laurence* v. *The Mayor*, 71 Ga. 392, and that case shows that, even after condition broken, the limit of the city's rights would generally be to have all arrearages cleared and discharged, the surplus proceeds realized by a sale of the property being payable to the real owner. Our reasons for the conclusion at which we have arrived need not be further elaborated. The constitution is imperative that property is to be taxed ad valorem. The foundation principle of such a system is that those who own and enjoy values are to pay the taxes. The real owners of the money which these lots would now sell for on the market are the persons whom we have designated as owners, and it is upon the cash market value that taxes are assessable. If that value is any less, on account of the subjection of the property to ground

rents or unpaid purchase money, than it otherwise would be, the fact would no doubt be taken into consideration in making the assessment. The market value, whatever that may be, is the proper basis.

"2. There was no error, either of practice or decision, in denying the injunction. Whatever the expectation of the purchasers, or the unbroken practice of the city hitherto may have been, the mandate of the constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded, is no reason why it should not be obeyed now."

We think these views are a correct exposition of the law applicable herein.

We find no element of estoppel in the case. As has been said, the statements of officials made at the time some of the sales may have been effected were nothing more than expressions of opinion, there being no evidence of any agreement on the part of the city or its duly authorized agents to exempt perpetually or at all these lots from taxation for city purposes. The ordinances and the deeds show the transaction and there is no estoppel arising from the language there used. On the contrary, there is evidence of an agreement to pay such taxes.

Such an estate as was created by these deeds does not in our opinion come under the general rule which imposes on a landlord, when the lease is silent upon the subject, the payment of taxes chargeable upon the premises during the term of the lease. Where the purchaser holds real property for a term which may be in perpetuity, upon the condition of paying a certain ground rent, and where he is entitled to a deed conveying the fee at any time on the payment of certain money, he is more nearly described as an owner than he is as a lessee of such property, and he would be liable to pay the taxes imposed upon the property upon the principle which is set forth in *Sanderson* v. *City of Scranton*, 105 Penn. St. 469, and *Delaware &c. Railroad Company* v. *Sanderson*, 109 Penn. St. 583. It is not necessary to decide this question, however, as the specific language

of the deed places the burden of paying the taxes on the purchaser and his grantees.

The judgment of the Supreme Court of Georgia was right, and must, therefore, be

*Affirmed.*

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## RED RIVER VALLEY BANK *v.* CRAIG.

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

No. 231. Argued and submitted April 11, 1901.—Decided May 13, 1901.

There is no such difference in the several statutes of North Dakota, so far as regards the rights of the parties, as to forbid the application of the latest statute to a case where a mortgage was forgiven, and the materials furnished prior to its passage; and the legislation under review cannot be held to violate any rights of the plaintiff in error, protected by the Constitution of the United States.

A mortgage which is subsequent to the right of subsequent lienors who furnish materials or labor in the erection of a building to sell the same, and have it removed for the payment of the liens, is not reduced in value by a statute authorizing the sale of the property such as is set forth in the opinion of the court.

This action was brought to enforce certain mechanic's liens provided for by section 4796, Revised Code of North Dakota, upon real estate described in the complaint. The trial resulted in a judgment in favor of the lienors, which on appeal was affirmed by the Supreme Court of the State, and the Red River Valley National Bank of Fargo, one of the defendants below, has brought the case here by writ of error.

The trial court found the following facts: On July 8, 1884, Elvira Cooper was the owner of the property, being lot 6, block 5, of the original townsite of Fargo, Cass County, North Dakota, and on that day she, with her husband, mortgaged it to secure the payment of the sum of $3000 to the Travelers' Insurance Company of Hartford, Connecticut. Prior to January 1, 1893, the mortgagor sold and conveyed the property,

subject to the mortgage, to one Rosa Herzman, who remained the owner until the foreclosure of the mortgage under the statute and the sale of the property to the insurance company, which took place on May 7, 1894, and on that day a sheriff's certificate of sale was issued to it. On January 12, 1895, the insurance company assigned this certificate of sale to the plaintiff in error, and on May 17, 1895, it received from the sheriff a deed of the premises. During the time of the ownership of the property by Rosa Herzman she erected upon the lot a two story and basement brick building, which was completed by February 3, 1894, and which still remains on the lot in good condition. During the summer and fall of 1893 various work was done and materials furnished upon and for the building for which the owner of the premises failed to pay in full, and thereafter and between November 17, 1893, and February 2, 1894, various persons who had furnished materials or performed work and labor for and in the erection of the house filed their liens, and subsequently, on November 15, 1898, commenced this action to foreclose the same against (among others) the plaintiff in error as the owner of the property.

It was also found by the court that the east and west walls of this new two story brick building were party walls, the east wall standing equally upon its own and the adjoining lot, while the west wall stood wholly upon its adjoining lot, and the walls were built in pursuance of an agreement to that effect between the owners of the different lots, so that the building in question and those on each side constituted a solid row of three brick buildings belonging to different owners, and the building was incapable of being removed from the lot unless it were first torn down. It was also found that it would be for the best interest of all parties that the land and the improvements thereon should be sold together, and that the land and the improvements were of equal value, each one being at least of the value of $2500. The judgment, after adjudging the amounts of the liens of the various parties, gave the plaintiff in error the privilege of paying the same within thirty days from the service of a copy of the judgment, and in default, after proper notice, the property was directed to be sold by the sheriff of Cass County, and of

the moneys received therefor one half was directed to be paid and delivered to the plaintiff in error and from the other half the lienors were to be paid, and if there were any excess after such payment it was to be paid over to the bank.

At the time of the execution of the mortgage the mechanic's lien law then in existence was known as chapter 31 of the Code of Civil Procedure, as found in the Revised Codes of 1877. Sections 655, 666 and 667 are set out in the margin.[1]

At the time when the work was done upon and the materials furnished for the erection of the house the mechanic's lien law in force is to be found from sections 5468 to 5485, Compiled Laws, N. D. 1887. Section 5469 is the same as section 655, of chapter 31, above mentioned, with the exception of an immaterial addition at the end of the section, while section 5480 is identical with section 666 of that chapter. Section 5481 is a substitute for section 667 of the same chapter, and is set forth in the margin.[2]

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[1] Chapter 31, Code of Civil Procedure of the Revised Codes of 1877, Territory of Dakota.

SEC. 655. *Lien, to whom and for what.*—Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery or fixtures furnished.

SEC. 666. *Lien superior to mortgage, when.*—The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

SEC. 667. *Action to enforce.*—Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court of the county or judicial subdivision wherein the property is situated.

[2] Compiled Laws, Territory of Dakota, 1887. (See section 667, *supra.*)

SEC. 5481. Any person having a lien by virtue of this article may bring

Counsel for Parties.

It is evident that the law was in substance the same on this subject when the mortgage was executed and when the work was done and the materials furnished.

The mechanic's lien law in existence at the time that this action was brought is to be found from sections 4788 to 4801, Revised Code of 1895. Section 4788 would seem to be a substitute for section 655 of chapter 31, above mentioned, and section 4795 is a substitute for section 666 of the same chapter. These sections are placed in the margin.[1]

*Mr. Ira B. Mills* for plaintiff in error. *Mr. William C. Resser* and *Mr. Ernest B. Mills* were on his brief.

*Mr. Samuel B. Pinney* for defendants in error submitted on his brief, on which were *Mr. G. W. Newton*, *Mr. E. H. Smith*, *Mr. J. D. Benton*, *Mr. V. R. Lovell* and *Mr. C. L. Bradley.*

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an action to enforce the same in the district court of the county or judicial subdivision where the property is situated, and any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court may also allow as part of the costs the money paid for filing each lien and the sum of five dollars for drawing the same.

[1] Chapter 77, Revised Codes, North Dakota, 1895.

SEC. 4788. *Who may have and for what.*—Any person who shall perform any labor upon or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement or for the erecting, alteration or repair of any building or other structures upon land, or in making any other improvement thereon, including fences, sidewalks, paving, wells, trees, drains, grades or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall upon complying with the provisions of this chapter have for his labor done, or materials, machinery or fixtures furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which the work was done or the things furnished, to secure the payment for such labor, materials, machinery or fixtures. The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement, if at the time he had knowledge thereof and did not give notice of his objection thereto to the person entitled to the lien. The provisions of this section and chapter shall not be construed to apply to claims or contracts for furnishing lightning rods or any of their attachments.

MR. JUSTICE PECKHAM, after making the above statement of facts, delivered the opinion of the court.

The Federal question in this case arises because of the legislation of North Dakota subsequent to 1884, the time of the execution of the mortgage to the Travelers' Insurance Company, the plaintiff in error contending that by reason of such legislation its rights, with reference to the property herein, have to some extent been taken away or unfavorably affected, without due process of law, and it also contends that the subsequent legislation operated to impair the obligation of a contract arising out of the execution of the mortgage already mentioned, its foreclosure and the sale of the property to the insurance company, and its assignment to the plaintiff in error.

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SEC. 4795. *When prior to prior lien on land. Power of court.*—The liens for the things aforesaid or the work, including liens for additions, repairs and betterments, shall attach to the building, erection or improvement for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which such erection, building or improvement belongs or is erected or put.

If such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement commenced since the attaching of such prior lien, incumbrance or mortgage, the court may in its discretion order and direct such building, erection or improvement to be separately sold under execution, and the purchaser may remove the same within such reasonable time as the court may fix. But if in the opinion of the court it would be for the best interest of all parties that the land and the improvements thereon should be sold together, it shall so order, and the court shall take an account and ascertain the separate values of the land and of the erection, building or other improvement, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building, erection or other improvement.

If the material furnished or labor performed was for an addition to, repairs of or betterments upon buildings, erections or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs or betterments, and upon the sale of the premises distribute the proceeds of sale so as to secure to the prior mortgage or lien priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs or betterments.

Opinion of the Court.

We think it was the legislative intent that the last statute should apply to past transactions and that no substantial rights of the plaintiff in error are thereby unfavorably affected, because, in our opinion, there is no such material difference in the several statutes, so far as regards the rights of the parties, as to forbid the application of the latest statute to a case where the mortgage was given and the materials furnished prior to its passage. The difference between that statute and its predecessors, so far as relates to the point in question here, has special reference to the remedy only and to the manner of executing the provisions of the statute in force at the time of the execution of the mortgage and also when the work was done and the materials furnished. It in reality solely affects the remedy, and does not thereby substantially alter those rights of the mortgagee or his representatives which existed when the mortgage was made. A mechanic's lien law was then in existence, and the mortgage was taken subject to the right of the legislature, in its discretion, to alter that law, so long as the alterations only affected the means of enforcing an existing lien, while not in substance enlarging its extent or unduly extending the remedy to the injury of vested rights. So long as those rights remain thus unaffected the subsequent statute must be held valid, although the remedy be thereby to some extent altered and enlarged. Looked at in this light, the legislation under review cannot be held to violate any rights of the plaintiff in error protected by the Constitution of the United States.

Section 655 of the old act provided for the lien and gave it to those persons who performed labor upon or furnished materials for a building, upon complying with the provisions of the chapter, (31). Section 666 provided for the enforcement of the lien in certain cases, and granted the right to any person having a lien to enforce the sale of the building, and to the purchaser the right to remove the same within a reasonable time. These two sections are reproduced in substantially the same language in the act of 1887, (in force when the work was done,) as sections 5469 and 5480 of the Compiled Laws of 1887, there being an immaterial addition in section 5469 to section 655, whose place it takes.

By the law of 1895, which was in force when this action was commenced, the old section 655 is somewhat elaborated by section 4788 of the Revised Code of that year, but the substance of the old section, so far as the facts of this case touch it, remains the same in the new section.

Old section 666 is amended by section 4795, Revised Code, which provides more in detail for the carrying out of the provisions of the old section. The old section itself provided for the enforcement of the lien which was given by that statute, and the last statute it must be remembered neither created nor extended that lien, but somewhat amplified the means to enforce or discharge it. By this alteration the prior statute was not altered to the disadvantage of the owner or his mortgagee in regard to those rights which the person furnishing the materials or performing the labor had under such prior statute. In that prior statute it was provided that the lien for the work done or materials furnished should attach to the buildings, erections or improvements for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which the same was erected or put, and any person enforcing such lien was granted the right to have the building, erection or other improvement sold under execution, and the purchaser had the right to remove the same within a reasonable time.

By the last act (section 4795) the same right still exists; the building may be sold separately and the purchaser may remove the same. There is added, however, the further provision which permits the court for the best interests of all the parties to sell the land and the improvements together, and after ascertaining the separate values of the land and of the building, provision is made for the distribution of the proceeds of the sale so as to secure to the prior mortgage or other lien priority upon the land and to the mechanic's lien priority upon the building into which his labor or materials have entered.

True it is that the property was sold under the foreclosure when there was no right to sell the land in connection with the building for the purpose of paying the liens on the latter. The liens on the building, however, were there, and the building

could be sold and removed to pay the amount thereof, and under the foreclosure the purchaser bought subject to that existing right. He thus obtained a title under which his building could be sold from under him and removed from the land. Under the amended statute the court may sell all the property, land and building together, and return to the owner the value of the land and the surplus arising from the building after payment of the liens. As the liens were in existence when the mortgage was foreclosed, we think the purchaser took title subject to the right of the legislature, in making a reasonable and proper amendment of the law, to provide in foreclosing the liens, for the sale of the whole property and the return to the owner of the lot of the full value thereof in money, instead of allowing him to keep the lot and have the building thereon sold and removed. The plaintiff in error's property was already in the grasp of the statute creating the liens when the mortgage was foreclosed, and that fact is the material one for consideration with reference to the statute and its amendment.

The plaintiff in error asserts that this change in the law rendered the mortgage security less valuable, and that, therefore, it impaired the obligation of the contract and was void. This is mere assertion, and we do not assent to its correctness. A mortgage which is already subject to the right of subsequent lienors, who furnish materials or labor in the erection of a building, to sell the same and have it removed for the payment of the liens, is not in our judgment reduced in value by the provision contained in the amendment under consideration.

Some reference has been made to a decision of the Supreme Court of North Dakota, decided before the foreclosure of the mortgage, and it has been said that it is therein decided that section 5480 of the Compiled Laws of 1887, which, as we have stated, is identical with section 666 of chapter 31, above mentioned, (in force when the mortgage was executed,) does not give any lien as against a mortgagee or one representing him in a case like this, because such lien could not be enforced without a demolition of the building, and in such case no lien is given, while by the latest statute it is asserted that the lien is given, and also an effective means of enforcing it. In brief, it

is urged that a lien is given by the last statute as against a mortgagee or his representative, in a case where it did not exist when the mortgage was made, as the Supreme Court of the State decided, and that such decision had been given when the mortgage was foreclosed and the property bid in by the mortgagee and then assigned to the plaintiff in error, and it is claimed that the subsequent statute giving the lien was a clear violation of the contract as against the plaintiff in error. *James River Lumber Company* v. *Danner*, 3 N. D. 470, is the authority referred to for this contention, but an examination of the facts and the opinion of the court therein shows that no such proposition was decided. In that case there was a mortgage upon the whole of the property, which consisted of a lot with a brewery erected thereon. A fire occurred which to some extent damaged, without destroying, the building. It was therefore repaired, and for the materials for such repairs and for the labor expended on the building liens were filed, and the claim was made that they were liens superior to the mortgage thereon at the time the materials were furnished and the labor performed. This the court held was not the true construction of section 5480; that while that section gives the lienor the right to sell the building and the purchaser the right to have it removed, yet, no authority was given to sell the entire building to pay the lien of one who had only repaired it while a recorded mortgage existed against the land at the time he made the repairs. It was said that a lien for repairs upon a building covered by a mortgage at the time of the repairs would not justify a sale and removal of the building as against such mortgage; that priority of lien was given in cases where the whole erection might be sold and removed without unlawfully encroaching upon the right of the mortgagee of the land, and that a priority of lien existed only when a new structure had been put upon the land subsequently to the execution of the mortgage, and the one who claimed a prior lien must have contributed to the erection of such building by the furnishing of materials or the doing of work. And the court further held that as the work on the partially destroyed building was not begun until some time after the recording of the mortgage on the

whole property, the lienor could not procure a sale of the whole building and give to the purchaser the right to remove it, and as this could not be done as against the mortgagee, the priority of lien did not exist. The court, however, recognizes in terms the existence of a lien under that statute, when a new structure has been put upon the land subsequently to the execution of the mortgage, if the person claiming the lien has contributed to the erection of the building by furnishing materials therefor or performing labor thereon.

In this case, the building did not exist at the time the mortgage was executed, and the liens were filed to secure payment for the materials used in its construction and the labor performed upon it, and no decision of the Supreme Court of North Dakota has been called to our attention holding that under such circumstances there would not have been a lien upon the building in favor of the mechanics and prior to that of the mortgage executed before its erection. In such case as this it is clear that under the act in force when the mortgage was executed and when the labor was performed, a lien on the building was created by virtue of that act, and that the building could have been sold under it and the purchaser would have had the right to remove it notwithstanding, in order to do so, he would have been compelled to demolish the entire building.

One of the amendments contained in the last statute, which provides a means for the enforcement of a lien by the sale of the whole premises in the case of repairs upon a building already covered by a mortgage, was probably passed because of the above decision of the Dakota court, and we need not concern ourselves as to its validity, because the plaintiff in error does not occupy such a position as to enable it to raise that question, the whole building in this case having been erected subsequently to the mortgage. The same may be said as to any question which might upon other facts be raised because of the cutting off of an existing mortgage not yet due and the (claimed) impairment of the obligation of a contract by the sale of the premises under the provisions of the amended statute.

The mortgage in this case was past due and had been foreclosed and the land sold in 1894, subject to the lien on the

building provided by the statute then in existence. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity. *Supervisors* v. *Stanley*, 105 U. S. 305; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Lampasas* v. *Bell*, 180 U. S. 276, 283.

The amendments to the old section 667, relating to the bringing of such an action as this, are simply of the same nature as those above discussed, amplifying to some extent, but not materially, the powers of the court as to the remedy.

The decision of the main question in this case is fatal to the rights claimed by the plaintiff in error, and the judgment must, therefore, be

*Affirmed.*

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## ARMIJO *v.* ARMIJO.

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

No. 243. Argued April 16, 17, 1901.—Decided May 13, 1901.

The act of April 7, 1874, c. 80, entitled "An act concerning the practice in territorial courts, and appeals therefrom" constitutes the only right of review by this court on appeals from territorial courts; and in this case, in the absence of any findings by the Supreme Court of the Territory, and the court being without anything in the nature of a bill of exceptions, and there being nothing on the record to show that error was committed in the trial of the cause, this court has nothing on which to base a reversal of the judgment of the court below, and affirms that judgment.

THE case is stated in the opinion.

*Mr. J. H. McGowan* for appellant.

*Mr. Neill B. Field* for appellee.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was commenced on February 13, 1897, by the

appellee Justo R. Armijo against the appellant in the district court of Bernalillo County in the Territory of New Mexico, for the purpose of recovering the sum of $9434.44 as a balance due for services rendered during the five years prior to January 1, 1897. The defendant filed a plea of the general issue and also one of set-off. Thereafter the defendant moved to refer the case to a referee on the ground that the trial of the action would involve the taking of a long account, and the motion was granted over the objection of the plaintiff. A trial was had before the referee, who on August 18, 1898, filed his report in the clerk's office recommending judgment in favor of the plaintiff for $6097.92 and costs. The defendant filed exceptions to the referee's report on September 2, 1898, and on the 15th day of that month the exceptions were overruled, the findings of the referee adopted as the findings of the court and judgment rendered for $6097.92 with interest and costs.

The defendant then sued out a writ of error, and also appealed from the judgment to the Supreme Court of the Territory. For the purpose of a review in that court the defendant annexed to the judgment roll a paper purporting to contain certain evidence taken on the trial before the referee, but the same was not authenticated in any manner, either by the certificate of the stenographer who took the testimony, or by the referee, or by the judge of the court in which the trial was had. No compliance with the territorial law or with the rules of the court relating to the authentication of testimony appears by the record. There was no bill of exceptions incorporating therein the testimony and no bill was ever signed by any judge, but on the contrary the record shows that the judge declined and refused to sign, seal or settle the bill of exceptions, and it was then stated in the alleged bill that the defendant excepted to such action of the court. This is all, so far as the record shows, that the defendant did towards procuring a bill of exceptions to be signed.

It may be surmised that the court refused to sign the proposed bill of exceptions because of the recital which preceded the commencement of the testimony, in which it was stated that the evidence thereafter set out was all the evidence intro-

duced and received on the trial of the cause, while the evidence thus certified omitted all mention of the exhibits which were offered and received in evidence by the referee, and to which attention was directed by him in his report and upon which his report was to some extent based. The proposed bill contained nothing but the oral evidence alleged to have been given on the trial of the cause before the referee. Whatever may have been the reason, the fact is that the bill of exceptions was not signed or in any manner authenticated by the judge of the court or by the referee, or even by the stenographer taking the evidence. Although exceptions to the report of the referee seem to have been filed and those exceptions overruled by the court in ordering judgment upon the report of the referee, the defendant never made any motion for a new trial.

After the writ of error was sued out and the appeal taken to the Supreme Court of the Territory counsel for the plaintiff in that court moved to strike from the transcript filed such part thereof as purported to set forth the evidence adduced on the hearing of the cause sought to be reviewed and to affirm, with damages for the delay, the judgment of the trial court and to enter judgment in this (territorial) court against the appellant for the reasons stated by him in such motion, among which was that no motion for a new trial had been made below. Thereafter the court decreed that the motion of the defendant in error and appellee to affirm the judgment on the ground that no motion for a new trial was filed in said cause, and to enter the same against the appellant and the sureties on her supersedeas bond, should be sustained and the rest of the motion overruled, and thereupon the judgment was affirmed against the appellant and the sureties on her supersedeas bond together with the costs of the Supreme Court. Judgment having been entered, the defendant appealed therefrom to this court.

After the appeal was taken application was made on the part of the appellant to the Supreme Court of the Territory to find the facts in accordance with the requirements of the act of Congress, and the court denied such application, and ordered it to be certified here that, for the reasons disclosed by the judgment, that court was unable to find the facts, the appeal not

having been perfected in such manner as to bring them before that court, and this denial was certified by its Chief Justice. The Supreme Court decided that in order to bring before it the facts in a case tried before a court or referee it was necessary that a motion for a new trial should be made in the court below, and if such motion were not made the facts in the case were not brought before the appellate court on the writ of error or appeal.

This matter of practice in the courts of the Territory is based upon local statutes and procedure, and we are not disposed to review the decision of the Supreme Court in such case. *Sweeney* v. *Lomme*, 22 Wall. 208. Our jurisdiction to review judgments of territorial courts is found in the statute approved April 7, 1874, chapter 80, entitled "An act concerning the practice in territorial courts, and appeals therefrom." 18 Stat. 27.

In cases not tried by a jury the record is brought before us by appeal, and on that appeal the act provides that, "instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree," etc.

This statute constitutes our only right of review on appeals from the territorial courts. *Apache County* v. *Barth*, 177 U. S. 538, 541; *Grayson* v. *Lynch*, 163 U. S. 468, 473.

In the absence of any findings by the Supreme Court of the Territory and also being without anything in the nature of a bill of exceptions, we have nothing on which to base a reversal of the judgment in this case. The refusal of the Supreme Court to make findings is justified by its certificate that the facts were not before it. The report of the referee authorized the judgment that was entered, and there is nothing whatever in the record to show that any error has been committed in the trial of the case.

The judgment is therefore

*Affirmed.*

# MARKS *v.* SHOUP.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 82. Submitted February 28, 1901.—Decided May 13, 1901.

Under the law of Oregon which was in force in Alaska when the seizure and levy of the plaintiff's goods were made by the defendant as marshal of Alaska under a writ of attachment, that officer could not, by virtue of his writ, lawfully take the property from the possession of a third person, in whose possession he found it.

THE case is stated in the opinion of the court.

*Mr. W. W. Dudley* and *Mr. L. T. Michener* for plaintiff in error. *Mr. W. E. Crews* and *Mr. J. H. Cobb* were on their brief.

*Mr. S. M. Stockslager*, *Mr. George C. Heard* and *Mr. Arthur K. Delaney* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action for damages, brought by the plaintiff in error, who was also plaintiff in the court below, and we will therefore so designate him, against the defendant, by virtue of his office, caused by the taking from the possession of the plaintiff of a certain stock of goods, wares and merchandise.

The goods originally belonged to one Joe Levy, who sold them to one Levine by verbal sale, and as a part of the consideration Levine assumed to pay a debt due to the plaintiff. Levine sold them to one Kendall, who assumed to pay the same debt. Kendall sold and delivered them to plaintiff.

The defendant was at the time of the taking of the goods marshal of Alaska, and he justified the taking under and by virtue of attachments issued out of the District Court against Levy, one in the case of *Powers Dry Goods Co.* v. *Levy*, and the

other in the *West Coast Grocery Co.* v. *Levy*, and claimed that the transfers by Levy were in fraud of his creditors.

The plaintiff replied that he had bought the goods from third persons for a valuable consideration, denied all fraud, and further pleaded that during all the time from prior to the commencement of the actions mentioned in defendant's answer until and at the time of the taking, he was in the actual and exclusive possession of the goods, and denied that defendant ever made any levy whatever upon said goods.

Defendant filed a supplemental answer at the trial setting up that the attachments had merged in judgments upon which executions had issued, the goods sold and the judgments satisfied.

The case was tried before a jury, and resulted in a verdict for the defendant.

Motion for a new trial was made and overruled, and judgment entered for defendant. This writ of error was then sued out.

In the attachment suits against Levy summons was issued but not served, and substituted service was afterward obtained by publication. The affidavits for the attachments did not mention the amount of indebtedness claimed, and the sufficiency of the substituted service and the validity of the judgment based upon it are attacked on that ground.

It is also contended that the levies of the attachments were invalid; and error is assigned on the admission of the testimony and in giving instructions to the jury.

(1) The laws of Oregon were in force in Alaska at the time of the attachments. Act of May 17, 1884, c. 53, 23 Stat. 24. The provision for attachments was as follows:

"A writ of attachment shall be issued by the clerk of the court in which the action is pending, whenever the plaintiff or any one in his behalf shall make an affidavit showing:

"1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) upon a contract." 1 Hill's Code, Oregon, ed. 1887, § 145.

It is contended that these provisions were not complied with

and the attachments were therefore void, and, they being void, there was no foundation for the judgments. This court has ruled already as to that contention in the case of *Matthews* v. *Densmore*, 109 U. S. 216, and other cases. In *Matthews* v. *Densmore*, the claim of a defect in the affidavit invalidating the attachment was directly passed on, and of the attachment it was said:

"It may be voidable. It may be avoided by proper proceedings in that court. But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts."

(2) The answer of the defendant alleged that the writs of attachment in the actions mentioned were placed in his hands for service, and by virtue of them he "duly levied upon all of the goods, wares and merchandise set forth in plaintiff's complaint herein, and ever since that time has held and now holds the same as said United States marshal under and by virtue of said writs."

His returns upon the writs were as follows:

"I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit: All the goods, wares and merchandise situated in the one-story building one door south of B. M. Behrends' bank, on Seward street between Second and Third streets, in the town of Juneau, District of Alaska, by posting a copy of said writ of attachment on the front door of said building; also, eleven (11) cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouses of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all of the above-described personal property of the above-named defendant now in my possession.

"Dated at Juneau, Alaska, May 14, 1898."

It will be observed that the returns are somewhat vague as to whose possession the property was in at the time of levy. If

the fact can be said to have been put in issue by the pleadings the only evidence in the case was given by the plaintiff as follows:

"About the 10th day of May, 1898, I was the owner and in the possession of a stock of goods, wares and merchandise in Juneau, Alaska. The goods were in the building on Seward street, next to B. M. Behrends. On or about that date the United States deputy marshal, W. D. Grant, came to the store and took the goods out of my possession. I declined to surrender possession, but the deputy marshal forcibly put me out of the building, took the key out of my pocket, and locked the front door."

The truth of this was not questioned, and it must be accepted as established that at the time of the levy the property was in the possession of the plaintiff. What is the effect of it? In other words, was the levy made, as described in the return of the defendant, legal?

The statute provided as follows:

"The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: . . .

"2. Personal property, capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody.

"3. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same." 1 Hill's Code, Oregon ed. 1887, § 149, subs. 2 and 3.

These provisions were passed upon in *Spaulding* v. *Kennedy*, 6 Oregon, 208. The facts of the case as stated by the court were as follows:

"Litchenthaler and Simpson were, on the ninth of November, 1875, the owners of a certain mare, the property in dispute, upon which they executed a chattel mortgage of that date in favor of the Granger Market Company. This mortgage was duly recorded, and remained unsatisfied at the commencement of this action. Subsequently Litchenthaler and Simpson delivered the mare to the plaintiff upon a second chattel mortgage

by them in his favor, executed subsequently to the one in favor of the Granger Market Company.

"In March, 1876, one James Welch obtained a judgment against the Granger Market Company, upon which an execution was issued, and placed in the hands of Kennedy, the appellant, who was a constable. Kennedy under this execution levied, as it is claimed, upon the mare, as the property of the Granger Market Company, by taking her from the possession of one Stemme, the bailee of the plaintiff Spaulding. Spaulding brought this action to recover possession."

The court said:

"It was the object of the levy to subject the right of the Granger Market Company to execution, and in order to do so, and by a levy and sale, transfer this right to an execution purchaser, the officer must pursue the course pointed out by the statute."

And after quoting the statute, said further:

"This property not being in the possession of the Granger Market Company at the time of the levy, the officer could not, by virtue of his writ, lawfully take it from the possession of a third person in whose possession he found it, and he committed a trespass in so doing. It is claimed that this statute is simply intended to protect those in possession of property who may have a lien on it by virtue of which they may be entitled to redeem it. This may be the object of the statute. The statute provides that such persons, when summoned as garnishees, shall answer and show by what title they hold the property; but the sheriff, when he finds the property which he supposes belongs to the judgment debtor in the possession of third persons, has no right to determine the right of that possession, except in the manner provided by law."

The same principle was expressed in *Lewis* v. *Birdsley*, 26 Pac. Rep. 632, and in *Bachellor* v. *Richardson*, 21 Pac. Rep. 392.

The cases cited by defendant in error are not to the contrary. *Page et al.* v. *Grant*, 9 Oregon, 116, was a direct attack, after execution returned unsatisfied, upon a sale claimed to be fraudulent. *Lyon* v. *Leahy*, 15 Oregon, 8, and *Philbrick* v. *O'Connor*,

Counsel for Parties.

15 Oregon, 15, and *Crawford* v. *Beard*, 12 Oregon, 447, were creditor's bills brought to set aside deeds for real estate after return of execution unsatisfied. It follows that the levy was invalid and could constitute no defence to the defendant, and the jury should have been so instructed.

(3) The errors assigned on instructions not disposed of by the above reasoning it is not necessary to consider. We may say, however, that we have grave doubts of their correctness.

*Judgment reversed with costs and cause remanded with directions to grant a new trial.*

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## LUHRS *v.* HANCOCK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 176. Argued and submitted March 7, 1901.—Decided May 13, 1901.

By the provision in Act 68 of the Laws of the Territory of Arizona that the common law of England, so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory, the common law was not made unqualifiedly the rule of decision, but that law, as modified by the conditions of the Territory, and changes in the common-law relation between husband and wife had been expressed in statutes prior to the passage of the act of 1885.

By a conveyance from a husband to his wife, property does not lose its homestead character.

The deed of a person alleged to be insane is not absolutely void; it is only voidable, and may be confirmed or set aside.

The inquiry as to the insanity of Mrs. Hancock was not open to the appellant.

THE case is stated in the opinion of the court.

*Mr. L. E. Payson*, for appellant, submitted on his brief.

*Mr. A. S. Worthington* for appellee. *Mr. C. F. Ainsworth* was on his brief.

Mr. Justice McKenna delivered the opinion of the court.

This is an appeal from the judgment of the Supreme Court of Arizona, affirming the judgment of the district court of the third judicial district of the Territory, rendered in an action of ejectment originally brought against Hancock and his wife, and to which action Pemberton was afterwards made a party.

The facts as found by the Supreme Court are as follows:

"This was an action by the appellant to recover possession of five certain lots in the city of Phœnix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A. Hancock and Lilly B. Hancock, husband and wife, answered, pleading 'not guilty,' and setting up the statute of limitations in bar of the plaintiff's right to recover. Similar defences were imposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises, and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below the plaintiff was adjudged to have no right, title or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

"The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in William A. Hancock, the common source from which both the plaintiff and the defendant Pemberton deraign title. The said premises were inclosed as one tract, with a dwelling house situated upon lots 14 and 15, and had been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said William A. Hancock, for the consideration of love and affec-

tion, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of $4000. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa County against the said William A. Hancock for the sum of $2524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of $2600, and on the same day, to secure the payment thereof, had executed to the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises."

The Supreme Court also certified that the exceptions on the trial to the rulings of the court were (1) to the admission of the deed dated February 27, 1886, from Hancock to his wife; (2) the rejection of evidence tending to prove that Hancock made an application for a homestead under the public land laws of the United States, and filed an application in the land office of Tucson, completed his homestead proofs and received a certificate from the receiver for the land applied for. A certified copy of the papers was offered in evidence, but ruled out. (3) The rejection of evidence of the insanity of Mrs. Hancock at the time she executed the mortgage to Robert Allstatter, the foundation of Pemberton's title. (4) The admission in evidence

of the note and mortgage over the objection of plaintiff claiming Mrs. Hancock insane and incompetent to make them.

We are confined to the assignment of errors based on these rulings. *Harrison* v. *Perea*, 168 U. S. 311; *Halloway* v. *Dunham*, 170 U. S. 615; *Young* v. *Amy*, 171 U. S. 179; 18 State, 27.

(1) The ground of objection to the deed is that it is void as a conveyance because void at common law, void under the statute restricting the conveyance of homesteads, and void because a fraud upon creditors, "and especially the plaintiff whose debt against Hancock then existed."

It is conceded that part of the property was a homestead in 1883 at the time of the commencement of the suit by Herrick and Luhrs, but that before judgment the homestead had ceased to exist, because, under the statute of the Territory passed March 10, 1887, a declaration in writing was necessary to be filed and recorded in the office of the county recorder to preserve the homestead exemption. In other words, it is conceded that the property was a homestead when Hancock executed the deed to his wife in 1886, but, it is claimed, that the deed being void and the property ceasing to be a homestead in 1889, it became subject to his debts.

Two questions arise: The validity of the deed, and the continuance of the homestead. We need not now express an opinion as to the latter. The former should be answered in the affirmative. The contention is that the deed was void because it was made directly by Hancock to his wife without the intervention of a trustee, and the contention is claimed to be supported by act No. 68 of the laws of the Territory. That act provided as follows:

"The common law of England so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory."

It will be observed not the common law unqualifiedly was

made the rule of decision, but that law as modified by the conditions of the Territory, and changes in the common law relation between husband and wife had been expressed in the statutes prior to the passage of the act of 1885. A community of property of the marriage was provided for; each of the spouses could have separate property, and of hers she had the absolute disposition. The separate legal individuality of the wife, therefore, was recognized, and the doctrine which confounded her being with that of her husband was abolished. The conditions had passed away which caused it to exist. New and more natural conditions had arisen, and the act of 1885 adopted the common law only so far as it suited to those conditions. This was the view of the Supreme Court of the Territory and we adopt it. That learned court could certainly know what the natural conditions of the Territory and the necessities of its people were, and how far consistent with them the laws of a past time were.

Indeed the modification of the common law as to the property relations of husband and wife generally in this country was expressed by this court in *Jones* v. *Clifton*, 101 U. S. 225. In that case the assignee in bankruptcy brought suit to set aside two deeds made by Clifton to his wife, executed, as it was contended, to defraud creditors. They were asserted to be void for the reason, among others, "because made directly to his wife, without the intervention of a trustee, and so passed no interest to her." To the contention it was replied that the deeds were voluntary settlements upon his wife. "And," Mr. Justice Field said, speaking for the court, "it cannot make any difference through what channels the property passes to the party to be benefited or to his or her trustee—whether it be by direct conveyance from the husband or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond

the control or interference of her husband, though formerly held to be indispensable, is no longer required." This doctrine applies to a homestead as well as other real estate, unless the laws of the Territory prescribe the form or put limits upon the alienation of a homestead. It is claimed that the law does, and paragraph 2141 of the Compiled Laws of 1887 is cited. The paragraph is as follows: ". . . no mortgage, sale or alienation of any kind whatever of such land (the homestead) by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

A statute similar to that of Arizona came up for construction in *Burkett* v. *Burkett*, 78 California, 310, and, following the principle of other cases in the same court and cases in other States, it was held that the object of homestead laws was to protect the wife and through her the family, and that a conveyance of the homestead by the husband to the wife was not forbidden by the statute, and was therefore valid. The following cases were cited: *Spoon* v. *Van Fossen*, 53 Iowa, 494; *Green* v. *Farrar*, 53 Iowa, 426; Thompson on Homesteads, sec. 473; Platt on Rights of Married Women, sec. 70, p. 225; *Riehl* v. *Bingenheimer*, 28 Wisconsin, 86; *Baines* v. *Baker*, 60 Texas, 140; *Ruohs* v. *Hooke*, 3 Lea, 302; 31 Am. Rep. 642; *Harsh* v. *Griffin*, 72 Iowa, 608.

But independent of other cases, the court said it would not "hesitate to hold such conveyances valid," and disregarded as unimportant the differences which were pointed out between the statutes of the States whose decisions were cited and the statute of California.

The contrary has been held by the Supreme Court of Illinois in *Kitterlin* v. *Milwaukee Ins. Co.*, 134 Illinois, 647, but the reasoning of the other cases we think is the better, and besides their number is not without weight.

The Supreme Court of California held, as the Supreme Court of Arizona held in the case at bar, that by a conveyance of the husband to the wife the property did not lose its homestead character. As the title certainly passed, that is unimportant; and equally unimportant whether the homestead was or was

not divested by the act of 1887, in the view we take of the effect of appellant's judgment against Hancock. It cannot prevail against the mortgage of Allstatter unless it became a lien upon the land covered by the homestead. It is so contended but unjustifiably. The deed from Hancock to his wife was prior to the judgment. The mortgage to Allstatter was subsequent to the judgment but prior to the levy of the execution, and the latter can only relate to and be supported by the judgment, if the judgment became a lien upon the property. It has been held in some jurisdictions that a judgment against a debtor becomes a lien on land fraudulently conveyed by him. In other jurisdictions it has been held otherwise, and this court has held otherwise. *Miller* v. *Sherry*, 2 Wall. 237, was a creditor's bill to set aside fraudulent conveyances, and a question arose as to the effect of the judgment upon land previously conveyed. The court said: "The judgment obtained by Mills and Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

The rule and the reason for it are admirably expressed by Judge Deady in *In re Estes*, 3 Fed. Rep. 127, as follows:

"In my opinion, the lien of a judgment which is limited by law to the property of or belonging to the debtor at the time of the docketing does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by a deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of cred-

itors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser. The operation of a lien of a judgment, being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."

(2.) The assignment of error based on the ruling of the court in rejecting evidence of an application by Hancock to enter a homestead under the public land laws is disposed of by the views expressed above. As the title passed to Mrs. Hancock by the deed to her from her husband, and from them to Pemberton through the mortgage executed to Allstatter, it is not necessary to consider, as we have said, whether the property continued or ceased to be a homestead.

(3.) The third and fourth exceptions to testimony were based on the alleged insanity of Mrs. Hancock when she executed the note and mortgage to Allstatter. But we do not think that inquiry was open to the appellant. The deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside. 159 U. S. at 547. Besides, the title of Pemberton, one of the defendants in error, comes through a judgment against Mrs. Hancock, and that cannot be attacked collaterally. *Ingraham* v. *Baldwin*, 9 N. Y. 45; *Kilbee* v. *Myrick*, 12 Florida, 419; *Foster* v. *Jones*, 23 Georgia, 168; *Speck* v. *Pullman Car Co.*, 121 Illinois, 33; *Maloney* v. *Dewey*, 127 Illinois, 395; *Woods* v. *Brown*, 93 Indiana, 164; *Boyer* v. *Berryman*, 123 Indiana, 451; *Stigers* v. *Brent*, 50 Maryland, 214; *Heard* v. *Sack*, 81 Missouri, 610; *McCormick* v. *Paddock*, 20 Nebraska, 486; *Lamprey* v. *Nudd*, 29 N. H. 299; *Brittain* v. *Mull*, 99 N. C. 483; *Henry* v. *Brothers*, 48 Penn. St. 70; *Wood* v. *Bayard*, 63 Penn. St. 320; *Grier's Appeal*, 101 Penn. St. 412; *Denni* v. *Elliott*, 60 Texas, 337.

The other questions discussed by counsel we do not think it is necessary to consider.

*Judgment affirmed.*

# AUDUBON *v.* SHUFELDT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 217. Argued April 8, 1901.—Decided May 20, 1901.

Alimony, whether in arrear at the time of an adjudication in bankruptcy, or accruing afterwards, is not provable in bankruptcy, or barred by the discharge.

*Mr. Henry Randall Webb* for appellants.

*Mr. John T. Dewesse* for appellee.

Mr. Justice Gray delivered the opinion of the court.

This was an appeal from an order of the Supreme Court of the District of Columbia sitting in bankruptcy, granting a discharge to Robert W. Shufeldt.

Shufeldt had been adjudged a bankrupt April 5, 1899, on his petition alleging that he was indebted to the amount of $4538.33, and had no assets which were not exempt under the Bankrupt Act of 1898. The debts from which he sought release were as follows:

| | | |
|---|---|---|
| Secured debt to Washington National Banking and Loan Association, | | $3200 00 |
| Unsecured debts as follows: | | |
| Florence Audubon, | $800 00 | |
| William H. Smith, | 150 00 | |
| Lewis J. Yeager, | 150 00 | |
| Sundry small debts, | 238 33 | |
| | | 1338 33 |
| | | $4538 33 |

Shufeldt was, and had been for several years before filing his petition in bankruptcy, a surgeon with the rank of captain in the United States Army, on the retired list, and was in receipt of a salary of $175 a month, his pay as such retired officer.

Statement of the Case.

The debt of $3200 was the debt of himself and his wife, secured on land in Takoma Park, Montgomery County, Maryland, conveyed by him to his wife in March, 1898, without consideration.

The debt of $800 represented arrears of alimony, granted to his former wife, Florence Audubon, on February 25, 1898, by a decree of the circuit court of Montgomery County in the State of Maryland, in a cause of divorce, directing him to pay alimony to her at the rate of $50 a month, beginning April 1, 1898. No part of that alimony has been paid.

About March 1, 1898, Shufeldt left Montgomery County, and took up his residence in the city of Washington in the District of Columbia. A suit in equity has been instituted and is still pending in the Supreme Court of the District of Columbia, to enforce the aforesaid decree for alimony, and to make him pay the alimony in arrear.

The debt of $150 to William H. Smith was a promissory note given for taking testimony in the divorce suit under a commission from the Maryland court, and was duly assigned to John W. Hulse before the filing of the petition in bankruptcy.

The debt of $150 to Lewis J. Yeager was for professional services rendered in the District of Columbia in the equity suit aforesaid.

The small debts for $238.33 were contracted for supplies furnished to Shufeldt and his family before the filing of the petition in bankruptcy.

After the filing of the petition in bankruptcy, Florence Audubon filed in court her claim for $800, being the arrears of alimony, describing it as "a debt" due by him to her; and voted thereon at the meeting of creditors for the election of a trustee. She afterwards filed a memorandum directing the withdrawal of her claim; but no order of the court to that effect was passed.

It was objected that the claim for alimony was not a provable debt under the Bankrupt Act, and should be excepted from the list of debts for which a discharge in bankruptcy might be granted. The court overruled the objection, and granted the discharge, being of opinion that the arrears of alimony which had accrued against the bankrupt up to the time of the adjudi-

cation in bankruptcy constituted a provable debt, in the sense of the Bankrupt Act of 1898; but that the discharge could not affect any instalments accruing since that adjudication. Florence Audubon appealed to this court.

By section 4 of the Bankrupt Act of July 1, 1898, c. 541, "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." 30 Stat. 547. An officer in the army falls within this description; and it may be that he is not bound to include his pay in his schedule. *Flarty* v. *Odlum*, (1790) 3 T. R. 681; *Apthorpe* v. *Apthorpe*, (1887) 12 Prob. Div. 192. Our bankrupt act contains no such provision as the English Bankruptcy Act, 1883, authorizing the court, when the bankrupt is an officer in the army or navy, or employed in the civil service, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. *In re Ward*, (1897) 1 Q. B. 266. But the question now before us is not whether his pay can be reached in bankruptcy, but whether he is entitled to a discharge from the arrears of alimony due to his former wife.

The Bankrupt Act of 1898, provides in § 1, that a "discharge" means "the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act;" and includes, in § 63, among the debts which may be proved against his estate, "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing," at the time of the petition in bankruptcy, whether then payable or not, and debts "founded upon a contract, expressed or implied." 30 Stat. 541, 563.

Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State,

and may therefore be there enforced by suit. *Barber* v. *Barber*, (1858) 21 How. 582; *Lynde* v. *Lynde*, (1901) 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction.

In the State of Maryland, and in the District of Columbia, alimony is granted by decree of a court of equity. *Wallingford* v. *Wallingford*, (1825) 6 Har. & Johns. 485; *Crane* v. *Maginnis*, (1829) 1 Gill & Johns. 463; *Jamison* v. *Jamison*, (1847) 4 Maryland Ch. 289; *Tolman* v. *Tolman*, (1893) 1 App. D. C. 299; *Tolman* v. *Leonard*, (1895) 6 App. D. C. 224; *Alexander* v. *Alexander*, (1898) 13 App. D. C. 334. And, as the Court of Appeals of the District of Columbia has more than once said: "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction." 6 App. D. C. 233; 13 App. D. C. 352.

Under the Bankrupt Act of 1867, it was held by the District Court of the United States for the Southern District of New York, in an able opinion by Judge Choate, (which is believed to be the only one on the subject under that act) that a claim for alimony, whether accrued before or after the commencement of the proceedings in bankruptcy, was not a provable debt nor barred by a discharge. *In re Lachemayer*, (1878) 18 Nat. Bankr. Reg. 270; *S. C.*, 14 Fed. Cas. 914. Like decisions have been made by Judge Brown in the same court under the present bankrupt act. *In re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321. And the same result has been reached in a careful opinion by Judge Lowell in the District

Court for the District of Massachusetts. *In re Nowell*, 99 Fed. Rep. 931.

In *Menzie* v. *Anderson*, (1879) 65 Indiana, 239, the Supreme Court of Indiana held that a judgment for alimony was not a "debt growing out of or founded upon a contract, express or implied," within the meaning of a statute exempting certain property from execution for such a debt.

In *Noyes* v. *Hubbard*, (1892) 64 Vermont, 302, it was held by the Supreme Court of Vermont that a decree for alimony, not being a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public as well as the parties were interested, was not barred by a discharge in insolvency.

In *Romaine* v. *Chauncey*, (1892) 129 N. Y. 566, it was held by the Court of Appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made specific and measured by the decree of the court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted.

In *Barclay* v. *Barclay*, (1900) 184 Illinois, 375, it was adjudged by the Supreme Court of Illinois that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy; and the court said: "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the State where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change

the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

In England, it seems to be the law that alimony is neither discharged nor provable in bankruptcy. *Linton* v. *Linton*, (1885) 15 Q. B. D. 239; *Hawkins* v. *Hawkins*, (1894) 1 Q. B. 25; *Watkins* v. *Watkins*, (1896) Prob. 222; *Kerr* v. *Kerr*, (1897) 2. Q. B. 439.

The only cases brought to our notice, which tend to support the decision below, are recent decisions of District Courts, in which the authorities above cited are not referred to. *In re Houston*, 94 Fed. Rep. 119; *In re Van Orden*, 96 Fed. Rep. 86; *In re Challoner*, 98 Fed. Rep. 82.

The result is that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy, or barred by the discharge.

*The order granting a discharge covering arrears of alimony is reversed, and the case remanded for further proceedings consistent with the opinion of this court.*

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

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 35. Leave to file petition for rehearing granted February 25, 1901.—Decided May 20, 1901.

The railroad company filed a bill to enjoin the collection of certain state taxes from 1892 to 1897 inclusive. This court held that a new corporation was formed by a consolidation of certain prior corporations made October 24, 1892, and that the taxes having accrued subsequent to that date were legally assessed under the state constitution of 1890, (180

U. S. 1). The railroad company moved for a rehearing with respect to the taxes of 1892 upon the ground that they accrued prior to the consolidation of October 24. *Held:* That as the Supreme Court of Mississippi had decided that all the taxes had accrued after the consolidation of October 24, and the company had thereby lost its exemption; and as this was a construction of the general tax laws of the State, which were complex and difficult of interpretation, this court would accept that construction and deny the petition for a rehearing.

THIS was a petition for a rehearing of the case reported in 180 U. S. 1, upon the ground that the taxes for the year 1892 were separable from taxes for the succeeding years, inasmuch as the taxes for that year had been completely levied and assessed on September 22, 1892, and that the claim of the State, if any, had fully accrued at least one month before the articles of consolidation were executed, (October 24, 1892,) and that the judgment therefore gave to the consolidation a retrospective effect.

*Mr. William D. Guthrie*, *Mr. J. M. Dickinson*, *Mr. Edward Mayes* and *Mr. Noel Gale*, for the Railroad Company, petitioner.

*Mr. F. A. Critz*, *Mr. Marcellus Green* and *Mr. R. C. Beckett*, for Adams, opposing.

MR. JUSTICE BROWN delivered the opinion of the court.

The decision of this case was based upon the theory that all the taxes involved in the case, from 1892 to 1897, accrued subsequent to the consolidation of October 24, 1892, which was held by this court to create a new corporation, subject to existing laws, and particularly to that provision of the constitution of 1890, "that every new grant of corporate franchise shall be subject to the provisions of the constitution." No suggestion was made, in the argument or briefs of the railroad company, of any distinction in respect to the liability of the company between the taxes of the year 1892 and those of subsequent years, and none such was recognized by the court in its opinion; but we are now asked to hold that the taxes for the year 1892 accrued before the consolidation of October 24, and were

consequently unaffected by that consolidation, and that with respect to such taxes the right of commutation or exemption, contained in section 21 of the charter of the Mobile and Northwestern Railway Company, attached and operated to exempt the company from the payment of taxes for the year 1892.

We have not found it necessary to decide whether a party, upon a petition for a rehearing in this court, may avail himself of a point not taken in the court of original jurisdiction, or upon either one of two appeals to the Supreme Court, nor in the assignment of errors in this court, nor even called to our attention in the briefs or arguments of counsel, as we are of opinion that upon the merits the petition must be denied.

Whatever force we might be disposed to give to prior adjudications of the Supreme Court of Mississippi upholding these exemptions, there can be no doubt that that court has expressly held that the taxes for the year 1892 did not accrue until after the consolidation of October 24 of that year, and hence that this case does not fall within those adjudications. We quote the following from the opinion of the court of February 20, 1899, upon a second appeal to that court: "So far as concerns the argument that the appellants relied on the case of *Mississippi Mills* v. *Cook*, (56 Miss.,) and that, if the overruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the overruling of that case, it is enough to say that question is not material here, since all the taxes here sued for accrued after the consolidation of October 24, 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of *Mississippi Mills* v. *Cook* is wholly unavailing as to these taxes." 77 Mississippi, 194, 316.

Whether this opinion be conclusive upon us in view of the argument that a contract has been impaired in violation of the Constitution, we do not feel called upon to decide. The statutes of the State of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892

accrued prior to October 24 of that year, are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such statutes; and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that State. *Burgess* v. *Seligman*, 107 U. S. 20; *Flash* v. *Conn*, 109 U. S. 371, 379; *Clark* v. *Bever*, 139 U. S. 96; *Board of Liquidation* v. *Louisiana*, 179 U. S. 622.

Had the opinion above cited involved the construction of section 21 of the Mobile and Northwestern charter—that is, the contract for commutation or exemption—it would have directly involved a Federal question; but it did not. It was an opinion as to when, under the general laws of the State of Mississippi, a claim for taxes accrued, and a distinct ruling that such taxes did not accrue until after a certain date. *Raymond's Lessee* v. *Longworth*, 14 How. 76, 79; *Bailey* v. *Magwire*, 22 Wall. 215. For the reasons above stated we accept the views of the Supreme Court of Mississippi as to the proper construction of these laws.

The petition for a rehearing must therefore be

*Denied.*

# JOSEPH SCHLITZ BREWING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 232. Argued April 11, 1901.—Decided May 20, 1901.

Bottles and corks in which beer is bottled and exported for sale are not "imported materials used in the manufacture" of such beer within the meaning of the drawback provisions of the customs revenue laws, although the beer be bottled and corked, and subsequently heated, for its better preservation.

THIS was a petition for a drawback upon hops and barley to the amount of $2371.35, and upon bottles and corks to the amount of $9817.97, used in the manufacture of bottled beer for export.

The Court of Claims made a finding of facts, the substance of which is set forth in the margin, and gave judgment for the first item, but rejected the second, and the claimant appealed.[1]

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[1] *Findings of Fact.*

The following are the facts of the case as found by the court:

I. The claimant is a corporation, organized under the laws of the State of Wisconsin.

II. Between the 1st day of February, 1893, and the 26th day of October, 1894, the claimant exported from the port of Milwaukee, Wis., bottled beer. The hops, barley, bottles and corks used in the manufacture of this bottled beer had been imported into the United States from foreign countries, and duties had been paid thereon upon importation. The bottled beer was manufactured by the claimant at Milwaukee, Wis. The imported materials used in the manufacture, when exported, were identified, the quantity of the materials used and the amount of duties paid thereon ascertained, and the fact of the manufacture of the articles in the United States and their exportation were determined under regulations prescribed by the Secretary of the Treasury. The total amount of the duties paid on the materials mentioned so used and exported was $12,189.32, divided as follows: Upon the bottles and corks, $9817.97; upon the hops and barley, $2371.35.

III. The Treasury Department has not refused to pay the drawback upon the hops and barley, but such drawback could be paid under the regula-

Cousel for Parties.

*Mr. William B. King* for appellant. *Mr. George A. King* was on his brief.

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tions of the department. It refuses to pay the drawback upon the bottles and corks for the reason stated in the following official letter dated March 24, 1893:

(Here follows certain correspondence summarized in the opinion.)

VII. The manufacture of beer for bottling for export differs from the manufacture for ordinary domestic use, both because the materials must be selected with greater care, and the process must be conducted differently in order that the bottled product may keep without change under varying conditions of climate, temperature, position and transportation, and the beer preserve purity and clearness under all such varying conditions. Turbidity of bottled beer made for exportation must especially be avoided, as this renders the beer commercially unsalable. This is chiefly caused by the precipitation of albuminoids contained in the beer, and the differences in the process of manufacture between domestic beer and bottled beer for export are chiefly intended for the elimination of these albuminoids. It may also be caused by the germination of living yeast cells, and this is prevented by the process of pasteurization.

IX. After beer intended for bottling for export is placed in the barrels the following processes occur:

The barrels are hoisted to the required height of the filling machine, the stamp is taken off, canceled and replaced, the keg is opened, a faucet entered in the lower hole, and the beer drawn from the barrel into the filling machine and through a proper disposal of siphons into the bottles. The bottles are then sent to the corking machines and corked; a thin metal cap is placed over the cork for the protection of the cork and a wire attached to the neck of the bottle and wound over the cork. The bottles are then placed in the steaming boxes and these boxes carried to a steaming vat which is filled with water and steam turned into the water, raising its temperature to about 150° and remaining at that temperature for about one hour, when it is cooled down to about 80° or 90°. This process, known as pasteurizing, is for the purpose of destroying living yeast cells, and is necessary for beer bottled for export.

Pasteurizing can be done in a large vessel before bottling, but the beer would become again impregnated by contract with the atmosphere when afterwards drawn into bottles.

This process must be conducted carefully, because if the temperature rises too high the beer gets an unpalatable taste and the albuminoids remaining in it are more apt to be eliminated, resulting in a loss of clearness, which renders the beer unsalable.

This pasteurization may be omitted in the case of bottled beer for local use.

The bottles, previous to their use, undergo a special washing process with hot water and soda, so arranged that the bottles are filled and emptied con-

*Mr. Assistant Attorney General Pradt* for appellee.

Mr. Justice Brown delivered the opinion of the court.

This is a claim for a drawback of duties upon certain imported bottles and corks alleged to have been used in the manufacture of bottled beer, subsequently exported.

By § 25 of the Act of October 1, 1890, c. 1244, 26 Stat. 567, 617, "where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." The object of this section is evidently to stimulate domestic manufactures by allowing to the manufacturer a rebate of duties paid upon imported materials used by him in such product.

The theory of the claimant in this connection is, that bottled beer is really a different article from ordinary beer, and requires

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tinuously. They are then washed in a tank filled with lukewarm water on the outside by hand and on the inside by brushes in the washing machine, and then rinsed with cold water before being placed in the racks to be filled.

Old as well as new bottles are used.

X. In making bottled beer, from the time of purchase of the ingredients until the completion of the finished product the process must be so managed as to diminish the albuminoids. When prepared as stated in the foregoing findings, bottled beer can stand the heat at the equator without being spoiled.

XI. Beer bottled for export is understood to be beer intended for shipment, whether to domestic or foreign points, and for use other than local and immediate. When beer is bottled for local and immediate use, it may be the same beer as hereinbefore described and prepared in the same manner as for export, including pasteurization, or it may be the same beer prepared in the same manner without pasteurization, or it may be ordinary keg beer, differing from bottled beer for export in the particulars described in findings VII and VIII, and without pasteurization.

XII. When bottled beer is sold to retailers, it is delivered in cases of bottles, and an extra charge is made to the purchaser for the case and bottles, which charge is credited to his account on the return of the case and bottles. A similar practice obtains on the sale of the bottled beer by the case by retailers to their consumers.

a process of manufacture in which bottles and corks are a material ingredient. Its argument is thus stated in the petition:

"In the manufacture of beer for export it becomes necessary to kill the yeast in the beer in order to prevent second fermentation and consequent ruin of the beer, and, in order to destroy the germs of the yeast, the finished beer must be steamed to the degree necessary to kill such germs, and for that purpose the beer must be inclosed securely in some vessel to prevent the escape of the carbonic acid gas, and of all such vessels a bottle manufactured of glass is the one best adapted for that purpose. Such beer, after being subjected to the process of steaming, is materially different from the beer before being subjected to steaming, and in order to create such different article a closed glass bottle is indispensable, and the bottles and corks, forming a portion of the complete manufactured article known as 'bottled beer,' are, as well as the hops and barley entering into the same, a necessary component part of the article when completed and in a condition ready for export."

It seems there has been some difference of opinion among the Treasury officials upon this subject, since on March 31, 1886, the then Secretary of the Treasury decided, under a statute similar to the one above cited, that a drawback should be allowed, not only for the hops, rice and barley used in the manufacture of the beer, but for the bottles and corks, and in an official table of drawback duties, published August 17, 1886, bottles and corks imported and used in bottling beer were specifically named as entitled to the benefit of a drawback to the full amount of the duty paid. This ruling remaining in force until October 28, 1890, when the Assistant Secretary decided that imported bottles used in the bottling of fermented liquors, made here from domestic grains and hops, were not entitled to a drawback under the Tariff Act of 1890; but, notwithstanding this ruling, it would appear that the drawback continued to be allowed and paid until March 24, 1893, when, in a letter to the collector of customs of New York, the Secretary overruled and rescinded the earlier decisions, and has since refused to allow the drawback.

In our view, the question presents no difficulty whatever.

Under the statute, the drawback is allowed only upon "imported materials . . . used in the manufacture of articles manufactured or produced in the United States," and subsequently exported. By this is undoubtedly meant that the imported materials must enter into and form one of the ingredients of the manufactured article, as did the hops and barley upon which the drawback was allowed, and properly allowed, by the Court of Claims. But the bottles and corks are not "imported materials" at all, but finished products, and usable for any liquor which the importer may choose to put in them. Neither are they ingredients used in the manufacture of exported or any other kind of beer, in any proper sense of the term, but simply the packages which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use of for the proper preservation of his product. Bottled beer is still beer, made of the same ingredients as ordinary beer, though made with greater care, and to speak of the bottles and corks as ingredients of the beer is simply an abuse of language.

The fact that the beer must be steamed after bottling to a point necessary to kill the germs of yeast, and for that purpose must be enclosed in some vessel to prevent the escape of the carbonic acid gas, only shows that the beer is bottled before it is finally manufactured and ready for the market. This process certainly does not convert a bottle from an incasement into an ingredient. In this particular beer does not materially differ from a hundred other articles which require to be incased for their proper preservation. Thus, champagne and other sparkling wines must be bottled while yet effervescing, or they will lose the twang which gives them their principal value. The same remark may be made of Apollinaris and other effervescing waters, though not manufactured, and of certain canned fruits and vegetables which are required to be incased while hot and still in the process of preservation.

The claim is by no means so strong a one for the allowance of a drawback as was the *Tidewater Oil Co.* v. *The United States*, 171 U. S. 210, in which imported shooks were used in the manufacture of boxes, subsequently exported to foreign countries. We held in that case that boxes constructed of shooks, which

were imported in bundles of ends, sides, tops and bottoms, and needed only to be put together in the United States and in certain nailing and trimming, the whole value of which was equal to about one tenth of the value of the boxes, were not "wholly manufactured" in the United States within Rev. Stat. § 3019 and the Treasury Regulations of 1884.

It may be entirely true that, if this drawback be not allowed, the duties upon the bottles and corks will preclude the manufacturer from competing in foreign markets with foreign brewers, since he must necessarily export his beer in imported bottles, while his foreign competitor may use bottles manufactured in his own country. Yet this apparent hardship will not authorize us to do violence to the clear language of the statute. If the law afford him an imperfect relief, his remedy is by application to Congress for additional legislation, and not to the judicial power for a strained interpretation of the law already in force.

The judgment of the Court of Claims is right, and it is therefore

*Affirmed.*

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## MALLETT *v.* NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

No. 189. Argued April 8, 1901. — Decided May 20, 1901.

Questions arising under the Constitution and laws of the United States were presented at the trial of this case in the Supreme Court of the State, and were decided against the party invoking their protection. Had that Court declined to pass on the Federal questions, and dismissed the petition without considering them, this Court would not undertake to revise their action.

The legislation of North Carolina in question in this case, did not make that a criminal act which was innocent when done; did not aggravate an offence or change the punishment and make it greater than it was when it was committed; did not alter the rules of evidence and require less or different evidence than the law required at the time of the commission of the offence; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the

offence charged; and the law granting to the State the right of appeal from the Superior Court to the Supreme Court of the State was not an *ex post facto* law.

The contention that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the Eastern, and not from the Western District of the State, is not well founded.

It appears by the statement of the plaintiffs in error in their petition for a reargument, that no Federal question was raised or considered in the criminal court or in the Superior Court in respect to the admission of the evidence; and therefore there was no basis on which to claim error in this respect in those courts; nor did the Supreme Court in passing on the contention, deal with it as a Federal question, but as a mere question arising under the criminal law of the State; and hence there is nothing in its action for this court to review.

In September, 1898, John P. Mallett and Charles B. Mehegan were indicted and tried in the criminal court of the county of Edgecombe, North Carolina, for conspiracy to defraud. They were convicted and sentenced to two years' imprisonment in the common jail. They appealed to the Superior Court. The record was certified up by the clerk of the criminal court on April 1, 1899. The Superior Court reversed the verdict and judgment, and granted a new trial. From this judgment of the Superior Court the State appealed, on July 7, 1899, to the Supreme Court, which reversed the judgment of the Superior Court, and remanded the cause to the criminal court, with directions that the sentence imposed by that court should be carried into execution.

At the time of the commission of the offence, and at the time of the trial in the criminal court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting the defendants a new trial. There are two district criminal courts in the State—the Eastern and the Western. In the eastern district, in which the county of Edgecombe is situated, the State, since March 6, 1899, by legislation of that date, is allowed to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial, but such right of appeal is not allowed to the State from judgments of the Superior Court in cases on appeal from the west-

ern district criminal court. It thus appears that the right of appeal from the Superior Court to the Supreme Court was conferred upon the State after the commission of the offence and the trial in the criminal, and before the Superior Court had granted a new trial.

From the judgment of the Supreme Court of the State a writ of error was allowed to this court.

*Mr. F. H. Busbee* for plaintiffs in error.

*Mr. J. C. L. Harris* and *Mr. B. G. Green* for defendant in error.

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

Before considering the errors assigned by the plaintiffs in error to the judgment of the Supreme Court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the State to dismiss the writ of error, on the alleged ground that the record does not disclose that any Federal question was raised in either of the courts in which the case was heard, and that no such question was raised.

It is, of course, obvious that there was no opportunity for the defence to raise in the criminal court the question as to the validity, as against the defendants, of the legislation allowing an appeal to the Supreme Court, because that legislation was not enacted till after the trial had been concluded.

It would also seem that the question of the validity of that legislation, in its Federal aspect, was not raised or considered in the Superior Court. It is true that in that court error was alleged to the action of the criminal court in permitting evidence of certain statements in the books of the defendants, and which books had been seized by the sheriff under an attachment against the property of the defendants, to be used on the trial against the defendants and over their objection, and that contention was sustained by the Superior Court, and the new trial was granted for that and other reasons. But it does not

appear that the Superior Court was formally called upon to consider any Federal question.

But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that court considered and decided against the party invoking their protection.

It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for reargument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the Supreme Court of a State after that court has pronounced its final decision. *Loeber* v. *Schroeder*, 149 U. S. 580; *Sayward* v. *Denny*, 158 U. S. 180; *Pim* v. *St. Louis*, 165 U. S. 273.

But those were cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *State* v. *Mallett*, 125 N. C. 718. Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action.

The first contention we encounter in the assignments of error is that, as the statute which provides for an appeal from the Superior Court to the Supreme Court in criminal cases was not passed until after the commission of the offence charged and the trial in the criminal court, it was, as against the plaintiffs in error, *ex post facto* and in violation of Art. 1, sec. 10, of the Constitution of the United States.

Opinion of the Court.

The opinion of the Supreme Court stating the facts and disposing of this question is brief, and may be properly quoted:

"The next exception in the petition is that at the time of the commission of the offence the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendant had no 'vested rights' in the remedies and methods of procedure in trials for crime. They cannot be said to have committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed, at the instance of the State, in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this court. The statute regulating appeals from the Eastern District Criminal Court, chapter 471, Laws 1899, was ratified March 6, 1899."

The subject has been several times considered by this court. The first case was that of *Calder* v. *Bull*, 3 Dall. 386, where the important decision was made that the provision prohibiting *ex post facto* laws had no application to legislation concerning civil rights. But the opinion, delivered by Mr. Justice Chase, contains a classification of the criminal cases in which the provision is applicable:

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates the crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the

time of the commission of the offence in order to convict the offender."

In *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, a law which excluded a minister of the gospel from the exercise of his clerical functions, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the Government of the United States, was held to be an *ex post facto* law, because it punished, in a manner not before prescribed by law, offences committed before its passage, and because it instituted a new rule of evidence in aid of conviction.

In *Kring* v. *Missouri*, 107 U. S. 221, will be found an elaborate review of the history of the *ex post facto* clause of the Constitution and of its construction by the Federal and the state courts. Kring was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentenced pronounced on his plea of murder in the second degree and subjecting him to an imprisonment for twenty-five years had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed; so that by the force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime; and it was held, four of the justices dissenting, that, as to this case, the new law was an *ex post facto* law, and that he could not again be tried for murder in the first degree.

In *Hopt* v. *Utah*, 110 U. S. 574, 589, one of the questions presented was, whether a law which made it competent for witnesses to testify to the commission of a crime who were incompetent to so testify at the time the crime was so committed, was an *ex post facto* law, and it was unanimously held otherwise. *Kring* v. *Missouri* was cited and relied on by the plaintiff in error, and was disposed of by the court, *per* Mr. Justice Harlan, in the following observations:

"That decision proceeded upon the ground that the state constitution deprived the accused of a substantial right which the

law gave him when the offence was committed, and, therefore, in its application to that offence and its consequences altered the situation of the party to his disadvantage. By the law as established when the offence was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offence was committed.

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, ought, in respect of that offence, to be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offence, or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only remove existing restrictions upon the competency of certain

classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged."

In *Gibson* v. *Mississippi*, 162 U. S. 565, it was held that the Mississippi Code, in force when the indictment was found, did not affect in any degree the substantial rights of those who had committed crime prior to its going into effect; it did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender. That the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. That the mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

In *Thompson* v. *Missouri*, 171 U. S. 380, it was held that an act of the legislature of Missouri, providing that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute, is not *ex post facto*, under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage. In the opinion in this case the previous decisions were again reviewed, and the following passage from Cooley's Treatise on Constitutional Limitations was quoted with approval:

"So far as mere modes of procedure are concerned a party

has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, although it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." (Chap. 9, p. 272, 5th ed.) See likewise *Duncan* v. *Missouri*, 152 U. S. 377.

Applying the principles established by these cases to the facts of the present case, we think it may be concluded that the legislation of North Carolina in question did not make that a criminal act which was innocent when done; did not aggravate an offence or change the punishment and make it greater then when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offence; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offence charged.

It must not be overlooked that, when the plaintiffs in error perfected their appeal from the Criminal Court, by procuring its certification, on April 1, 1899, to the Superior Court, the new law, ratified on March 6, 1899, provided that the State could have the decision of that court reviewed by the Supreme Court.

Upon the whole, therefore, we agree with the Supreme Court of North Carolina in holding that the law granting the right of appeal to the State from the Superior to the Supreme Court of the State was not an *ex post facto* law within the meaning of the Constitution of the United States.

The further contention, that the plaintiffs in error were denied the equal protection of the laws because the State was allowed

an appeal from the Superior Court of the Eastern, and not from the Western, District of the State, is not well founded.

In *Missouri* v. *Lewis*, 101 U. S. 22, it was held that, by the Fourteenth Amendment of the Constitution of the United States, a State is not prohibited from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject-matter, amount or finality of their respective judgments or decrees; and that where, by the constitution and laws of Missouri, the St. Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis and some adjoining counties, and the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State, such an adjustment of appellate jurisdiction is not forbidden by anything contained in the Fourteenth Amendment. It was said by Mr. Justice Bradley, giving the opinion of the court:

"Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line

there may be a right of trial by jury, and on the other no such right. Each State prescribes its own modes of judicial proceedings. If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision."

The principles of this case have been approved and applied in several subsequent cases. *Hallinger* v. *Davis*, 146 U. S. 314, 322; *Hodgson* v. *Vermont*, 168 U. S. 262; *Holden* v. *Hardy*, 169 U. S. 366; *Brown* v. *New Jersey*, 175 U. S. 172.

We, therefore, see no error in the action of the Supreme Court of North Carolina in holding that the State has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts.

There remains to consider the contention that, in the trial in the criminal court, by the use of certain books of account belonging to them, the plaintiffs in error were thereby made to be witnesses against themselves, and thus their privileges and immunites as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

In the petition for a rehearing in the Supreme Court, which, as we have seen, is the only part of the record on which the plaintiffs in error can rely as raising Federal questions, the point was thus presented:

"That prior to the beginning of this action an attachment against the property of the defendant was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in this case. By virtue of said attachment the sheriff of Edgecombe County seized the ledger and counter book of the defendants and has kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defend-

ants were offered in evidence. The defendants objected; the objection was overruled, and the defendants excepted. In this the defendants submit there was error. For it is, in effect, making the defendants give evidence against themselves under the principles laid down in the case of *Boyd* v. *United States*, 116 U. S. 616. At the argument of this case at this term counsel had not found this authority, and their argument did not go upon this ground. Since said hearing they found said case, and they are advised that the principle and the authority are decisive, and would at once satisfy the court of the defendants' right to a new trial, if the matter could be brought to its attention."

The only ground of objection shown by the record to have been taken by defendants' counsel to the admission of this evidence was "because the testimony now offered was subsequent to the examination in the supplementary proceedings."

Nothing seems to have been claimed, either in the criminal court or in the Superior Court, as to the inadmissibility of the books as evidence on the ground of any provision of the Federal Constitution. The Supreme Court thus treated the subject:

"We will consider now the only exception which the petition to reargue insists the judge of the Superior Court should have passed upon and held in favor of the defendant, *i. e.*, that the sheriff, by attachment, having seized the ledger and counter book of the defendants, they were put in evidence against them. There was certainly no error in using the defendants' own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. *State* v. *Graham*, 74 N. C. 646. Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in the possession of the prisoner, that fact cannot be used against him. Here the books came legally into the possession of another, and the tell-tale entries were competent against the parties making them in the course of their business."

It therefore appears by the statement of the plaintiffs in error in their petition for a reargument that no Federal question was

raised or considered in the Criminal Court or in the Superior Court, in respect to the admission of the evidence. So that there was no basis on which to claim error in this respect in those courts. Nor did the Supreme Court, in passing upon the contention, deal with it as a Federal question, but as a mere question arising under the administration of the criminal law of the State, and there is, therefore, nothing in its action for us to review.

But we do not wish to be understood as implying that, even if this question had been duly presented in the state courts as a Federal question, there was error in admitting the evidence complained of.

The judgment of the Supreme Court of North Carolina is

*Affirmed.*

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## COLBURN *v.* GRANT.

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

No. 221. Argued and submitted April 8, 9, 1901.—Decided May 20, 1901.

The statements below of the Court of Appeals of the District of Columbia in this case, that abandonment of discretionary power by a trustee to his cotrustee, is a fact to be proved by him who alleges it; that so likewise is negligence in the supervision of a trust; and that neither abandonment nor negligence is to be implied without satisfactory proof of the fact, or of circumstances sufficient to warrant the inference, and that the court does not find that proof in the statement of facts contained in the record, are cited and approved by this court.

The treatment of facts and law in the opinion of the courts below was full and satisfactory, and releases this court from further discussion.

THIS is an appeal from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District dismissing a bill in equity, which had been filed in that court. The complainants were legatees of one Augustus G. P. Colburn and their trustee, Franklin H. Mackey, against Robert E. Grant, the executor of the estate of

Statement of the Case.

George Fitz James Colburn, a deceased trustee of the estate of said Augustus Colburn, for an accounting, it being alleged that there had come into the hands of said trustee and his cotrustee, both of whom were deceased, a large sum of money, namely, $28,000, and that only $5000 thereof had been accounted for. The codefendants of the defendants' executor were those persons who would be entitled to distribution of his testator's estate. The case was heard upon the pleadings and an agreed statement of facts.

The stipulation of facts was as follows:

"In order to obviate the expense of taking testimony in relation thereto, it is hereby stipulated and agreed that the following are conceded as facts, and that the statements herein may be read and taken in this cause as established.

"That the complainant Franklin H. Mackey, trustee, was appointed by decree of this court in equity cause No. 18,728, and has qualified as such.

"That the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of Hervey Colburn, who was a brother to Augustus G. P. Colburn.

"That the complainants Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn and Louise B. Colburn are the only children of H. Hobart Colburn, a deceased child of the said Hervey Colburn; that said H. Hobart Colburn predeceased the said George Fitz James Colburn, and that all the above-named parties are now of full age.

"That George Fitz James Colburn died in September, 1897, unmarried and without issue, his wife having died before him, and that all the brothers and sisters of Augustus G. P. Colburn predeceased the said George Fitz James Colburn except P. D. Miranda Kimball, who died on the 22d day of December, 1897.

"That under the will of the said Augustus G. P. Colburn the said George Fitz James Colburn and John W. Taylor were named as trustees, without bond, for the management of the trust portion of said estate, with power to sell the same.

"That the real estate in the city of Newark, State of New Jersey, mentioned in the will of the said Augustus G. P. Colburn, was sold by said trustees shortly after the death of the

testator, the net proceeds arising therefrom amounting to twenty-seven thousand dollars, which was paid part in cash and the remainder in subsequent instalments, the latter instalments being collected by the said Taylor.

"That the said George Fitz James Colburn removed from the city of Newark in the year 1873 to the city of Washington, D. C., where he resided, except for a few months, up to the day of his death.

"That John W. Taylor, one of the said trustees, was a prominent lawyer of the city of Newark at the time of his appointment, and continued so to be up to the date of his death in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death by his own hands on November 20, 1898.

"That after the death of the said Taylor it was found that he had squandered many estates under his custody, amongst others the said estate of Augustus G. P. Colburn, except the sum of five thousand dollars, which was under the exclusive control of the said George Fitz James Colburn, and which latter sum of $5000 has been turned over by the executor of said George Fitz James Colburn to said Franklin H. Mackey, trustee, by order of this court in equity cause 18,728.

"That the said trust estate, except the said sum of five thousand dollars referred to, was by the said George Fitz James Colburn left solely to the collection, management and discretion of the said Taylor, who handled said sum without the coöperation, supervision or knowledge of the said George Fitz James Colburn, the latter only requiring from said Taylor the payment of the income of said estate to him, said George Fitz James Colburn, as provided by said will.

"Upon the death of said Taylor, trustee, the said George Fitz James Colburn, as surviving trustee, made claim against the estate of said Taylor for the amount of the trust fund by him squandered, as aforesaid, and upon said claim of twenty-two thousand dollars he received a dividend of $3342.45.

"That by paper writings dated respectively September 6, 9 and 11, 1895, Rev. Edward A. Colburn, Rollinson Colburn, and H. Hobart Colburn released all claim to the said $3342.45 unto

the said George Fitz James Colburn, and that thereupon the said George Fitz James Colburn purchased an annuity for himself, which he enjoyed until his death. Said paper writing is in the following form: 'I hereby give my full assent that my cousin, George Fitz James Colburn, shall have full right to use the sum of $3342.45 received by him from his father's estate, should he so have need, and do resign any interest I may have in said sum of $3342.45 if he so desire to use it.' Originals of above paper to be filed in this suit."

*Mr. Franklin H. Mackey* for appellants.

*Mr. J. Holdsworth Gordon*, for appellee, submitted on his brief.

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

The case was heard in the Supreme Court of the District on bill, answers and an agreed statement of facts. Some complaint is made in appellants' brief of the alleged fact that the court treated certain allegations in the answer of the defendant executor as evidence, although an answer under oath had been dispensed with, and it is said that only those portions of the answer which admitted the allegations of the bill, or contained admissions against interest, should have been considered.

We are inclined to think that, upon the record made up and presented at the hearing, the court had a right to consider all the allegations of the answer. No replication, putting the allegations of the answer in issue, appears to have been filed, and the court may have well supposed that the complainants had agreed to have the case disposed of on bill, answers and stipulation. If such a course was a surprise to counsel, application should have been made to have the decree suspended, and for leave to take rebutting evidence.

However, we have examined and compared the respective allegations of the bill and answer, and do not perceive that, even upon the theory of appellants' counsel, any such substan-

tial difference in the facts could have been made to appear as would have justified a different result.

Not only, then, is there an agreement as to the controlling facts, but there also seems to be little or no controversy in respect to the principles of law involved. The learned counsel for the appellants concedes, in effect, the propositions of law found in the opinion of the Court of Appeals, but contends that a proper application of those propositions would call for a different decree.

The purpose of the bill is to have the estate of George Fitz James Colburn held liable for a defalcation by John W. Taylor, who was united with said Colburn in the administration of a trust estate created by the will of Augustus G. P. Colburn, father of George F. J. Colburn.

The father, who was a resident of Newark, New Jersey, died on May 27, 1872, and in his will, dated May 25, 1872, devised to said son, for and during his natural life, a certain dwelling house and lot in said city, with power to the trustees named in the will, who were his said son and John W. Taylor, to sell the same at any time, and to invest the proceeds of such sale as advantageously as possible, and to pay over the income arising therefrom to his said son during his life. Shortly after the death of the testator the trustee sold this real estate for the sum of $27,000, which was paid partly in cash and partly in instalments. George F. Colburn subsequently removed to the city of Washington, where he died in September, 1897.

John W. Taylor was a prominent lawyer in the city of Newark at the time of his appointment, and continued so to be up to the date of his death, and was regarded by the general public as a man of business integrity at the time of his death by his own hand on November 20, 1893.

After Taylor's death it was discovered that he had squandered many estates in his custody, among others the said estate of Augustus G. P. Colburn, except the sum of $5000, which was under the exclusive control of George F. J. Colburn, and which latter sum is not in controversy here.

Upon the death of Taylor, George F. J. Colburn, as surviving trustee, made claims against the estate of Taylor for the amount

of his defalcation in the estate of Augustus G. P. Colburn, and upon said claim of twenty-two thousand dollars he received a dividend of $3342.45. The amount so received was subsequently, with the consent of the residuary legatees under his father's will, invested by George F. J. Colburn in an annuity for himself, which he enjoyed until his death.

Without going into further details, it is evident, and, indeed, is conceded, that George F. J. Colburn was not involved in the dishonest acts of his cotrustee, and which resulted in the loss of the larger part of the trust estate. Nor is it contended that, as a matter of law, was George F. J. Colburn liable for the malfeasance of his cotrustee.

What is contended is that an abandonment of discretionary power by a trustee to a cotrustee, where the trust is entitled to the united discretion of both, is such an act of supine negligence as to render the trustee who has abandoned his active participation in the management of the trust liable for the losses occasioned by the misconduct of the cotrustee; that George F. J. Colburn did so abandon his functions as trustee, and that, accordingly, he was, and his estate now is, liable for the money misapplied by Taylor.

The courts below did not refuse to recognize the soundness of appellants' statement of the law as a general proposition, and, indeed, stated it strongly in the following language:

"Cotrustees may not act independently of one another, nor ignore each other in the management of the trust. The trust is entitled to the united judgment, discretion and ability of all the trustees selected. For this reason they may not delegate discretionary powers among themselves."

But it was the opinion of those courts that, while such is the general doctrine, yet the facts of the present case do not call for its application; that the conduct of Colburn was not in the nature of an abandonment by him of duties devolved upon him as trustee under his father's will.

The Supreme Court thus expressed its conclusion:

"After a loss has occurred, as in this case, by the positive fault of some one, it may be easy to say how it could have been prevented; but in order to hold some one else fairly responsible,

the point of view held by the party sought to be made liable at and before the loss occurred is the only safe point of view to assume. . . . From the light of the circumstances shown, I cannot convince myself that George F. J. Colburn was guilty of any such negligence as to render him liable, nor that the claim now made by the bill in this case is a proper one to be allowed against his executor."

The Court of Appeals, after a full statement of the facts and the law applicable thereto, expressed the following conclusion:

"But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz James Colburn, 16 App. Cas. D. C. 107, 114, or any proof of negligence on his part in the supervision of the trust in such manner as to render himself or his estate liable.

"It is true that it is said in the statement that the trust estate, to the extent of twenty-two thousand dollars, was left by Colburn to 'the collection, management and discretion solely of Taylor,' and that Taylor 'handled said sum without the cooperation, supervision or knowledge of Colburn.' But this is not sufficient. The statement may be consistent with the relinquishment only by Colburn of the ministerial duties which he might well have intrusted to Taylor. In order to hold Colburn responsible there should be some evidence of abandonment by him of the discretionary duties which it was not proper for him to delegate to his cotrustee.

"It is very evident that the testator had confidence in Taylor, whom he designates as his friend, and who was in all probability his legal adviser; and the joinder of Taylor in the trust is, under the circumstances, strong evidence that it was the testator's intention that his should be the controlling mind in the management of the trust; and this view is fully corroborated by the fact that Colburn, in view of his own special interest in the trust and that there was a residuary devise of the trust fund, might not be entirely impartial or entirely judicious in such management. If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed on the trustee Taylor other than to collect the rents and to remit them to Colburn in Washington, and this

duty had been left exclusively to him, we do not think that it would be reasonable to infer from this fact alone that Colburn had abandoned the trust; and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different condition arise? It does not anywhere in the record appear how this fund of twenty-two thousand dollars, alleged to have been left to the management of Taylor, was invested. It does not appear that, after having been once invested, there was ever need or occasion for reinvestment. Indeed, it may reasonably be conjectured that the amount remained as a mortgage on the property sold; and inasmuch as there is nothing to show that such mortgage was ever paid and that the proceeds were reinvested, it would not be unreasonable to assume that the investment remained as it was first placed. At all events, we cannot assume the contrary in the absence of proof. We cannot assume that the money became due, and that Taylor received it and reinvested it without the concurrence of Colburn, or that he wholly failed to reinvest it and converted it to his own use. That Taylor obtained control of the fund and misappropriated it is very clear, but when, or how, or under what circumstances he did so, we are not told. For all we know, he may have come into possession of the fund in the last week or the last month of his life, and he may have been the ministerial agent to receive the money when it was due and payable. He may have come properly into possession of it, and the misappropriation may have been an afterthought. We cannot infer delinquency on the part of Colburn when there is no more proof than is contained in this record that, by his abandonment of his trust, or by his negligence in the supervision of it, he had put it in the power of his cotrustee to prove faithless in his duty. Abandonment of discretionary power by a trustee to his cotrustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of a trust. Neither abandonment

nor negligence is to be implied without satisfactory proof of the fact or of circumstances sufficient to warrant the inference, and we do not find that proof in the statement of facts contained in this record."

Another fact in this case is not without weight.

After Taylor's death, and when it appeared he was a defaulter, Colburn at once presented a claim, as cotrustee, against his estate, and was allowed a dividend in the sum of $3342.45. Thereupon the residuary legatees consented in writing that Colburn should have a right to use said sum in the purchase of an annuity on his own account.

While we are not disposed to accept the suggestion, on behalf of the appellees, that by consenting to such a use by Colburn of the money received from the estate of Taylor, the residuary legatees were estopped from claiming liability for the rest of the fund misapplied by Taylor, we yet think that such a consent tends strongly to show that the residuary legatees, who were fully aware of all the facts and circumstances, did not regard Colburn's conduct as subjecting him to liability for Taylor's misconduct. And the further fact, shown by the record, that no intention to hold Colburn for Taylor's defalcation was ever disclosed till more than two years after Colburn's death, and nearly six years after that of Taylor, tends to show that the effort to so hold him is an afterthought, not entitled to the approval of a court of equity.

The treatment of facts and law in the opinions of the courts below, contained in the record, was so full and satisfactory as to relieve us from further discussion.

The decree of the Court of Appeals of the District of Columbia is

*Affirmed.*

# AMERICAN SUGAR REFINING COMPANY *v.* UNITED STATES.

# AMERICAN SUGAR REFINING COMPANY *v.* UNITED STATES.

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

Nos. 225, 236. Argued April 12, 1901.—Decided May 20, 1901.

These cases, argued and submitted together, involve the appraisement of sugars imported from Brazil. The sugars were shipped "green," that is, contained moisture, a certain portion of which drained on the voyage, whereby they became more valuable. Duties were levied and collected by the collector upon the increased valuation, against the protest of the importers. *Held* that the appraisement so made was legal.

THE case is stated in the opinion of the court.

*Mr. H. B. Closson* for the Sugar Refining Company. *Mr. John E. Parsons* was on his brief.

*Mr. Assistant Attorney General Hoyt* for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These two cases were argued and submitted together. They involve the appraisement of certain sugars imported from Brazil. The sugars were shipped "green," that is, contained moisture. A certain per cent of this moisture drained on the voyages, and the sugars became thereby more valuable. In other words, as the sugars diminished in weight they increased in value, being worth as much here as the original quantity shipped in Brazil. This is always true of Brazilian sugars, and is recognized by the trade and is made a basis of settlement between vendor and vendee. The "settlement test" was used by the appraisers in ascertaining the value of the sugars in Brazil in

the condition they arrived here. Mr. Sharretts, a member of the general board of appraisers, testified in No. 236 (and there was no opposing testimony) as follows:

"The price paid for sugars of this description from Brazil is a conditional one, the stipulation being that they will give a certain price, with a proviso that the decrease or loss of weight in decreased moisture shall not exceed a certain point. Therefore, in determining what the real price to be paid for that sugar was, it was necessary to determine what the test was in the United States. By an agreement between the board of general appraisers and the government on the one side and the importers on the other, we accepted in all cases the settlement test as controlling; that is, the test upon which the commercial transaction was made was the test which we accepted as the controlling one in determining the quantity or percentage of sugar on which duty was to be paid. In this particular case the board found or the board made a return upon the settlement test. On that settlement test they made the report and found the value to be equal to 11*s.* 11*d.* per 100 kilos or per ton, the equivalent for this sugar of the same test as that which arrived in the United States, in the country of exportation. In other words, they held that the diminished quantity of sugar arriving in the United States was worth just as much as they paid for the original quantity as shipped from Brazil. We therefore found it on the basis of the settlement test to be 11*s.* 11*d.*"

Duties were levied by the collector upon the increased valuation of the sugars. The importers protested, claiming that the duties were illegally exacted. The action of the collector was affirmed by the board of general appraisers, and successively by the Circuit Court and the Circuit Court of Appeals. The cases were then brought here.

Under section 182½ of the tariff act of 1894 the rate of duty was fixed at forty per cent; but upon what valuation? Counsel for petitioner says:

"In each of these importations the appraiser ascertained that the market value of the sugar when shipped was a certain amount per hundredweight. To this valuation, in each case, he made an addition of a certain further amount per hundredweight

to represent a supposed increase of its value during the voyage owing to drainage. Duty was accordingly assessed at forty per cent, not of the value of the sugar per hundredweight 'at the time of the exportation to the United States,' 'on the day of actual shipment,' and 'in the condition in which such merchandise is there bought and sold for exportation to the United States,' but at forty per cent of its greater value per hundredweight in its condition when landed."

It is apparent that the increase in value offsets the decrease in weight—that is, the total value of the invoice was not increased. Where then was there injury to petitioner? The claim is that duties should have been levied according to the condition in which the sugars had been bought in Brazil, but the claim ignores one element of that condition—the very element which made the condition—and ignoring it the claim is attempted to be justified by section 19 of the customs administrative act of 1890. The section provides as follows:

"That whenever imported merchandise is subject to *ad valorem* rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale. . . . That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual value or wholesale price as defined in this section."

We do not think the statute is very obscure. Passing by the consideration of section 23, (inserted in the margin,)[1] we may say, as was decided in *Marriott* v. *Brune*, 9 How. 619, and

[1] SEC. 23. "No allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after the entry, abandon to the United States all or any portion of

*United States* v. *Southmayd*, 9 How. 637, imported merchandise is that which arrives in this country, and it is upon that duties are to be paid. Those cases passed on imports of sugars which had lost weight by drainage on the voyages. The controversy was whether duties should be levied upon the weight of the sugars when shipped, or upon their weight when they arrived, which was less on account of drainage and waste to the extent of five per cent, than when they were shipped. The court sustained the latter view, saying: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is what is imported—for nothing is imported until it comes within the limits of the port." The evidence in those cases also showed that the quality of the sugars was less on account of the drainage. "Nor is his sugar improved in quality," the court said, "by the drainage, so as to raise any equity against him (the importer) by it."

The evidence in the case at bar is that the sugars had improved in quality—becoming a higher grade of sugar, and necessarily under the principle of the cited cases it was that grade which was imported. Why then should they not have paid duty according to that grade? It was that grade, to use the language of *Marriott* v. *Brune*, which went "into the consumption of the country"—it was that grade which went "into competition with our domestic manufactures."

But, it is contended, that was not their condition when shipped. In one sense it was not, nor did the importers seek to pay duty on the sugars in the condition in which they were shipped. An element of that condition escaped, and it was calculated that it would escape, and the price to the importer was to be adjusted by it. With no decrease in the value of its sugars, petitioner claims a decrease of duties which the law fixes by value. The petitioner wants the benefit of the weight of the old condition and the benefit of the quality of the new.

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goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties of the portion so abandoned, provided the portion so abandoned amounts to ten per centum or over of the total value or quantity of the invoice."

To dwell upon the relative conditions of the sugars is misleading. They are really not the same articles, and it is upon the imported article the duty must be laid. This is the purpose of the statute. It is "such merchandise" which is imported and which is subject to an *ad valorem* duty according to its market value from whence it has come. And the practical justness of the rule is illustrated by this case. It is true that a witness testifying generally as to drainage from sugar cargoes said "it (the drainage) might be worth more and it might not be worth much." But what it was worth in the present case was not testified to. Whatever it was worth, it was petitioner's property, and whether it was worth reclamation was for petitioner to judge. Besides the ultimate valuation of the appraisers is not contested. Their authority is to make it. As the Court of Appeals said, "the legality of the appraisement is questioned, not its accuracy or its equity." We have no doubt about its legality, and the

*Judgments are affirmed.*

## DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 413. GREGORY *v.* PIKE. Appeal from the Circuit Court of the United States for the District of Massachusetts. Motions to dismiss or affirm submitted April 8, 1901. Decided April 15, 1901. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Thomas H. Talbot* for the motions. *Mr. F. A. Brooks* opposing.

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No. 272. TERRITORY OF OKLAHOMA UPON THE RELATION OF RIDINGS, COUNTY ATTORNEY, *v.* NEVILLE ET AL., BOARD OF COUNTY COMMISSIONERS. Appeal from the Supreme Court of the Territory of Oklahoma. Submitted April 24, 1901. Decided April 29, 1901. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Smith* v. *Adams*, 130 U. S. 167; *Thomas* v. *Wooldridge*, 23 Wall. 283, 288. *Mr. John W. Shartel* and *Mr. J. R. Keaton* for the appellant. *Mr. Horace Speed* for the appellees.

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No. 311. MANCHESTER *v.* CENTRAL BAPTIST CHURCH AND SOCIETY OF TIVERTON. Error to the Supreme Court of the State of Rhode Island. Motions to dismiss or affirm submitted April 29, 1901. Decided May 13, 1901. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. William P. Sheffield, Jr.*, for the motions. No one opposing.

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No. 388. NORDSTROM (BY HIS NEXT FRIEND DENNING) *v.* VAN DE VANTER, SHERIFF, ETC. Appeal from the Circuit Court of the United States for the District of Washington. Motions to dismiss or affirm submitted April 29, 1901. Decided May 13, 1901. *Per Curiam.* Order affirmed with costs on the author-

ity of *Nobles* v. *Georgia*, 168 U. S. 398; *Kohl* v. *Lehlback*, 160 U. S. 293, and see *State* v. *Nordstrom*, 21 Wash. 403; *Nordstrom* v. *Moyer, Sheriff*, 170 U. S. 703; *Nordstrom* v. *Washington*, 164 U. S. 705; *Craemer* v. *Washington*, 168 U. S. 124; *State* v. *Nordstrom*, 7 Wash. 506. *Mr. Walter S. Fulton* and *Mr. Frank B. Crosthwaite* for the motions. *Mr. James Hamilton Lewis* opposing.

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No. 469. Grand Island and Wyoming Central Railroad Company *v.* Sweeney. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motions to dismiss or affirm submitted May 13, 1901. Decided May 20, 1901. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Charles W. Brown* for the motions. *Mr. Charles F. Maderson* and *Mr. N. K. Griggs* opposing.

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No. 389. Nordstrom *v.* State of Washington. Error to the Supreme Court of the State of Washington. Motions to dismiss or affirm submitted May 27, 1901. Decided May 28, 1901. *Per Curiam.* Judgment affirmed, with costs, on the authority of *Nobles* v. *Georgia*, 168 U. S. 398; *Nordstrom* v. *Van de Vanter*, 181 U. S. 616, and cases cited. *Mr. Walter S. Fulton* and *Mr. Frank B. Crosthwaite* for the motions. *Mr. James Hamilton Lewis* opposing.

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## *Decisions on Petitions for Writs of Certiorari.*

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No. 606. Board of Liquidation of the City Debt of New Orleans *v.* United States *ex rel.* Warner. Fifth Circuit. Denied April 8, 1901. (Mr. Justice White and Mr. Justice Peckham took no part in the consideration and disposition of this application.) *Mr. Branch K. Miller* for the petitioner. *Mr. Richard DeGray, Mr. J. D. Rouse, Mr. Wm. Grant* and *Mr. H. M. Jordan* opposing.

Decisions announced without Opinions.

No. 607. BOARD OF LIQUIDATION OF THE CITY DEBT OF NEW ORLEANS *v.* UNITED STATES *ex rel.* FISHER. Fifth Circuit. Denied April 8, 1901. (Mr. Justice White and Mr. Justice Peckham took no part in the consideration and disposition of this application.) *Mr. Branch K. Miller* for the petitioner. *Mr. Charles Louque* and *Mr. E. Howard McCaleb* opposing.

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No. 594. PASSAIC PRINT WORKS *v.* ELY AND WALKER DRY GOODS COMPANY. Eighth Circuit. Denied April 15, 1901. *Mr. Frederick V. Van Vorst* for the petitioner. *Mr. William B. Thompson* opposing.

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No. 605. PARKER *v.* SQUIRES. Sixth Circuit. Denied April 15, 1901. *Mr. William J. Gray* for the petitioner. *Mr. Ronald Kelly* opposing.

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No. 623. KELLY *v.* JUTTE AND FOLEY COMPANY. Third Circuit. Denied April 15, 1901. *Mr. E. Spencer Miller* for the petitioner. *Mr. Richard P. White* opposing.

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No. 624. RIEGER *v.* UNITED STATES. Eighth Circuit. Denied April 15, 1901. *Mr. Frank Hagerman* and *Mr. Willard P. Hall* for the petitioner. *Mr. Attorney General* and *Mr. Wm. H. Wallace* opposing.

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No. 625. HARTFORD FIRE INSURANCE COMPANY *v.* WILSON. Court of Appeals of the District of Columbia. Granted April 15, 1901. *Mr. Alexander Wolf* and *Mr. Samuel B. Paul* for the petitioner. *Mr. Henry P. Blair* opposing.

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No. 610. BURT *v.* UNION CENTRAL LIFE INSURANCE COMPANY. Fifth Circuit. Granted April 22, 1901. *Mr. A. W. Terrell* for the petitioners.

Decisions announced without Opinions.

No. 617. ALLEGHENY OIL COMPANY *v.* SNYDER. Sixth Circuit. Denied April 22, 1901. *Mr. W. H. H. Miller* and *Mr. J. B. Chapman* for petitioner. *Mr. D. A. Hollingsworth* and *Mr. Edward McSweeney* opposing.

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No. 618. GILLMOR *v.* BROWN. Sixth Circuit. Denied April 22, 1901. *Mr. W. H. H. Miller* and *Mr. J. B. Chapman* for petitioners. *Mr. D. A. Hollingsworth* and *Mr. Edward McSweeney* opposing.

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No. 619. NEW YORK LIFE INSURANCE COMPANY *v.* ALLISON. Second Circuit. Denied April 22, 1901. *Mr. E. E. McCall*, *Mr. G. W. Hubbell* and *Mr. Frederic D. McKenney* for petitioner. *Mr. A. J. Dittenhoefer* opposing.

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No. 631. TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY *v.* COX. Seventh Circuit. Denied April 22, 1901. *Mr. Lawrence Maxwell, Jr.*, and *Mr. S. O. Pickens* for petitioners. *Mr. John G. Williams* and *Mr. G. W. Wickersham* opposing.

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No. 633. FALK *v.* UNITED STATES. Court of Appeals of the District of Columbia. Denied April 22, 1901. *Mr. Edwin Forrest* for petitioner. *Mr. Attorney General*, *Mr. Solicitor General Richards* and *Mr. Thomas H. Anderson* opposing.

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No. 632. LAWDER *v.* STONE, COLLECTOR. Fourth Circuit. Granted April 29, 1901. *Mr. Edward S. Hatch* and *Mr. Thomas P. Wickes* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

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No. 640. LOEB *v.* UNITED STATES. Second Circuit. Denied April 29, 1901. *Mr. W. Wickham Smith* and *Mr. Charles*

*Curie* for petitioners. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

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No. 642. TUCKER, VICE CONSUL, *v.* U. S. *ex rel.* ALEXANDROFF. Third Circuit. Granted April 29, 1901. *Mr. F. R. Condert, Jr.*, *Mr. Paul Fuller*, and *Mr. John F. Lewis* for petitioner.

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No. 626. FRANCIS *v.* UNITED STATES. Sixth Circuit. Granted April 29, 1901. *Mr. Miller Outcalt* and *Mr. Thomas F. Shay* for petitioners.

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No. 621. HALE, AS RECEIVER, *v.* ALLINSON. Third Circuit. Granted May 13, 1901. *Mr. M. H. Boutelle*, *Mr. Joseph K. McCammon* and *Mr. James H. Hayden* for petitioner. *Mr. John G. Johnson* opposing.

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No. 638. REPUBLIC OF COLOMBIA *v.* CAUCA COMPANY. Fourth Circuit. Denied May 13, 1901. *Mr. Calderon Carlisle* and *Mr. William G. Johnson* for petitioner.

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No. 643. JONES *v.* NEWTON. Fourth Circuit. Denied May 13, 1901. *Mr. Samuel Park* and *Mr. R. G. Bickford* for petitioner. *Mr. Thomas Evans* opposing.

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No. 645. NEW ENGLAND RAILROAD COMPANY *v.* HYDE. First Circuit. Denied May 13, 1901. *Mr. Frank A. Farnham* and *Mr. Frederic D. McKenney* for petitioner. *Mr. Donald G. Perkins* opposing.

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No. 647. ROWAN *v.* IDE. Fifth Circuit. Denied May 13,

1901. *Mr. William A. Gunter* and *Mr. Thomas H. Clark* for petitioner.

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No. 649. Western Union Telegraph Company *v.* Burgess. Sixth Circuit. Denied May 13, 1901. *Mr. Rush Taggart*, *Mr. George H. Fearons* and *Mr. Henry Newbegin* for petitioner.

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No. 653. Louisville Trust Company *v.* Comingor. Sixth Circuit. Granted May 13, 1901. *Mr. Augustus E. Willson* for petitioner.

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No. 655. Mencke *v.* Cargo of Java Sugar, etc. Second Circuit. Granted May 13, 1901. *Mr. J. Parker Kirlin* for petitioner. *Mr. Wilhelmus Mynderse* opposing.

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No. 636. Joseph Bancroft & Sons Company *v.* Bloede. Fourth Circuit. Denied May 20, 1901. *Mr. John N. Steele* and *Mr. Herbert H. Ward* for petitioner. *Mr. George R. Willis* and *Mr. Robert Biggs* opposing.

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No. 661. United States *ex rel.* Bride *v.* McFarland et al. Court of Appeals of the District of Columbia. Denied May 20, 1901. *Mr. O. B. Hallam* for petitioner. *Mr. Andrew B. Duvall* and *Mr. C. A. Brandenburg* opposing.

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No. 662. Connecticut Mutual Life Insurance Company *v.* Hillmon. Eighth Circuit. Granted May 20, 1901. *Mr. Edward S. Isham*, *Mr. Wm. G. Beale*, *Mr. Gilbert E. Porter* and *Mr. James W. Green* for petitioner. *Mr. C. F. Hutchings* and *Mr. L. B. Wheat* opposing.

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No. 663. Wright *v.* United States. Fifth Circuit. De-

nied May 20, 1901. *Mr. J. D. Rouse*, *Mr. Wm. Grant* and *Mr. H. M. Jordan* for petitioners. *Mr. Attorney General*, *Mr. Solicitor General* and *Mr. W. W. Howe* opposing.

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No. 670. UNITED STATES *v.* MCBRATNEY. Second Circuit. Denied May 20, 1901. *Mr. Attorney General*, *Mr. Solicitor General* and *Mr. Assistant Attorney General Hoyt* for petitioner. *Mr. Charles Curie* and *Mr. W. Wickham Smith* opposing.

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No. 673. ZACHER, AS RECEIVER AND ASSIGNEE, *v.* FIDELITY TRUST AND SAFETY VAULT COMPANY, ASSIGNEE. Denied May 20, 1901. *Mr. Alexander P. Humphrey* for petitioner. *Mr. W. O. Harris* and *Mr. John G. Simrall* opposing.

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No. 675. INSURANCE COMPANY OF NORTH AMERICA *v.* STEAMSHIP "ST. HUBERT." Third Circuit. Denied May 20, 1901. *Mr. Francis S. Laws* and *Mr. John F. Lewis* for petitioner. *Mr. J. Parker Kirlin* opposing.

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No. 656. CITY OF PIERRE *v.* DUNSCOMB. Eighth Circuit. Denied May 20, 1901. *Mr. Ivan W. Goodner* for petitioner. *Mr. A. B. Kittredge* and *Mr. M. H. Cardozo* opposing.

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No. 671. UNITED STATES *v.* LACKEY. Sixth Circuit. Denied May 27, 1901. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. *Mr. Robert F. Hill* opposing.

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No. 674. UNION STEAMBOAT COMPANY *v.* ERIE AND WESTERN TRANSPORTATION COMPANY. Sixth Circuit. Granted May 27, 1901. *Mr. J. J. Darlington* and *Mr. C. E. Kremer* for petitioner. *Mr. F. H. Canfield* and *Mr. Harvey D. Goulder* opposing.

Decisions announced without Opinions.

No. 665. LEICESTER MILLS COMPANY *v.* POWELL. Third Circuit. Denied May 27, 1901. *Mr. Hector T. Fenton* for petitioner. *Mr. Charles Howson* opposing.

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No. 678. PAUL SHEAN SANITARY PLUMBING AND MANUFACTURING COMPANY *v.* GUARANTY TRUST COMPANY OF NEW YORK, and No. 679. CHRISTIE ET AL. *v.* GUARANTY TRUST COMPANY OF NEW YORK. Fifth Circuit. Denied May 27, 1901. *Mr. A. B. Browne* and *Mr. J. W. Terry* for petitioners. *Mr. Julien T. Davies*, *Mr. R. S. Lovett* and *Mr. Brainard Tolles* opposing.

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No. 683. TRUST COMPANY OF NORTH AMERICA *v.* MANHATTAN TRUST COMPANY. Eighth Circuit. Denied May 27, 1901. *Mr. Charles Henry Jones* for petitioner. *Mr. George W. Wickersham* opposing.

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No. 581. CITY OF HURON *v.* WARREN; No. 582. CITY OF HURON *v.* ELWOOD, and No. 644. CITY OF HURON *v.* SHEPARD. Eighth Circuit. Denied May 28, 1901. *Mr. John Wood* for petitioner. *Mr. Wm. M. Jones*, *Mr. C. O. Bailey* and *Mr. John L. Pyle* opposing.

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No. 635. DELEMOS *v.* UNITED STATES. Fifth Circuit. Denied May 28, 1901. *Mr. Thomas H. Clark* and *Mr. F. G. Caffey* for petitioner. *Mr. Attorney General* and *Mr. Assistant Attorney General Beck* opposing.

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No. 672. BOARD OF EDUCATION OF THE CITY OF PIERRE *v.* MCLEAN. Eighth Circuit. Denied May 28, 1901. *Mr. Ivan W. Goodner* for petitioner. *Mr. Robert W. Stewart* opposing.

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No. 680. DOUGHERTY *v.* UNITED STATES; No. 681. FARRAHER *v.*

UNITED STATES, and No. 682. LAVIN *v.* UNITED STATES. Third Circuit. Denied May 28, 1901. *Mr. Francis B. Bracken* for petitioners. *Mr. Attorney General* and *Mr. Assistant Attorney General Beck* opposing.

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No. 694. COUNTY OF HUGHES *v.* LIVINGSTON. Eighth Circuit. Denied May 28, 1901. *Mr. Thompson P. Estes* for the petitioner. *Mr. Edward C. Stringer* opposing.

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No. 697. BRITISH AND FOREIGN MARINE INSURANCE COMPANY *v.* INTERNATIONAL NAVIGATION COMPANY; No. 698. INSURANCE COMPANY OF NORTH AMERICA *v.* SAME; No. 699. THAMES AND MERSEY INSURANCE COMPANY *v.* SAME; and No. 700. ATLANTIC MUTUAL INSURANCE COMPANY *v.* SAME. Second Circuit. Denied May 28, 1901. *Mr. Treadwell Cleveland* for petitioners in Nos. 697, 698 and 699, and *Mr. Lewis Cass Ledyard* for petitioners in No. 700. *Mr. Henry Galbraith Ward* opposing.

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No. 703. MODERN WOODMEN OF AMERICA *v.* UNION NATIONAL BANK OF OMAHA. Eighth Circuit. Denied May 28, 1901. *Mr. John L. Kennedy* for petitioner.

## SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1900.

### ORDER AS TO HAWAII.

It is now here ordered by the Court that the Territory of Hawaii be, and it is hereby, assigned to the Ninth Judicial Circuit under Section fifteen of the Judiciary Act of March 3, 1891.

April 15, 1901.

# INDEX.


## ADMIRALTY.

1. The Harter act, so-called, does not relieve the ship owner from liability for damages caused by the unseaworthy condition of his ship at the commencement of her voyage. *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 218.
2. Nor is the ship owner exempted from liability under that act, "for damage or loss resulting from faults or errors of navigation, or in the management of said vessel," unless it appears that she was actually seaworthy when she started or that the owner had exercised due diligence to make her so in all respects. *Ib.*
3. The mere fact that the owner provides a vessel properly constructed and equipped is not conclusive that the owner has exercised due diligence within the meaning of the act, for the diligence required is diligence on the part of all the owner's servants in the use of the equipment before the commencement of the voyage and until it has actually commenced; and the law recognizes no distinction founded on the character of the servants employed to accomplish that result. *Ib.*
4. Whether a ship is reasonably fit to carry her cargo is a question to be determined on all the facts and circumstances, and the difference in the facts of this case from those in *The Silvia*, 171 U. S. 462, was such that the Court of Appeals was at liberty to reach a different result. *Ib.*
5. In a suit for a collision against a vessel navigated by charterers, it is competent for the court to entertain a petition by the general owners that the charterers be required to appear and show cause why they should not be held primarily liable for the damages occasioned by the collision. *The Barnstable*, 464.
6. A ship is liable *in rem* for damages occasioned by a collision through the negligence of the charterers having her in possession and navigating her. *Ib.*
7. If a stipulation in the charter party that "the owners shall pay for the insurance on the vessel" imposes any other duty on the owner than that of paying the premiums, it goes no farther than to render them liable for losses covered by an ordinary policy of insurance against perils of the sea; and as such policy would not cover damage done to another vessel by a collision with the vessel insured, the primary liability for such damage rests upon the charterers, who undertook to navigate the vessel with their own officers and crew, and not upon the owners. *Ib.*

## ALIMONY.

1. A decree of the highest court of a State, giving full faith and credit to a

decree in another State for alimony, cannot be reviewed by this court on writ of error sued out by the defendant. *Lynde* v. *Lynde*, 183.

2. The refusal of the highest court of a State to give effect to so much of a decree in another State, as awards alimony in the future, and requires a bond, sequestration, a receiver and injunction, to secure payment of past and future alimony, presents no Federal question for the review of this court. *Ib.*

3. Alimony, whether in arrear at the time of an adjudication in bankruptcy, or accruing afterwards, is not provable in bankruptcy, or barred by the discharge. *Audubon* v. *Shufeldt*, 575.

*See* DIVORCE, 3.

ATTACHMENT.

Under the law of Oregon which was in force in Alaska when the seizure and levy of the plaintiff's goods were made by the defendant as marshal of Alaska under a writ of attachment, that officer could not, by virtue of his writ, lawfully take the property from the possession of a third person, in whose possession he found it. *Marks* v. *Shoup*, 562.

BANKRUPT.

A bankrupt, nine days before the filing of a petition in bankruptcy against him, made a general assignment for the benefit of his creditors which was an act of bankruptcy. After the filing of the petition in bankruptcy, the assignee sold the property. After the adjudication in bankruptcy, and before the appointment of a trustee, the petitioning creditors applied to the District Court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The court ordered that the marshal take possession, and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or, failing to do so, be decreed to have no right in it. The purchaser came in, and propounded a claim, stating that he bought the property for cash in good faith of the assignee, submitted his claim to the court, asked for such orders as might be necessary for his protection, and prayed that the creditors be remitted to their claim against the assignee for the price, or the price be ordered to be paid by the assignee into court and paid over to the purchaser, who thereupon offered to rescind the purchase and waive all further claim to the property. *Held*, that the purchaser had no title in the property superior to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court, bringing in the assignee if necessary. *Bryan* v. *Bernheimer*, 188.

*See* ALIMONY, 2;
JURISDICTION OF DISTRICT COURTS OF THE UNITED STATES.

CASES AFFIRMED OR FOLLOWED.

1. *East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Com-*

*merce Commission*, 181 U. S. 1, followed. *Interstate Commerce Commission* v. *Clyde Steamship Company*, 29.

2. *Brown* v. *Marion National Bank*, 169 U. S. 416, followed on the point that "if an obligee actually pays usurious interest as such, the usurious transaction must be held to have occurred then, and not before, and he must sue within two years thereafter." *Dangerfield National Bank* v. *Ragland*, 45.
3. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Waters-Pierce Company* v. *Texas*, 177 U. S. 28; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389, approved and affirmed. *Hancock Mutual Life Ins. Co.* v. *Warren*, 73.

*See* CONSTITUTIONAL LAW, 19 to 23;
COURT AND JURY, 1.

## CASES DISTINGUISHED.

This case distinguished from *Railroad Co.* v. *Husen*, 95 U. S. 465. *Rasmussen* v. *Idaho*, 198.

## CLAIMS AGAINST THE UNITED STATES.

One who pays to government officers, entitled to receive money for public lands, more than the law required him to pay for it cannot recover that excess in an action against the Government in the Court of Claims. *United States* v. *Edmondston*, 500.

## COMMON LAW.

1. There is no body of Federal common law, separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statutes enacted by the several States. *Western Union Tel. Co.* v. *Call Publishing Co.*, 92.
2. The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment. *Ib.*

## CONSTITUTIONAL LAW.

1. After the Supreme Court of South Carolina had construed the mortgage contract in accord with the claim of the plaintiffs, and gave judgment accordingly, in an application for a rehearing it was set up for the first time that this was in conflict with the Constitution of the United States. *Held*, that this came too late. *Eastern Building Association* v. *Welling*, 47.
2. The assertion that, although no Federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the Constitution of the United States was relied on, nevertheless it is the duty of this court to look into the record and determine whether the existence of such a claim was not necessarily involved, was unsound, as shown by authority. *Ib.*
3. Section 3625 of the Revised Statutes of Ohio dealing with the subject of

answers to interrogatories in applications for policies of life insurance, applicable to all life insurance companies doing business in the State of Ohio, and in force at the time the policy of insurance sued on in this case was issued, was within the power of the State over corporations, and not in violation of the Constitution of the United States. *Hancock Mutual Life Ins. Co.* v. *Warren*, 73.

4. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power, delegated by the legislature as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the Constitution of the United States. *St. Paul Gas Light Co.* v. *St. Paul*, 142.
5. In this case, as no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of such a contract did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court. *Ib.*
6. The provision in the statute of March 13, 1899 of Idaho that "whenever the governor of the State of Idaho has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other State or Territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit the importation from them of any sheep into the State, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper," does not conflict with the Constitution of the United States. *Rasmussen* v. *Idaho*, 198.
7. In this case the court proceeds on the assumption that the legal import of the phrase "due process of law" is the same both in the Fifth and the Fourteenth Amendments to the Constitution of the United States; and that it cannot be supposed that it was intended by the Fourteenth Amendment to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government by the Fifth Amendment in a similar exercise of power. *French* v. *Barber Asphalt Paving Co.*, 324.
8. It was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation: that amendment legitimately operates to extend to the citizens and residents of the States, the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights. *Ib.*
9. The conclusions reached by this court in many cases cited and summarized by the court in its opinion are thus stated by two writers, (Cooley and Dillon) whose views this court adopts. "The major part of the

cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits. The whole cost in other cases is levied on lands in the immediate vicinity of the work. In a constitutional point of view, either of these methods is admissible, and one may sometimes be just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule. The courts are very generally agreed that the authority to require the property specially benefited, to bear the expense of local improvements is a branch of the taxing power, or included within it . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abuttors, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." *Ib.*

10. *Norwood* v. *Baker*, 172 U. S. 269, considered, and held not to be inconsistent with these views *Ib.*

11. A constitutional right against unjust taxation is given for the protection of private property, but it may be waived by those affected, who consent to such action to their property as would otherwise be invalid. *Wight* v. *Davidson*, 371.

12. It was within the power of Congress, by the act of March 3, 1899, c. 431, 30 Stat. 1344, to extend S street in the District of Columbia, to order the opening and extension of the streets in question, and to direct the Commissioners of the District to institute and conduct proceedings in the Supreme Court of the District to condemn the necessary land; and it was also competent for Congress, in said act, to provide that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one half thereof should be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as provided for in said act; and that the sums to be assessed against each lot or piece or parcel of ground should be determined and designated by the jury, and that, in determining what amount should be assessed against any particular piece or parcel of ground, the jury should take into consideration the situation of said lots, and the benefits that they might severally receive from the opening of said streets. *Ib.*

13. The order of publication gave due notice of the filing of the petition in

this case, and an opportunity to all persons interested to show cause why the prayer of the petition should not be granted. *Ib.*

14. It also operated as a notice to all concerned of the pending appointment of a jury, and that proceedings would be had under the act of Congress. *Ib.*
15. The act of March 3, 1899, was a valid act, and the proceedings thereunder were regular and constituted due process of law. *Ib.*
16. The Court of Appeals, in regarding the decision in *Norwood* v. *Baker*, 172 U. S. 269, as overruling previous decisions of this Court in respect to Congressional legislation as to public local improvements in the District of Columbia, is overruled. *Ib.*
17. It was not the intention of the court in *Norwood* v. *Baker*, 172 U. S. 269, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment to the Constitution of the United States; but the purpose of that Amendment is to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress. *Tonawanda* v. *Lyon*, 389.
18. It is within the power of the legislature of a State to create special taxing districts, and to charge the cost of local improvements, in whole or in part, upon the property in said district, either according to valuation, or superficial area, or frontage; and it was not the intention of this court, in *Norwood* v. *Baker*, 172 U. S. 269, to hold otherwise. *Webster* v. *Fargo*, 394.
19. The court holds and adheres to its decisions in *French* v. *Asphalt Paving Co.*, *Tonawanda* v. *Lyon* and *Wight* v. *Davidson*, and finds nothing in the record to show that the complainants have entitled themselves to its interference. *Cass Farm Company* v. *Detroit*, 396.
20. *Cass Farm Company* v. *Detroit*, *ante*, 396, followed in holding that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress; and Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*, 172 U. S. 269. *Detroit* v. *Parker*, 399.
21. *Parsons* v. *District of Columbia*, 170 U. S. 45, and *French* v. *Barber Asphalt Paving Co.*, *ante*, 324, followed. *Wormley* v. *District of Columbia*, 402.
22. *French* v. *Barber Asphalt Paving Co.*, again followed in holding that the contract in question in this case made for the construction of a sewer and the assessment against the property of the plaintiff in error

for the cost of making it were not null and void. *Shumate* v. *Heman*, 402.

23. *French* v. *Barber Asphalt Co.*, *ante* 324, and *Wight* v. *Davidson*, *ante* 371, followed. *Farrell* v. *West Chicago Park Commissioners*, 404.
24. There is no such difference in the several statutes of North Dakota, so far as regards the rights of the parties, as to forbid the application of the latest statute to a case where a mortgage was given, and the materials furnished prior to its passage; and the legislation under review cannot be held to violate any rights of the plaintiff in error, protected by the Constitution of the United States. *Red River Valley Bank* v. *Craig*, 548.
25. A mortgage which is subsequent to the right of subsequent lienors who furnished materials or labor in the erection of a building to sell the same, and have it removed for the payment of the liens, is not reduced in value by a statute authorizing the sale of the property such as is set forth in the opinion of the court. *Ib.*
26. Questions arising under the Constitution and laws of the United States were presented at the trial of this case in the Supreme Court of the State, and were decided against the party invoking their protection. Had that Court declined to pass on the Federal questions, and dismissed the petition without considering them, this Court would not undertake to revise their action. *Mallett* v. *North Carolina*, 589.
27. The legislation of North Carolina in question in this case, did not make that a criminal act which was innocent when done; did not aggravate an offence or change the punishment and make it greater than it was when it was committed; did not alter the rules of evidence and require less or different evidence than the law required at the time of the commission of the offence; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commissions of the offence charged; and the law granting to the State the right of appeal from the Superior Court to the Supreme Court of the State was not an *ex post facto* law. *Ib.*
28. The contention that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the Eastern, and not from the Western, District of the State, is not well founded. *Ib.*
29. It appears by the statement of the plaintiffs in error in their petition for a reargument, that no Federal question was raised or considered in the criminal court or in the Superior Court in respect to the admission of the evidence; and therefore there was no basis on which to claim error in this respect in those courts; nor did the Supreme Court in passing on the contention, deal with it as a Federal question, but as a mere question arising under the criminal law of the State; and hence there is nothing in its action for this court to review. *Ib.*

*See* CORPORATION;
QUARANTINE.

## CONTRACT.

1. Any seal may be used and adopted by a corporation as well as an individ-

ual, and the same general principles respecting seals apply to municipal as well as private corporations. *District of Columbia* v. *Camden Iron Works*, 453.

2. It was for the Commissioners of the District of Columbia to determine whether the interests of the District required the contract in this case to be sealed. And the contract having been executed as and for the District, the seals of the Commissioners are to be assumed to have been affixed as the seal of the corporation. *Ib.*
3. Where work is to be completed within a specified number of days from the date of the execution of a contract, parol evidence that the contract was executed and delivered subsequent to its date, is admissible. *Ib.*
4. Covenant will lie on a contract under seal, though not fully performed, where absolute performance has been dispensed with. *Ib.*
5. Where strict performance by plaintiff is prevented or waived by defendant, a claim by defendant of fines and penalties for delay or failure cannot be sustained. *Ib.*
6. The matter of interest was properly left to the jury. *Ib.*

CORPORATION.

1. The Building Association, a corporation organized under the laws of New York, was authorized by law to make advances to its members. The statutory provisions regarding such advances and the securing of the same are stated in the opinion of the court. Bedford, a resident in Tennessee, became a shareholder by subscription to the stock, and by payment therefor. The statutes of Tennessee authorized the corporation to do business in that State. Bedford, after subscribing to the stock, paid his subscription, and on his application secured a loan from the corporation and mortgaged his property to secure it. All this was authorized by the statutes of Tennessee at the time when it was done. Subsequently a new statute was enacted, the provisions in which are set forth in the opinion of the court, and an act was passed concerning building associations, the parts of which, relating to foreign building associations, are also set forth in the opinion of the court. The Building Association subsequently filed its charter with the secretary of state of Tennessee, and an abstract of the same in the office of the register of Shelby County, but it did not comply with the building association laws. Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the United States Circuit Court to foreclose the mortgage, and collect the amount due under his contract. Bedford answered that the notes and mortgage violated the laws of Tennessee, and were void. *Held:* (1) That Bedford's subscription to the stock of the association, its issuance, and the application of a loan in pursuance of it, constituted a contract, which is inviolable by the state legislature. (2) That by his subscription to the stock of the association, Bedford became a member of it, bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. *Bedford* v. *Eastern Building & Loan Association*, 227.

2. This court recognizes the power of a State to impose conditions upon foreign corporations doing business within the State, but that cannot be exercised to discharge the citizens of the State from their contract obligations. *Ib.*

COURT AND JURY.

1. *Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658, sustained and followed as to the relations of the trial court to the jury in regard to its finding. *Pythias Knights' Supreme Lodge* v. *Beck*, 49.
2. The question whether the deceased did or did not commit suicide was one of fact, and after the jury had found that he did not, and its finding had been approved by the trial court and by the Court of Appeals, this court would not be justified in disturbing it. *Ib.*
3. On April 5, 1895, a certificate of membership, in the amount of $3000, was issued by the Supreme Lodge to Frank E. Beck, payable on his death to his widow, Mrs. Lillian H. Beck. The application for membership contained this stipulation: "It is agreed that, if death shall result by suicide, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors or by the use of narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation of or attempt to violate any criminal law, then there shall be paid only such a sum in proportion to the whole amount of the certificate as the matured life expectancy at the time of such death is to the entire expectancy at date of acceptance of the application by the board of control." It was as to the conduct of Beck before he committed suicide that an instruction was asked for, which the trial court, in its charge to the jury referred to as follows: "Here is an instruction asked, which I refused, and I wish to state here that it is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed he cannot recover. But if a man contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply." *Held*, that this instruction correctly states the law. *Ib.*
4. The plaintiff, in her proofs of law, stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that, while standing alone, it would justify a verdict for the defendant, yet, if explained, and the jury were satisfied that the death did not result from suicide, she was not concluded by this declaration. *Held*, that there was no error in this ruling. *Ib.*

CUSTOMS DUTIES.

1. Bottles and corks in which beer is bottled and exported for sale are not

"imported materials used in the manufacture" of such beer within the meaning of the drawback provisions of the customs revenue laws, although the beer be bottled and corked, and subsequently heated, for its better preservation. *Joseph Schlitz Brewing Co.* v. *United States*, 584.

2. These cases, argued and submitted together, involve the appraisement of sugars imported from Brazil. The sugars were shipped "green," that is contained moisture, a certain portion of which drained on the voyage, whereby they became more valuable. Duties were levied and collected upon the increased valuation, against the protest of the importers. *Held*, that the appraisement so made was legal. *American Sugar Refining Co.* v. *United States*, 610.

DIVORCE.

1. A husband and wife had their matrimonial domicil in Kentucky, which was the domicil of the husband. She left him there, and returned to her mother's at Clinton in the State of New York. He filed a petition against her in a court of Kentucky for a divorce from the bond of matrimony for her abandonment, which was a cause of divorce by the laws of Kentucky; and alleged on oath, as required by the statutes of Kentucky, that she might be found at Clinton, and that Clinton was the post-office nearest the place where she might be found. The clerk, as required by those statutes, entered a warning order to the wife to appear in sixty days, and appointed an attorney at law for her. The attorney wrote to her at Clinton, advising her of the object of the petition, and enclosing a copy thereof, in a letter addressed to her by mail at that place, and having on the envelope a direction to return it to him, if not delivered in ten days. A month later, the attorney, having received no answer, made his report to the court. Five weeks afterwards, the court, after taking evidence, granted the husband an absolute decree of divorce for the wife's abandonment of him. *Held*, that this decree was a bar to the wife's petition for a divorce in New York. *Atherton* v. *Atherton*, 155.
2. A decree of divorce from the bond of matrimony, obtained in the State of Pennsylvania, in which neither party is domiciled, upon service by publication and in another State, is entitled to no faith and credit in that State. *Bell* v. *Bell*, 175.
3. A decree for a divorce and alimony may be affirmed *nunc pro tunc* in case of death of the husband after argument in this court. *Ib.*
4. A decree of divorce from the bond of matrimony, obtained in the State of North Dakota, in which neither party is domiciled, upon service by publication and in another State, is entitled to no faith and credit in that State. *Streitwolf* v. *Streitwolf*, 179.

FEDERAL QUESTION.

The Supreme Court of Illinois decided a local, and not a Federal question, when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived

at when the former assessment, which had been set aside, was made. *Lombard* v. *West Chicago Park Commissioners*, 33.

## FRAUD.

*See* STATUTE OF FRAUDS.

## INSOLVENCY.

1. The right of an insolvent debtor to prefer one creditor to another, exists in the State of Illinois to its fullest extent, and the giving of judgment notes is recognized as a legitimate method of preference. *United States Rubber Co.* v. *American Oak Leather Co.*, 434.
2. In the absence of national bankrupt laws, if a remedy is sought in a court of equity against fraudulent preferences, it must be on allegation and proof of a design to defraud and to delay the complaining creditor. *Ib.*
3. While the policy of the law permits preferences, and such preferences as are necessarily unknown to others than those concerned, it does not permit any device which prevents the debtor from giving a like advantage to his other creditors, if he so wishes, unless such device is put in the form of a mortgage, or other instrument, perpetually open to public inspection upon the public record. *Ib.*
4. The present case is one in which the fundamental rule that equality is equity, may properly be applied. *Ib.*

## INTERSTATE COMMERCE.

1. Although the Interstate Commerce Commission found as a fact that the competition at Nashville, which forms the basis of the contention in this case, was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or to abandon all Nashville traffic, nevertheless they were forbidden by the act of February 4, 1887, c. 104, 24 Stat. 379, to make the lesser charge for the longer haul; but since that ruling of the commission was made it has been settled by this court in *Louisville & Nashville Railroad Company* v. *Behlmer*, 175 U. S. 648, and other cases cited, that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point; and it follows that the construction affixed by the commission to the statute upon which its entire action in this case was predicated was wrong. *East Tennessee, Virginia & Georgia Railway Co.* v. *Interstate Commerce Commission*, 1.
2. The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that a competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point

than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that, incidentally, the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. *Ib.*

3. It is plain that all the premises of fact upon which the propositions of law decided by the Circuit Court of Appeals rest, are at variance with the propositions of fact found by the commission, in so far as that body passed upon the facts, and this court accordingly reversed the decree of that court, and ordered the case remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the commission be enforced, and to dismiss the application made for that purpose with costs, the whole to be without prejudice to the right of the commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced and to hear and determine the controversy according to law. *Ib.*

JUDGMENT.

1. The question whether the benefit accruing to each particular tract of real estate assessed by the park commissioners for the payment of the Douglas boulevard equalled the sum of the assessment placed thereon, was foreclosed by the findings of fact of the trial court, to which the case was submitted without the intervention of a jury. *Lombard* v. *West Chicago Park Commissioners*, 33.
2. The question in this case involves the construction and effect of the decision of this court in the case of *Baker* v. *Cummings*, 169 U. S. 189, between the same parties, and growing out of the same transaction which is the subject of the litigation in this case. *Baker* v. *Cummings*, 117.
3. Matters which have been fully investigated between the parties and determined by the court, shall not be again contested, and the judgment of the court upon matters thus determined shall be conclusive on the parties, and never subject to further inquiry. *Ib.*
4. This doctrine applies to this case. *Ib.*

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. Questions of fact, when once settled in the courts of a State, are not subject to review in this court. *Western Union Telegraph Co.* v. *Call Publishing Co.*, 92.
2. Judgment awarding a peremptory writ of mandamus directing the execution of certain county bonds for the construction of a courthouse and jail having been rendered in October, 1897, the case taken on error to the appellate tribunal in 1898, and affirmed in 1899, and the bonds having been, in the meantime, issued and sold and the building constructed, and the county officials, who were the original respondents below, and are appellants here, having gone out of office before this appeal was taken, the court is of opinion that the rule approved in

*Mills* v. *Green*, 159 U. S. 651, and in cases there cited, should be applied. *Codlin* v. *Kohlhausen*, 151.

3. Where a bill in equity was demurred to on the ground that the Circuit Court had no jurisdiction as such, and also on the ground that the remedy was at law, and the demurrer was sustained and the bill dismissed on the latter ground, without prejudice to an action at law, the city of New Orleans, defendant below, was not aggrieved in a legal sense by its own success, and cannot bring the decree in its favor here on a certificate of jurisdiction. *New Orleans* v. *Emsheimer*, 153.
4. No appeal lies to this court, under the act of March 3, 1891, c. 517, § 6, from a judgment of the Circuit Court of Appeals directing the Circuit Court of the United States to remand a case to the state court. *German National Bank* v. *Speckert*, 405.
5. A statute of Wisconsin required building and loan associations to deposit with the state treasurer securities to a certain amount, to be held in trust for the benefit of local creditors. The receiver of a Minnesota building and loan association, which had made the deposit required by the Wisconsin statute, prayed that such securities might be turned over to him, and the proceeds distributed among all the shareholders of the association, wherever they might reside, upon the ground that the association had no authority to pledge such securities; that such pledge operated to prefer the Wisconsin shareholders over the other shareholders of the association, and was a violation of the contract clause of the Constitution. The Supreme Court held that the contract clause of the Constitution could not be invoked to release these securities from the operation of the statute, as the stockholders had waived their right to insist upon the constitutional objection by the voluntary act of the board of directors, which was binding upon them, in making the deposit with the state treasurer under the statute. *Held:* That this was a non-Federal ground broad enough to support the judgment, and the writ of error must be dismissed. *Hale* v. *Lewis*, 473.
6. The act of April 7, 1874, c. 80, entitled "An act concerning the practice in territorial courts, and appeals therefrom" constitutes the only right of review by this court on appeals from territorial courts; and in this case, in the absence of any findings by the Supreme Court of the Territory, and the court being without anything in the nature of a bill of exceptions, and there being nothing on the record to show that error was committed in the trial of the cause, this court has nothing on which to base a reversal of the judgment of the court below, and affirms that judgment. *Armijo* v. *Armijo*, 558.

B. Jurisdiction of Circuit Courts of Appeals.

1. The Circuit Courts of Appeals have power to review the judgments of the Circuit Courts in cases where the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, notwithstanding constitutional questions may have arisen after the jurisdiction of the Circuit Court attached. *American Sugar Refining Co.* v. *New Orleans*, 277.
2. But in any such case, where a constitutional question arises on which the judgment depends, a writ of error may be taken directly from this

court to revise the judgment of the Circuit Court, although the case may nevertheless be carried to the Circuit Court of Appeals, but if so, and final judgment is there rendered, the jurisdiction of this court cannot thereafter be invoked directly on another writ of error to the Circuit Court. *Ib.*

3. When the plaintiff invokes the jurisdiction of the Circuit Court on the sole ground that the suit arises under the Constitution or laws or some treaty of the United States, as appears on the record from his own statement of his cause of action, in legal and logical form, and 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, is determined, then the appellate jurisdiction of this court is exclusive. *Ib.*
4. The property and franchises, which are the subject-matter of this suit, were not in the possession of the state court, when the Federal court appointed its receiver; and jurisdiction having attached there under the allegations of the original bill, that jurisdiction did not fail by reason of anything that appeared in *ex parte* affidavits, denying the truth of the allegations contained in the original bill in respect to the amount in dispute. *Put-in-Bay Waterworks &c. Company* v. *Ryan*, 409.

C. Jurisdiction of District Courts of the United States.

Under the Bankrupt Act of 1898, the District Court of the United States in which proceedings in bankruptcy are pending has no jurisdiction, unless by consent of the defendants, of a bill in equity by the trustee in bankruptcy against persons to whom the bankrupt, before the proceedings in bankruptcy, made a sale and conveyance of property which the plaintiff seeks to set aside as fraudulent as against creditors, but which the defendants assert to have been made in good faith and to have vested title in them. *Wall* v. *Cox*, 244.

LIFE INSURANCE.

*See* Constitutional Law, 3.

MARRIED WOMAN.

1. Where a married woman had resided in Arkansas for many years, and, just as she was leaving the State to join her husband, who had taken up his residence in Louisiana, was injured through the alleged negligence of the defendant railway company, and brought an action to recover damages in a state court in Arkansas, which, on the application of the company, was removed into the Circuit Court of the United States for the Western District of Arkansas, the rule of decision was the law of Arkansas, the place of the wrong, and of the forum, and not the law of Louisiana. *Texas & Pacific Railway Co.* v. *Humble*, 57.
2. By the law of Arkansas, plaintiff was entitled to bring the action in her own name and without joining her husband. And if her husband should subsequently bring suit in Louisiana on the same cause of action, it is not to be assumed that the courts of that State would not recognize the binding force of the judgment in Arkansas. *Ib.*
3. By the legislation of Arkansas the earnings of a married woman arising

from labor or services done and performed on her sole account are her separate property, and although the statutes may not have deprived the husband of the services of the wife in the household, in the care of the family, or in and about his business, they have bestowed on her, independently of him, her earnings on her own account, and given her authority to acquire them. *Ib.*

4. The evidence in this case tending to show that plaintiff for some years had been carrying on business on her own account, which had been suspended by reason of temporary illness for a short time just previous to the accident, the Circuit Court did not commit reversible error in instructing the jury that, if they found for the plaintiff, they might take into consideration in assessing her damages, among other things, her age and earning capacity before and after the injury was received, as shown by the proofs. *Ib.*
5. On this record the earning capacity referred to presumably had relation to earnings on plaintiff's own account, and if defendant wished this made more explicit, it should have so requested. *Ib.*
6. By the provision in act 68 of the Laws of the Territory of Arizona that the common law of England, so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory, the common law was not made unqualifiedly the rule of decision, but that law, as modified by the conditions of the Territory, and changes in the common-law relation between husband and wife had been expressed in statutes prior to the passage of the act of 1885. *Luhrs* v. *Hancock*, 567.
7. By a conveyance from a husband to his wife, property does not lose its homestead character. *Ib.*
8. The deed of a person alleged to be insane is not absolutely void; it is only voidable, and may be confirmed or set aside. *Ib.*
9. The inquiry as to the insanity of Mrs. Hancock was not open to the appellant. *Ib.*

MINING CLAIMS.

1. As against the purchaser of interests in mining claims after the location certificates were recorded, the original locators were held by the state court estopped to deny the validity of the locations. The question of estoppel is not a Federal question. *Speed* v. *McCarthy*, 269.
2. The state court further held that where the annual assessment work had not been done on certain mining claims, a co-tenant could not, on the general principles applicable to co-tenancy, obtain title against his co-tenants by relocating the claims. *Ib.*
3. This was also not a Federal question in itself, and the contention that the state court necessarily decided the original mining claims to be in existence at the time of the relocation, in contravention of provisions of the Revised Statutes properly interpreted, could not be availed of

under section 709, as no right or title given or secured by the act of Congress in this regard was specially set up or claimed. *Ib.*

MUNICIPAL CORPORATION.

1. The power of the State of Illinois to levy a special assessment in proportion to benefits, for the execution of a local work, and the authority to confer on a municipality the attribute of providing for such an assessment, is not denied. *Lombard* v. *West Chicago Park Commissioners*, 33.
2. Where a special municipal assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the complete work. *Ib.*

NATIONAL BANK.

1. Section 5142 of the Revised Statutes of the United States, providing for the increase of the capital stock of a national bank, and declaring that no increase of capital stock shall be valid until the whole amount of the increase is paid in, and until the Comptroller of the Currency shall certify that the amount of the proposed increase has been duly paid in as part of the capital of such association, does not make *void* a subscription or certificate of stock based upon capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank; certainly, the statute should not be so applied in behalf of a person sought to be made liable as shareholder, when, as in the present case, he held, at the time the bank suspended and was put into the hands of a receiver, a certificate of the shares subscribed for by him; enjoyed, by receiving and retaining dividends, the rights of a shareholder; and appeared as a shareholder upon the books of the bank, which were open to inspection, as of right, by creditors. *Scott* v. *Deweese*, 202.
2. As between the bank and the defendant, the latter having paid the amount of his subscription for shares in the proposed increase of capital was entitled to all the rights of a shareholder, and therefore, as between himself and the creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him. *Ib.*
3. That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the whole amount of the proposed increase of capital has been paid in, was a matter between it and the Government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in, nor have the effect to relieve a shareholder, who became such by paying into the bank the amount subscribed by him, from the individual liability imposed by section 5151. *Ib.*
4. Upon the failure of a national bank the rights of creditors attach under section 5151, and a shareholder who was such when the failure occurred cannot escape the individual liability prescribed by that section upon the ground that the bank issued a certificate of stock before, strictly speaking, it had authority to do so. *Ib.*

5. If a subscriber to the stock of a national bank becomes a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position. *Ib.*

PUBLIC LAND.

1. In reviewing questions arising out of Mexican laws relating to land titles, it is difficult to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country in 1846–1848. *Whitney* v. *United States*, 104.
2. Looking through the provisions to which its attention has been called the court finds nothing in them providing in terms, or by inference for a general delegation of power by the supreme executive to the various governors to make a grant like the one set up in this case; and it holds that the appellants have not borne the burden of showing the validity of the grant which they set up, either directly, or by facts from which its validity could be properly inferred within the cases already decided by this Court. *Ib.*
3. When Congress, under the act of March 2, 1827, granted to the State of Illinois alternate sections of land throughout the whole length of the public domain, in aid of the construction of a canal to connect the waters of the Illinois River with those of Lake Michigan, it also granted by implication the right of way through reserved sections; but this implication would not extend to ninety feet on each side. *Werling* v. *Ingersoll*, 131.
4. The State of Illinois never took title to a strip of land ninety feet wide on each side of the route of that canal through the public lands, so far as related to the sections reserved to the United States by the act of March 2, 1827. *Ib.*
5. The State, in constructing the canal, proceeded under that act, filed its map thereunder, and constructed the canal with reference thereto. *Ib.*
6. The facts in these two cases are so nearly alike that the court thinks it sufficient to consider only the first. The land there in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo. The plaintiffs claim title by virtue of a patent issued in confirmation of two grants made by the Mexican government. The defendants, without claiming the fee, claim a right of permanent occupancy, as Mission Indians, who had been in occupation of the premises long before the Mexican grants. *Held:* (1) That the United States were bound to respect the rights of private property in the ceded territory, but that it had the right to require reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented, shall be considered abandoned; (2) That so far as the Indians are concerned, the land was rightfully to be regarded as part of the public domain,

and subject to sale and disposition by the government; (3) That if the Indians had any claims founded on the action of the Mexican government, they abandoned them by not presenting them to the commission for consideration; (4) That lands which were burdened with a right of permanent occupancy were not a part of the public domain, subject to the full disposal by the United States. *Barker* v. *Harvey*; *Quevas* v. *Harvey*, 481.

7. Some discussion appears in the briefs as to the meaning of the word "servidumbres," (translated "usages"). The court declines to define its meaning when standing by itself, but holds that in these grants it does not mean that the general occupation and control of the property was limited by them, but only that such full control should not be taken as allowing any interference with established roads or crossroads, or other things of like nature. *Ib.*
8. Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority, or by an executive withdrawal under such authority, either express or implied. *Lockhart* v. *Johnson*, 516.
9. Under the act establishing the Court of Private Land Claims, public lands belonging to the United States, though within the claimed limits of a Mexican grant, became open to entry and sale. *Ib.*
10. If the provisions of the laws of New Mexico in force when this location was made were not complied with, and another location is made before such work was done, the new location is a valid location. *Ib.*
11. In the courts of the United States in action of ejectment the strict legal title must prevail; and if the plaintiff have only equities, they must be presented on the equity side of the court. *Ib.*
12. Although the plaintiff has no right to maintain this action, he ought not to be embarrassed by a judgment here from pursuing any other remedy against the defendants, or either of them that he may be advised. *Ib.*

## QUARANTINE.

1. Article 5043*c* of the Revised Statutes of Texas, 1895, provides: "It shall be the duty of the commission provided for in article 5043*a* to protect the domestic animals of this State from all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere; and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to coöperate with live stock quarantine commissioners and officers of other States and Territories, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this State against Texas or splenetic fever. It shall be the duty of said commission, upon receipt by them of reliable information of the existence among the domestic animals

of the State of any malignant disease, to go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the live stock reported to be affected, and whether the same is contagious or infectious, and if said disease is found to be of a malignant, contagious or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animals infected with disease or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commissioners. The said commission shall also, from time to time, give and enforce such directions and prescribe such rules and regulations as to separating, feeding and caring for such diseased and exposed animals as they shall deem necessary to prevent the animals so affected with such disease from coming in contact with other animals not so affected. And the said commissioners are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act." *Held*, that this statute, as construed and applied, in this case, is not in conflict with the Constitution of the United States. *Smith* v. *St. Louis & Southwestern Railway Co.*, 248.

2. The prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased, but to what has become exposed to disease. *Ib.*

RAILROAD.

Where there is dissimilarity in the services rendered by a railroad company to different persons, a difference in charges is proper, and no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that the difference is so great as, under dissimilar conditions of service, to show an unjust discrimination; and the recovery must be limited to the amount of the unreasonable discrimination. *Western Union Telegraph Co.* v. *Call Publishing Co.*, 92.

REMOVAL OF CAUSES.

*See* MARRIED WOMAN, 1.

STATUTE OF FRAUDS.

Doctor and Mrs. Piper, each somewhat advanced in years, were without children and had no kin to whom the husband wished to bequeath his estate. They desired the comforts and happiness of a home in which they could have the sympathy, attention and care of younger people, upon whom they could look as their children. The property in question in this suit was purchased by the doctor, in execution of an agreement in parol between him and the appellee, whereby Piper and his wife were to become members of Hay's household in Washington, and to be supported, maintained and cared for by Hay during their respective lives, in consideration of which Piper was to convey by will, or other-

wise, to Hay all of his property of every kind and wherever situated. In part execution of that agreement Piper purchased the lots in question in this suit and built a house thereon, and in further execution of it he put Hay in possession of the lot and house to be occupied by Hay and his family in connection with Piper and his wife. While Hay was in the actual occupancy of the premises as his home, (which occupancy existed when this suit was brought,) Piper, in violation of his agreement, put the title to the property in his niece, the plaintiff in error. The bill alleged the foregoing facts, and that the transfer to the plaintiff in error was made solely for the purpose of defrauding the defendant in error. *Held:* (1) That the alleged agreement with Piper was proved to have been just as stated by Hay; (2) That the failure of Piper to invest Hay with the legal title was such a wrong to the latter as entitled him to the protection which would be given by a decree specifically declaring that the defendant holds the title in trust for him; (3) That such relief is consistent with the objects intended to be subserved by the Statutes of Frauds; (4) That the alleged agreement, being one which the Court of equity would specifically enforce, if it had been in writing, and it having been partly performed by Hay in reliance of performance by Piper, and Hay being ready and willing to do what, under the agreement, remained to be done by him during the lives of Doctor and Mrs. Piper, he was entitled to the decree of the court below in his favor. *Whitney* v. *Hay*, 77.

SCIRE FACIAS.

1. While a *scire facias*, for the purpose of obtaining execution, is ordinarily a judicial writ to continue the effect of a former judgment, yet it is in the nature of an action, and is treated as such in the statutes of New Mexico. *Brown* v. *Chavez*, 68.
2. After a judgment is barred under those statutes, the writ of *scire facias*, giving a new right and avoiding the statute, cannot be maintained. *Ib.*

STAMP TAX.

1. What is denominated "a call" in the language of New York stock brokers, is an agreement to sell, and as the statutes of the United States in force in May, 1899, required stamps to be affixed on all sales or agreements to sell, the calls were within its provisions. *Treat* v. *White*, 264.
2. A stamp tax on a foreign bill of lading is, in substance and effect, equivalent to a tax on the articles included in that bill of lading, and therefore is a tax or duty on exports, and therefore in conflict with article 1, section 9 of the Constitution of the United States, that "No tax or duty shall be laid on articles exported from any State." *Fairbank* v. *United States*, 281.
3. An act of Congress is to be accepted as constitutional, unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution. *Ib.*
4. If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibi-

tion or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. *Ib.*

STATUTES.

A. STATUTES OF THE UNITED STATES.

*See* ADMIRALTY, 1;
CUSTOMS DUTIES, 1;
JURISDICTION, A, 4, 6;
NATIONAL BANK, 1, 4;
PUBLIC LAND, 4;
STAMP TAX, 3.

B. STATUTES OF THE STATES.

*Idaho.* *See* CONSTITUTIONAL LAW, 6.
*New York.* *See* CORPORATION, 1.
*North Carolina.* *See* CONSTITUTIONAL LAW, 27.
*Oregon.* *See* ATTACHMENT.
*Texas.* *See* QUARANTINE.
*Wisconsin.* *See* JURISDICTION, A, 5.

TAX AND TAXATION.

1. Payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment. *Wells* v. *Savannah*, 531.
2. The validity of such a contract presupposes a good consideration therefor. *Ib.*
3. In this case the ordinances exempting from taxation were only exemptions for the year in which the ordinance was passed; and the same rule applies to all the exempting ordinances. *Ib.*
4. The views of the Supreme Court of Georgia in this case are sustained by this court. *Ib.*
5. The railroad company filed a bill to enjoin the collection of certain state taxes from 1892 to 1897 inclusive. This court held that a new corporation was formed by a consolidation of certain prior corporations made October 24, 1892, and that the taxes having accrued subsequent to that date were legally assessed under the state constitution of 1890, (180 U. S. 1). The railroad company moved for a rehearing with respect to the taxes of 1892 upon the ground that they accrued prior to the consolidation of October 24. *Held:* That as the Supreme Court of Mississippi had decided that all the taxes had accrued after the consolidation of October 24, and the company had thereby lost its exemption; and as this was a construction of the general tax laws of the State, which were complex and difficult of interpretation, this court would accept that construction and deny the petition for a rehearing. *Yazoo and Mississippi Valley Railroad Co.* v. *Adams*, 580.

TRUST.

1. The statements of the Court of Appeals of the District of Columbia in this case, below, that abandonment of discretionary power by a trustee to his cotrustee, is a fact to be proved by him who alleges it; that so likewise is negligence in the supervision of a trust; and that neither

abandonment nor negligence is to be implied without satisfactory proof of the fact, or of circumstances sufficient to warrant the inference, and that the court does not find that proof in the statement of facts contained in the record, are cited and approved by this court. *Colburn* v. *Grant*, 601.

2. The treatment of facts and law in the opinion of the courts below was full and satisfactory, and releases this court from further discussion. *Ib.*

## USURY.

*See* CASES AFFIRMED AND FOLLOWED, 2.